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SCHOOL OF LAW

COURSE: MASTERS THESIS

**TITLE: ENHANCING CHILD JUSTICE IN KENYA: AN APPRAISAL OF THE
IMPLEMENTATION OF THE RIGHTS OF CHILD OFFENDERS**

**PROJECT PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE AWARD
OF THE MASTER OF LAWS (LLM) DEGREE**

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DECLARATION

I, RAWLINGS LILUMA MUSIEGA, Admission Number G62/34219/2019, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university. The sources referred to have been duly acknowledged.



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This project paper has been submitted for examination with my approval as the University supervisor.



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Date...16TH NOVEMBER 2021.....

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DEDICATION

This research is lovingly dedicated to my mother, Veronica Daisi Musiega who has been a constant source of inspiration. She gave me the drive and discipline to tackle this research with determination. Without her love and support the project would not have been possible.

ACKNOWLEDGEMENT

First and foremost, praises and thanks to God, the Almighty, for his showers of blessings to complete this work successfully.

I would like to express my deepest and sincere gratitude to my research supervisor, Dr. Nancy Baraza for the invaluable guidance throughout the research. Her dynamism, vision, sincerity and motivation have deeply inspired me. It was a privilege to work and study under your guidance.

I am extremely grateful to Dr. Sarah Kinyanjui for her keen interest in my work. Her prompt corrections, timely suggestions with kindness, enthusiasm and dynamism have enabled me complete my thesis.

Most of all, I am highly indebted to my wife Silvia Makanga for her moral support, encouragement, love and prayers. She was the force behind my decision to pursue a Masters degree.

ABSTRACT

More than 12,000 children interact with the criminal justice system every year. A large percentage of these children are exposed to physical, mental and sexual abuse while interacting with the criminal justice system.¹ This is despite the fact that there are safeguards within both municipal and international law to ensure that the rights of children in conflict with the law are safeguarded during trial. Courts in particular have an important role to play in safeguarding the rights of children in conflict with the law. This research intends to interrogate the structure of the trial process involving children in conflict with the law, the role of courts and other players in the child justice system in safeguarding the rights of children in conflict with the law and challenges faced in safeguarding the rights of children in conflict with the law. In addition, best practises from other jurisdictions e.g., the United Kingdom and South Africa will be sought and lessons derived from the good practices in those jurisdictions will be used to suggest a way forward in safeguarding the rights of child offenders.

¹ Diego Ottolini, 'Violence Does Not Fall on One Roof Alone. A Baseline Survey on Violence Against Children in The Kenya Juvenile Justice System' (2016) <https://resourcecentre.savethechildren.net/node/10143/pdf/vac_in_the_kenya_jjs_survey.pdf> Accessed 27th March 2020.

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1959 Declaration of the Rights of the Child

African Charter on the Rights and Welfare of the Child

Constitution of Kenya

Convention on the Elimination of all forms of Discrimination Against Women

Universal Declaration of Human Rights

United Nations Convention on the Rights of the Child

UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines 1990).

UN Children's fund (UNICEF) Principles and Guidelines on Children Associated with
Armed forces or Armed groups (the Paris principles).

United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo rules).

International Covenant on Civil and Political Rights.

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

United Nations body of principles for the protection of all persons under any form of
detention or imprisonment (body of principles)

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the
Havana rules)

LIST OF DOMESTIC LEGAL INSTRUMENTS

The Constitution of Kenya 2010
Bail and Bond Policy Guidelines
Borstal Institutions Act Cap 92 Laws of Kenya
Child Offender Rules 1998
Criminal Procedure Code Cap 75 Laws of Kenya
Community Service Order Act (1998)
Legal Aid Act No. 6 of 2016
National Police Service Act No. 11A of 2011
Penal Code Cap 63 Laws of Kenya
Probation of Offenders Act Cap 64 Laws of Kenya
Sentencing Policy Guidelines
The Children Act No. 8 of 2011
Victim Protection Act No. 17 of 2014
The ODPP Diversion Policy
The Children Bill

LEGAL INSTRUMENTS OF FOREIGN JURISDICTIONS

International legal instruments

European Convention on Human Rights

Domestic legal instruments

Anti-social Behavior, Crime and Policing Act 2014

Bail Act 1976

Children and Young Persons Act 1933.

Criminal Procedure Act 51 of 1977

Children Act 1908

Crime and Disorder Act of 1998

Criminal Justice and Courts Act 2015

Police and Criminal Evidence Act (PACE) 1984 Code C (Rev. August 2019)

Policing and Crime Act 2017

Probation Act 1907

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- Beatrice Wanjiku & Another vs The Attorney-General & Another High Court of Kenya at Nairobi, Petition 190 of 2011
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- Fatuma Hassan Salo v Republic [2006] e KLR
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- M. W. K & another v Attorney General & 3 others [2017] e KLR
- R v Chief Constable of Kent and Another ex parte L
- R v DPP ex parte B [1991] 93 Cr App R 416
- Regina V. Secretary of State for The Home Department, Ex Parte Venables and Regina V. Same, Ex Parte Thompson (Consolidated Appeals) [2001] EWCA Civ
- R v MuretoMunyoki 20 [KLR]
- S v M 2007 2 SACR 539 (CC) para 15.
- P K v Republic (2019) eKLR (Nakuru High Court Criminal Appeal No.7 of 2014)
- P.O.O (A minor) v Director of Public Prosecutions & Another 2017 eKLR (Homabay High Court Constitutional Petition Number 1 of 2017)

LIST OF ABBREVIATIONS

ACRWC	- African Charter on the Rights and Welfare of the Child
CRC	- Convention on the Rights of the Child
CSO	- Community Service Order
DPP	- Director of Public Prosecutions
ICCPR	- International Convention on Civil and Political Rights
NSPCC	- National Society for the Prevention of Cruelty to Children
ODPP	- Office of the Director of Public Prosecutions
UDHR	- Universal Declaration on Human Rights
UK	- United Kingdom
UN	- United Nations
UNHCR	- United Nations High Commissioner for Refugees

CHAPTER ONE

GENERAL INTRODUCTION

1.1. Introduction

Crime among children has increased in recent times with many children having been found to have committing serious crimes including murder, robbery with violence, drug trafficking and terrorism related offences among other serious offences.² This has shifted focus to the child Justice System with questions asked on its effectiveness in ensuring justice is served.³ Because of their vulnerability and the many societal issues that push children into committing offences, it has been argued that the child justice system needs to focus on rehabilitation rather than retribution. Rehabilitation will ensure child offenders reform and are reintegrated back into the community to continue with their growth and development.⁴ Failure to rehabilitate child offenders predisposes them to adult criminality.

Despite the acknowledgment of the importance of focusing on rehabilitation of child offenders and the enactment of legal instruments that promote its adoption, there is lack of an elaborate framework to ensure its realisation.⁵ It is against this backdrop that this paper assesses the child justice system in Kenya and its effectiveness in enhancing implementation of the rights of child offenders.

The Constitution of Kenya classifies children as a vulnerable group among other groups e.g., women, older members of the community, persons with disabilities etc.⁶ In the case of *M.W.K & Another v Attorney General & 3 others* children are classified as a vulnerable group for multiple reasons. One is because of their mental and physical status; they may not be able to protect themselves against people who may want to take advantage of them. Further, due to economic inequalities, children are highly dependent to those around them hence may be susceptible to harassment and undue influence from older persons within society.⁷

²Kinyanjui Sarah, *Survey on Rehabilitation and Social Integration Programmes, Services and Practises for Children in Conflict with the Law In Kenya* (Department of Children Services and UNODC 2021) 1.

³Ibid.

⁴Ibid.

⁵Ibid.

⁶ Article 21(3) of the Constitution of Kenya provides that all state organs and all public officers have the duty to address the needs of Vulnerable groups within the society, Including women, older members of the society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

⁷ [2017] eKLR (Constitutional Petition 347 of 2015)

Child offenders are a particularly vulnerable group. Child offenders have been defined as persons under the age of 18 years that come face the justice system following suspicion of having committed a crime.⁸ The reasons why such a group of people can be considered as a vulnerable group include; the minors may have been tricked or forced by an adult person to perpetrate the crime, the child's tendency to commit a crime may be an indication of a lack of proper care and protection at some point in their lives as opposed to a wilfully delinquent character. In addition, some of the child offenders were caught committing crimes in a bid to survive after leaving their homes to escape from violence and other forms of abuse.⁹

Once these children face the justice system however, they are met with a situation where instead of being provided with a safe space that is considerate of their plight as children, they are subjected to more physical, mental and sexual abuses. In a survey conducted by the National Council on Administration of justice, 79.8 % of the total respondents reported having witnessed forms of physical, psychological and sexual abuse being meted out to child offenders. 72.2 % of that number stated that they had been subjected to physical, psychological or sexual abuse.¹⁰ The study also confirmed that there are around 12, 000 children who faced the criminal justice system every year. 60% of these children have during their periods in detention been forced to share prison cells with adults.¹¹ These set of circumstances indicate a clear violation of the rights of child offenders.

Despite the ongoing violence against children, there is an existing legal framework that makes an attempt to safeguard the rights of child offenders. Legal safeguards for the rights of child offenders are contained in case law, international law, legislation as well as the Kenya Constitution 2010.

⁸ Save the Children, 'Children in Conflict with the Law' <<https://resourcecentre.savethechildren.net/keyword/children-conflict-law>> Accessed 15th March 2020.

⁹*Ibid.*

¹⁰ Diego Ottolini, 'Violence Does Not Fall on One Roof Alone. A Baseline Survey on Violence Against Children in The Kenya Juvenile Justice System' (2016) P.viii<https://resourcecentre.savethechildren.net/node/10143/pdf/vac_in_the_kenya_jjs_survey.pdf> Accessed 27th March 2020.

¹¹*Ibid.*

The Constitution of Kenya makes provision for the rights of children at Article 53. Children ought to be protected from violence, abuses, neglect and any form of undignified treatment and punishment.¹²

It further protects children from detention except only as a last resort and for the shortest time.¹³ Further, if a child offender is to be detained, then should be away from adults and it should consider the age and gender of that child.¹⁴ The child's best interests should be considered at all times.¹⁵

Acts of parliament in Kenya have also incorporated measures to protect child offenders. The Children Act Number 8 of 2011 in particular contains many such provisions. A children's court ought to be in a separate building from where other courts are and only persons authorised by the court as well as the Children Act, 2011 are to be present in court.¹⁶ Matters relating to children are also supposed to be conducted expeditiously.¹⁷ A child is also entitled to legal representation and the expenses to be catered for by the state which has also been provided for under the Children Act.¹⁸

Kenya is also a party to various conventions that have provisions for safeguarding the rights of child offenders. The United Nations Convention on the Rights of the Child (CRC) leads from the forefront where it provides that any child deprived of his/her liberty has a right to speedy access to an advocate and any other necessary help.¹⁹

Case law has also contributed a great deal to the growth in jurisprudence around the role of courts in safeguarding the rights of a child. These cases have been developed both locally, internationally and also in other jurisdictions. An example is the case of *P.O.O (A minor) v Director of Public Prosecutions & Another 2017 (eKLR)*. Where the high court declared as unconstitutional proceedings against a minor and ordered that the

¹² Constitution of Kenya 2010, Article 53(1)(d).

¹³ Constitution of Kenya 2010, Article 53(1)(f).

¹⁴ *Ibid.*

¹⁵ Constitution of Kenya 2010, Article 53(2), Convention on the Rights of the Child, Article 3, Children Act No.8 of 2001, S 4(2).

¹⁶ Children Act 2011, s74.

¹⁷ *Ibid*, s76(2).

¹⁸ Wasilczuk, M.K, 'Substantial Injustice: Why Kenyan Children are entitled to counsel at State Expense' (2012) 45 (1) *New York International Journal of International Law and Politics* P.P 291-333 P.333 <<https://nyujilp.org/wp-content/uploads/2013/04/45.1-Wasilczuk.pdf>> Accessed 27th March 2020.

¹⁹ Convention on the Rights of the Child 1989, Article 37.

minor be awarded damages worth Kshs. 200, 000.²⁰ This case provides practical guidelines of how court is supposed to protect child offenders.

The Constitution demands of state organs to uphold and fulfil all the rights in the bill of rights. Courts are a part of the ‘state organs.’ The powers to ensure that the rights of children are fulfilled alongside other state organs e.g., the police and prosecutors therefore lie with them. The responsibility to fulfil a right means that the state has to take an initiative to ensure the right is enjoyed.²¹

It is the responsibility of every state officer charged with handling any matters to do with children to ensure that the rights of children are safeguarded. It is within this context that the study shall examine the child justice system in Kenya, particularly the trial process and to what extent courts and the other players are discharging their constitutional mandate of upholding the best interests of children.

1.2. Statement of the problem

The problem sought to be addressed in this research is whether the Kenyan courts and other players in the child justice system have met their responsibility of safeguarding the rights of child offenders who appear before them. The research attempts a comprehensive study of the theoretical and conceptual underpinnings of laws and policies in place and whether they provide an effective platform for the players to meet their obligations. Though it may be argued that there are well laid out legal and policy parameters that guide the police, prosecutors and courts in ensuring the rights of child offenders are safeguarded, this may not be so. There still exist many cases of violation of rights of such children at the point of arrest, detention, trial and even the post-trial stage. These violations have had the effect of interfering with the growth and development of those children and their education turning would be successful children into hard-core criminals. As will be argued later, there is need for serious reforms and capacity building in order for the objective to be met. Reforms derived from best practices in other jurisdictions will be proposed in order to better the system.

²⁰[2017] eKLR (Constitutional Petition 1 of 2017)

²¹ United Nations Human Rights Office of the High Commissioner, ‘International Human Rights Law’ (2020) <<https://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx>> Accessed 15th March 2020.

1.3. Justification of the study

The main significance of this study is to highlight the plight of child offenders and propose improvements to the child justice system. The study will contribute and improve to the existing literature on the important subject of Rights of Child offenders. To this end, the research intends to provoke an intense discourse on the subject and propose new solutions to the problem of violation of rights of child offenders.

The findings and recommendations are important for the police, Judicial officers and other rights groups involved in child protection programmes as they will have a clearer perspective of the numerous challenges and will be able to review their policies accordingly. The research also provides vital information for future research and legal amendments in the field.

1.4 Objectives of the study

1.4.1 General objectives

This study aims at finding out the role of key stakeholders in the child justice system in implementation of the rights of child offenders.

1.4.2 Specific objectives

The specific objectives of this study were;

- i. To interrogate the theoretical and conceptual underpinnings of the rights of child offenders
- ii. To investigate the role, the courts in Kenya together with other stakeholders in the Juvenile justice system play in implementation of the rights of child offenders, the challenges they face in the process and the possible solutions found in the existing legal framework
- iii. To examine measures taken by what other jurisdictions to ensure the rights of child offenders are implemented
- iv. To find out and propose ways in which the system could be improved based on best practises derived from other jurisdictions.

1.5 Research Questions

This study seeks to answer the following questions:

- i. What is the theoretical and Conceptual underpinning of the rights of child offenders?
- ii. How do courts in Kenya in conjunction with other players in the child justice system implement the rights of child offenders amidst the numerous challenges posed by the dynamic circumstances of each case?
- iii. What measures have been taken by other jurisdictions to improve the Juvenile Justice system in a bid to implement the rights of child offenders?
- iv. What lessons from those other jurisdictions can be applied to Kenya to improve the welfare of child offenders?

1.6 Research Hypothesis

The hypothesis in this study is that courts and other players need to be more vigilant and effective in implementing the rights of child offenders. While it may be argued that courts have come a long way in implementing the rights of such children, rights including the right to reasonable bond terms, right to pro bono counsel at the expense of the state, right to education and right to non-custodial sentences just to name but a few are still largely violated.

To be able to deal with this menace, first, the judiciary as a whole need to be strengthened in terms of funding. This will enable it to employ more judges and magistrates which will have a ripple effect in expeditious disposal of cases involving minors, building of customized court rooms that are child friendly to ensure protection of the dignity and privacy of children who are standing trial and employment of counsellors who will offer psychological support to children who have undergone trauma just to name but a few.

Secondly there is need for systems change to adopt best practises derived from other jurisdictions that are a step ahead in implementing the rights of child offenders such as the United Kingdom and South Africa

In addition, other stake holders in the child justice system such as the police, prosecutors and children officers need to be more proactive in order to complement the courts in ensuring the rights of child offenders are safeguarded.

1.7 Theoretical Framework

To realize the objectives of these study in examining the role of Kenyan courts and other players in implementing the rights of child offenders and proposing institutional reforms to better the child justice system, this study is grounded on three legal theories of law: Sociological Jurisprudence, Legal realism and legal positivism.

L.B Curzon in his book *Jurisprudence* views the sociological approach in relation to the study of law as involving a study of the layout, structure, mandate, purpose and values of a legal system; It follows that persons, institutions doctrines, rules and procedures within that legal system must be analysed. Sociological jurisprudence views law as a social engineering tool reflecting the needs of humans, governing the was systems function, and it embodies the basic values of a society within its fundamental principles and substantive rules.²²

Pound in his *Mechanical Jurisprudence* (1908) commented on the social movement in jurisprudence as a movement practical application of the law; for application of principles and doctrines to human activities and behaviour rather than to assumed first principles; for prioritizing the human factor and relegating logic to its true position as an instrument.²³

This theory presupposes that law is a tool for social engineering. The theory necessitates a study on the theoretical and conceptual underpinnings of the rights of child offenders. The study focussed on the extraneous factors that lead child offenders to commit certain crimes as well.

This theory guided the study in explaining the causes of crime in terms of how the surrounding of a child can affect the extent to which they are likely or not to commit a crime. Some of the causes of crimes according to social-cultural theories include; cultural conflicts proposed by Ruth and Cavan.²⁴ When children are exposed to different cultures, they can pick up some traits that they previously did not possess e.g., drug abuse that may expose them to higher tendencies of committing a crime.

²² Curzon, L.B *Jurisprudence* (2nd Edition: Cavendish Publishing Limited, 1995)

²³ Roscoe Pound, "Mechanical Jurisprudence" (1908) <<https://www.minnesotalegalhistoryproject.org>> Accessed 10th May 2020.

²⁴Shonle R., Theodore.N. and Ferdinand, *Juvenile delinquency* (4th Edition New York: Harper & Row,1981)

Legal realism as a theory is also important to this study. Oliver Wendell Holmes in his book, *The Common Law* begun the legal realism school of thought in 1881 which was then viewed as an attack on the conservative view of law. According to legal realists, law is not just an independent set of rules and principles that are applied by judges in the course of fulfilling their duties. To the contrary, decisions arrived by magistrates, which to a large extent determine what the law is, are influenced by political, social and moral biases.²⁵

This research is guided by the school of thought of legal realism that postulates that persuasions and characteristics of individual judges influences law.²⁶

According to this school of thought, law is what the judge says it is on specific day. This school of law places much emphasis on the role of courts, and of a judge in shaping what the judicial system is. This branch of legal realism is important to this research since the research holds the opinion that the ultimate power in safeguarding the rights a child offender rests with the judge. It is indeed true that the police, prosecutors, the children's department as well as the prisons department have their roles to play but ultimately if a court on its own motion takes a step to safeguard the rights of a child in conflict with the law, then much more impact will be achieved than if courts just fold their arms and do nothing to safeguard the rights of a child during trial.

Finally, the study will employ the theory of legal positivism. This is because positive law is procedural in nature. The paper is to a large extent concerned with the law and its interpretation. Hans Kelsen's pure theory of law presupposes that a legal system is comprised of norms which are derived from a basic norm. Michael Freeman Opines that 'But if a norm can only be derived from another norm, does this mean one can continue this derivation *ad infinitum*? Theoretically, yes, but in practice, since norms are concerned with human conduct, there must be some ultimate norm postulated on which all the others rest. This is the Grundnorm (basic norm).²⁷ Constitutions are majorly considered to be the Grundnorm. The constitution is the basic instruments that give life to other laws. Therefore, most statutes and institutions derive their powers and

²⁵ Legal Information Institute, 'Legal Realism' <<https://www.encyclopedia.com/law/encyclopedias-almanac-transcripts-and-maps/legal-realism>> Accessed 19th March 2020.

²⁶ Martin Luenendock, 'Legal Realism' (5th August 2016) <<https://www.cleverism.com/lexicon/legal-realism-definition/>> Accessed 19th March 2020.

²⁷ Michael Freeman, 'Introduction to Jurisprudence' (9th Edition 2014 Sweet & Maxwell)

legitimacy from the constitution. It provides for procedure of machining and amending laws. This theory will guide the research in proposing for constitutional and statutory reforms to improve safeguards of rights of child offenders. It gives paramountcy to the principle of the best interests of the child. The children Act contains similar provisions at section 4. The best interest principle despite being anchored in both the constitution and the Children Act is not properly defined. This limits in application in guiding courts in assisting child offenders. There is need for a definition of the term and how it can be applied in the rules governing trial of minors in order to ensure its ultimate applicability.

1.8 Research Methodology

Desktop research was conducted in this study. The writer analysed primary and secondary sources of law. Primary sources of law included the Constitution of Kenya, legislation, case law as well as international law. Secondary sources of law included journals, reports, articles, conference papers and textbooks.

The study equally adopted a qualitative approach by analysing how the law on rights of child offenders is being interpreted. The research also focused on how the interpretation and implementation of the Law affects the real-life situations of child offenders. In this regard the researcher looked into factors influencing stakeholders in interpretation of the law and the challenges they face. Emphasis was be placed on the gaps that exists in the Law and how they undermine implementation of rights of child offenders. The findings propose solutions to help tackle the challenges faced by stake holders in interpreting and implementing the Law relating to child offenders.

Comparative analysis was also conducted. This involved a study of the rules, institutions, procedures of the United Kingdom and South Africa and comparing with their application to Kenya. The researcher settled on United Kingdom since Kenya inherited the UK legal system after colonialism and continues to apply it since it has been firmly entrenched in Kenya's legal system.²⁸The researcher settled on South Africa because just like Kenya, South Africa is equally a member of the commonwealth. South Africa's jurisprudence is also one of the leading. Du Plessis described it as path-breaking and progressive reflecting a commendable innovative approach to comparative law.²⁹ The

²⁸Wabwile MN, The Place of English Law in Kenya, *Oxford University Commonwealth Law Journal* 2003 51.

²⁹Du Plessis JE "South Africa" in Smits JM (ed) *Elgar Encyclopedia of Comparative Law 2nd ed* Edward Elgar Publishing Cheltenham 2012) 814.

aim of comparative law was to find out the implication of any differences in the legal systems and where possible find a way forward for Kenya that seems to be lagging behind in some aspects.³⁰

1.9 Scope of the study

The study is limited to implementation of rights of child offenders in Kenya. As such the researcher has evaluated both international and domestic legal instruments that are applicable to Kenya and Judicial decisions that are applicable to the subject at hand. The researcher has placed reliance on Kenyan law and international law with a survey of the law of United Kingdom and South Africa for comparative purposes.

