

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

TOPIC:

**BEST INTEREST PRINCIPLE GUIDELINES IN THE TRIAL
PROCESS; AN ANALYSIS OF THE CRIMINAL JUSTICE
SYSTEM IN KENYA**

BY

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REQUIREMENTS OF THE MASTER OF LAWS DEGREE OF
THE UNIVERSITY OF NAIROBI**

DECLARATION

I, **OSORO NICK OTIENO**, do hereby declare this thesis to be my original work and that it has not been submitted elsewhere and is not due to be submitted for a degree in any other university.

Signature _____

OSORO NICK OTIENO

This thesis is submitted with my approval as the University supervisor.

Signature _____

DR. SARAH MURINGA KINYANJUI

DEDICATION

I dedicate this thesis to my loving family, my mum, dad, thank you for the immense support during the course of my studies.

ACKNOWLEDGEMENT

I would like to thank God for the guidance throughout my career and studies. To my supervisor Dr. Sarah Muringa Kinyanjui, thank you for the dedication and guidance during the writing of this thesis. A special mention to all the people, including but not limited to my classmates, lecturers and friends who supported me in the course of my Master of Laws studies.

LIST OF STATUTES

Constitution of Kenya, 2010

Children Act 2001, Cap 141 Laws of Kenya

Criminal Procedure Code, Cap 75 Laws of Kenya

LIST OF REGIONAL AND INTERNATIONAL INSTRUMENTS

Convention on the Elimination of All Forms of Discrimination against Women

Convention on the Rights of the Child

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Universal Declaration of Human Rights (UDHR)

ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPOA	Independent Policing Oversight Authority
KYCTC	Kamiti Youth Corrective and Training Center
NCAJ	National Council for the Administration of Justice
OVC	Orphans and Vulnerable Children
UDHR	Universal Declaration of Human Rights
UN	United Nations

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CHAPTER 1

1.1 INTRODUCTION

The protection and safeguarding of children's right is a critical component of the criminal justice system in any country According to Olufemi, how children in conflict with the law are treated by all persons, has a huge impact on recidivism, as well as the fact that children are at a developmental stage, and must therefore be dealt with utmost care.¹

Children are defined under the Convention on the Rights of the Child (CRC) and the Children Act, as persons under the age of eighteen years.² It is a widely accepted view that they should be served better and afforded protection by the systems this demands ensuring their safety and general welfare are considered by the sectors involved.³

The criminal justice system is therefore an important component of child protection; it mainly focuses on addressing how to prevent and respond to violence involving children. Further, it looks at child abuse and exploitation and the rights of children who are in the care of others and not that of their families.⁴ A child is in conflict with the law, where it is established that his/her

¹ Matthias Olufemi 'A Sociological Review of Issues on Juvenile Delinquency' (2012) the Journal of International Social Research 468.

² Article 1 Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990 & Section 2 of Act No.8 of 2001.

³ United Nations 'Guidance Note of the Secretary-General: UN Approach to Justice for Children' (2008) United Nations 1; *the Convention on the Rights of the Child, which is ratified by all but three countries in the world (the United States, Somalia, and South Sudan); of those non state parties, the United States has signed the treaty and is, therefore obliged not to act against the object and purpose of the treaty.*

⁴ 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' (Master of Advanced Studies in Children's Rights thesis, Institut Universitaire Kurt Bosch – University of Fribourg 2008) 7.

behavior is inconsistent, with what is expected by the rules put in place to govern the society and maintain law and order.⁵

Central to the concept of justice for minors, is a generally accepted principle that a child's best interest, shall be of primary concern in all matters touching on the child, in particular act as a guiding principle in the children's court.⁶ Article 53(2) of the Constitution of Kenya, 2010 and Section 4(3) of the Children Act 2001; provide that a child's best interest be treated as the paramount matter of consideration when issues of the child's welfare arise.⁷

There are however immense challenges, shortcomings and breaches of the best interest principle, as observed when children end up being locked in jails and their interests not considered during the trial process. An example of the challenges can be seen in the Kenyan cases of *Julius Muriira & 3 others v Republic*,⁸ *Edward Ochieng Ouko v Republic*⁹ and *Kazungu Mkunzo & Another v Republic*,¹⁰ where the court advised that such errors, as sentencing to death persons below eighteen (18) years of age should be avoided. In addition, it was also pointed out that the speed in resolution of disputes is of great importance to the trial process, hence the provisions of time limits within which to try child offenders.¹¹

Moreover, the best interest of the child is served by ensuring they have minimal contact with the justice systems and more with guardians and parents to enable their development be guided effectively. The Children Act remains the primary Kenyan legislation with provisions, for the obligations legal or otherwise, of bearers of specific duties; this includes parents, civil society

⁵ Richard et al, *Delinquency and Opportunity* (Taylor & Francis Group 1960) 2-3.