1.10 Literature review

There is a legion of literature on matters to do with children and the law.

The CSC (Consortium for street Children) undertook a two-year research and advocacy study to assess the plight of street children in child justice systems in six countries including Kenya. They published a report in 2004 in which they documented their findings in relation to Kenya. The report noted the concerns relative to the child justice system as: The report noted that the various ages of criminal culpability were inconsistent, discriminatory and too low , it noted that there was massive police violence and brutality against street children, refugees and child offenders, the level of enforcement of the laws and policies that protect children and uphold their welfare and dignity was inadequate, the level at which children were being detained was too high thus separating them from their families which in turn affects their growth and develop, there was lack of separation of children with special needs, child offenders and children in need of care and protection in judicial proceedings, alternative care institutions lack independent complaint mechanisms, are insufficiently funded and lack adequate human resources, the report also noted that child justice system did not cover the whole country as there were no fully equipped children's courts around the country and thus the child justice system was generally inefficient.³¹

³⁰ P. Ishwara Bhat, 'Comparative Method of Legal Research: Nature, Process and Potentiality' (2015) 57 (2) *Journal of the Indian Law Institute* P. 149 <http://14.139.60.114:8080/jspui/bitstream/123456789/34748/1/009_Comparative%20Method%20of%20Legal%20Research%20Nature%20Process%20and%20Potentiality%2028147-173%29.pdf> Accessed 19th March 2020.

³¹ Cradle, The Undugu Society of Kenya, Consortium for street Children, 'Street Children and Juvenile Justice in Kenya' (2004) P. 8. <https://www.streetchildren.org/wp-content/uploads/2013/12/street_children_juvenile_justice_kenya.pdf> Accessed 27th March 2020.

An article by the United Nations International Children's Emergency Fund (UNICEF) that centres its discussion around taking child protection to the next level in Kenya highlights matters to do with interaction of children in the criminal justice system.³²

In an article published in 2014, Njeru W.K &Koech P.K noted that extreme poverty grossly affected the development and advancement of children. This is because children are unable to access basic amenities such as food, education and medical care. As a result, and in a bid to survive, poor and orphaned children end up engaging in child prostitution and many other criminal activities. These children continue with these activities as there is no one to save them and the laws and policies that should protect them are inadequate leading them even to forego education. Another problem bedevilling our society is the lack of good will and capacity to implement the applicable laws especially at the community level which affects education as children get to engage in child labour and girls opt for early marriages. Girl child network which is a nongovernmental organization mainly concerned with ensuring both boys and girls attain their right to education has been faced by some challenges. The courts are still slow in determining children matters and the court process remains expensive and complex. People prefer to resort to out of court settlement or taking cultural adjudication process to avoid high costs and time-consuming process of court procedure.³³

An article by Save the Children, a resource centre for children matters also has perspective in matters to do with child offenders. Instead of painting child offenders as rude and unruly characters, the article paints them as victims of a social system that has failed to offer them care and protection. This research agrees with that point of view therefore advocating for caring treatment of child offenders as opposed to exposing them to more trauma during trial making that article relevant to this research.³⁴

An article by Diego Ottolini also contributed to a large extent to this research. As noted earlier, the statistics on the number of child offenders is scarce. This article however tries to paint a picture of what happens to so many children all over the country including the fact that 12,000 children annually face the child justice system. A majority of these

³² UNICEF, 'Taking Child Protection to the Next Level in Kenya' (December 2015) P. 17 <https://www.unicef.org/protection/files/Kenya_CP_system_case_study.pdf> Accessed 20th March 2020.

³³ Njeru W. K &Koech P. K, 'A Critical Analysis of the Implementation of Children's Rights in Kenya' (December 2014) 3(6) *Educational Research International Journal* P. 23

³⁴ Save the Children, 'Children in Conflict with the Law' <<https://resourcecentre.savethechildren.net/keyword/children-conflict-law>> Accessed 15th March 2020.

children experience some kind of physical, mental and sexual abuse with girls being at a high risk of gender-based violence (GBV).³⁵

Seeing all these predicaments that children go through, leading many of them to break the law and thus to face trial under the criminal justice system, this study focuses on what can be done to improve the system in order to safeguard the rights of these children to ensure they are rehabilitated. Thus, the study has also focussed on literature that suggests improvements to the system.

The United Nations office of the High Commissioner published an article expounding on the role of the state in fulfilling, respecting, promoting, protecting and observing human rights. Since the rights of child offenders are human rights, the article is important to this work since it helps get a view of the role of courts in human rights relating to children.³⁶

Wambugu, Kingendo and Kinyua (2015) have also published a paper focused on implementation of public policy and assessment practices in rehabilitation schools in Kenya. It studied the policy framework applicable in assessment of child offenders. A comparison was done on the framework and its practicality through examination of the tools and procedure used and the study arrived at the inevitable conclusions that there was need for policy reforms for strengthening assessment of child offenders in Kenya.³⁷

One pertinent issue that is at the centre of justice for minors is the principle of the best interests which requires that a child's best interest shall be given paramountcy in all aspects concerning children. This principle should guide the children's court at all times.³⁸ Article 53(2) of the Constitution of Kenya 2010³⁹ and section 4(3) of the Children Act entrench the principle of the best interest of the child. In the High court of Kenya

³⁵ Diego Ottolini, 'Violence Does Not Fall on One Roof Alone. A Baseline Survey on Violence Against Children in The Kenya Juvenile Justice System' (2016) <https://resourcecentre.savetechildren.net/node/10143/pdf/vac_in_the_kenya_jjs_survey.pdf> Accessed 27th March 2020.

³⁶ United Nations Human Rights Office of the High Commissioner, 'International Human Rights Law' (2020) <<https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>> Accessed 15th March 2020.

³⁷ Wambugu, B.N, Kingendo, M, & Kinyua J.N, 'Policy and Practice in the Assessment of Juvenile Offenders in Public Juvenile Rehabilitation schools in Kenya' (2015) (3) 7 *International Journal of Education and Research* P.2

³⁸ Anne-Catherine et al, "Protecting the Rights of Children in Conflict with the Law; Research on Alternatives to the Deprivation of Liberty in Eight Countries' (Mater of Advanced Studies in Children's Rights thesis InstitutUniversitaire Kurt Bosch- University of Fribourg 2008)57.

³⁹ Constitution of Kenya

case of *Refugee Consortium of Kenya & Another v Attorney General & 2 others*⁴⁰ Lenaola J recognized that it was the most important principle in child rights.

The principle has been demystified to mean the actual requirement to consider the child's interest before any finding affecting his/her life is made.⁴¹ In applying the principle, the following issues must be considered,⁴²

- a) The specific interest in issue
- b) The nature of that interest
- c) The duration of the interest?
- d) The method of determining the interest and whether they are based on the child's subjective wishes?

Yvette McGee et al focused on the framework used by the courts, to ensure that the child's best interest is applied effectively. They recognize the difficulties presented to authorities mandated to tackle issues involving children because of competing interests presented by other equally important values.⁴³

However, an effective framework to balance these interests has been developed. Chief Justice O'Connor recognized the "inherent tension" between the rehabilitative goals of a system of criminal justice and the increasing criminalization attached to child offenders.⁴⁴ The complexities of the criminal justice system thus necessitate the treatment of child offenders in a manner that is different because of their vulnerability that will result in an unjust judgement that is not in their best interests.⁴⁵ This literature was important in shedding light on the right to legal counsel at the expense of the state and ensuring the rights of children facing the criminal justice system are protected.

This study evaluated the Child Criminal Justice system as a whole and also undertook a theoretical investigation of the application of the best interest principle and makes recommendations that may be a solution to the challenges faced by the system. Emphasis

⁴⁰ [2015] e KLR.

⁴¹ Yvonne Dausab, 'The best interests of the Child' (2009) In *Children's Rights in Namibia* (Oliver C, eds) Rupel Macmillan Education Namibia

⁴² Ibid 147.

⁴³ Yvette McGee et al, "Chief Justice O'Connor's Juvenile Justice Jurisprudence: A consistent Approach to inconsistent interests" 2015 *Akron Law Review* 56-77.

⁴⁴ Ibid.

⁴⁵ Wasilczuk, M.K, 'Substantial Injustice: Why Kenyan Children are entitled to counsel at State Expense' (2012) 45 (1) *New York International Journal of International Law and Politics* P.P 291-333 P.318 <<https://nyujilp.org/wp-content/uploads/2013/04/45.1-Wasilczuk.pdf>> Accessed 27th March 2020.

has been laid on the more effective application of the principle the underlying reason being those children, due to their vulnerability, require to be treated differently from adults. Purdy argues that it is important to provide children with conditions they will need to flourish.⁴⁶

According to Njue, the correctional facilities play a role in reforming the child offender.⁴⁷ She concludes that child offender, changed from the antisocial behaviour after they were taken through rehabilitative programs; including but not limited to counselling and formal education. This literature guided the study on the effectiveness of the sentencing policy in rehabilitation of child offenders while at the same time safeguarding their rights which according to Purdy, include, right to adequate housing, food, education, an appropriate environment and medical care.⁴⁸

1.11 Chapter Breakdown

Chapter 1 of this research gives an overview of what the research is all about. It helps to create a mental image of the plight faced by a lot of children face the criminal justice system. The chapter contains the Background to the study, the statement of the problem, the justification for the study, Research questions and objectives, research methodology and the literature review

Chapter 2 analyses of the theoretical and conceptual underpinnings of the rights of child offenders. This is coupled with an analysis of the trial process relating to child offenders. Analysing the trial process as relates to children is instrumental in finding out the role that courts and other stakeholders play. The chapter also points out the challenges that are faced by stakeholders in the child justice system.

Chapter 3 critically analyses the children Act and other legal instruments that guide stakeholders in the child justice system in Kenya. The challenges faced in implementation shall are addressed and possible solutions offered.

Chapter 4 of this study delves into an analysis of what other jurisdictions e.g., South Africa and the United Kingdom have done to safeguard the rights of child offenders.

⁴⁶ Laura M. Purdy, *In their best interest The Care against Equal Rights for Children* (Cornell University Press 1992) 3-26.

⁴⁷ Eunice Wanja Njue, 'The Effect of Correctional Institutions in Control of Juveniles Delinquency in Kenya: The case of Kabete and Dagoretti Rehabilitation Centres, Nairobi (MA thesis University of Nairobi 2014)61-62

⁴⁸ Ibid 38.

From this analysis, best practices are be derived and an analysis undertaken of whether such practices if imported can help improve the child justice system in Kenya

Chapter 5 makes recommendations on what can be done to improve the child justice system in Kenya so as to improve implementation of rights of child offenders. This chapter also provides a summary of the study and conclusions.

CHAPTER TWO

THE THEORETICAL AND CONCEPTUAL UNDERPINNINGS OF THE RIGHTS OF CHILD OFFENDERS

2.1 Introduction

This chapter discusses the historical, theoretical and conceptual underpinnings of the rights of child offenders. An understanding of the rights of children is essential in analyzing the role each stakeholder has to play in the whole structure. A discussion shall be fostered on the concept of the rights of child offenders and factors that influence children to commit crimes.

The main thrust of this chapter is a discussion on the principles governing aspects of child offenders. Here the international and domestic legal instruments that establish those principles are highlighted and thereafter the principles shall be discussed in detail.

2.2 The Historical Perspective

Children rights in general arose out of a realization that children were not adequately protected under the existing system. This concept can be traced back to the conclusion of the First World War when many lives were lost and a lot of property was destroyed. The most disadvantaged groups were the ethnic and religious minorities and vulnerable groups of children and women.⁴⁹ This led to intense development of international human rights and children rights in particular out of the realization that due to their vulnerable and defenseless nature, children were a special category who needed special care and protection.

This led to the adoption of the 1924 Declaration of the rights of the child which the first global legal instrument was recognising that children indeed have rights. The declaration is however faulted for being just that, a declaration! It did not bind member states and never placed legal obligations on them to implement its provisions. The declaration in fact refers specifically to “men and women of all nations” and not states. Secondly the declaration did not really recognize or assign children rights. It only acknowledged that they need protection.⁵⁰ The UN Convention on the Rights of the child was adopted by the

⁴⁹ Scholastica Omondi, “An analysis of the International Regional and National Instruments on Child Sexual Abuse in Kenya” Volume 2 Issue 6(2014) Journal of Research in Humanities and Social Sciences 51.

⁵⁰, Office of the United Nations High Commissioner for Human Rights “Legislative History of the Convention of the Rights of the Child” Volume 1 2007 3 <www.resourcecentre.savethechildren.net/library/legislative-history-convention-rights-child-volume-1> Accessed 28th May 2020.

United Nations General Assembly on 20th November 1989. It entrenches the human, civil, political, economic, social and cultural rights of children under 18 years of age. It is widely accepted having been ratified by all the countries in the world except Somalia and the United States.⁵¹ In short, the CRC grants children rights and places all rights on an equal pedestal. Hence, the articles of the convention are indivisible, interdependent and interrelated. Kenya joined the world by ratifying the Convention on 31st July 1990.⁵²

Following closely was the African Charter on the Rights and Welfare of the child which was adopted by the Assembly of Heads of state and Government of the Organisation of African Union in July 1990 and was brought into force in November 1999.⁵³ The calls for the enactment of the charter were fuelled by the realization by African countries that the CRC did not capture the extricate socio-cultural and economic realities that were real in Africa. The charter however doesn't compete with the CRC but only supplements and compliments it.⁵⁴ The convention assigns rights to children and makes them independent subjects while the charter incorporates and entrenches African values and experiences into children rights in Africa.⁵⁵

Kenya enacted the Children Act of 2001 to domesticate the provisions of the CRC and ACRWC. It contains wide provisions that touch on every aspect involving children and governance of child institutions. It also contains substantive provisions that require children in conflict with the law are protected throughout the trial process.

In 2010 Kenya promulgated a new Constitutional dispensation. This constitution makes elaborate provisions for human rights under chapter four which makes up the bill of rights. Children rights are specifically provided for under Article 53 of the constitution. The rights of arrested persons and the right to fair hearing and the rights of persons detained, held in custody or imprisoned are provided for under article 49, 50 51 respectively. They apply to all persons including children in conflict with the law. The recognition of children rights in the constitution is a positive step as children enjoy the protection that comes about with the supremacy of the constitution.

⁵¹Palmqvist Eva "Children's Rights in Kenya-An analysis based on the CRC Reports" Save the Children (2006) 6 www.resourcecentre.savethechildren.net/node/4521/pdf/4521.pdf Accessed 28th May 2020

⁵² Ibid.

⁵³DejoOlowu, "Protecting Children's Rights in Africa: A critique of the Africa Charter on the Rights and Welfare of the Child" *The International Journal of Children's Rights* 127.

⁵⁴ Ibid 128.

⁵⁵ Ibid.

2.3 The Concept of Rights of Child Offenders

The Universal Declaration of Human Rights emphasizes in its preamble the recognition of the inherent dignity and of equal and inalienable right to all members of the human family is the foundation of freedom, justice and peace in the world. This is a declaration that there are some fundamental rights and principles which are widely recognized as applicable to all human beings irrespective of age, gender, race or color. The constitution of Kenya contains a bill of rights at Chapter four. It contains provisions that are aimed at recognizing and protecting human rights and fundamental freedoms in order to preserve the dignity of individuals and communities and to promote social justice of everyone.⁵⁶ The constitution further recognizes that the rights and fundamental freedoms in the Bill of rights belong to everyone and are not obtaining from the state, are not exclusive and can only be limited in no other way but as provided in the Constitution.⁵⁷

Despite being suspected of having committed a crime, or having been found to be in conflict with the law, our children still hold rights and these rights need to be safeguarded at all costs. These rights include; education; leisure, recreation and cultural activities; health and health services; care and support for special needs children; protection from economic exploitation; and protection from all forms of torture, inhuman and degrading treatment. For a trial against a child to be said to be fair, then that child's right to favorable bail and bond, right to counsel at the expense of the state, right for him or her to be heard, right to be detained separately from adults and the right to sentenced as a child must be upheld.

A number of international instruments were ratified as a result to protect special interests and rights of children. Subsequently, regional and national instruments were then ratified and they borrowed largely from the international instruments that had been ratified. International instruments include International Convention on the Rights of the child, International Covenant on Civil and political Rights, United Nations standard minimum rules for the administration of juvenile justice (the Beijing rules), United Nations body of principles for the protection of all persons under any form of detention or imprisonment (body of principles), United Nations rules for the protection of juveniles deprived of their liberty (the Havana rules), United Nations standard minimum rules for non-custodial

⁵⁶ Constitution of Kenya 2010, Article 19(2).

⁵⁷Constitution of Kenya 2010, Article 19(3).

measures (the Tokyo rules) and UN children's fund (UNICEF) principles and guidelines on children associated with armed forces or armed groups (the Paris principles).

Regional instruments include the African Charter on the Rights of the Child which National Instruments include the Constitution of Kenya and the Children Act. One undisputable aspect of all these instruments is that they require the best interests of the child to be given priority in all aspects involving a child.⁵⁸

2.4 Factors Influencing Crime among Children

A child is any Human Being below the age of eighteen years.⁵⁹ It cannot be emphasized enough that Children, due to their age, mental and physical nature, are vulnerable. UNHCR policy on sexual and gender-based violence recognizes that children's Special needs arise from their dependence, their vulnerability and their development needs⁶⁰ which refers to their needs for good physical and mental growth and development at different ages.⁶¹ These factors place children at a disadvantage amongst other members of the society. Thus, they are exposed and may become more susceptible to crimes as a result.

A lot of research has been done on factors that lead children to commit crimes. Some of the causes of crimes according to social-cultural theories include; cultural conflicts proposed by Ruth and Cavan.⁶² When children are exposed to different cultures, they can pick up some traits that they previously did not possess e.g., drug abuse that may expose them to higher tendencies of committing a crime.

Another cause of juvenile delinquency is the family background of the children in those children that are born in a family where the parents commit crimes are more likely to follow the same path than those born in families that do not commit crimes. This theory was proposed by Sutherland.⁶³ Broken homes can also cause children to be more prone to committing offenses. A broken home can either be caused by the death or separation

⁵⁸ Constitution of Kenya, Article 53(2), Children Act s 4,

⁵⁹ Children Act, s 2.

⁶⁰ UNHCR, *Sexual and Gender-Based Violence against refugees, Guidelines for prevention and response*, May 2003

⁶¹ Machel, Graca, *Impact of Armed Conflict on Children*, UN General Assembly, A/51/306, 26th August 1996 pursuant to General Assembly Resolution 48/157 of 20th December 1993.

⁶² ShonleR., Theodore .N. and Ferdinand, *juvenile delinquency* (4th Edition New York : Harper & Row, 1981)

⁶³ Sutherland E.H and Cressey D.R., *Juvenile Delinquency* (McGrawhill Book Company, 1949)

of parents in the home and this can lead to not enough attention being paid to the children who may find themselves on a path towards criminality.

The economic condition of the household e.g., where the family is poverty stricken can also cause a child to be more prone to committing a crime. Such children as a result of their poor living conditions may be tempted to start stealing from their neighbours and exhibit some violent behaviour in a bid to survive.

The press according to Jerome Motto also has a role to play in deviant behaviour in children. Children are always looking out for headlines on the television and newspapers and when such headlines are always highlighting cases of rape, robbery and gambling, such ideas can be normalized by children predisposing them to a higher tendency of committing crimes.⁶⁴

It is noteworthy however, that child offenders are delicate class that should be handled with care. Otieno⁶⁵ opines that Article 8 of the UDHR provides for the right to an effective remedy, to every person when they appear before competent national tribunals for acts that may be in violation of their fundamental rights as prescribed by law. Child offenders being humans should have their rights safeguarded and treated as persons who have rights. The principle of development and survival of the child, as provided in the CRC is critical to ensure a child lives to the maximum extent possible. As a result of this, any disruption to the child's life must be justified; hence the child justice system should strive to minimize such disruptions by applying human rights. ⁶⁶According to Olufemi, how child offenders are treated by all persons, has a huge impact on recidivism, as well as the fact that children are at a development stage, and must therefore be dealt with utmost care.⁶⁷It is in recognition of this critical aspect that various international regional and national legal instruments were enacted to ensure the goal is attained.

⁶⁴ 'Theories and Causes of Juvenile Delinquency' <https://shodhganga.inflib_net.ac.in/bitstream/10603/145628/7/07_chapter3.pdf> Accessed 26th December 2019.

⁶⁵Osoro Nick Otieno, "Best Interest Principle Guidelines in the Trial Process; An Analysis of the Criminal Justice System in Kenya"(LLM Thesis, University of Nairobi,2016) 9.

⁶⁶ Jan Wouters et al eds, "The World Bank Legal Review; Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability" (2015 Volume) World Bank Group 83.

⁶⁷ Matthias Olufemi, "A Sociological Review on Issues of Juvenile Delinquency" (2012) The Journal of International Social Research 468.

2.5 Principles Governing Rights of Child Offenders in Kenya

The four principles governing children rights in Kenya are the best interests, the views of the child, survival and development, and non-discrimination. The principles are established in all the Domestic, regional and international legal instruments that have legislated on children rights. Under this sub topic, an analysis of each of these principles is done in order to paint a clear picture of what each of them entails.

2.5.1 The Best Interest Principle

Yvonne Dausab, has interpreted this principle in very simple terms. She says, the best interests of the child mean involving the child before a decision affecting his/her life is made.⁶⁸To put it into perspective, she calls upon the relevant institutions to consider the following whenever they are interpreting a matter concerning a child:

- The Specific interest in issue
- The nature of the specific interest
- The duration of the interest
- The criteria used in determining the interest and whether the child's wishes are objective or subjective⁶⁹

This principle is recognized under article 53(2) of the constitution of Kenya and section 4 of the children Act. Kenyan Courts have also recognized this principle as paramount in all matters concerning child offenders. In *P K v Republic*⁷⁰ where the High Court Sitting at Nakuru, overturned the decision of a magistrate's court which had sentenced a minor to life imprisonment for defilement and set him at liberty while applying the best interest's principle. In another case, *KMM v Republic*⁷¹, the high court sitting at Machakos overturned the decision of a magistrate's court which had convicted a minor for Robbery with Violence and sentenced him to death. The high court stated that the minor, who had already suffered imprisonment for one year was greatly prejudiced as he should have been attending school or in an appropriate institution if the sentence would have been imposed according to the law.

⁶⁸Yvonne Dausab, 'The best interest of the child'(2009) In 'Children's Rights in Namibia' (Oliver C, eds) Ruppel Macmillan Education Namibia.

⁶⁹ Ibid.