⁶ Anne-Catherine (n 4) 57.

⁷ Constitution of Kenya 2010 & Act No.8 of 2001; Petition No.382 of 2014, Refugee Consortium of Kenya & another v Attorney General & 2 others [2015] eKLR *The most important principle when dealing with the rights of children is that of the "best interests of the child"* Lenaola J.

⁸ [2008] eKLR (CA) 2.

⁹ [2006] eKLR (CA) 1.

¹⁰ [2006] eKLR (CA).

¹¹ See Act No.8 of 2001, rule 12 of the Child Offender Rules.

and the government in general especially on matters involving children.¹² Part XIII of the Act, addresses the rights to be applied during trial, to ensure the due process is followed and a variety of sentences at the courts disposal to be meted on the child offender.

In a number of cases since 2001, the criminal justice system has upheld the Children Act provisions and the rules therein. However, there are instances where the best interest of a child has not been considered; hence this study is premised on the best interest of the child in so far as the criminal justice system is concerned, to highlight the shortcomings, challenges and breach of the same. Sheldon observes that in particular, children's court judges' face challenging duties, of striking a balance to ensure what is best for the child prevails.¹³ It is the purpose of this study, to evaluate the correctness of this proposition, as well as whether other parties during the trial process experience certain limitations, when applying the best interest principle.

The criminal justice system in Kenya in particular the trial process, with regard to child offenders is guided by set international, regional and national norms and standards such as the CRC and Children's Act. It is the sole responsibility of all parties, involved during the trial, to ensure due process is followed in recognition of the ideals of the best interest principle. It is through following the due process, that the criminal justice system will live up to the set standards.¹⁴ It is within this context that this study, will examine the system with regard to criminal justice, the trial process in particular, and to what extent the best interest principle is applied.

¹² Godfrey Odongo, 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's record in implementing children's rights norms' (2012) African Human Rights Law Journal 114.

¹³ Sheldon et al, 'Unraveling Juvenile Delinquency; Exploring the Mysteries of Human Behaviour' (1950) New York Commonwealth fund Hein Journal 32.

¹⁴ *ibid.*

1.2 STATEMENT OF THE PROBLEM

This thesis interrogates the problem that the existing structure of the criminal justice system in Kenya, in particular those on children in conflict with the law did not anticipate the shift of focus on implementation of rights of the child. The best interest principle should act as a guide, during the trial process to accommodate the current theme of rights of the child to ensure actual implementation of the same.

1.3 RESEARCH OBJECTIVES

1.3.1 General Objective

The general objective of the study is an analysis of the application and challenges in application of the best interest principle during the trial process, in criminal cases involving children in Kenya.

1.3.2 Specific Objective

- a) To examine the extent of the best interest principle application during the trial process.
- b) To identify and examine the challenges and shortcomings undermining the application of the principle.

1.4 HYPOTHESES

In the study, the following hypothesis was tested. The criminal justice system in Kenya, in particular the trial process of child offenders, contributes to the shortcomings experienced by the parties, in applying the best interest principle during the trial process.

1.5 RESEARCH QUESTIONS

The study is guided by the following research question, which will aid in achieving the objectives of this research.

- a) What are the implications and demands of the best interest principle on the criminal justice system?
- b) To what extent does the criminal justice system implement the child's best interests?
- c) What are the shortcomings undermining application of the principle and how best can they be addressed?

1.6 JUSTIFICATION OF THE STUDY

A definition of a child's right can be found in the CRC; this was the first international agreement that comprehensively dealt with the children's rights protection. This particular Convention has guidelines on how children should be treated and protected.¹⁵ After the First World War, nations had to come to terms with the effects of the war which included wanton destruction of property and loss of human life, the worst affected groups were vulnerable groups of children and women.¹⁶ This was particularly, because at such a time the principle was not in existence, therefore how to treat children was not an important subject.