⁷⁰ (2019) eKLR(Nakuru High Court Criminal Appeal No.7 of 2014)

⁷¹ (2015) eKLR (Machakos High court criminal appeal No.114 of 2015

The complications associated with the application of the best interest principle in live cases is an issue that judges and even scholars have had to grapple with for a while. Yvette McGee observed that the criminal justice questions involving children facing state supreme courts are often the most difficult questions they tackle. Therefore, adoption of an effective framework has been developed to aid in application of the best interest Principle.⁷²Otieno⁷³ has discussed the elements to be taken into account as enumerated below.

Firstly, the child's views; the child's opinion must be taken into account and given considerable weight despite their age. Secondly, the identity of the child which includes; age, religion, and beliefs must be considered to ensure their individual best interest is considered. Thirdly, noting the family structure, the preservation of the same in terms of the environment and relations; plays an important part in actualizing the best interest. Fourth, the child's safety; this remains a state obligation. The state must ensure that the child is protected and cared for as provided in law.

Fifth, a child's vulnerability must be considered without forgetting that they are a minority. This enables the legal systems ensure the child is brought to some level to be able to enjoy his or her rights. Lastly, a child must be afforded quality and affordable education. The impact any decision will have on education should be considered broadly to uphold the principle.

It is important to note from the foregoing that the best interest principle, being the main and paramount principle to be applied in children's matters does not stand alone. It is complemented by the principle of non-discrimination, the principle of the views of the child and the principle of survival and development of the child. While considering the best interest, it is almost impossible to separate it from these other principles.

⁷² Yvette McGee et al, 'Chief Justice O'Connor's Juvenile Justice Jurisprudence: A Consistent Approach to Inconsistent Interests' (2015) *Akron Law Review* 56-77.

⁷³Osoro Nick Otieno, "Best Interest Principle Guidelines in the Trial Process: An Analysis of the Criminal Justice System in Kenya" (LLM Thesis, University of Nairobi 2015) 25.

2.4.2 The Principle of Non discrimination

The principle of non-discrimination is encoded international⁷⁴ and National legislation. The constitution of Kenya prohibits against any state organ discriminating against any person on any basis.⁷⁵It also specifically protects children against discrimination.⁷⁶

The constitution being the supreme law has clearly prohibited against discrimination of any person by the state or any person on account of age. This provision is meant to safeguard children against discrimination. The essence of this principle is equality of opportunity for children from all walks of life and it takes into account their diversity.⁷⁷

In safeguarding the welfare interests of the child, the ACRWC contains provisions on the right to education, leisure, recreation and cultural activities, health and health services, care and support for handicapped children, protection from economic exploitation and protection from all forms of torture, inhuman and degrading treatment.⁷⁸ These rights are available even to child offenders.

The responsibility of ensuring these rights are realised is placed on the state. In the case of *Erick Githua Kiarie v Attorney General & 2Others 2016(e KLR)*⁷⁹the High court had to compel the state to provide basic education to minors who had been detained at a borstal institution. The Court was of the view, rightly so, that even though these children were in conflict with the law it would be discriminatory and against their development to deny them the right to education.

2.4.3 The Views of the Child Principle

This principle presupposes the idea that a child must be heard in issues affecting them and their views must be given the weight they deserve.⁸⁰ This principle demands that proceedings before a court of law ought to give a child the chance to express himself. It requires that the proceedings must be conducted in a language that the child understands.

⁷⁴Convention on the Rights of the child, Article 2; African Charter on the Rights and Welfare of the Child, Article iii

⁷⁵Constitution of Kenya, Article 27(4) provides;The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion conscience, belief, culture, dress, language or birth

⁷⁶ Ibid, Article 27(5)

⁷⁷DejoOlowu, "Protecting Children's Rights in Africa: A critique of the Africa Charter on the Rights and Welfare of the Child" The International Journal of Children's Rights 129.

⁷⁸African Charter on the Rights and Welfare of the Child, Articles Xi-Xv.

⁷⁹ Erick GithuaKiarie v Attorney General & 2 others (2016) eKLR (Eldoret High Court Constitutional Petition Number 19 of 2014.)

⁸⁰ Ibid (n 25).

It also requires that an interpreter be acquired at state's expense in a case where the minor does not understand the court's Language. This principle is closely intertwined with the right to be given an advocate at the expense of the state. *In POO (a minor) v Director of Public prosecutions*⁸¹ the court opined that the provision of the Constitution and CRC unambiguously illustrate that the Petitioner being a minor with limited knowledge of his rights and even how to express those rights suffer substantial injustice in the absence of legal aid or assistance from an adult.

2.4. 4 Survival and Development of the Child

It has been argued that the term development must be interpreted to include not only physical health but also mental, emotional, cognitive, social and cultural development.⁸² Survival is concerned with provision of basic needs which are essential to prevent death. To this list, then, might be added safe drinking water and adequate shelter, clothing and sanitation facilities.⁸³ It is important that children are provided with these basic needs to enable them survive and develop effectively.⁸⁴

This principle is thus important for child offenders as it requires that despite the fact that they have ongoing cases in court, they are still entitled to continue with their normal lives. They have a right to continue with their education and to be provided with minimum basic needs of life. Although detention of children in custody is highly discouraged, the principle of survival and development requires that children who are remanded in custody are remanded in favorable conditions where they are provided with safe drinking water, proper shelter, clothing and sanitation and most of all, they are entitled to proper medical care.

The imposition of capital punishment against children is prohibited.⁸⁵ This is a step that recognizes the principle of survival and development of the child as it gives the child a chance to serve his or her punishment within the shortest time possible and to reintegrate

⁸¹(2017) eKLR (Homabay High Court Constitutional Petition Number 1 of 2017) Para 36.

⁸²DejoOlowu, "Protecting Children's Rights in Africa: A critique of the Africa Charter on the Rights and Welfare of the Child" *The International Journal of Children's Rights* 129.

⁸³ Douglas Hodgson, "The child's Right to Life, Survival and Development (1994)" *International Journal of Children Rights* 383.

⁸⁴ *Ibid* 385-386.

⁸⁵ Convention on the Rights of the Child, Article 37(a).

back into the community and be constructive. It also protects a child's right to life as it prohibits the death penalty.⁸⁶

2.5 International Legal Instruments Establishing the Principles Governing the Rights of Child Offenders

International Law including General Rules of international law as well as treaties and conventions that have been ratified forms part of the Laws of Kenya.⁸⁷The application of International Law has also been a subject of discussion before Kenyan Courts. The High Court in *Beatrice Wanjiku & Another vs The Attorney-General & Another*⁸⁸acknowledged that International Law is part of Kenyan Law.

There are a number of international legal instruments which are applicable to Kenya and are aimed at ensuring implementation of rights of child offender. They include: United Nations Convention on the rights of the child,International Covenant on Civil and political Rights(ICCPR),United Nations standard minimum rules for the administration of juvenile justice (the Beijing rules), United Nations body of principles for the protection of all persons under any form of detention or imprisonment (body of principles), United Nations rules for the protection of juveniles deprived of their liberty (the Havana rules), United Nations standard minimum rules for non-custodial measures (the Tokyo rules)and UN children's fund (UNICEF) principles and guidelines on children associated with armed forces or armed groups (the Paris principles)and African Charter on the rights and welfare of the child.

2.5.1 The Convention on the Rights of the Child

The convention has established general principles that apply in matters involving children in general and children in conflict with the law specifically. First, the convention establishes the principle of Non-Discrimination. To this end, convention obligates state parties to legislate measures that ensure all children are protected from discrimination of any kind.⁸⁹

The Convention also establishes the principle of the best interests of the child. It requires state parties to ensure that every decision made by state organs including courts,

⁸⁶ Douglas Hodgson, "The child's Right to Life, Survival and Development" (1994) 2 International Journal of Children Rights 387.

⁸⁷ Constitution of Kenya 2010, Article 2(5).

⁸⁸ High Court of Kenya at Nairobi, Petition 190 of 2011 para 17.

⁸⁹Convention on the Rights of the Child, Article 2.

touching on the welfare of a child, must ensure that the best interest of the child remains paramount.⁹⁰

The third general principle established by the CRC is the Right to life, survival and development. The wording of the convention is to the effect that State parties must recognize a child's right to life and ensure that children are afforded basic needs in life to ensure their survival and development.⁹¹

The last principle established by the convention is Respect for the views of the child. The Convention provides that state parties shall to the best extent possible safeguard a child's right to be heard in matters affecting them and such views shall be given considerable weight.⁹²This includes the child's right to be heard before any court of law or other administrative bodies within the applicable.

Those principles have been encoded in our national legislation and courts and other stakeholders are mandated to apply them faithfully in proceedings and decisions relating to children.

The principles above apply to all matters involving children including the trial of child offenders. The Convention however delves directly into the aspect of Children in conflict with the Law by providing a guide on administration of child justice. It requires that a child who has been charged with any offence must be treated with dignity while taking into account their age and the desire to reintegrate the child back to the community.⁹³

This is recognition that despite the child having rights, that child may trample upon the rights of others for which that child will be called upon to answer and to be punished accordingly. As such, the minor has to be heard. It is also an emphasis on restorative justice rather than retributive justice because it focuses on correcting the child and reintegrating the child back to the community. To this end, the Convention requires that the tenets of a fair hearing such as conducting hearings in an understandable language, provision of an advocate at the expense of the state, protecting the privacy of the child and giving the child a chance to be heard are incorporated in trials involving a child.

⁹⁰Convention on the Rights of the Child, Article 3.

⁹¹Convention on the Rights of the Child, Article 6.

⁹²Convention on the Rights of the Child, Article 12(1).

⁹³ Convention on the Rights of the Child, Article 40.

The Convention also provides for the manner of arrest and detention of a child offender. This is aimed at safeguarding the rights and dignity of children. The same should be done humanely and should be a measure of last resort.⁹⁴ The child should also be detained separately from adults.⁹⁵

Another aspect which is related to the aspect of children deprived of their liberty which the Convention seeks to regulate is the aspect of disposition of child offender matters. The Convention prohibits subjecting children to inhuman or degrading punishment as well as capital punishment or life imprisonment.⁹⁶

As stated herein earlier, the Convention on the rights of the child focused on restorative justice. The convention recognizes that after a child in conflict with the law has gone through the trial system and has been punished for the crime committed, such a child will need to be reintegrated back to the society. The Convention makes provision for such reintegration.⁹⁷

2.5.2 International Covenant on Civil and Political Rights

ICCPR is an international treaty that was adopted by the United Nations general Assembly on 16th December 1966 and entered into force on 23rd March 1976. ⁹⁸The treaty was ratified by Kenya on 1st May 1976.⁹⁹

ICCPR requires party states to enact Constitutions and other legislations that protect the rights and welfare of their Citizens.¹⁰⁰ The treaty abolishes the death penalty except for very serious crimes however it specifically prohibits passing of the death penalty against children aged below eighteen years of age.¹⁰¹ It contains provisions against arbitrary arrest and detention and requires that an arrested person shall be informed promptly of the reasons for arrest and be arraigned in court as soon as is practically possible.¹⁰²

⁹⁴ Convention on the Rights of the Child, Article 37(b).

⁹⁵ Convention on the Rights of the Child, Article 37(c).

⁹⁶ Convention on the Rights of the Child, Article 37(a).

⁹⁷ Convention on the Rights of the Child, Article 39.

⁹⁸ www.treaties.un.org <Accessed 22nd October 2021>

⁹⁹ Ibid.

¹⁰⁰ International Convention on Civil and Political Rights, Article 2.

¹⁰¹ Ibid, Article 5.

¹⁰² Ibid, Article 9.

The treaty specifically prohibits incarceration of accused persons with convicts and children with adults.¹⁰³ The rights to fair hearing and protection of the Privacy of children during trial is recognized under the treaty as well.¹⁰⁴ Children have a right to thoughts, conscience and religion and this should be considered whenever anyone is making any decisions that touch on a child.¹⁰⁵ This is duly recognized by the treaty where it recognizes that everyone has a right to hold and express an opinion.¹⁰⁶ ICCPR makes specific provisions against discrimination of children on account of age, sex, race, color, religion, national or social origin or on any other ground whatsoever.¹⁰⁷

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

These rules which are also known as the Beijing Rules were adopted by the United Nations General Assembly on 29th November 1985.¹⁰⁸ The rules are applicable to all children without discrimination and they are intended to meet the needs of child offenders while protecting their basic rights.¹⁰⁹

The rules require member states to consider the emotional, mental and intellectual capacity of children and thus prohibit against placing the age of criminal liability too low.¹¹⁰ The aim of the child justice system should be to ensure reaction to child offenders should be proportional to circumstances of both the offender and the offence.¹¹¹ Thus, discretion should be given to all actors in the child justice system including investigators, prosecution, adjudication and follow up dispositions so that they are able to deal with children matters effectively.¹¹²

The rules recognize the rights of child offenders to be presumed innocent until the contrary is proved, to be notified of the charges, right to counsel, right to presence of parent or guardian, to participate in proceedings by confronting and cross-examining witnesses and right to appeal.¹¹³ Member states are enlisted to protect the right to

¹⁰³ Ibid, Article 10.

¹⁰⁴ Ibid, Article 11.

¹⁰⁵ Ibid, Article 18.

¹⁰⁶ Ibid, Article 19.

¹⁰⁷ Ibid, article 24.

¹⁰⁸ United Nations standard minimum rules for the administration of juvenile justice, Preamble.

¹⁰⁹ Ibid, rule 2.

¹¹⁰ Ibid, rule 4.

¹¹¹ Ibid, rule 5.

¹¹² Ibid, rule 6.

¹¹³ Ibid, rule 7.

privacy of child offenders by restriction publication of case details in the mass media and concealing names and other information of child offenders.¹¹⁴

Part two of the rules make provision for Investigation and prosecution. The rules require that when a child is apprehended, the parents are notified as soon as possible and the child is arraigned before a judge immediately for consideration of release on bond.¹¹⁵

The rules make a strong case for diversion. They propose empowering of the police and prosecutors to divert appropriate cases whenever possible. It is recognized that this will hinder the negative effects associated with the criminal justice system.¹¹⁶ It would be important to train and offer instructions to the police in this field to equip them with the necessary skills to handle children matters.¹¹⁷ A case is made by the rules against detention of children pending trial. It is highly recommended that child offenders be released on reasonable bond terms pending their trial.¹¹⁸

Part three provides for adjudication and disposition. The rules recommend that member states establish specialized children's courts which should be separate and distinct.¹¹⁹ It recommends that the children court should ensure child offenders are afforded legal counsel at the expense of the state where they are unable to afford the same and parents and guardians of the child offenders should be allowed to participate in the proceedings to assist the children.¹²⁰ The children court should order for social inquiry reports in order to appraise itself on the circumstances of a child before it before making any decision.¹²¹

The aim of the children's court should be to rehabilitate a child offender rather than desert, to assist rather than to punish, to react to a specific case and dealt with it individually rather than react to protect the society, to deter further commission of an offence rather than to incarcerate children.¹²² It is in this light that the rules propose the following methods of disposing off matters relating to child offenders; Care, guidance and supervision orders, probation, community service orders, Financial penalties,

¹¹⁴ Ibid, rule 8.

¹¹⁵ Ibid, rule 10.

¹¹⁶ Ibid, Rule 11.

¹¹⁷ Ibid, Rule 12.

¹¹⁸ Ibid, Rule 13.

¹¹⁹ Ibid, Rule 14.

¹²⁰ Ibid, Rule 15

¹²¹ Ibid, Rule 16.

¹²² Ibid, Rule 17.

restitution and compensation, intermediate treatment and other treatment orders, orders to participate in group counselling and other counselling activities, orders concerning foster care, living communities and other educational setting

2.5.4 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)

The body of principles were adopted by the United Nations General Assembly on 9th December 1988 and they apply for the protection of all persons under any form of detention. The principles insist that persons who are detained or imprisoned must be treated with dignity and in a humane manner.¹²³ Arrest and detention should be done by competent officials in strict adherence to the law and no human rights should be violated.¹²⁴ The principles prohibit detention without trial and provide that any detention or imprisonment shall be by order of a judicial authority.¹²⁵ Reasons must be given to the person arrested of the reasons for the arrest, informed of the charges against them and be promptly arraigned before a competent court as soon as possible.¹²⁶ Torture of those incarcerated or detaining them in inhuman and degrading conditions is prohibited.¹²⁷ Those arrested are entitled to notify their family and friends of the arrest.¹²⁸ An arrested person has a right to legal counsel.¹²⁹ Detained persons have a right to education and reasonable material should be provided to them for that reason.¹³⁰ Detained persons have a right to be presumed innocent until proven guilty and for their trial to proceed and be concluded speedily.¹³¹

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

These Rules were adopted by the United Nations General Assembly on 14th December 1990 to provide minimum standards accepted by the United Nations for the protection of

¹²³ United Nations body of principles for the protection of all persons under any form of detention or imprisonment, principle 1.

¹²⁴ *ibid*, principle 2.

¹²⁵ *ibid*, principle 4.

¹²⁶ *ibid*, principle, 10,11&12.

¹²⁷ *ibid*, principle 6.

¹²⁸ *ibid*, principle 16.

¹²⁹ *ibid*, principle 17 and 18

¹³⁰ *ibid*, principle 28

¹³¹ *ibid*, principle 38 &39

child offenders deprived of their liberty.¹³² They enlist child justice systems to uphold the rights and safety and promote the physical and mental well-being of child offenders.¹³³ The Rules emphasize that imprisonment should be a measure of last resort.¹³⁴

The Rules require child offenders who have been arrested awaiting trial to be presumed innocent until proven guilty and as such detention shall be avoided and limited only to exceptional circumstances.¹³⁵ Such child offenders shall have a right to free legal counsel and their communication with their legal counsel shall be private and confidential.

The rules provide an efficient system for management of facilities that hold child offenders. The rules require that adequate records of child offenders shall be kept and they must remain confidential to protect the privacy of such children.¹³⁶ Before a child is placed at a facility, a social inquiry shall be conducted on the child to inform on all the circumstances of the child.¹³⁷ Child offenders who are detained shall have rights to facilities and services that meet all the requirements of health and human dignity. The facilities should be designed in a safe way to minimize risks.¹³⁸ They should be given adequate sleeping accommodation that takes into account their age and dignity.¹³⁹ They should also be given sanitary facilities that are up to standard.¹⁴⁰ A child offender who is of school going age should be permitted to continue with their education. Other vocational training activities and work should also be encouraged and facilitated.¹⁴¹ Child offenders should be encouraged and facilitated to participate in recreational activities to help them develop physically and also improve their skills and talents.¹⁴² Child offenders should be permitted to satisfy their religious needs and also to develop spiritually¹⁴³ and finally, they should be given adequate medical care.¹⁴⁴

¹³² United Nations rules for the protection of juveniles deprived of their liberty, rule 3.

¹³³ Ibid, Rule 1.

¹³⁴ Ibid.

¹³⁵ Ibid, Rule 17.

¹³⁶ Ibid, Rule 19.

¹³⁷ Ibid, Rule 27

¹³⁸ Ibid, Rule 32

¹³⁹ Ibid, Rule 33

¹⁴⁰ Ibid, Rule 34

¹⁴¹ Ibid, Rule 38

¹⁴² Ibid, Rule 47.

¹⁴³ Rule 48

¹⁴⁴ Rule 49.

2.5.6 United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

These standard minimum rules were adopted by the United Nations General Assembly on 14th December 1990 to provide a set of basic principles to promote the use of non-custodial measures as well as minimum safeguards for persons subject to alternatives to imprisonment.¹⁴⁵ The rules apply to all persons including child offenders.¹⁴⁶

The rules emphasize that resort to non-custodial measures shall be subject to judicial discretion and the consent of the offender. They shall involve activities that are mindful of the medical and psychological well-being of the offender and shall not include activities that pose a health risk to the offender.¹⁴⁷

The rules require member states to empower police officers and prosecutions to impose non-custodial measures and divert offenders from the judicial system in appropriate cases.¹⁴⁸ They encourage judicial officers in member states to require social Inquiry reports from authorized officers to inform the courts of social information on the offender that is relevant in determining the appropriate non-custodial measure.¹⁴⁹

The sentencing alternatives to imprisonment which the Rule propose include; Verbal sanctions such as admonitions reprimand and warning, conditional discharge, Status penalties, economic sanctions and monetary penalties such as fines and day fines, confiscation or an expropriation order, restitution or compensation order, suspended or deferred sentence, probation and judicial supervision, A community service order, referral to an attendance Centre, and House arrest.¹⁵⁰

The rules require member states to empower their authorities to have a wide range of post disposition alternatives in order to assist offenders reintegrate into the society. The post disposition alternatives proposed include; Furlough and half way houses, work or education release, various forms of parole, remission and pardon.¹⁵¹

¹⁴⁵ United Nations standard minimum rules for non-custodial measures, rule 1.

¹⁴⁶ *ibid*, rule 2.

¹⁴⁷ *ibid*, rule 3

¹⁴⁸ *ibid*, rule 5

¹⁴⁹ *ibid*, rule 7

¹⁵⁰ *ibid*, rule 8.

¹⁵¹ *ibid*, rule 9.

2.5.7 UN Children’s Fund (UNICEF) Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (The Paris Principles)

These principles were promulgated out of the realization that hundreds of thousands of children around the world are associated with armed forces in various ways including support roles such as cooking or posturing, fighting actively, laying mines and spying and girls are often used for sexual purposes.¹⁵² They are a key instrument in development of international norms as well as shifts in policy at national, regional and international levels.¹⁵³ They improve on the Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa” (“the Cape Town Principles”).¹⁵⁴ The principles recognize and incorporate the four common principles of Nondiscrimination, Best interests, right to life, survival and development and views of the child.¹⁵⁵ They are applicable to children associated with armed groups who are regarded as victims rather than perpetrators.¹⁵⁶

The principles acknowledge that the situation of girls may very different and more severe in relation to the reasons and manner in which they join the armed forces or armed groups; the potential for their release; the effects that the experience of being in the armed force or armed group has on their physical, social and emotional well-being; and the consequences this may have for their ability to successfully adapt to civilian life or reintegrate into family and community life after their release.¹⁵⁷

To prevent recruitment of children into the armed forces, the principles recommend establishment of a comprehensive prevention plan by states, Collaboration between all states and actors and prevention of the unlawful recruitment or use of girls and boys includes safe attendance at schools, prevention of family separation and early identification, protection and reunification programs for separated children.¹⁵⁸

The following measures are proposed to protect children who leave the armed forces; no child is to be subject to inhuman and degrading treatment or punishment or torture;

¹⁵² UN children’s fund (UNICEF) principles and guidelines on children associated with armed forces or armed groups Page 4.

¹⁵³Ibid.

¹⁵⁴Ibid.

¹⁵⁵Ibid page 9.

¹⁵⁶Ibid.