Children therefore need and continue to require special protection to safeguard their survival and development, in light of the changes being made to our legal system and institutions to comply

¹⁵ Juvenile Justice Reform Commission, 'The Rights of Children in Conflict With the Law' (2007) Ministry of Justice of Montenegro Juvenile Justice Reform Commission UNICEF Montenegro 4.

¹⁶ 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 Science 51.

with the Constitution of Kenya 2010. To effectively ensure application of the best interest principle, and avoid historical errors this study provides an appraisal of what exists and what needs to be done in line with the new constitutional order. It is through an appraisal of the criminal justice system, where parties can be able to identify the gaps that need urgent attention. The change to the Constitution of any country has an impact on most legislation. It follows that certain processes should always be reviewed to determine their effectiveness.

In any action touching on children, whether to be undertaken by courts of law or other authorities, this includes non-state actors, a child's best interests must be the primary consideration. This may not have always been the case in Kenya, as per the examples given above, and this study will elaborate the mechanisms applied and how to limit the breach and ensure compliance. Most importantly, much reliance is placed on the fact that a child being the future leader needs protection from the legal system, if the nation is to withstand the test of time.

1.7 CONCEPTUAL AND THEORETICAL FRAMEWORK

It is the responsibility of countries, to make suitable legal and other provisions to ensure compliance with the best interest principle. The importance of the principle is paramount noting its wide acceptance and historical underpinnings. The criminal justice system as a concept does ensure the success of the trial process, in particular how other concepts in this case; the best interest is applied. The system encompasses a set of bodies and processes as set by the state, to impose sanctions to those who violate the law.

The formulation of any criminal justice system, integrates the police service, the courts of law and after service care or correctional, through which the legal procedure of criminal justice is managed. The discussion in the subsequent chapters, has delved deeper into the operations of each of these parties, and their contribution or lack of thereof in application of the best interest principle.

1.7.1 Foundations of the Best Interest Principle

The best interest principle is to be applied in all actions touching on children and requires direct measures to be used to protect their rights, which in turn will ensure their general well-being.¹⁷ It is therefore fundamentally important that decision-making, on matters involving children, focus be on appropriate action for the individual child depending on the circumstances. This will ensure their best interest is always considered.

A careful look at the wording of the principle, illustrates that a child's best interest may not always be the only, factor under consideration; there can be other competing in particular, human rights interests, for example, between the individual children. It is through these different parties' roles, that the interest is manifested and applied. The best interest principle, however, must remain the only subject to be actively considered; it is prudent to demonstrate that the other interests were explored and what is best for the child, applied as a primary consideration.¹⁸

This is in realization that the best interest principle is grounded, within human rights discourse. As such, the task of implementing the human rights of a child, need to engage all sectors of

¹⁷ Rachel Hodgkin et al, 'Implementation Handbook for the Convention on the Rights of the Child' (2002) United Nations Children's Fund 35- 40.

¹⁸ *ibid* 43-48.

society. It is within this premise that this study will apply the human rights principles as a foundation in the discussion.

1.7.2 Theoretical Foundations of Human Rights

Sen elaborates the general importance attached to human rights, she argues that humans possess these rights, without any specific legislation; children being humans are not left out.¹⁹ The concept creates duties and obligations amongst parties involved with the child. It is widely accepted that children alongside adults are amenable to human rights, therefore necessitating steps to be taken to ensure the same is not violated.

John Locke in *Two Treatises of Government* argues that the society comprises different categories of persons, and therefore all these persons rights, need to be considered to ensure peaceful co-existence.²⁰ The social co-existence enables proper treatment of children according to reasonableness and considering they fall under the category of vulnerable groups. Since the Universal Declaration of Human Rights (UDHR) by the United Nation's General Assembly on 10 December, 1948, human rights are generally viewed as being universal, their international application aspect is also stressed, and that they do not discriminate be it on religion, nationality, sex or social status.²¹

It is noteworthy that this declaration through the principles therein, formed the substance of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Children are to be accorded the protection they

¹⁹ Amartya Sen, 'Elements of a Theory of Human Rights Philosophy and Public Affairs' (2004) Research Library Core Blackwell Publishing Inc 315.

²⁰ Gregory J. 'Human Rights in Theory and Practice: A Selected and Annotated Bibliography, with an Historical Introduction' (1995) Salem Press 6.