¹⁵⁷Ibid Page 13

¹⁵⁸Ibid page 16.

capital punishment or life imprisonment shall not be passed on such children, their liberty shall not be deprived unlawfully or arbitrarily, such children shall never be considered deserters, all appropriate measures must be taken to ensure their physical and emotional recovery and social reintegration, measures must be taken to ensure reestablishment of family unity, all allegations of violence including sexual gender based violence must be investigated and prosecuted unless it is against the best interests of a child associated with armed forces or groups.

2.5.8 African Charter on the Rights of the Child

The charter contains various provisions which are in consonance with the Convention. Like the convention, the charter is predicated on four cardinal principles. These principles are Non-discrimination,¹⁵⁹best interests of the child¹⁶⁰, rights to life, survival and development¹⁶¹and the views of the child.¹⁶²

In safeguarding the Rights and welfare of children in conflict with the law the charter contains provisions on Administration of Juvenile Justice.¹⁶³It requires that every child who is suspected of committing an offence or has been found guilty shall be entitled to special treatment taking into account their age and dignity.

The charter requires state parties to ensure the following children who are detained are not subjected to inhuman or degrading treatment, are separated from adults, are presumed innocent until otherwise proved guilty, are promptly informed of the charges against them in an understandable language or are given an interpreter and are afforded pro bono counsel at the expense of the state.

2.6 National Legal Instruments on the Principles Governing the Rights of Child Offenders

2.6.1 The Constitution of Kenya

The Constitution of Kenya is the Supreme Law in Kenya and all laws that apply in Kenya are subject to the constitution any law that is inconsistent with it is void and any act that contravenes the constitution is invalid.¹⁶⁴Under Article 53, the Constitution

¹⁵⁹ African Charter on the Rights and Welfare of the child, Article III.

¹⁶⁰ African Charter on the Rights and Welfare of the Child, Article IV.

¹⁶¹ African Charter on the Rights and Welfare of the Child, Article V.

¹⁶² African Charter on the Rights and Welfare of the Child, Article IV (2).

¹⁶³ African Charter on the Rights and Welfare of the Child, Article 17.

¹⁶⁴Constitution of Kenya, Article 2(4).

provides for the general Rights of all children including the right to be held separately from adults if arrested, to be held for the shortest possible time and for a child's best interest to be given paramountcy.

The constitution makes general provisions for the rights of arrested persons but those rights equally apply to children who are arrested on suspicion of being in conflict with the Law.¹⁶⁵ It provides that an arrested person has the right to be informed promptly in a language that he understands of the reason for the arrest and the right to remain silent. It equally provides for the right to access legal services and to be held separately from convicts. It stresses on arraignment for arrested persons in court within 24hours where possible and to be released on reasonable bail and bond

The provisions for fair hearing for all persons in Kenya, whether adults or minors are found at Article 50(2) of the constitution which provides that every person has the right to a fair trial which includes the right to be presumed innocent until otherwise proved guilty, to be informed promptly of the charges one is facing, to be given ample time and facilities to prepare for one's defence, speedy trial, legal representation at the state's expense, to attend one's trial and for the same to proceed in a language that one understands, protection against double jeopardy and the right to appeal or review a lower court's decision.

2.6.2 The Children Act

The Children Act was assented to on 31st December 2001 and commenced operation in Kenya on 1st March 2002. It is basically an Act that provides for all the rights concerning children as well as administration of institutions dealing with all matters concerning children.

The Act has incorporated the four basic principles that guide the courts and all other institutions in matters concerning the child. First the Act has incorporated the principle of survival and development of the child. It places the mandate on the state to ensure this right is attained.¹⁶⁶ Secondly, the Act also recognises and incorporates the principle of the

¹⁶⁵Constitution of Kenya, Article 49.

¹⁶⁶ Children Act s 4(1).

best interest of the child.¹⁶⁷It provides in strict terms that the best interest principle shall be given paramountcy in all matters concerning a child.¹⁶⁸

Thirdly, the Act also incorporates the principle of the views of the child.¹⁶⁹It stresses that a child shall be given a chance to express his or her view in matters concerning them and the said views shall be considered in decision making. The fourth principle of non-discrimination is also incorporated in the Act.¹⁷⁰ It prohibits any form of discrimination against any child on any grounds.

2.7 Prevention of Juvenile Delinquency

In recognition of the challenges faced by minors, and in a bid to prevent juvenile delinquency, The United Nations General Assembly adopted and proclaimed the *UN guidelines for the prevention of Juvenile delinquency* popularly known as the Riyadh guidelines in December 1990.¹⁷¹These guidelines emphasize on the participation of the whole society in ensuring development of adolescents. For this to be achieved, the guidelines make the following proposals.

First, it proposes institution of comprehensive plans at every level of government. These include a survey of the problems, policies, infrastructure and resources available, clearly define the duties and responsibilities for available agencies and personnel, establishing of clear strategies for coordination of preventive measures between governmental and non-governmental agencies, monitoring and evaluation of policies and strategies, research and establishment of Methods for reducing the opportunity to commit delinquent acts, Encouraging Community involvement and participation, Involvement of all stakeholders in taking a combined effort to prevent juvenile delinquency and youth crime, Increased Youth participation in delinquency prevention policies and processes, including recourse to community resources, youth self-help, and victim compensation and assistance programs and increase of specialized personnel at the grassroots levels.¹⁷²

Secondly, the guidelines propose placing a lot of emphasis on preventive policies by engaging and enrolling all children and young persons in social activities through family, the community, peer groups, schools, vocational training and the world of work, as well

¹⁶⁷ Children Act s 4(2)

¹⁶⁸ Children Act s 4(3)

¹⁶⁹ Children Act 4(4).

¹⁷⁰ Children Act s 5.

¹⁷¹ Adopted and Proclaimed by General Assembly resolution 45/112 of 14 December 1990.

¹⁷² UN guidelines for the prevention of Juvenile delinquency (Riyadh Guidelines 1990), Article III.

as through various voluntary organizations. Particular importance should be given to personal development of children and young persons, and they should be accepted as full and equal partners in socialization and integration processes.

Recognizing that the family is the basic central unit for instilling social virtues in children, the government should invest in policies that strengthen family ties. Schools should also dedicate their time in teaching basic values that help children understand and appreciate culture and social values of their communities, promote their personal development as well as their talents, physical and mental abilities, that protect their rights and fundamental freedoms, Encouragement of young persons to understand and respect diverse views and opinions, as well as cultural and other differences; Sensitization of young people on vocational training, employment opportunities and career development Investing In programs that promote psychological support for young people and Avoidance of harsh disciplinary measures, particularly corporal punishment.¹⁷³

Community-based services and programs focus on special needs, problems and interests of young people should be developed. There is also need to focus on proper guidance and counseling mechanisms. Young people should be encouraged to participate in recreational and extra curriculum activities as well. The media should offer positive education to young people and minimize on activities that promote crime, drug use and pornography.¹⁷⁴

Thirdly, the government should improve the welfare of children through social policies. Government agencies implement programs and policies that target on the young people directly. Budgetary allocation to these programs should be increased and young people should be encouraged to participate. Of importance also is to invest in mental health programs where young people can get adequate psychological support as well as proper guidance and counselling. Young people should also be afforded volunteering programs as well as internships in order for them to receive work experience.¹⁷⁵

Fourthly, legislation and juvenile justice administration should aim at preventing juvenile delinquency. Proper research should be done and adequate laws passed that promote the

¹⁷³UN guidelines for the prevention of Juvenile delinquency, Article IV.

¹⁷⁴ Ibid.

¹⁷⁵ UN guidelines for the prevention of Juvenile delinquency, Article V.

social well-being of young people. They should be protected from victimization, abuse, exploitation and the use for criminal activities.¹⁷⁶

Finally, the guidelines propose that Juvenile delinquency should be tackled through Research, policy development and coordination. There should be increased symposium, seminars and trainings on this topic that should target all stake holders. The exchange of information, experience and expertise gained through projects, programs, practices and initiatives relating to youth crime, delinquency prevention and juvenile justice should be intensified at the national, regional and international levels. Scientific research should encourage collaboration among key stake holders with respect to effective modalities for youth crime and juvenile delinquency prevention and the findings of such research should be widely shared.¹⁷⁷

2.8 Conclusion

The Concept of Children Right is a concept that has come a long way. Initially, children were considered not to have rights. However, after the first world war, it was recognized by the world over that, children had been greatly affected and were thus a vulnerable group that required protecting. The international community began the clamor for children rights culminating to the promulgation of the declaration of the rights of the child in 1959. The declaration of the rights of the child was not effective as it was not binding and did not place obligations on states. It was realized that there was a need for a convention that would place obligations on states to act in order to realize the rights of children. After a long journey, the convention on the rights was passed. It is recognized as one of the most accepted international conventions with 192 states ratifying it. The Convention on the Rights of the Child elaborately declares children's Rights and places an obligation on member states to ensure implementation.

African states supported the convention on the rights of the child however they found it had shortcomings in failing to recognize the peculiar social and cultural status of the African child. This necessitated the enactment of the African Charter on the Rights and Welfare of the Child to complement the CRC. This charter recognizes the cultural aspects of the African child. Kenya has domesticated the internationally recognized rights of the child in the Kenyan constitution and the Children Act.

¹⁷⁶ UN guidelines for the prevention of Juvenile delinquency, Article VI.

¹⁷⁷ UN guidelines for the prevention of Juvenile delinquency, Article VII.

There are four major principles that are established in both international and national laws to guide in matters affecting children. They are; the best interest principle, the nondiscrimination principle, the principle on survival and development of the child and the principle on the views of the child. These principle as discussed in the chapter, take Center stage whenever any person or body is making any decision on matters affecting the child. Courts in Kenya are required to apply these principles whenever they are presiding over cases of children in conflict with the law.

It is important for the government to focus on prevention of Juvenile delinquency. This can be achieved through a number of ways as proposed in the UN guidelines on prevention of Juvenile Delinquency adopted by the General Assembly in December 1990. The measures proposed include general prevention where the state is required to put in place comprehensive prevention plans at every level of government, the socialization processes which require the family, community and education institutions to work hand in hand in developing children as a measure of preventive juvenile delinquency and the mass media plays its role in positive education of children and prevention of drug abuse, social policy where government sponsor learning institutions and other programs that encourage children to work and receive experience, legislative and juvenile justice administration policies that aim at crime prevention and finally through research, policy development and coordination which is aimed at coming up with.

CHAPTER THREE

THE LEGAL, POLICY AND ADMINISTRATIVE FRAMEWORK FOR TRIAL OF CHILD OFFENDERS IN KENYA

3.1 Introduction

This chapter analyses the existing legal, policy and administrative framework in place for trial of children in conflict with the law. A discussion is held on the trial process beginning with arrest and detention, arraignment in court, the trial and the disposition of children in court. The discussion of each stage includes the legal and policy framework that drives the process. The study also analyses the administrative/ institutional framework which is basically the role played by various stakeholder in the juvenile justice system including the court, police, the prosecutor, the defense counsel, the children department, the probation and aftercare service providers and prison.

Our criminal justice system apportions criminal responsibility according to age. The penal code provides that a person under the age of eight years is not criminally liable for an action or omission.¹⁷⁸ There is however a reprieve given to children aged between eight to twelve years as the prosecution is required to prove that at the time of committing the criminal offence or making a criminal omission the child had the capacity to know that he was not supposed to do the act or make the omission.¹⁷⁹ There is also a legal presumption that a male child under the age of twelve is incapable of having carnal knowledge.¹⁸⁰

From the foregoing, it is imperative to point out that for a child suspected of committing an offence to go through trial under the criminal justice system, then that child should not be under the age of twelve years as they are exempted by the law which recognizes that they lack criminal responsibility.

3.2 Arrest, Search and Detention

Despite the many measures that may be put in place to prevent juvenile delinquency, it may be impossible to completely eliminate it. Therefore, children who commit crimes should be made to answer for the crime mainly as a measure of learning from their mistakes and rehabilitating. The Juvenile justice system should foster this. The first instance that a child who is suspected of committing a crime comes face to face with the

¹⁷⁸ Penal Code, s14(1).

¹⁷⁹ Penal Code, s14(2).

¹⁸⁰ Penal Code, s14(3).

criminal justice system is at the point of arrest. In most cases arrest is done by the police who are mandated by the National Police Service Act. Arrest comes with requirements to conduct a search on the body or property of the person arrested and maybe detain that person. The Law provides that a child's rights to human dignity and privacy are protected at this point. Thus, in line with our incipient human rights culture, before every arrest, search and detention of a child is executed, police officer must explore other less invasive methods which may be used arraign the suspect before court and to secure evidence.

The law as contained in our various legal instruments guide how arrest, search and detention of a child suspected to be in conflict with the law should be conducted. Leading from the front is the Constitution of Kenya which safeguards the right of the child to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.¹⁸¹ Detention of a child should be a measure of last resort and should be for the shortest time possible. During detention a child should be separated from adults and people of the opposite sex.¹⁸² The term "a measure of last resort" which is a principle that must be applied when deciding whether to detain a child or not presupposes that detention of a child should happen when everything else has failed. A police officer should therefore employ every other method to satisfy their legitimate purpose without having to detain a child. The methods to be employed should be less invasive.

The reasoning behind this constitutional principle is to safeguard the constitutional right to freedom and to make it difficult to curtail it except for justifiable reasons. Second, the traumatic, brutalizing, dehumanizing and degrading effects that detention has on people can worse on children who are already vulnerable and it can affect their physical and mental wellbeing.¹⁸³

This aspect has been acknowledged by the courts. For instance, Mativo J admitted detention centers and police stations lack the necessary facilities and cannot be homes or places for raising children. He acknowledged further that they affect the normal and healthy growth of our children and cause them psychological and sociological problems which affect their development a fact that is supported by medical evidence. Thus, he

¹⁸¹Constitution of Kenya, Article 53 (1)(d).

¹⁸²Constitution of Kenya, Article 53(1)(f).

¹⁸³ MWK & Another v Attorney General & 3Others (2017) e KLR para.76.

advocated for detention of children as a measure of last resort and for the shortest time possible as provided by the Constitution at Article 53(2).”¹⁸⁴

It is acknowledged that a Search amounts to an interference with the privacy of the person being searched yet the right to privacy is enshrined in the Constitution as well as common law. Privacy is therefore, a valuable aspect of one's personality. It is however permissible to interfere with it especially in circumstances of maintaining law and order that can bear a significant limitation on the right. There are other competing factors which necessitate a careful weighing up of the right to privacy and other factors. It is prudent to consider whether a search would violate the persons constitutional right to privacy and whether it is justifiable and permissible under the limitation clause.¹⁸⁵

The children Act also prohibits against subjecting children to inhuman treatment and any form of torture or punishment. It sets the bar higher by making specific provisions against unlawful arrest children and depriving them of their liberty. It emphasizes on separation of children from adults during detention and requires children to be afforded legal assistance as well as access to their family during detention.¹⁸⁶

The Child offender Rules made pursuant to the Children Act to guide matters of children who are on trial also provides guidelines on the subject. It requires that where a child is arrested with or without a warrant on suspicion of having committed a criminal offence he shall be arraigned before the court as soon as practicable but in any case, not beyond twenty-four hours without leave of court. The Officer Commanding a Police station is required to immediately inform the child's parents or guardian and the Children Officer of the arrest of any child. It is mandatory for a child's parent or guardian or advocate to be present during interrogation of any child. Where the child's parent or guardian is untraceable, then the children Officer ought to be notified to attend the interrogation of a child.¹⁸⁷

The Child offender Rules do not require a parent or guardian must be present when the child is arrested. The Rules however require that the child's parent, guardian, advocate or the children officer must be present when the minor is being interviewed. Mumbi J in the

¹⁸⁴ Ibid para 77.

¹⁸⁵ Ibid.

¹⁸⁶ Children Act s18.

¹⁸⁷ Child Offender Rules, Rule 4.

case of *DMO & another JB v Republic*¹⁸⁸ opined that the law is clear that an interview by police of a person under the age of eighteen years cannot take place in the absence of his or her parents or guardian, an advocate appointed by his parents or guardian or a Children's Officer. Evidence obtained from a minor in the absence of his parents, guardian or advocate risks being declared inadmissible before the trial court.¹⁸⁹

The legal position regarding arrest search and detention of children is therefore that whenever a child is arrested, care should be employed to ensure the child's dignity and right to privacy is protected. These rights should not be breached at all even at the point of searching the child. The child should then be arraigned in court as soon as possible. The law as discussed above requires that the child be arraigned in court as soon as possible but before expiration of twenty-four hours. If the twenty-four hours expire after court working hours or on a weekend or holiday then the child should be arraigned on the next working day. The child should not be detained with adults. However due to the effects of detention on children and due to the deplorable conditions of our holding area, the police are encouraged to avoid detaining children unless it is absolutely necessary. One very effective way this can be achieved is by use of bail and bond.

3.2.1 Bail Pending Arraignment

The Constitution recognizes for the right of children to be released on bail pending arraignment in court. It makes it mandatory for every person who has been arrested to be granted bail or bond as they await to be arraigned in court and formally unless there are good reasons why the same should not be granted. The conditions given for imposing bail or bond should be reasonable and should not be seen as outrageous or a denial of bail.¹⁹⁰

The Criminal Procedure Code empowers an Officer in Charge of a police station to admit an arrested person to bail or bond as they await investigations to be completed and formal charges to be preferred.¹⁹¹ The National Police Service Act empowers the investigating officer of a case wide discretionary power to release a suspect in a case in

¹⁸⁸ (2013) eKLR

¹⁸⁹ Anthony Muriithi –vs- OCS Meru Police Station and 2 Others Meru High Court Petition No. 79 of 2011 evidence of blood samples obtained through the use of force without the consent of the petitioner declared to have been illegally obtained and was therefore inadmissible.

¹⁹⁰ Constitution of Kenya, Article 49(1)(h)

¹⁹¹ Criminal Procedure Code Cap 75 Laws of Kenya Section 123(1)

which they are investigating on bond on condition that they appear in court when required.¹⁹²

The provisions of the constitution are further complimented by the Child Offender Rules which provide that where a person apparently under the age of eighteen years is apprehended with or without warrant and cannot be brought forthwith before a court, the police or officer to whom such person is brought shall inquire into the case, and release the person on bail or bond on condition that he attends court unless the charge is one of murder or manslaughter or any other serious charge, secondly, when it is necessary to separate the child offender from an undesirable person, thirdly, when the police officer believes that releasing the said person will defeat justice.¹⁹³

One tenet of our criminal justice system is the presumption that a person is innocent until proven guilty. Children who are apprehended on suspicion of committing offences are thus not excluded from this presumption. Bail pending arraignment in court is an efficient and effective tool which can be employed by police officers to help in safeguarding the rights of children to freedom and liberty. It helps protect children from exposure to the degrading inhuman and traumatizing conditions that exists in our police station. As already noted herein before, the conditions at our police cells are deplorable and not fit for a human being let alone a child. Police should be encouraged to exercise their discretion justifiably in order to safeguard children's rights and to protect them from inhuman and degrading conditions at the detention centers.¹⁹⁴

3.2.2 Arraignment in Court

A child offender who has been arrested has the right to be arraigned in before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested. If it is impossible to arraign the child in court within the twenty four working hours of the court, either because it is a weekend or a holiday or the court working hours have ended, then the child should be arraigned before the end of the next court working day.¹⁹⁵ Upon being arraigned, the child should be promptly informed in a language he understands, of the charges against him and if they are to be detained any longer, they should be

¹⁹² National Police Service Act, Section 51(3)

¹⁹³ Child Offender Rules, Rule 5.

¹⁹⁴ Article 37 Convention on the Rights of the Child, Article 37

¹⁹⁵ Constitution of Kenya, Article 49(1) (f)

informed of the reasons.¹⁹⁶This aspect is further emphasized by the Children Act which also requires a child to be promptly informed of the accusations.¹⁹⁷ This essentially means that a child has the right to be charged on the first day of arraignment in court or to be made aware of the reasons for continued detention or to be set at liberty. The process of charging a child at this point essentially means taking plea.

The legal principles to be applied in plea taking in all criminal cases were well enunciated in the *locus classicus* case of *Adan vs Republic [1973] EA 445* where the Court laid down the following: -

- i. *The charge and the particulars of the charge containing the essential ingredients of the offence should be explained to the child offender in a language he properly understands.*
- ii. *The child offender's reply should be recorded in his very own words and if he admits the charge then a plea of guilty ought to be recorded.*
- iii. *After a plea of guilty is recorded, the prosecution should proceed to read to the accused the facts in support of the charge and the child offender should be given a chance to explain, dispute or deny the facts*
- iv. *Where the child offender disputes the facts, his reply should be recorded and the plea changed to not guilty.*
- v. *Where the child offender admits the facts then he is found to be in conflict with the Law and the same is recorded.*

These principles have also been legislated under the Criminal Procedure code¹⁹⁸ which provides that an accused to be called upon to plead

- i. The charge together with the facts supporting the charge should be read to the child offender in a language he understands.
- ii. He shall then be asked whether he admits or denies and his response should then be recorded in his own words and if he pleads guilty, he shall be found to be in conflict with the law.

¹⁹⁶ Constitution of Kenya, Article 49(1) (h)

¹⁹⁷ Children Act s186.

¹⁹⁸ Criminal Procedure Code, s207.

- iii. If he denies the charge then the court shall give a hearing date and proceed to hear the case
- iv. If the child offender refuses to answer to the charges, the court shall enter a plea of not guilty

In protecting the rights of a child accused of an offence, and in a bid to protect the dignity of the child, the Children Act prohibits the use of words such as “accused person” “guilty” and “convicted.”

Emphasis is placed on the fact that the charges and all proceedings against a minor should be carried on in a language understood by the minor. This is a tenet of the rules of natural justice that require the child to be adequately informed of the charges facing him together with all the facts of the case and to be given a chance to be heard in defense against such charges. The courts should therefore employ an interpreter, who understands the child’s language so that he can interpret for a child who does not understand the court’s language. The interpreter should be employed at the expense of the state.¹⁹⁹

The foregoing provisions apply to all criminal cases including in cases where the accused person is a child. It is important to point out that a child should have legal representation at every point of the trial including the plea taking stage. If the child is unable to afford legal representation, then one should be provided for him or her at the expense of the state.²⁰⁰

If the child offender admits the charges as per the procedure enumerated, the court shall then proceed to sentence that child. The procedure and modes of disposition of matters of child offenders are different from that of adults. The process has been discussed under another subtopic. If the child denies the charges, then the court shall hear the case. The court however has to grant the child bond as a constitutional right.

3.2.3 Bail Pending Trial

The constitution provides for the right of a person arrested to be granted bail on reasonable conditions unless there are sound reasons not to be granted bail.²⁰¹ The Court

¹⁹⁹ Children Act s186(e).

²⁰⁰ Children Act s186b; Constitution of Kenya.

²⁰¹ Constitution of Kenya Article 49(1)(h).

is also mandated by Act to release a child offender on bail or bond pending trial.²⁰²The bail and bond policy guidelines formulated by the a task force appointed by the chief justice under the umbrella of the National Council on the Administration of Justice(NCAJ)²⁰³specifically provides that denial of a child offender bail or bond is against the best interests of that child.²⁰⁴ The guideline call upon courts to consider other options other than denial of bail which will lead to remanding a child offender or any other person with special needs. The other options proposed includes close supervision or placement with a fit person determined by court.²⁰⁵In such cases courts should resort to detention only as a last resort.²⁰⁶

Bail and Bond conditions should be reasonable and while granting the same. The court should be minded about the importance of a person's liberty and the presumption that a person is innocent until proven guilty. Bail should therefore not be too excessive to amount to denying the same. It should be aimed at securing the attendance of the child offender for trial. Secondly, bail or bond conditions should be appropriate to the offence committed and should consider the personal circumstances of the accused person.²⁰⁷In this case the guidelines call upon court to consider the age of the person who is charged.

The Children's Court should endeavor to implement the foregoing guidelines and to promote utilization of bail or bond as a tool for protecting the rights of children especially those accused of committing offences by protecting them from the harsh and deplorable conditions associated with our holding facilities.

3.3 The Trial Process

There is established a specialized court by the Act to hear any charge against a minor except where the child is charged with murder or in conjunction with other people who are above the age of majority.²⁰⁸The specialized courts are known as children's Court and for a magistrate to preside over such courts, they must be gazzetted by the chief

²⁰² Children Act, s185(4)

²⁰³ Judicial Service Act No.1 of 2011, section 34

²⁰⁴ Bail and Bond Policy Guidelines, p18.

²⁰⁵ Child offender Rules, Rule 10(6).

²⁰⁶ Supra note 24. P27.

²⁰⁷ Ibid. P9

²⁰⁸ Children Act, s73.

Justice.²⁰⁹ The chief justice gazettes magistrates to preside over children's cases all over the country.²¹⁰

The law requires that the children's court must sit separately from other courts. This means that they should either sit in a different building from other courts or at different times from those others. The law also restricts the persons who shall attend during the sitting of the children's Court. These persons are; court officials, parties to a case, witnesses, advocates and persons directly linked to the case, parents and guardians of the child before court, registered agents of media houses and any other person permitted by the court.²¹¹ The children's court is empowered to exclude any person who is not authorized to attend proceedings involving a minor.²¹²

During the hearing of matters concerning children, the Children's court is guided by the following factors: Feelings and wishes of the child that can be ascertained considering the child's age and understanding, the child's education, physical and emotional well-being more so in a case where the child requires specialized care, the effect of any changes to the child's well-being, the child's culture, societal background, age, sex and religious affiliation, the likelihood of the child being exposed to any harm or suffering, the ability of the child's parent to protect and care for the child and the child's exposure to drugs and substance abuse and whether they need special medical care as a result.²¹³

For a fair hearing to ensure the Constitution provides that every child facing trial shall have an advocate allocated to him or her by the state and paid for by the state.²¹⁴ It has been acknowledged that substantial injustice would occur if a child offender is not given an advocate to defend then in court. This position is further emphasized by the Act which empowers the court to order that a child who is unrepresented in proceedings before that court be granted legal representation and the expenses incurred be paid from money allocated by parliament.²¹⁵

There is constituted the National Legal Aid Service established by the Legal Aid Act which provides legal aid services to be paid for by the state to qualified persons under

²⁰⁹ Children Act, s73(d)(ii).

²¹⁰ Ibid.

²¹¹ Children Act, s74.

²¹² Children Act s75.

²¹³ Children Act s76.

²¹⁴ Constitution of Kenya, Article 50(2) (h).

²¹⁵ Children Act s 77.

the Act.²¹⁶ Amongst the matters that qualify to benefit from Legal aid from the National Legal Aid Service are children matters.²¹⁷

Child Offender Rules are established under the fifth schedule of the children Act to govern conduct of proceedings involving a minor offender before a children's Court.²¹⁸The Rules places immense emphasis on expeditious disposal of handling of children matters. The Rules limit the duration for hearing and disposal of children matters to three months failure to which the case should be dismissed forthwith.²¹⁹For matters appearing before superior court, the Rules place a time limit of twelve months and failure to adhere to that time limit should lead to automatic dismissal of the case.²²⁰The Court of Appeal however rendered the provisions setting time limits to hear children matters ultra vires section 186(c) of the children Act and also unconstitutional.²²¹

3.4 Disposition

Disposition of matters of child offenders is mainly governed by children Act being the parent Act and complimented by various other Acts of parliament. The general Rule is that a child should not be imprisoned or placed in a detention camp.²²² The law also protects children from the death sentence.²²³The Children act provides various modes of dispositions to be meted out to child offenders.²²⁴ These dispositions are; by discharging the offender either conditionally or unconditionally by invoking section 35(1) of the Penal Code; by discharging the offender after his entering into a recognizance, with or without sureties; by making a probation order under the provisions of the Probation of Offenders Act; by committing the child offender to the care of a fit person or a willing charitable children's institution; by sending the child offender to a rehabilitation school where he is above ten years and below fifteen years; by ordering the offender to pay a fine, compensation or costs; by placing the offender under the care of a qualified counsellor; by placing the child offender in an educational institution or a vocational

²¹⁶ Legal Aid Act, s35(1).

²¹⁷ Legal Aid Act, s35(2)

²¹⁸ Section 194 of the Children Act provides that proceedings in respect of a child accused of having infringed any law shall be conducted in accordance with the Rules set out in the fifth schedule.

²¹⁹ Child Offender Rules, Rule 12(2).

²²⁰ Child Offender Rule, Rule 12(3).

²²¹Kazungu Kasiwa Mkunzo & Another versus Republic (2006) e KLR.

²²² Children Act s 190(1).

²²³ Children Act s190(2).

²²⁴ Children Act s 191.

training program; by committing him to a probation hostel; by ordering him to perform community Service and where a child offender is sixteen years and above, they can be committed to a bookstall institution.

3.4.1 Borstal Institutions

The Borstal Institutions Act was enacted in 1963 to provide for formulation of borstal institutions for detention, correction and rehabilitation of youthful offenders.²²⁵ Those who are sent to borstal institutions are youthful offenders who the act defines as a person convicted for an offence punishable by imprisonment and who has reached the age of fifteen years but is below the age of eighteen years.²²⁶ Borstal institutions are mandated to provide those committed with educational, industrial and agricultural training for a maximum period of three years.²²⁷ While the prescribed term is three years, children serve for one and a half years after which they are considered for release on license.²²⁸ The aim of this is to reform the minors and to equip them with skills necessary to make them useful in the outside world and prevent them from committing other crimes.

Borstal institutions are currently run by the Kenya Prison Service. There exist three Borstal institutions with one for girls having been opened in 2016. The facilities offer vocational training aimed at equipping the students with various skills, academic education and agricultural training. The staff at the school are prohibited from being armed while on duty.²²⁹

There is a comprehensive aftercare program run by both the Kenya Prison Service and the Probation and Aftercare Service. Probation Officers supervise the child offender for a period determined by the Board of License. This is to ensure proper reintegration and acceptance of the minor back to the community and to help them settle. Before a child offender is released, a probation officer must file an environment adjustment report so weigh the viability of releasing the child offender. Statistics indicate that Shimo La Tewa

²²⁵ Preamble, Borstal Institutions Act Cap 92 Laws of Kenya

²²⁶ Ibid.

²²⁷ Borstal Institutions Act, s 6.

²²⁸ Kinyanjui Sarah, *Survey on Rehabilitation and Social Integration Programmes, Services and Practises for Children in Conflict with the Law In Kenya* (Department of Children Services and UNODC 2021) 26.

²²⁹ Okech Clement, *The Juvenile Justice in Kenya: Growth System and Structure* p6 available at www.unafei.or.jp accessed 14/2/2021.

Borstal institution had 339 inmates as of July 2016 while Shikusa Borstal Institution had 384 by that time.²³⁰

3.4.1 Youth Corrective Training Centre

The Youth Corrective Training Centre was established in 1962. It was meant for boys who unruly and defiant boys who needed short and instant correction. Unlike Borstal institutions, the Incarceration at this institution was relatively short. The Centre was meant for the rough undisciplined youth who needed to be detached from the family and kept in such a facility as a deterrent and corrective measure.²³¹

The Youth Corrective Training Centre (YCTC) is established under the Prisons Act with only one for boys having been established at Kamiti. Children and youth admitted to the center must be aged between 17-21 years for duration of four months.²³² The environment there only allows for short supervision and admission here can only be through the court on the advice of the probation office.²³³

The boys who are committed to Kamiti Youth Corrective Training Centre must be first offenders and they only engage in extra curriculum activities, farming and hobbies. This is because of the short time they spend there. One of the issues ailing the center is that there are no aftercare services. Its viability is also in question due to existence of Borstal institutions which serve the same age and both sexes.²³⁴

3.4.2 Children Remand Homes

Children remand homes were established as reception of vagrant children and keeping them safely for a short term. Initially a vagrant child would be taken to a children home by anyone including a chief or a police officer but currently, a child can only be committed to a remand home through a court order. At the moment, there exists 14 children remand homes which are allowed to receive child offenders as well as those in need of care and protection. The remand homes are run by the Department of Children Services which is responsible for the child welfare.²³⁵

²³⁰ Ibid

²³¹ ibid

²³² Kinyanjui Sarah, *Survey on Rehabilitation and Social Integration Programmes, Services and Practises for Children in Conflict with the Law In Kenya* (Department of Children Services and UNODC 2021) 26.

²³³ Ibid

²³⁴ ibid

²³⁵ ibid

3.4.3 Rehabilitation Schools

The government has also established numerous rehabilitation schools all over the country pursuant to the Act to assist in reforming child offenders and assisting them to reconcile back into the society. The fundamental goal of rehabilitation schools is to correct and reform young offenders convicted by a law court and help them develop mentally, physically and psychologically.²³⁶ Rehabilitation homes have a duty to enforce the well-being of the children and protect them from harm. To attain this goal, they should ensure strict adherence to policy and regulatory frameworks that govern them. The UN Human Rights Council requires countries to formulate policy and regulatory frameworks that adhere to international law and are responsive to children's plight. Those policies should also address challenges that bedevil rehabilitation centers.²³⁷

The functions of rehabilitation schools are to provide social training which should aim at disciplining and correcting the child, provide spiritual education by offering religious training, providing academic training to the child to continue their, arming the child with the necessary skills that will make him or her to be economically viable, they also ensure that the child attains admission to regular school upon expiry of the rehabilitation period.²³⁸ The children Act explicitly provides that for one to qualify to be committed to a rehabilitation school, the that child must be between the age of 10years and 15years.²³⁹ A child can only be committed to a Rehabilitation school for a maximum of three years or until the said child gets to the age of 18years.²⁴⁰

3.4.4 Fit Persons and Charitable Institutions

The children Act provides that a child found to be in conflict with the Law can be committed to the care of a fit person. A fit person could be a relative or a charitable institution which has been assessed by the court and must be willing to take up the child. The Act does not define who a fit person is. We can however borrow the definition of the Indian Children Act which defines a fit person to mean any person or institution found fit

²³⁶ Kariuki W Rosalind et al, *Challenges Facing Juvenile Delinquent centers in Kenya: A case study of Othaya Rehabilitation Centre, Nyeri, Kenya* African Journal of Education Science and Technology Vol 5 No 2(2019) pg 164-172. Retrieved from <http://www.ajest.info/index.php/ajest/article/view/363>

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Children Act, s191(e).

²⁴⁰ Children Act, s53(3).

by a competent authority after assessment, to take care of a child within the conditions given.²⁴¹

Charitable institutions are authorized to receive children where the child is taken by an authorized officer who believes the child to be requiring care and protection or pursuant to a care order.²⁴² Charitable institutions are legally required to provide children committed to them with adequate care and protection for the time that they are there.²⁴³ The director children services is required to supervise a child committed to a charitable center until the period such a child is committed therein expires.²⁴⁴ The director of children services is authorized by the Act to designate an officer to inspect any charitable institution offering care and protection to children.²⁴⁵ An officer designated as such is authorized to enter and inspect the premises, documents held by the institution and even interview children therein.²⁴⁶ It is a criminal offence to refuse a designated officer to enter and inspect a charitable institution or to interfere with the work of such an officer.²⁴⁷

3.4.5 Community Service Orders

A community Service order is a court order directing an offender to perform a community Service.²⁴⁸ Community Service comprises of work for the benefit of the public within a specified period of time without pay.²⁴⁹ Public works that an offender can be directed to perform includes; any works on public roads, any works on public forests, any works involving conserving and managing the environment, any works in hospital, schools and other government entities, any works involving supply of water to the general public, any type of work in any orphanage or children home, and specialized or professional services to and for the benefit of the larger community.²⁵⁰ It is notable that the foregoing list is not meant to be limited and an offender can be asked to perform public works outside the list.²⁵¹ Dr. Sarah Kinyanjui opines that Community based

²⁴¹ Indian Children Act 1960, s2.

²⁴² Children Act, s63.

²⁴³ Ibid, s64.

²⁴⁴ Ibid, s65.

²⁴⁵ Ibid, s67.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Community Service Order Act (1998), s3

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

interventions are instrumental where restorative options are pursued and in reintegration process.²⁵²

Before a court makes a community service order against an offender, the court is required to conduct an inquiry into the suitability of the offender to perform a community service through a community service officer.²⁵³ To ensure implementation of community service orders, Probation Officers are appointed as Community Service Officers.²⁵⁴

Where an offender breaches a community Service order, the court summons such a person or orders for their arrest and when they are brought before the court, the court upon hearing them together with the community service officer, may caution the offender and order them to comply or amend the order to make it capable of being complied with or revoke it and pass another sentence available in Law.²⁵⁵

There are elaborate systems in place to ensure the smooth operation of community service orders. Children courts should exploit this avenue more for the benefit of child offenders and for the benefit of the society at large. Community service is important to children as they are able to perform activities that have meaningful impacts to the community which go a long way in developing relationships and skills. Secondly, these activities help children develop career skills such as communication skills, social skills and helps children step out of their comfort zones. Thirdly, Community Service helps children develop personal connections. During these activities children get to meet and interact with different people from different backgrounds who assist them to hone various skills which they may need in future such as communication skills, organization skills among others. Finally, community service opens children to new direction as it can expose children to new career paths. Being able to volunteer to various organizations can give children insights into the actual work done in those organization.²⁵⁶

Implementation of CSO has not been without challenges. Challenges in implementation of CSO in child cases include; lack of support and negative attitude by relevant

²⁵²Kinyanjui Sarah, *Survey on Rehabilitation and Social Integration Programmes, Services and Practises for Children in Conflict with the Law In Kenya* (Department of Children Services and UNODC 2021) 31.

²⁵³ Ibid

²⁵⁴ Ibid Section 12.

²⁵⁵ Ibid Section 5.

²⁵⁶ www.wcsu.edu accessed 10th February 2021.

stakeholders; high rate of noncompliance and reoffending; corruption; lack of knowledge and training on CSO; limited resources for the CSO Program; and poor supervision of CSO offenders.²⁵⁷

A number of solutions have been proposed for these challenges. They are; public awareness and sensitization on CSO Program; provision of adequate resources for CSO Program; strict and close supervision of offenders; and encouraging integrity and fighting corruption.²⁵⁸

3.4.6 Probation

The Act authorizes the court to make a probation order against the offender under the provisions of the Probation of Offenders Act.²⁵⁹ In a situation where a person has been charged with an offence and the court is of the opinion that the charge as been proved and considering the age, character, antecedents, home environment, physical as well as mental health of the offender, the offence committed, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may make the appropriate orders.²⁶⁰ Before making a probation order against an offender, the court is required to order for a social inquiry to be conducted and the findings recorded in a pre-sentence report which is filed in court.²⁶¹ The report should contain recommendations as to the suitable period of supervision, rehabilitation programs and any measures necessary to reduce the measures of re-offending.²⁶² A probation order is made to last for a period of between 6 months to three years. ²⁶³Where a probationer fails to comply with a probation order, the court may make any other sentence against him.²⁶⁴

A child or a youth can also be sentenced to a probation hostel for a Year where the circumstances of the case require a child offender who has been placed on probation to be removed from the home environment.²⁶⁵ Programs offered at probation hostel focus

²⁵⁷Muteti S M and Ndege I M, 'The delivery of Community-based Sentences: The Case of Community Service Orders in Kenya' National Crime Research Centre, 2017, 6.

²⁵⁸Ibid.

²⁵⁹Probation of offenders Act, s4.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid. Section 5.

²⁶⁴ Ibid section 8.

²⁶⁵ Probation of Offenders Act, s. 5(1) & (2).

on discipline, psycho social support, empowerment, nurturing of responsible individual conduct and teamwork.²⁶⁶

3.4.7 Fines and Compensation

The law allows for fining in certain offences²⁶⁷ and as specified in the relevant provisions, a fine may be given together with another punishment or it may be substituted with a other punishment.²⁶⁸ A court should consider a fine as a first option where it is provided for instead of rushing to imprison.²⁶⁹ A fine should only be ignored where the court finds it not to be suitable in the circumstances of the case.²⁷⁰ A fine given by a court should be reasonable and not aimed at making the accused person serve the jail term that is why the nature of the offence committed as well as the social status of the person should be considered.²⁷¹ A social inquiry report should help the court know the accused person's social status and whether he can raise the fine.²⁷² A court can order the accused person to compensate the victim either in the place of a fine or imprisonment or together with such other punishment.²⁷³ Usually the time for payment of compensation becomes due when the fourteen day period for appeal lapses.²⁷⁴ It is desirable to order for Compensation to restorative and retributive justice. A child offender is called upon to take responsibility for their actions and remedy the harm where compensation is ordered. The victim's needs are also taken care of. There is therefore need to impose compensation orders as much as possible.²⁷⁵

3.5. ODPP Diversion Policy

The Constitution of Kenya vests all prosecutorial powers with the Director of public prosecutions whose office is established as an independent office. The director of public prosecutions, upon embracing the enormous responsibility placed on his office and the constitutional dictates which encourage alternatives to criminal prosecution and imprisonment, came up with the ODPP diversion policy which was published in 2019.

²⁶⁶Kinyanjui Sarah, *Survey on Rehabilitation and Social Integration Programmes, Services and Practises for Children in Conflict with the Law In Kenya* (Department of Children Services and UNODC 2021) 27.

²⁶⁷Penal Code, s.28 (1).

²⁶⁸Penal Code, s.26 (3).

²⁶⁹ Anis Mihidin v Republic HCCRA No. 98 of 2001 (Unreported).

²⁷⁰ Fatuma Hassan Salo v Republic [2006] eKLR where it was stated that, "where an option of a fine is given, the court has to give reasons as to why a fine is inappropriate"

²⁷¹ Penal Code, s.28. See R v MuretoMunyoki 20 [KLR] 64 in which it was stated, "it is a first principle in inflicting fines that the capacity of the accused to pay should be considered"

²⁷² Sentencing Policy Guidelines Pg 29

²⁷³ Penal Code, s31; Probation of Offenders Act, s6; Victim Protections Act.

²⁷⁴ Criminal Procedure Code, s 175(4).

²⁷⁵ Sentencing Policy Guidelines Pg 27.

The policy is backed by the Constitution which emphasizes on restorative rather than retributive justice. It promotes reconciliation, mediation and traditional dispute resolution mechanisms and suns undue procedural technicalities.

Diversion is defined as a way of resolving disputes without resorting to the full judicial proceedings. It is recognized as a mode of ensuring speedy resolution of disputes with benefits to both the offender and the victim.

The power to decide whether a person is eligible for diversion or not rests with public prosecutors.²⁷⁶ While considering diversion, a prosecutor is required to determine each case on its own merit. Diversion however is permitted in four instances; First, In instances of adult offenders who are suspected to have committed petty offences, Two, in instances of child offenders irrespective of the nature of the offence, Thirdly in instances of vulnerable persons irrespective of the nature of the offence and Finally in instances of felony offences where there exist exceptional circumstances.²⁷⁷ A case is only eligible for Diversion where there is sufficient evidence to support the charge, where public policy supports initiation of prosecution and finally, the offender has unequivocally admitted the charge.

Diversion can be requested by the offender, their representative, the children officer, the police, the judicial officer or even a representative of the victim or the victim themselves.²⁷⁸ The options available for diversion range from simple apology to a full-scale therapeutic program and supervision.²⁷⁹

There are two stages where the decision to Divert can be initiated. First is the Pre-charge decision on diversion. At this stage the charge has been registered but is yet to be filed in court. The public prosecutor makes the decision to divert and he will apply to the court for extension of time to explore diversion. A later mention date will be given and if the diversion is successful, the prosecutor will apply to the court for termination of the charges.²⁸⁰

²⁷⁶ODPP Diversion policy, clause 31.

²⁷⁷ODPP Diversion Policy, clause 43

²⁷⁸ Ibid, Clause 37

²⁷⁹ Ibid, Clause 46

²⁸⁰ Ibid, Clause 57

The second stage is the post charge diversion. In this case, the charge is already filed in court and the prosecutor will apply for deferral of plea taking and if the diversion is successful then the charges will be terminated.²⁸¹

At the diversion interview, the prosecutor is required to draft a diversion memorandum agreement setting out the terms of the diversion and the offender must voluntarily agree to the terms and sign the agreement.²⁸² The offender's representative can also sign on behalf of the offender. Where the offender is a child, the prosecutor is required to ensure that the child has the capacity to understand the terms of the agreement and to accept responsibility.²⁸³

The time frame for the diversion varies with the program selected but upon successful completion then prosecutor will certify that the diversion has been successfully completed and the case will be terminated from court, if it had been filed or the police file will be closed if the case was not filed in court.²⁸⁴ Where the diversion has not been successfully completed, for instance where the offender breaches the terms of the diversion, the case will be referred to court for the case to proceed judicially.²⁸⁵

One important aspect of the policy is that it requires prosecutor to keep records of all the cases that have been diverted. The records which comprise of court records, prosecution records and police records should however be kept confidential for purposes of administration of Justice.²⁸⁶

In cases of child offenders, the diversion policy addresses stigma associated with criminal conviction and incarceration. A child offender is assisted to avoid the negative connotations attached with judicial proceedings and they can easily reintegrate back into the society as they are not regarded as convicts and have no criminal record.

3.6 The Children Bill, 2021

The Children Bill (National Assembly Bill No. 38 of 2021, sponsored by the leader of the majority party) seeks to repeal the Children Act 2001. The Bill underwent first reading pursuant to standing order 127(3) on 13th October 2021 and was committed to

²⁸¹ Ibid, Clause 59

²⁸² Ibid, Clause 50

²⁸³ Ibid, Clause 51

²⁸⁴ Ibid, Clause 54.