²¹ *ibid* 9; Jan Wouters et al eds, 'The World Bank Legal Review; Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability' (2015 Volume 6) World Bank Group 40-45.

deserve by having them separated from adults while in custody (Article 10 (2b) (ICCPR) and their general development considered (Article 10(1)(ICESCR).

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 possess rights during the trial process. It is noteworthy that the concept of development and survival of the child, as provided in the CRC is crucial, to ensure a child lives to the maximum extent possible. As a result of these, any disruptions to the child's life must be justified; hence the criminal justice system should strive to minimize such disruptions by applying human rights.²²

It is worthy to mention that the legal instruments mentioned above comprise positive law. This is the basis foundation of the best interest principle as it is codified by law. However through a human rights perspective, the laws can be canvassed fully, leaving room for further opinion.

1.8 METHODOLOGY

This study employed both desk and field research. The desk research involved analysis of the relevant domestic, regional and international legal instruments that have focused on how to deal with child offenders. The field research, focused on interviews since it is through current data that we will demonstrate how application of the best interest principle is done, the existence of challenges and limitations that lead to breach of the principle.

On field research, this study had a target respondent of ten (10) participants who were interviewed. This comprised of two (2) of the following; judicial, police and prosecutors officers,

²² *ibid* 83.

it also included one (1) probation and three (3) after service care officers. The respondents, requested anonymity due to the nature of their work and the responsibilities thereon, as such pseudo names were used. It was observed that wherein interviews were to be conducted for child offenders, a wider sample would be required to clearly articulate the issues.

1.8.1 LIMITATIONS OF THE STUDY

The limitation of this study is with respect to the sample size of respondents who were interviewed. It was this study's finding that the sample size of ten (10) participants is convenient for effective critical analysis of data and having in mind logistics and the budget dedicated to conduct this study.

Further, to ensure that the sampling is not flawed, and that it is appropriate, careful selection of the ten (10) was done to ensure data obtained is accurate. The snowballing technique, also known as convenience sampling mechanism was used to identify the respondents to be interviewed.²³ The study focused only on parties directly or indirectly dealing with child offenders therefore, generalization of the study findings to other areas was done with authenticity being the main focus.

1.9 LITERATURE REVIEW

The following literature, which is organized in themes, was reviewed.

²³ Mark et al, 'On the Concept of Snowball Sampling' (2011) University of California 2.

1.9.1 Best Interest Principle

Joseph Goldstem et al sought to find out, whether there should be a presumption in law, that parents are free to determine what is best for their children. In addition what would justify state intrusion on the privacy of family relationship?²⁴ It is within this context, where we find that parties experience certain limits when applying the best interest principle. It is the task of this study, to assess the quality this statement with in depth discussions noting the role of the parties during the trial process and the connection to the shortcomings thereon.

He argues that a child best interest is not part of an equation; where a child is concerned, as with any other offender, rights are a primary factor in ensuring fairness in the process.²⁵ The importance of this book is that it shows, when applying the best interest principle, primary focus are on the child's best interest. All other factors that crop up, may be overlooked, such include views of the parents, state, correctional facilities etc. It is the authors' conclusion that sometimes best is no longer an option and that realism requires we look instead, to the least detrimental solution to the issue at hand. This study will look at this option and show that indeed it does consider what is best for the child.²⁶

Hartman's focus is on the legal lines drawn between childhood and adulthood, and the different kinds of competencies demanded under different circumstances.²⁷ He looks at the role of the children's court in terms of rights, custody and care. From this literature, this study examined how and why the parties have a duty, to ensure the best interest principle application is effective.

²⁴ Joseph Goldstem et al, *The Best Interests of the Child; The Least Detrimental Alternative* (The Free Press 1996).

²⁵ *ibid* xii, 53-54.

²⁶ *ibid*.

²⁷ Francis X. Hartman, *From Children to Citizens ; The Role of the Juvenile Court* (Springer-Veriag Inc 1987) 7.

The rights of a child, according to him are problematic, because this conception of children rights, assumes a kind of independence and direct co-relation between an individual and state while relating in society.²⁸ How the courts strike a balance to ensure the best interest principle is applied, is what this study will seek to find out, and discuss its contribution to the challenges experienced.

Alisha discusses the effects of family structure on child offenders; we can see the need to consider family structure in this study to effectively address the best interest of a child perspective.²⁹ This literature enables this study understand the various factors courts may apply, in bringing forth this interest during the trial process. This will enable the highlighting, of the existing gap leading to the limitations.