²⁸⁵ Ibid, Clause 55.

²⁸⁶ Ibid, Clause 62.

the departmental committee on Labour and social welfare for consideration and reporting. The clerk of the National Assembly invited members of the public to submit memoranda on the bill before 4th November 2021 in line with the constitutional requirements for public participation.²⁸⁷

The Children Bill addresses several issues which have been discussed in the project paper. If passed, the Bill will be a great milestone in the implementation of the rights of child offenders. The issues in the project papers that are addressed by the Bill are Highlighted hereunder.

3.6.1 Children Institutions

The bill proposes establishment of three children's institutions; children rescue centres, child protection units and charitable children's institutions. Children rescue centres shall be established for purposes of temporary care of children in need of care and protection pending foster care, adoption and other interventions.²⁸⁸ The Bill proposes that children shall be committed to rescue centres for a maximum of one year. The children rescue centres shall be gazetted and may not include police stations, remand homes or rehabilitation schools.²⁸⁹ The bill also proposes county governments to be allowed to establish children protection centres with the approval of the relevant cabinet secretary.²⁹⁰ These proposals in the Bill are positive for the reason that it proposes a departure from the practice where children in need of care and protection are mixed with child offenders. Equally it recognizes that children in need of care and protection should not be detained at police stations as is the practice currently. Allowing county governments to establish children rescue centres will be a big step in the right direction in terms of resource gathering and infrastructural development in the rescue centres. This is because of decentralization of the mandate of establishing rescue centres from the cabinet secretary based in Nairobi to county governments which are based in all the 47 regions of the country.

The bill places the responsibility of establishing child protection units at every police station on the inspector general of the national police. This will provide a safe place for

²⁸⁷Daily Nation 18th October 2021 page 5

²⁸⁸ Children Bill 2021, S64.

²⁸⁹Ibid.

²⁹⁰Ibid.

holding children in conflict with the law.²⁹¹ This proposal will cure the perennial problem of incarceration of children with adults. There is however need for emphasis to be had on separating male children from female children in the proposed child protection units.

The bill also proposes establishment of charitable institutions. They are meant to accommodate children who have no immediate access to parental care and no alternative family-based placement is available.²⁹² Although the children Act in existence currently recognizes charitable institutions, the bill seeks improves the provisions in the Act to make the operations of charitable institutions more efficient.

The bill proposes establishment of children remand homes which shall provide accommodation, care and protection for children in conflict with the law. The Bill requires the cabinet secretary to provide facilities for children with special needs. It is also a requirement in the Bill that there will be different sections in the remand home for different ages, sexes and needs.²⁹³

Finally, the bill seeks to make provisions for establishment of Rehabilitation schools to provide accommodation, education, training and facilities for care and protection for children.²⁹⁴ Equally the bill also proposes that there be different sections in the schools for different ages, sexes, needs and risks.²⁹⁵

3.6.2 Children's Court

The bill seeks to empower the chief Justice to establish children's courts in other counties and sub counties as may be appropriate.²⁹⁶ Currently the only fully fledged children's courts at Milimani and Tononoka. The bill also proposes that there be established Registrars and deputy registrars of children's Court who do not exist now.²⁹⁷ The High court is also empowered to hear appeal on diversion and trial of children in conflict with the law.²⁹⁸ The bill proposes that the environment of the children's court should be made friendly for the child and that the Chief justice shall be empowered to determine the time and location at which the children's court shall be

²⁹¹ Ibid, s65

²⁹² Ibid, s69

²⁹³ Ibid, s80

²⁹⁴ Ibid, s81

²⁹⁵ Ibid, s82.

²⁹⁶ Ibid, 93

²⁹⁷ Ibid, s93

²⁹⁸ Ibid

sitting. However, the bill seeks to prohibit a children's court from sitting at the same time and locations as other courts.²⁹⁹ The bill seeks to make it mandatory for children under the age of sixteen years old whether complainants or child offenders to be provided with legal aid at the expense of the state.³⁰⁰ For children above sixteen, provision of legal aid will be left to the discretion of the court.³⁰¹

3.6.3 Specific Procedure for Child Offenders

The bill establishes a specific legal procedure for Child offenders at part XIV. The bill proposes that children officers conduct preliminary inquiry on the child's social economic and personal circumstances at the point of arrest or serving of summons or issuance of a written Notice before a decision is even made to take them to court or not.³⁰² The bill proposes to raise the age of criminal culpability to twelve years.³⁰³ However a child below the age of fourteen is deemed not to know the difference between right and wrong unless the contrary is proved.³⁰⁴ The bill proposes that detention of a child shall only be a measure of last resort and for good reasons.³⁰⁵ The bill proposes to entrench Diversion into legislation and empowers magistrates to drive the process.³⁰⁶ It seeks to legislate options of diversion to include; giving an apology, restitution, attending counseling, caution, curfew among others.³⁰⁷

3.7 Conclusion

The trial of Child offenders is a well-guarded process right from the point of arrest and detention to the point of making a finding of guilty against a child. There are various statutory safeguards geared towards protecting and upholding the dignity and development of children facing criminal trial which if flouted, may lead to dismissal of the cases for violating the child's constitutional rights and even an order for compensation. It is acknowledged as discussed in this chapter that the courts have an enormous duty to safeguard these rights. Perhaps that is why the children Act requires the establishment of a special court for children which is well versed in the procedures and legal provisions regarding children and which is also specially designed to be able to

²⁹⁹Ibid, s95

³⁰⁰Ibid, s99

³⁰¹Ibid

³⁰²Ibid, s220

³⁰³Section 224

³⁰⁴Ibid.

³⁰⁵ Ibid, s225

³⁰⁶Ibid.

³⁰⁷Ibid.

meet its mandate. A lot of emphasis is made on the issue of legal representation for children facing criminal trials to enable them navigate the complexities of the trial process and to participate in process full. That is why a case was made for the state to meet the expenses of the legal trials of minors.

While the court may arrive at a finding of guilty against a child offender, it is recognized that various social aspects may have influenced the child into committing the said offense and for the sake of the child's growth and development, then various available sentences other than imprisonment which enable the child to take responsibility for his or her mistakes and to be punished are discussed. These sentences include probation, community service, fines and compensation, rehabilitation among others.

Due to the complexities involved in the trial of a child, there are bound to be various challenges and failures. This necessitates a study on other jurisdictions which are perceived to have advanced in protection of children rights in order to derive best practices which can be incorporated into the Kenya Jurisdiction. The next chapter undertakes a study of selected jurisdictions.

CHAPTER FOUR

A SURVEY OF OTHER JURISDICTIONS

4.1 Introduction

This chapter evaluates the legal and institutional frameworks that are concerned with safeguarding the rights of child offenders in other jurisdictions. The chapter analyses the legal and institutional regimes from the United Kingdom and South Africa in a bid to identify the best practices in the protection of rights of children in conflict with the law. In its conclusion, the chapter details the best approaches that may be borrowed by Kenya to enhance its protection of children in conflict with the law.

4.2 United Kingdom

4.2.1 Introduction

Children's rights in the United Kingdom are protected and guaranteed by a plethora of national laws as well as international instruments. National laws are enacted and amended by the respective national assemblies of the country's constituent of the United Kingdom; that is Westminster where English law is concerned, the Welsh Assembly Government, the Northern Ireland Assembly and the Scottish Parliament.³⁰⁸ The most notable international legal instruments protecting the rights of the child in the United Kingdom are the Convention on the Rights of the Child and the European Convention on Human Rights.

While most of these legal instruments are fairly recent, the United Kingdom started distinguishing children's rights circa 1850.³⁰⁹ At this time, the child justice system could be best described as skeleton as it simply comprised of reformatory and industrial schools for child offenders. This distinction also introduced separate laws to deal with young offenders and ushered in the concept of child justice.³¹⁰ The increasing recognition of children's rights ignited ardent advocacy for separate courts to handle cases involving young people.³¹¹ In 1908, these efforts led to the enactment of the *Children Act 1908*

³⁰⁸ The National Society for the Prevention of Cruelty to Children (NSPCC), Child Protection Factsheet; An Introduction to Child Protection Legislation in the UK, May 2012

³⁰⁹Bradley Kate, *Juvenile Delinquency and the Evolution of the British Juvenile Courts, C.1900-1950*, October 2008 Available at <https://archives.history.ac.uk/history-in-focus/welfare/articles/bradleyk.html#t1> Accessed 1 November 2020.

³¹⁰Shore Heather, Reforming the Juvenile in Nineteenth and Early Twentieth Century England, *Prisons Service Journal Issue 127* (September 2011).

³¹¹Behlmer G, *Friends of the Family: The English Home and its Guardians* (Stanford, 1998) pp. 242-7

which established juvenile courts among other child-centered provisions.³¹²The *Children Act* further enhanced the state's power to intervene in family matters.

By this time, jurisprudence in children matters had not developed. The juvenile court thus drew influence from various intellectual disciplines such as criminology, psychology and psychiatry.³¹³ An important role played by the reliance on these intellectual disciplines was the increasing critical role of probation officers in rehabilitating delinquents. The *Probation Act 1907* accordingly introduced a provision required child offenders to be supervised by a probation officer after trial.³¹⁴

Following the success of probation officers, the government sought to increase its reach in preventing juvenile delinquency. In 1919, a children's branch of the Home Office³¹⁵ was established through the *Children Act 1908*.³¹⁶This branch was responsible for inspecting reformatory and industrial schools and further manage the juvenile courts, probation and placement of child offenders.³¹⁷ However, following the institutionalization of reformation schools and the increased reliance on probation officers, the committal to these schools greatly declined.³¹⁸ Thus, the schools became marginalized and dilapidated.

In 1927, a committee established by the Home Office to look into the problems plaguing the schools reported various forms of abuse in the schools.³¹⁹ Also among its findings was that the reformatory and industrial schools removed young offenders from their home-life which adversely affected the improvement of the child's character.³²⁰ The committee resolved that the main priority of the juvenile court should be the welfare of the child.

³¹²*Supra note 2*

³¹³ Bradley Kate, *Juvenile Delinquency and the Evolution of the British Juvenile Courts, C.1900-1950*, October 2008 Available at <https://archives.history.ac.uk/history-in-focus/welfare/articles/bradleyk.html#t1> Accessed 1 November 2020.

³¹⁴ Whitehead P and Statham R, *The History of Probation: Politics, Power and Cultural Change 1876-2005* (Crayford, 2006)

³¹⁵ The Home Office is a ministerial department established in 1782 that performs fundamental roles in the security and economic prosperity of the United Kingdom. Available at <https://www.gov.uk/government/organisations/home-office> Accessed 1 November 2020.

³¹⁶Behlmer G, *Friends of the Family: The English Home and its Guardians* (Stanford, 1998) pp. 247

³¹⁷ *ibid*

³¹⁸ First Report Home Office Children's Branch, HMSO, 1923, 17

³¹⁹ Report of the Departmental Committee on the Treatment of Young Offenders, 1927

³²⁰ *ibid*

The committee recommended that juvenile courts be presided over by magistrates with specialized training in children's matters. It further recommended that juvenile courts should be separated and should sit at different times and location from other courts. It also demanded for simplifying of court proceedings for better understanding of the child.

The report also called for concealing the identity of children and protecting them from media reporting of cases. This was born out of a feeling that the child's chances of being employed in future would be jeopardized. The report also recommended that court should as much as possible be made aware of all the circumstances involving the child before it including their school, health and even social well-being

The 1927 report was the foundation of the *Children and Young Persons Act 1933*. The 1933 Act merged reformatory and industrial schools into Approved schools also known as Borstal institutions. It also supported short-term committal to these schools and emphasized access to separate justice for young offenders. The *Children and Young Persons Act 1933* is the foundation of contemporary children law in the United Kingdom.

4.2.2 Current Legal Framework in the United Kingdom

While the *Children and Young Persons Act* of 1933 was progressive, international instruments that were later adopted by the United Kingdom provided for more specific and child-centric provisions. There have been significant steps in attempting to align the existing national laws to the standards prescribed by international law. However, legal commentators maintain that the child justice system is still excessively punitive.³²¹ This notion is informed by the fact that prior to 1998, a child under 13 was considered incapable of committing an offence under the principle of *doli incapax*.³²² However, under the current legal regime, it is impossible for a child aged between 10 and 17 to avoid liability of crime by pleading *doli incapax*. Moreover, in exceptional circumstances, children may be tried as adults in adult courts.³²³ This relative ease with

³²¹ B. Goldson, *The New Youth Justice* (Lyme Regis, 2000) p. 309; B. Goldson and J. Muncie, *Youth, Crime and Justice: Critical Issues* (London, 2006) and D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford, 2002)

³²² Hooper; Murphy; Ormerod, eds. (2007). "Section F19 Inferences from Silence and the Non-production of Evidence". *Blackstone's Criminal Practice* (2008 ed.). Oxford. At pg. 1888 It was observed that under the common law defence of *doli incapax*, a child under the age of seven was presumed incapable of criminal liability. The prosecution was thus barred from producing evidence that the child understood right and wrong.

³²³ See *Regina V. Secretary of State for The Home Department, Ex Parte Venables And Regina V. Same, Ex Parte Thompson* (Consolidated Appeals) [2001] EWCA Civ 1698

which child can be incarcerated has raised questions with the compatibility of local legislation and the CRC.

4.2.3 Age of Criminal Culpability

Section 50 of the *Children and Young Persons Act 1933* prescribes the minimum age for criminal culpability at 10 years. Before 1998, children under the age of 14 charged with a crime could plead the common law defense *doli incapax*. This defense was intended to mitigate this low age of criminal culpability. Once pleaded, the prosecution had to prove that a child under the age of 14 years knew that their actions were wrong rather than merely naughty for the child to bear criminal responsibility. This defense was amended by the *Crime and Disorder Act of 1998*. The effect of this abolishment was that the minimum age as set by the *Children and Young Persons Act of 1933* was irrebuttable.

The minimum age of criminal culpability in the UK has been criticized as being too low. In comparison, peer countries in Europe prescribe the minimum age at 14 (Germany, Georgia and Italy) and 15 (Denmark, Czech Republic, Greece and Poland).³²⁴

4.2.4 Arrest and Detention

The *Police and Criminal Evidence Act 1984*, under Section 57, contains provisions that are specific to handling of child offenders by arresting police officers. The rights conferred by this section are in addition to the rights generally enjoyed by adult arrested persons.

In making arrests, police in the UK are also guided by various Codes of Practice reference in the *Police and Criminal Evidence Act of 1984*. The conduct of arrests and detention are specifically governed by Code C of the *Police and Criminal Evidence Act*. The Code stipulates if a person appears to be below 18 years old, he or she shall be treated as a child where there is no other conflicting evidence.³²⁵ This provision of the Code attempts to reconcile the 1984 Act with newer legislation that provides better protections for child offenders.³²⁶

³²⁴ Wikipedia, *Age of Criminal Responsibility*, Available at https://en.wikipedia.org/wiki/Age_of_criminal_responsibility Accessed 1 November 2020

³²⁵ *Police and Criminal Evidence Act, 1984* Code C (Rev. August 2019) paragraph 1.5

³²⁶ For instance, the *Criminal Justice and Courts Act 2015* amended Section 37(15) of the *Police and Criminal Evidence Act 1984* to include 'anyone who appears to be under the age of 18' in the definition of an arrested juvenile. Similarly, the *Policing and Crime Act 2017* requires persons under the age of 18 years to be treated as juveniles for all intents and purposes of the *Police and Criminal Evidence Act 1984* including provisions on bail and detention.

Where there is are grounds to suggest that the arrested person is of majority age but claims to be child so as to receive beneficial treatment, the Youth Offending Team³²⁷ or a medical professional is engaged by the police to determine the age of the arrested person. Where the assessment is inconclusive, the offender should be treated as a child while in detention. Their age will formally be determined in court.

Child offenders must also be subjected to vulnerability assessments to determine whether they are vulnerable or risk to themselves and others. The essence of the vulnerability assessment is to identify whether the child has mental health issues, drug and substance abuse problems, to determine the level of literacy, to determine levels of confidence and any specific difficulties with speech, language, communication and understanding.³²⁸ Where such concerns are confirmed by the custodial staff, the relevant children's authority must be notified.

The *Police and Criminal Evidence Act (PACE)* empowers the custody officers dealing with a child offender to take all practical steps to ascertain a person responsible for the welfare of the offender³²⁹ otherwise called an appropriate adult. Code C of PACE defines an appropriate adult to include a parent or guardian, a representative from a local authority or a social worker.³³⁰ In cases where the child's parents are estranged, they should be excluded as the appropriate adults where the child expressly says so.

The appropriate adult has to be informed that the child offender has been arrested, the reasons for their arrest and where they are being detained.³³¹ The arrested child will then be informed of the duties of the appropriate adult³³² and be further informed that they can speak privately with that person or with a solicitor. However, such conversations with an appropriate adult are not protected by privilege and thus may be used as evidence in court against the child.

³²⁷ The Youth Offending Team is a multi-agency team coordinated by a local authority to prevent youth recidivism and incarceration. Available at https://en.wikipedia.org/wiki/Youth_offending_team#cite_ref-1 Accessed 1 November 2020.

³²⁸ Essex Police, E0103 Procedure - Juvenile, Young Person Arrest, Reception and Detention, 30 April 2020 Available at <https://www.essex.police.uk/foi-ai/essex-police/our-policies-and-procedures/e/e0103-procedure---juvenile-young-person-arrest-reception-and-detention/> Accessed 1 November 2020

³²⁹ Section 57 (2) of the *Police and Criminal Evidence Act 1984*.

³³⁰ *Police and Criminal Evidence Act, 1984* Code C (Rev. August 2019) paragraph 1.7

³³¹ Section 57 (3) of the *Police and Criminal Evidence Act 1984*.

³³² The role of the responsible person is to safeguard the rights, entitlements and welfare of juveniles and vulnerable persons. See PACE Code C paragraph 1.7A

Where a child offender confesses to committing an offence to a social worker or member of a youth offending team, or confesses to the offence in the presence of any such person, except during the time that person is acting as the child offender's appropriate adult, then in all fairness, another appropriate adult is appointed.

One of the appropriate adult's statutory duties is to make sure that the child offender is treated fairly and that all their rights are not contravened. In this regard, the adult will render advice on various issues to the child offender, observe that any interview is conducted fairly and assist in any communication with the child.

Section 31 of the *Children's and Young Persons Act of 1933* requires female offenders under 17 years of age must be under the care of a female when detained. The female care giver need not be in the presence of the detainee at all times but must be accessible throughout the detention period.

Once charged with an offence, the officer in charge of the station will decide whether to caution the minor or prosecute them. The caution or reprimand is given to a young offender in writing and in the presence of an appropriate adult. Records of these reprimands are kept in the police database while a copy is given to the appropriate adult. The *Crime and Disorder Act of 1998* also limited the number of times a police officer could caution a young offender and thus effectively encouraged their prosecution. It also extended the circumstances under which young offenders could be sent to custody by establishing the Detention and Training Order.

Where a final warning is given to a young offender, the details shall be shared with the Youth Offending Team (YOT) for supervision and guidance of the offender. The Youth Offending Team may provide an Acceptable Behavior Contract to a young offender. The child and their parent or guardian shall be respondents to the contract. Breach of any terms of the contract will result in an Anti-Social Behavior Order.³³³ Further breach of the Anti-Social Behavior Order may lead to prosecution.

In other circumstances, the police *Suo moto* may impose a local curfew on a child offender under the age of 16 banning them from appearing in public places between 9:00 pm and 6:00 am without being accompanied by an adult. The police are also empowered

³³³*Anti-social Behaviour, Crime and Policing Act 2014 Part 2*

to impose fines for certain offences taking into consideration the offender's financial situation. The liability of the fine rests on the offender's parents or guardians.

If the officer decides that further detention is necessary, the child offender is transferred to Local Authority Care for the remainder of their detention. It is mandatory for Children to be detained in a facility separate from adults. Unless an appropriate adult is present, invasive searches of a minor are prohibited by the law unless express consent is sought and granted by the appropriate adult.

4.2.5 Bail Pending Arraignment

Generally, every person in the United Kingdom has a right to bail. Whenever a person is arraigned before a court or remanded after conviction pending enquiries or a report they are entitled to unconditional release on bail if the exceptions to bail do not apply.³³⁴ There are some instances, however, when the right to bail will be denied. These are captured under Schedule One of the *Bail Act 1976* as where the court is convinced that an offender will abscond, commit another offence while out on bail, or interfere with witnesses or otherwise obstruct the course of justice. Further, the court or an officer may deny bail to a child where it is for their own welfare that they be held in custody.³³⁵

The police in the UK have the power to release a suspect on bail terms under the *Police and Criminal Evidence Act*.³³⁶ There is a general presumption, however, that a person will be released from custody without bail unless the preconditions of bail are met.³³⁷ Police bail may be granted by an officer in four instances; bail to attend a police station³³⁸; pre-charge bail before a decision to charge has been made by the arresting officers³³⁹; bail pending further investigation under Section 34(5) of PACE and; bail post-charge under Section 38(1) of PACE. In some instances, a police officer may grant street bail without detaining the suspect after considering the seriousness of the offence and the ability to continue with investigations at a police station.

³³⁴ *Bail Act 1976* Section 4

³³⁵ *ibid*

³³⁶ See Sections 30A, 34, 37 and 38 of the *Police and Criminal Evidence Act 1984*

³³⁷ Home Office, *Bail and Refusal of Bail by Criminal Courts and Police Officers*, Version 5, April 2020 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880492/Bail-and-refusal-of-bail-by-criminal-courts-and-police-officers-v5.0-gov-uk.pdf Accessed 1 November 2020.

³³⁸ Section 30A of PACE

³³⁹ *ibid* Section 37

4.2.6 Arraignment in Court

Where the police decide that a matter should proceed to court, a young offender will be presented to a Youth Court or a Crown Court where the offence is severe or they have been charged jointly with an adult. This must be done expeditiously and within 24 hours of their arrest. All young offenders under the age of 17 must be accompanied by an appropriate adult when brought before court.

A decision to arraign a young offender in court has to be weighed favorably and with due regard to the best interests of the child. It has been held in *R v Chief Constable of Kent and Another ex parte L* and *R v DPP ex parte B [1991] 93 Cr App R 416* that a decision to prosecute a young offender may be the subject of judicial review where it is shown that the decision did not consider the circumstances or general character of the accused. Therefore, in considering whether to prosecute or not, the prosecution is obliged to balance public interest and the welfare of the child after a thorough analysis of the background circumstances.³⁴⁰

The principal aim of the child justice system is to deter children from committing offences.³⁴¹ In UK's Code of Crown Prosecutors, an out-of-court disposal may take the place of a prosecution if it is an appropriate response to the offender and/or the seriousness and consequences of the offending. In this regard, not all cases should end up in court. This is particularly prevalent in children's cases.

Youth Courts are magistrates' court presided over by three magistrates specially trained to handle children's matters.³⁴² The court may also be presided over by one district judge. These courts have the jurisdiction to handle minor offences committed by children including theft and burglary, anti-social behavior and drugs offences.³⁴³

Youth Courts take a more casual rather than the formal tone set out by the Crown Courts. In Youth Courts, children are referred to by their first names rather than referring to them as the "accused persons". Moreover, unless prior permission is successfully sought from the court, members of the public are strictly prohibited from attending the Youth Courts.

³⁴⁰ The Crown Prosecution Service, 2013. Code For Crown Prosecutors. London: Gov.co.uk

³⁴¹ *Crime and Disorder Act 1998* Section 37 and 38

³⁴² The Crown Prosecution Service, Youth Crime, Available at <https://www.cps.gov.uk/crime-info/youth-crime> Accessed 2 November 2020

³⁴³ *ibid*

In some instances, the magistrates might take off their robes and wigs in order to set a child-friendly atmosphere.³⁴⁴

At this first appearance in court, the young offender is charged formally. If they enter a plea of guilty, then the appropriate sentence will be passed. In the case of a serious offence, the case will be transferred to the Crown Court. If a plea of not guilty is entered by the young offender, then the court might consider whether to release the accused person upon such bail terms that are reasonable and proceed to set a date for trial.

4.2.7 Bail Pending Trial

The Bail Act generally guarantees bail for every person. When a child pleads not guilty, they have a right to access bail unless the offence complained of falls within the list of exceptions against which bail cannot be granted. Depending on the seriousness of the offence, the court may grant conditional bail or unconditional bail. Where bail is denied, the option of reviewing this decision should be availed to the minor throughout the pendency of the case.

4.2.8 The Trial Process

The *Children and Young Persons Act 1933* emphasizes on protecting the welfare of the defendant during trial.³⁴⁵ In this light, Section 16 of the *Youth Justice and Criminal Evidence Act*³⁴⁶ introduced special measures to be taken into consideration during the hearing of minor's case. They include employing the services of an intermediary during examination of witnesses at the police and at court; giving evidence "in private" by clearing the courtroom of members of the public; judges and lawyers dressing in a friendly manner as opposed to the more official wigs and gowns; witnesses testifying behind a screen; the use of video recorded evidence in chief; giving evidence via live video link from a separate room; the use of pre-trial video recorded cross-examination; and, the provision of aids to communication by means of an interpreter, computer or other device. Moreover, there are restrictions on reporting of children's cases by the media. There are also laws that protect and provide for concealing the identity of children who are parties before the court.³⁴⁷

³⁴⁴ Practice Direction, Trial of Children and Young Persons in the Crown Court, Feb. 2000, 9-13, Available at <http://www.hmcourts-service.gov.uk/cms/926.htm>

³⁴⁵ *Children and Young Persons Act 1933*, Sections 23 and 24

³⁴⁶ *Youth Justice and Criminal Evidence Act, 1999*

³⁴⁷ *Children and Young Persons Act 1933*, Sections 23 and 24

Jurisprudence has played a huge role in ensuring that child offenders are protected during trial. Laws are consistently progressive and dynamic to suit the interests of the child. The ratio of judicial precedence is often manifested in practice directions which bind courts and litigants. For instance, a practice direction issued by the Lord Chief Justice of England and Wales to guide Crown Court prosecutions of children prohibits against the trial process exposing defendants to intimidation, humiliation or distress. It requires steps to be undertaken to help young defenders understand and engage in the proceedings.”³⁴⁸ The practice directions further require that breaks be taken as frequently as possible and that recognizable police presence be reduced as much as possible.³⁴⁹

4.2.9 Disposition

Courts in the United Kingdom are guided by the *Coroners and Justice Act* when passing sentences to young offenders. Pursuant to Section 125 of the Act, all courts are bound to follow the available sentencing guidelines when disposing of an offender’s case unless it would be against the rules and interests of justice.

In this regard, the United Kingdom has established Sentencing Council which is an independent body within the Ministry of Justice that ensures transparency and consistency in the disposition whilst maintaining and promoting the independence of the judiciary. The Council in 2017 came up with a definitive guideline to guide the courts in the disposition of cases of child offenders.

Paragraph 1.1 of the guidelines, mandates courts to bear in mind that the main aim of the youth Justice system which is to curb against commission offences by children and young people and b) the welfare of the child or young person. The guidelines also stipulate that disposition should be focused on the child or young person rather than the seriousness of the offence. Custodial sentences are also discouraged by the guidelines. Sentences should also not result in the separation of the child or young person from society. Furthermore, deterrence should not be one of the aims of disposition, rather modes of disposition should focus on rehabilitation and restorative justice.

³⁴⁸ Practice Direction, Trial of Children and Young Persons in the Crown Court, Feb. 2000, 3, available at <http://www.hmcourts-service.gov.uk/cms/926.htm> Accessed 2 November 2020.

³⁴⁹ *ibid*

4.2.10 Guilty Pleas

Section 144 of the Criminal Justice Act 2003 requires the court to take the following into consideration when passing a sentence where an offender has pleaded guilty;

- a. The stage during the proceedings, at which the offender indicated his desire to plead guilty, and
- b. The circumstances in which this indication was given.

A guilty plea reduces the term of the sentence. The earlier a guilty plea is entered in the course of the criminal proceedings, greater reduction of the length of the sentence. The sentence may be reduced by a maximum of one-third where a minor pleads guilty.

4.2.11 Available Sentences

There exists a wide range of sentences that are available to the court from sentences considered less severe to those considered more serious. Examples of less severe sentences include, supervision orders with conditions or an Action Plan Order, an intensive, three-month long community-based program. More severe sentences are custodial methods of punishment which include detention and training orders. These severe sentences are meted out to offenders who are considered to pose a risk to the public and repeat offenders. They range from a minimum period of four months to a maximum period of two years. Half of the sentence is served in detention while the other half is served in community under supervision of “youth offending” team. Only those offenders over the age of fifteen may be sentenced to detention in a young offenders’ institution, although this latter restriction does not apply to children aged ten and over convicted of murder.

4.3 South Africa

4.3.1 Introduction

South Africa protection of Children’s rights flows from constitutional imperatives enshrined under Article 28. The provision generally canvasses rights specific to children and generally puts paramount importance on the interests of the child in every matter concerning children.³⁵⁰ Special emphasis is put on the rights of child offenders under Section 28 (1) (g) which emphasizes that detention of a child should be a matter of last

³⁵⁰ The Constitution of South Africa 1996, Article 28 (2)

resort and the rights of the child should be upheld even in detention. It also requires that they be separated from adults and the conditions that they are kept in should be dignified. This section of the South African constitution is greatly informed by international legal instruments that provide for safeguarding children's rights. Of uttermost importance is the CRC which South Africa signed and ratified.³⁵¹ By the time the constitution came into force, South Africa had not yet complied with what the CRC wanted of its signatories. Thus, a commission was constituted to look into child justice in South Africa.³⁵² The investigations culminated into the *Child Justice Act*³⁵³ which establishes a separate criminal justice system for children.

The *Child Justice Act* serves as the primary piece of legislation that provides for the protections of children in conflict with the law. The preamble of the Act recognizes the constitutional emphasis on the best interests of the child and the need for their special protection. With regard to child offenders, the preamble protects them against being subjected to harmful practices and limits incarceration of children in providing that it should be a measure of last resort and should be for the shortest possible time. The Act heavily advocates for diversion of child offenders from the criminal justice system. While the Act has been lauded for being abreast with international trends in safeguarding the rights of child offenders, it has faltered for being silent on disposition of cases of child offenders.³⁵⁴

The Child Justice Act of South Africa is premised on three guiding principles. These are; the best interests of the child; the diversion principle and; children should not be treated more severely than adults.

4.3.2 Focus on the Best Interests of the Child

The 1996 Constitution of South Africa under Article 28 (2) provides that child's best interests should be given paramountcy in all matters concerning a child. Legal commentators have argued that the use of "paramount" was deliberate to give more primacy to the interests of the child such that the interests of the child were more

³⁵¹ The Convention was ratified by South Africa on 16 June 1995.

³⁵² Maguire J "Children of the Abyss: Permutations of Childhood in South Africa's Child Justice Act" 2012 *New Criminal Law Review* 68-121

³⁵³ Child Justice Act 75 of 2008

³⁵⁴ Gallinetti J, Muntingh L and Skelton A "Child Justice Concepts" in Sloth- Nielsen J and Gallinetti J (eds) *Child Justice in Africa: A Guide to Good Practice* (Community Law Centre, University of the Western Cape Bellville 2004)

important than any other consideration.³⁵⁵ This notion was, however, dispelled by the Constitutional court in South Africa in *Centre for Child Law V Minister of Justice and Constitutional Development* where it was held that although the child's best interest were more important than anything else, this does not mean that everything else was unimportant.³⁵⁶ The court further stated that the "child's best interests" is not an unlimited right. That it had to be measured against other rights which have to be taken account of as well where necessary.³⁵⁷

In contrast, the South African Court in *S V M*³⁵⁸ emphasized the importance of the principle of the best interests of the child thus;

The ambit of the provisions of Section 28 (2) is undoubtedly wide. The language of that section emphasizes that while enforcing the law, one must be child sensitive; It further emphasizes on interpreting and developing the law in a way that favors protecting and advancing the interests of children. The courts are called upon to always uphold and respect children rights in their daily operations.

What this contrast goes to show is that the courts in South Africa have wide discretionary powers to interpret and apply the best interest of the child.³⁵⁹ They have to consider a myriad of factors in order to make a pronouncement that will sit well with the "best interests of the child principle." Therefore, each case must be determined on its own merits given due consideration to the unique circumstances that surround the case.

4.3.3 The Principle of Diversion in South Africa

The principle of diversion is a central focus in South African legislation concerning child justice.³⁶⁰ This principle articulates that child offenders should be diverted from the formal criminal justice system whenever possible.³⁶¹ In its manifestation, child offenders are put through an alternative process, parallel to the formal criminal justice system, that

³⁵⁵ Müller K and Tait M "The Best Interests of Children: A Criminal Law Concept?" 1999 De Jure 322-329 where the authors compare the term "paramount in the South African Constitutional provision with "a primary consideration" as used in the Convention on the Rights of the Child and "the primary consideration" as used in the African Charter.

³⁵⁶*Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 29.

³⁵⁷ *ibid*

³⁵⁸*S v M* 2007 2 SACR 539 (CC) para 15.

³⁵⁹ Junger-Tas J "Trends in International Juvenile Justice: What Conclusions can be Drawn?" in Junger-Tas J and Decker SH (eds) *International Handbook of Juvenile Justice* (Springer Dordrecht 2006) 505-532

³⁶⁰ See Chapter 8 of the *Child Justice Act* 2008

³⁶¹ See the Preamble and Section 2 (b) of the *Child Justice Act* 2008

escapes a trial, conviction or a criminal record.³⁶² The principle advocates for other punitive measures rather than imposing sentences on child offenders.

The rationale of diversion is that child offenders who are diverted from the formal criminal justice system are more likely to be integrated back into society with relative ease. It has become increasingly evident that when a child offender gets deeper into the criminal justice system, the greater the risk that they will land in a life of crime as adults.

This principle reverberates with the society-focused rehabilitation in the United Kingdom where the child justice system prefers that a young offender is not removed from society when punished. The two principles consider account the other rights of the child such as education, culture, parental care and leisure among others.

4.3.4 Children should not be treated More Severely than Adults

Section 3(b) of the *Child Justice Act* provides that a child must not be treated more severely than an adult would in the same circumstances. This principle is autochthonous. It is not derived from international instruments or *jus cogens*. A cursory look at the wording in Section 3 (b) would lead to the conclusion that children should be treated less severely. However, in strict interpretation, the provision demands that a child be treated in the least equal to an adult in similar circumstances.

International provisions, on this issue, have in fact indicated that children should be with more leniency than adults. There is apprehension that the provision might have been included in the act to mitigate the chance that the Act would otherwise be considered to be too lenient and not sufficiently punitive.³⁶³ Even if this were still to be the case, it would be difficult to see how equal treatment of children and adult would be justifiable in light of the plethora of legal provisions advocating special treatment.

4.3.5 Age of Criminal Culpability

The Child Justice Act of 2008 raised the minimum age of criminal culpability from 7 to 10 years.³⁶⁴ The Act further included a rebuttable presumption of *doli incapax* for

³⁶²Gallinetti J, Muntingh L and Skelton A "Child Justice Concepts" in Sloth- Nielsen J and Gallinetti J (eds) *Child Justice in Africa: A Guide to Good Practice* (Community Law Centre, University of the Western Cape Bellville 2004)

³⁶³ Maguire J "Children of the Abyss: Permutations of Childhood in South Africa's Child Justice Act" 2012 *New Criminal Law Review* 68-121

³⁶⁴ Pillay Anthony, *Deliberating the Minimum Age of Criminal Responsibility*, *South African Journal of Psychology* 2015, Vol 45 (2) 143-11146

children aged between 10 and 14 years.³⁶⁵ For a child between the ages of 10 and 14, the law required expert evidence to be produced for them to be proven to have criminal responsibility. Section 8 of the Child Justice Act empowers the Parliament of South Africa to consider whether the minimum age of criminal responsibility can be raised in the fifth anniversary of the Act. Giving credence to this provision, in 2020, following various consultative forums the Child Justice Amendment Bill was enacted.

The Child Justice Amendment Act 2019 increased the minimum age of criminal responsibility from 10 to 12 years. The Act also maintains the presumption of *doli incapax* for children between the ages of 11 and 14 years.

4.3.6 Age Estimation

One of the challenges that exists in the child justice system in south Africa is the determination of the age of a minor. It is important to know the age of a child offender so as to know whether they are criminally responsible. The downside is that many children do not know their true ages or choose not to tell their true ages.³⁶⁶ In South Africa, it is estimated that only forty percent of births are registered and thus recognized.³⁶⁷

Where it is difficult to determine the age of a minor with certainty, the court has the discretion to estimate the age of that person if no evidence is presented to indicate the date of birth.³⁶⁸ However, judicial officers seldom exercise this discretion and instead rely on medical assessment. The High Court of South Africa in the case of *S v Dial (2006 (1) SACR 395 (E))*, the court recognized the importance of age determination as a person below 18 years is a child and falls within the ambit of the constitution. The court required that in the absence of any document proving age then a magistrate ought to rely on medical evidence from the doctor in estimating the probable age of a child.

Where a judicial officer decides exercise their discretion in determining the aged of an accused person, the Child Justice Act imbues the court with certain powers for conduct of such an exercise. Under Section 16 of the Act the judicial officer may summon any person to produce the documentation, information or statements; or consider the form and any documentation submitted by the probation officer.³⁶⁹

³⁶⁵ See Section 7 (2) of the Child Justice Act

³⁶⁶ Skelton Ann and BoyaneTshela, Child Justice in South Africa, *Monograph 150* (2008)

³⁶⁷ *Child Law Manual for Judicial Officers*, Pretoria: Justice College 2004, C-12.

³⁶⁸ *Criminal Procedure Act* 51 of 1977 Section 337

³⁶⁹ *Child Justice Act* 2008 Section 16

4.3.7 Arrest and Detention

The Child Justice act frowns upon the subjection of children to the formal criminal justice system whenever possible. In this regard, the Child Justice Act encourages other modes of securing a first appearance in court other than arrest and detention. The child offender may be issued with a summons or a written notice to attend court.³⁷⁰ A written notice or summons should be delivered to the child in the presence of their parents or guardian.³⁷¹ A probation officer must be notified of the written notice or summons within 24 hours.

The police officer handing over the summons or written notice must notify the child of their rights, explain the nature of the offence, explain the procedures that immediately follow the written notice or summons and also warn the child of the danger of failing to honor the summons or written notice.³⁷²

Written notices and summons are reserved for minor offences listed under Schedule 1 of the Act. For serious offences, a child offender may be arrested.³⁷³ During the arrest, the police officer must inform the child of the reason for their arrest in a language understood by the child, nature of the offence and the immediate procedures that follow arrest. The child offender must also be informed of their rights. The police officer arresting the child offender must notify the parents or guardians of the offender that the child has been arrested within 24 hours of their arrest. Similar notice has to be given to the probation officer in the jurisdiction of the arrested child.³⁷⁴ It is strictly prohibited under the Child Justice Act to arrest a child under the age of 10 years.³⁷⁵

The police officer may grant bail pending arraignment with a written notice or summons. The child may only be released to the care of a parent or guardian or an appropriate adult.³⁷⁶ In any case, the child must be presented before a magistrate's court within 48 hours of arrests unless there are very good reasons not to do so.³⁷⁷

³⁷⁰ Section 17 of the Child Justice Act 2008

³⁷¹ *ibid* Section 18 and 19

³⁷² *ibid*

³⁷³ *ibid* Section 20

³⁷⁴ *ibid*

³⁷⁵ *Child Justice Act* Section 9 (1)

³⁷⁶ *ibid* Section 21 and 23

³⁷⁷ *ibid*

If the child is to remain in police custody for any reasons recognized by the Act, the least restrictive option is recommended for detainment.³⁷⁸ The Act recommends placing the child in child and youth care center.³⁷⁹

It is mandatory for a probation officer to assess every child suspected of committing an offence.³⁸⁰ The probation officer who is notified by the police of the child's arrest, summons or written notice must conduct an assessment of the child before the child can appear at the preliminary inquiry. The assessment is done to establish the age of the child; whether the child is in need of care and protection; to collect information relating to previous conviction; to formulate recommendations in regard to the appropriate cause of action to be taken; to consider diversion where possible; and to establish whether the child has been influenced to commit the offence by an adult.³⁸¹ The probation officer will then prepare a report on his findings for consumption by the magistrate at the preliminary inquiry. All information collected by the probation officer is confidential.

4.3.8 Preliminary Inquiry

After a child has been arrested, they are presented before a magistrate for preliminary inquiry. It is an informal pre-trial procedure which is fact finding in nature.³⁸² It may be held in a court premises or any other place suitable for the exercise. The preliminary inquiry must be attended by the prosecutor in conduct of the case, parents or guardians of the offender and the probation officer.³⁸³

At the inquiry, the magistrate considers the assessment report prepared by the probation officer and gathers all relevant information with regard to the child. The magistrate can then make a decision on whether the case is suitable for diversion. Any information furnished at the preliminary hearing is confidential.³⁸⁴ Failure to attend the preliminary inquiry by persons obliged to attend may invite the magistrate to issue warrants of arrest against the absentee.³⁸⁵ The magistrate may at the preliminary hearing order that for diversion or refer the matter to court.³⁸⁶

³⁷⁸*Child Justice Act* Section 26 (1)

³⁷⁹*Child Justice Act* Section 29

³⁸⁰*Child Justice Act* Section 34 (1)

³⁸¹*Child Justice Act* Section 35

³⁸²*Child Justice Act* Section 43

³⁸³*Child Justice Act* Section 44(1)

³⁸⁴*Child Justice Act* Section 45

³⁸⁵*Child Justice Act* Section 46 as read with 24(7)

³⁸⁶ *ibid* Section 49

There are a number of diversion options that a magistrate may choose from. These include a compulsory school attendance order; a family time order which requires a child to spend a specified number of hours with his or her family; a good behavior order; a peer association order which requires a child to associate with persons or peers of good character and avoid those of bad character; a reporting order requiring a child to report to a certain person who will monitor the child's behavior and a supervision and guidance order which places a child under guidance and counseling.³⁸⁷

In determining a suitable option for diversion, the magistrate must give regard to the child's culture, religion, age, language background, education, domestic and environmental background, the proportionality of the recommended option, the nature of the offence, societal interests and the child's developmental needs.³⁸⁸ Compliance with diversion orders is supervised by a probation officer appointed by the magistrate presiding over the preliminary inquiry.

Where a magistrate decides that the child will be prosecuted; the child will be referred to the child justice courts for trial.

4.3.9 Plea Taking and Trial Process

At the first appearance in the Child Justice Court, the prosecutor will formally charge the child. It is noteworthy that the Child Justice Act does not establish any specialized courts for children separate from those of adults. The prescription of Child Justice Court is merely a name for a court conducting the trial of a child rather than a distinct court handling children's matter only.

Every child is entitled to legal representation in South Africa. In some instances, the child may be presented with an advocate at the expense of the state. In such cases, a child arraigned before the Child Justice Court without legal representation must be referred by the court to Legal Aid South Africa for consideration.³⁸⁹ Plea cannot be taken until a child is given reasonable time to employ a legal representative.

In the Child Justice Court, the child is required to take a plea in a similar manner as in the formal criminal justice system. If the child is charged with an adult, the trial process will be conducted in accordance with the provisions of the Child Justice Act for the child

³⁸⁷*Child Justice Act* Section 53

³⁸⁸*Child Justice Act* Section 54

³⁸⁹*Child Justice Act* Section 82

and the Criminal Procedure Act for the adult.³⁹⁰ Before taking plea, the judicial officer presiding over the case must inform the child of the accusations against them, their respective rights and the process to follow thereafter.³⁹¹

After plea taking, the child may apply for bail pending trial in accordance with Section 25 of Act. The Act stipulates that where the bail terms are too steep for the child's parent to afford, the judicial officer must set appropriate conditions that do not include money.

The Court is mandated to conduct the hearing in such a manner that promotes the best interests of the child. To this end, the court is empowered to search for any additional information from any other person involved, to ensure the proceedings friendly and understandable to a child depending on their age.³⁹² Further, no person is allowed to attend the proceedings unless their attendance is necessary or they have been allowed to attend by court.³⁹³ The Act allows the child to be assisted by their parents during proceedings. However, the extent of this assistance is not specified by the Act.

The Act also imposes a limit on postponements by court hearing children's matters. If the minor is in prison during the hearing of the matter, the court may only postpone for a maximum of 14 days. Where the child is not in detention, the trial may only be postponed for 60 days.³⁹⁴ The Child Justice Court may still consider diverting the matter at any time before the conclusion of trial.

4.3.10 Disposition

Where a child is found guilty after trial or by their own plea, the court will pass a disposition pursuant to Section 68 of the Child Justice Act. In serious offences, courts must be guided by pre-sentence reports prepared by probation officers.³⁹⁵ The court may impose different sentences on the child most of which are non-custodial. Prison sentences may only be imposed in extreme cases and as a last resort.

Among the ranges of disposition options available are community-based sentences which allows a child to remain in the community. They include family time orders, compulsory school attendance orders, reporting orders and peer association orders. They are

³⁹⁰*Child Justice Act* Section 63(2)

³⁹¹*Child Justice Act* Section 63(3)

³⁹²*Child Justice Act* Section 63 (4)

³⁹³ *ibid* Section 63 (5)

³⁹⁴*Child Justice Act* Section 66

³⁹⁵ *ibid* Section 71

monitored by an appointed probation officer. The Child Justice Court may also impose restorative justice sentences³⁹⁶ which seek to settle the matter between the victim and offender without necessarily going through the formal system. They include family group conferences where the families of the victim and offender meet at an appointed time and place to settle their differences and mediation where a third party may guide the victim and offender to settle their differences.

Other sentences include fines, compulsory residence orders and correctional supervision orders. The court may order compulsory residence in a child and youth care center for a maximum of five years or until the minor turns 21 years.

The Child Justice Act expressly prohibits the imprisonment of children under the age of 14 years.³⁹⁷ For older children, imprisonment should only be a last resort and for the shortest time possible. The sentence of imprisonment is reserved for repeat offenders and serious offences such as treason, sedition, murder, kidnapping, rape and sexual assault.³⁹⁸ The maximum prison sentence for a child between 14 and 17 years is 25 years. Children imprisoned in South Africa have the possibility of early release throughout their sentence.

4.4 Best Practices in United Kingdom and South Africa

4.4.1 Introduction

Kenya, being a common law jurisdiction, borrows heavily from English legislation. The Children Act of Kenya was fashioned in line with its homonymous counterpart in the United Kingdom with some additions from international law. Therefore, there are significant similarities between the legal regimes protecting child offenders in both jurisdictions. However, the child justice system in the United Kingdom seems to be more refined than that of Kenya. The researcher attributes this refinement to a robust institutional framework which is properly inculcated in every system that deals with child offenders.

The United Kingdom, particularly England and Wales, has proper systems in place to handle all matters regarding children. There has been consistent development in terms of law and along the way, systems and institutions have been put in place in adaptation

³⁹⁶*Child Justice Act*, Section 73

³⁹⁷ *ibid* Section 77

³⁹⁸ *ibid*

these emerging laws. In stark contrast, the network of systems handling children has remained constant despite the dynamic nature of international children's rights.

South Africa's form of child justice is relatively new only coming into operation in 2008 with the enactment of a comprehensive Child Justice Act. The regime safeguarding children is conflict with the law can be found in this singular legislation without further reference to any other laws. The provisions of the Act are reliant on existing infrastructure and do not create any new machinery to facilitate the implementation of this provisions. Nevertheless, South Africa still boasts of a robust child justice system if compared to its peers in Africa.

One of the main challenges faced by South Africa's child justice system was the determination of age. This problem is prevalent because a large number of births are not registered in the country. In a bid to resolve this problem, South Africa introduced a guideline to help courts estimate the age of arrested persons. The government of South Africa also requires records to be kept of children who are diverted from the criminal justice system for forensic purposes.

Both the United Kingdom and South Africa have manifested good practices in their child justice systems that are congruent to international best practices. These practices are categorized below.

4.4.2 Harmonized and Specific Legislation for Child offenders

The South Africa Child Justice Act 2008 is a comprehensive piece of legislation that singularly contains safeguards for child offenders. It is easy to identify and thus follow procedures and guarantees that are provided for child offenders by simply referring to the Act. There is also a clear distinction between general entitlements of a child as provided in the *Children Act* No. 38 of 2005 and the guarantees of child offenders as provided in the *Child Justice Act* 2008.

The rights of child offenders in the United Kingdom, on the other hand, are spread out in different statutes. Challenges are encountered when it comes to cross-referencing various provisions with related or successive ones in different legislation.

In Kenya, provisions in the Children Act and the Child Offender Rules have to be cross referenced with provisions of the Criminal Procedure Code and Penal Code among other legislation. It is also noteworthy that the Child Offender Rules are subsidiary and not a

stand-alone legislation. Thus, where the rules are in contradiction to a statute, then that statute will take precedence.³⁹⁹

4.4.3 Age of Criminal Responsibility

South Africa's absolute minimum age of criminal culpability is 12 years. United Kingdom limits criminal responsibility to children 10 years and over. Compared to the two jurisdictions, the age of criminal culpability is unreasonably low. In Kenya, criminal may be prosecuted at the age of 8. At the same age in South Africa and United Kingdom, there are is an irrefutable presumption the child is not capable of criminal responsibility. Moreover, in South Africa children between the ages of 12 and 14 are presumed *doli incapax*, that is, incapable of discerning right from wrong.

Indeed, before settling upon the minimum age of criminal culpability, the United Kingdom heavily relied on intellectual disciplines to guide its approach to child justice. Similarly, South Africa's minimum age was a culmination of a series of consultations between disciplines such as psychology, psychiatry and other medical and behavioral disciplines.

Moreover, the Child Justice Act in South Africa contains a provision that mandates Parliament to consider raising the minimum age of criminal responsibility five years after the enactment of the Act and a further five years after the enactment of the Amendment Act. Such a provision is overtly missing from Kenya's legal framework.

4.4.4 Mentorship Programs

It is abundantly clear from the foregoing research that children's welfare and upbringing is irrefutably reliable on the presence of a responsible adult. South Africa and the United Kingdom heavily rely on probation officers, peer influence and mentorship to assist in the rehabilitation of a child. The mentorship is institutionalized in the United Kingdom by the establishment and empowerment of such groups as the Youth Offending Teams to aid in guidance of wayward children from an early age.

During disposition, both South Africa and the United Kingdom give prominence to orders that place the young offenders with responsible adults who supervise and mentor

³⁹⁹ Section 31 of the *Interpretation and General Provisions Act* provides that, "no subsidiary legislation ought to be inconsistent with an Act of Parliament." See also *Moi University v Council of Legal Education & another* [2016] eKLR where the High Court of Kenya stated that the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009, being subsidiary legislation cannot override the express provisions of the University Act

the child to be a law abiding and responsible adult as well. That prominence is also given to guidance of an adult in all steps from arrest to post-sentence and release from custody. For instance, police officers are trained to guide the child through the law rather than enforce the law against the child.

In Kenya, courts rely on probation officers to do all the work. Mentors, while existent, are rarely used to nurture wayward children. Most sentences will involve a punitive act of community service or a custodial sentence in a Borstal institution.

4.4.5 South Africa's Diversion Principle

One of the key features of South Africa's safeguards protecting child offenders is the principle of diversion. This principle is acknowledged in the constitution and comprehensively provides for and advocated in statute. In every step of the child justice system, a person with custody of a young offender has to a certain extent some power to divert that child from the criminal justice system. The principle also manifests, to some extent, in the United Kingdom and Kenya. However, not much emphasis is placed on it to compel the relevant stakeholders to take action.

4.4.6 Preliminary Inquiry in South Africa

As a pre-trial procedure, child offenders in South Africa are taken through a preliminary inquiry before being produced in court. The purpose of the preliminary inquiry is to gather all relevant information pertaining to the child and to determine whether the child can be diverted from the criminal justice system. It is quite a necessary procedure because it saves on time that would otherwise be used by trial courts in fact finding. It also reduces the chance of taking a child offender through the intimidating justice system.

4.5 Conclusion

The aim of this chapter was to compare the safeguards placed by other jurisdictions with regard to children child offenders with those in Kenya. The researcher has assessed legal and institutional framework in South Africa and in the United Kingdom and identified specific practices that may be emulated locally. It is derivative of the foregoing research that there are specific concerns eminent in Kenya's child justice systems which need to be addressed.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary of Findings

In this discourse, the researcher identified that despite the existence of well-aligned legal safeguards assuring protection of the rights of child offenders, there are still overt violations of these rights at the point of arrest, detention, trial and even the post-trial stage. The adverse effects of these violations are manifested in the growth and development of the children. Guided by the overall objective, the researcher sought to find out the role of Kenyan courts in safeguarding the rights of child offenders during trial.

The researcher's first objective was to interrogate the theoretical and philosophical underpinnings of the rights of child offenders. This objective was discussed extensively under chapter two of this paper. The researcher established although children were traditionally believed to have no rights, it became clear that children were part of a vulnerable group of persons that required protection by law. Thus, the conception of children's rights materialized. This recognition of children's rights was manifested in the 1924 Declaration of the rights of the child. It was later codified and acquired the force of law in the 1989 United Nations Declaration of the Rights of the Child.

The researcher further established that like any other person, children are indiscriminately entitled to basic human rights like the right to dignity. The rights of child offenders naturally cascade from these fundamental human rights. Moreover, even where a child offender is incarcerated, they are still entitled to the right to education, leisure, recreation and cultural activities, health and health services, support and care for children with special needs, insulation from economic exploitation and torture, inhuman and degrading treatment. These guarantees are universally espoused in international instruments and have since been domesticated by national legislation.

In Kenya, children's rights are recognized by the Constitution and specifically provided for in the Children Act and its subsidiary regulations. The researcher also established that these rights are construed within four principles; the best interests of the child, the views of the child, survival and development, and non-discrimination. Out of the four

principles, the best interests of the child are most paramount and constitutionally recognized.

In conclusion, the researcher posited that children-centred laws should be focused on the prevention of child crimes rather than insisting on punitive sanctions. The conclusion is informed by the *UN guidelines for the prevention of Juvenile delinquency* which suggest a host of measures to prevent child crimes.

The second objective was to investigate the role of courts and other stakeholders in safeguarding the rights of child offenders. This objective was accomplished by an assessment of the existing legal, policy and administrative framework in place for trial of child offenders. The researcher proceeds from the premise that child crimes cannot be completely eliminated despite the many measures put in place to prevent it. Thus, a delicate balance has to be struck between maintain the rule of law and protecting the rights of child offenders.

In this regard, as the researcher found, various legislation has put in place measures to protect children who are found to have violated the law. The researcher enumerates these measures while tracing the sojourn of a child offender from the time of arrest until disposition. Throughout the process, as the researcher finds, various stakeholders are required to preserve the child's inherent human dignity and right to privacy. This may be termed as the source from which all other measures flow. These measures are what the researcher found to be the role of the courts and other stakeholders in safeguarding the rights of child offenders

Chapter four of this paper addressed the fourth objective which tasked the researcher to examine what other jurisdictions have done to ensure the rights of child offenders are safeguarded. In this pursuit, the researcher interrogated the legal and institutional regimes on children's rights in South Africa and the United Kingdom. It was established, through this interrogation, that although the philosophical and theoretical underpinnings of children's rights in these jurisdictions are akin to those in Kenya, there are many practical and systemic differences.

The researcher found that all three jurisdictions had robust provisions on the rights of the child. However, it was only South Africa that had a consolidated legislation to deal with child offenders. Similarly, in all three countries primacy is given to the best interests of

the child in all matter's children. This ideology is institutionalized by all three countries but its implementation is varied.

Among these differences is the age of criminal culpability were compared to other jurisdictions, the Kenya system imposed criminal responsibilities at a much younger age. The institutional arrangements in all jurisdictions were diverse. In the United Kingdom, for instance, the researcher found that stakeholders other than court have some power to impose sanctions on a child other than the justice system. In South Africa, before a child is formally charged, a preliminary inquiry is carried out to assess the possibility of diverting such a child from the criminal justice system.

To reiterate, the general objective of this research paper was to find out the role of Kenyan courts in safeguarding the rights of child offenders during trial. Chapter two of this paper established that child offenders were entitled to similar guarantees under the Bill of Rights as any other person is. In addition to these rights, chapter three enumerated measures that have been put in place by various laws to safeguard the rights of child offenders throughout the trial process. In Chapter four, a survey was carried out by assessing the legal and institutional arrangements on children's rights in the United Kingdom and South Africa.

From the foregoing, the researcher established that the golden thread creating a nexus between child offenders and courts is the obligation imposed by law. In this sense, the primary role of the courts and other stakeholders in safeguarding the rights of child offenders is in direct congruence with upholding the specific measures put in protect these children in their encounter with the legal system.

The final objective was to find out and propose ways in which the system could be improved based on best practises derived from other jurisdictions. This will be accomplished in the conclusions and recommendations of this chapter.

5.2 Conclusions

At the beginning of this paper, the researcher hypothesized that courts needed to be more vigilant and effective in protecting the welfare and rights of child offenders. This notion was premised on the researcher's argument that despite various protections under the law, the rights of child offenders are still largely violated. In particular, the researcher noted violations in terms of the right to reasonable bond terms, right to pro bono counsel

at the expense of the state, right to education and right to non-custodial sentences. The researcher also pointed out that stakeholders such as the police service and children's officers needed to be more proactive in safeguarding these inviolable children's rights.

Having established that children are vulnerable persons in need of protection, the study pleaded a case for the rights of child offenders. In Chapter two, the researcher asserted that child offenders should be protected a tinge more fervently than other persons. A study of the four principles underlying children's rights was carried out in the same chapter. Emergent among the four principles was the best interests of the child which is given primacy over all other factors considered in children's matters. Others are the views of the child, non-discrimination and survival and development of the child. These principles are the theoretical and philosophical underpinnings of the rights of child offenders.

After analysing global legal instruments on the rights of the child, it became evident that these instruments promoted the prevention of child crimes rather than the imposition of sanctions. Nevertheless, the principles embraced in the Kenya legal system are equally promoted by these international instruments. The researcher also notes that it would be impossible to alleviate instances of child crimes. In this sense, punishment seems to be an infinite loop that breeds more criminal behaviour. Therefore, in this light, the researcher concludes that Kenyan laws should be more focussed on prevention rather than punishing.

In chapter three, the researcher interrogated the measures put in place to protect children in conflict with law under the current legal regime. The study interrogated the instance of arrest of a child offender. The researcher established that arresting officer have the obligation to, where necessary, use less-invasive methods to search an arrested child. Child offenders should only be detained as a last resort and for the shortest appropriate time. The law also requires the presence of an adult during interviews of a child offender and subsequent appearances in court. Other measures identified by the researcher involve actions on the part of the judicial officers, children's officers and other stakeholders involved in children's matters. These obligations are roles each stakeholder has to play in the safeguarding the rights of child offenders.

The researcher concludes that the law has elucidated the roles of each stakeholder clearly. The court plays an important role in safeguarding the rights of child offenders since it is the adjudicator of the conduct of the child. It is the courts that ultimately determine the sanctions to be imposed by a child offender. In this sense, the future of the child rests squarely in the hands of a presiding judicial officer.

Institutions such as the children's office, the Police Service, Borstal Institutions and the Prison's service also have a duty in the protection of children's rights as much as courts do. At each stage of the criminal justice system that is from arrest to disposition and later post-disposition, the child encounters different stakeholders. The guarantee of children's rights should not at any point be unjustifiably limited by these stakeholders. That further, society also plays a huge role in safeguarding the rights of child offenders especially when a child offender is being re-integrated back into society.

Even though challenges may be faced because of different intervening factors, the resort should always be to the law. This conclusion is premised on the idea that the principle of the best interests of the child as provided for under the Kenya legal system is overarching. It takes precedence over all other factors. Thus, where circumstances deem the performance of certain acts difficult, the relevant stakeholders must always consider what is best for the child on top of all else.

In chapter four, the researcher contrasted and compared the Kenya children rights regime with that of South Africa and United Kingdom. The purpose of this pursuit was to identify the best practices carried out by these jurisdictions in safeguarding the rights of child offenders. The United Kingdom has a long history of children rights. With the history comes a wealth of jurisprudence both in case law and institutional practices. Kenya being a common law country, has adopted most of its legislation from their English counterparts. In this regard, the Kenya Children Act is not unlike the Children Act of England. The difference between the two jurisdictions is how the provisions of the Act have been institutionalized and implemented over the years. South Africa, on the other hand, boasts a harmonized law specific to child offenders. Their practices and institutions are fairly autochthonous and have worked well since inception.

While provisions regarding children's rights are largely similar in all three jurisdictions, the institutions mandated to carry out different functions are different. The researcher

concludes therefore that it is not the law that is a problem in Kenya, the problem lies with the stakeholders in various institutions dealing with children matters. These problems may be caused by a poor implementation of the law, the lack of proper oversight over institutions, lack of proper capacity to handle children matters or a general laxity beholden in the stakeholders.

All in all, between the two foreign jurisdictions, the researcher concludes that there are a lot of practices that are beneficial if implanted to our own legal system. These practices will be enunciated in the next chapter.

Overall, the researcher concludes that child offenders have rights like any other person protected under the constitution of Kenya. More specifically, they are entitled to rights specifically guaranteed for children under the Children Act. The fact that they face possible incarceration should not be an impediment or an impetus to limit any of the rights that they are entitled to by virtue of their status as minors.

The researcher acknowledges the steps that have been taken to inculcate special measures into various institutions in a bid to protect child offenders. The researcher also acknowledges that significant milestones have been made in Kenya with regard to children's rights. However, the researcher posits those violations of rights of child offenders are still rampant, not because of the absence of legislation but for the lack of proper institutionalization of good practices within stakeholders.

5.3 Recommendations

5.3.1 Raising the age of criminal culpability

In Kenya, the minimum age for criminal culpability is 8. Below this age, minors are immune from prosecution and obtaining sanctions. However, there is a presumption that a child over the age of 8 but younger than 12 is incapable of committing a crime. They can only be held criminally responsible where the prosecution is able to prove that they had the capacity to know that they ought to be done in the circumstances.

Compared to its African peers, Kenya has one of the lowest ages of criminal responsibility.⁴⁰⁰ Most countries in the region set the minimum age of criminal

⁴⁰⁰ Cape Verde sets the age of criminal responsibility at 16 which is the highest in Africa. Available at <https://archive.crin.org/en/home/ages/Africa.html> Accessed 1 March 2021

responsibility at either 13 or 14 years. Even then, these countries still insist that children at this age cannot be the subjects of custodial sentences.⁴⁰¹

The United Nations Committee on the Rights of the Child has previously declared that an age of criminal culpability at 12 years is internationally unacceptable. The committee recommended raising the age of criminal responsibility to 14.⁴⁰² Many countries across the globe adjusted their laws accordingly. Perhaps for good reason, England was adamant in maintaining its age of criminal responsibility at 10. At the time the recommendation was being made, children between the ages of 10 and 16 made up 2 out of 200 convictions on murder charges. Moreover, the government took a stern approach on child justice after the *James Bugler*⁴⁰³ case in which 2 10-year-old boys were convicted for the murder of another minor.

Whereas such arguments are moot in Kenya, the age of criminal culpability is still low. There has been no hope of the age being revised any time soon. South Africa have a provision in their laws to consider revising the age of criminal culpability after every five years. Needless to say, the main objective of the rights of child offenders is the prevent child crimes and not to punish minors. This is a practice that should also be embraced locally. Moreover, Kenya, being a signatory to the Convention on the Rights of the Child, should adhere to the recommendations by the committee and raise the age of criminal culpability to at least 12 years.

This recommendation extends beyond a mere revision of the laws but should reflect the philosophy of children's rights. From the study above, punitive sanctions do not reform a minor but rather debilitate them into hardened criminals. Where the law provides that a minor should take criminal responsibility of their actions, the sanctions following conviction should be imposed taking into account the growth, development, survival and re-integration of that into society.

5.3.2 Empowerment and Training of Stakeholders to Handle Children's Matters

The researcher established that the law is sufficiently provident to safeguard the rights of child offenders. The problem, arises, where stakeholders are unaware of the legal

⁴⁰¹ *ibid*

⁴⁰² United Nations Convention on the Rights of the Child, General Comment No. 10 para 30ff

⁴⁰³ *Regina V. Secretary of State for The Home Department, Ex Parte Venables Regina V. Same, Ex Parte Thompson* [1998] A.C. 407

protections that these children enjoy or disregard them completely. Once arrested, minors cross the threshold of the revolving doors of the Kenyan child justice system and begin a path that takes them from police detention to court, from court they are taken to remand centres and they keep rotating from court to remand centres for months or years before their cases are determined.⁴⁰⁴

In the process, minors plead guilty to offences for fear of being held in deplorable remand centres. They further proceed to court without an advocate, or their parents or guardians. In some instances, police mete out their punishments without referring cases to court or a legal arbiter. All these violations occur despite the law. This indicates, as the researcher aptly pointed out, a lack of capacity in the stakeholders on safeguarding the rights of child offenders

Training is the best way to enhance the capacity of various stakeholders in providing services to children under their care. In situations where children have to be institutionalised, their rights and welfare must be fully protected. Those handling them should therefore have the necessary skills to provide appropriate care. Police officers should be trained to deal specifically with children's cases. The Department of Children should consider placing reliance of volunteer children's officers but rather employ full-time staff trained in handling children's cases.

5.3.4 Consider pre-trial diversion of child offenders

Placing children in institutional care should be the last option when rescuing children from situations that require immediate and urgent intervention. The government's policy on care and protection of vulnerable children lays emphasis on interventions designed to reintegrate children back into family and community settings. The same policies should be employed with child offenders.

While the constitution provides that the detention of minors should be a last resort, data indicates a different scenario. Convicted minors serve an average of three years in correctional institutions. Often, these institutions are poorly funded and thus lack a proper environment to promote the rights of children. Most Borstal institutions, for instances, are built next to adult prisons. Although children are kept separate from adults,

⁴⁰⁴UNICEF "*Rights at Risk: Issues of Concern for Kenyan Children*" Available at https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm Accessed 1 March 2021

they often interact while doing daily chores or labour. The institutions do not offer quality education. When a detainee is released, they have to resume their education where they left before committal.

In the circumstances, it would be proper to attempt a diversion of young offenders from the justice system before they are arraigned in court. South Africa instituted this practice in 2001 and has successfully diverted more than 75% of young offenders from a gruelling justice system. In the end, such young offenders can be re-integrated into society and continue their lives like any other child.

Children are the backbone of a nation. The development of a nation is pegged on the proper development of its progeny. Where children are incarcerated at a young age, they fail to conform to various societal norms and develop a negative bias to these norms. In the end, they turn to crime. Diversion of children from the criminal justice system significantly increases the chances of a child's survival and development. Arguably, it will also increase the productivity of a country's economy in the long run.

5.3.5 Creating a specific legislation to deal with child offenders

Children laws Kenya in are confounded in different legislative instruments. The Children Act generally provides for the rights of children. The Act's subsidiaries provide for other aspects of children's matters. For instance, the child offender rules provide for child justice. However, it has to be read together with the Penal Code and Criminal Procedure Code for it to be comprehensive.

Creating a specific legislation that governs the rights of child offenders will provide a harmonized manual for all stakeholders dealing with children's matters. It will be a single reference point for all person's dealing with young offenders that could easily be amended. The specific legislation will also acquire a superior status to other legal provisions that will contradict its provisions. In turn, this will ensure that children's rights take precedence over any other statutes that diminish the rights of child offenders.

5.3.6 Remove Borstal Institutions from administration by the Prison Service

The Borstal institutions are run and managed by the Kenya Prisons Service. The Prisons Services is also responsible for running adult prisons. Being an institution that manages children's affairs, it is only prudent that it be run by the Department of Children's Services. It should flow by logic that since adults and children should be kept separate in

the matters regarding children, a similar position should maintain with regard to these institutions. In any case, Department of Children's Services is the executive organ responsible for children matters in Kenya.

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