Omondi appreciates that there are special children courts, to ensure that the child's best interest is always put into consideration, however a review of the procedural laws points to their inadequate response to ensure proper implementation of the principle.³⁰ This realization directs the study to the effectiveness of the laws to the application of the principle. In addition, how is the principle affected in implementation by such inadequate response? She agrees with the view that the principle and children right to be heard in all matters affecting them, needs to be incorporated in any justice system.³¹

²⁸ *ibid* 13.

²⁹ Parks Alisha B, 'The Effects of Family Structure on Juvenile Delinquency' (MA thesis, East Tennessee State University 2013) 7-16.

³⁰ Scholastica Omondi, 'The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya' Volume 2 Issue 3 (2014) *Journal of Research in Humanities and Social Science* 38-60.

³¹ *ibid* 57.

1.9.2 Administration of Criminal Justice System

The Judicial Training Committee which was the body at the time charged with responsibility of training the judiciary staff observed during a seminar that criminal justice, in particular when concerning children in conflict with the law is an intrinsic part of the child's process of natural development in the society.³² The focus of the discussion was to come up with concrete suggestions, appropriate practical and valuable recommendations on criminal justice. This literature touches on the subject of this study, it elaborated that the concrete suggestions discussed, have not yet been fully implemented and how it is proposed the implementation be done.

According to a United Nation report, the problem of child offenders is becoming more complicated, universal, and the criminal justice systems are either not well equipped to tackle the present realities or are not in existence whatsoever.³³ This study justified the report and has provided a frame that ensures a child's best interest is the key focus, in administration of criminal justice. It further, gave practical situations of the present realities.

Schwartz, discussed decisions regarding criminal justice on minors, she argues that they should be viewed cautiously, because there is a good chance that they may be out of touch with what is going on in the society.³⁴ Further, she opines we should learn from history of other countries when handling this issue. In addition, that the greatest challenge, to developing sound children crime prevention and control policies lies in the development of an informed citizenry.³⁵

³² Judicial Training Committee et al, 'Effective Coordination and Cooperation of Criminal Justice Agencies in the Administration of Juvenile Justice' (Kenya-UNAFEI Joint Seminar Nairobi Kenya 14-17 August 2011) 1-26.

³³ United Nation, 'Juvenile Delinquency' (2003) World Youth Report 190.

³⁴ Ira M Schwartz, (*In Justice for Juveniles; Rethinking the Best Interests of the Child* (Lexington Books 1989)15-16.

³⁵ *ibid* 23&34.

She recommends that only an informed discussion on the issue by representatives of the people, court officials who deal with children matters and civil society will lead to significant reduction in the problem. This study reviewed these caution approach as an effective way to ensure best interest principle is applied. Further, to ascertain whether they are efficient in addressing the problem in this study. In addition, it will highlight the contribution of different parties and how there is need for a unified approach to the problem.

According to Njue, the correctional facilities play a role in reforming the child offender.³⁶ She concludes that child offender, changed from the antisocial behavior after they were taken through rehabilitative programs; including but not limited to counseling; both individual and group counseling, and formal education.³⁷ This literature guided this study, to critically evaluate the processes that precede the sentencing at the conclusion of the trial process.

Bridges discusses why some children involve themselves with acts of stealing and not others, why a particular child is a delinquent, or why others damage property and commit arson.³⁸ He is of the view that each of these offences is the result of a mix of causes. Some can be traced to back years before the committal of the offense, while others are immediately connected with the act of delinquency.

He concludes that matters contributing to delinquency can be found, not only in the physical or mental make-up of the individual, but also in his present and past environments.³⁹ This literature

³⁶Eunice Wanja Njue, 'The Effect of Correctional Institutions on Control of Juveniles Delinquency in Kenya: The Case of Kabete and Dagoreti Rehabilitation Centres, Nairobi' (MA thesis, University of Nairobi 2014) 61-62.

³⁷ *ibid* 63.

³⁸ K. M. Banham Bridges, 'Factors Contributing to Juvenile Delinquency,(1927) *Journal of Criminal Law and Criminology* 531-532.

³⁹ *ibid* 575-576.

was useful in this study, to examine how these factors are applied to ensure the child's best interest is considered to attain an appropriate sentence. Omondi observes that children develop special needs, when they encounter the justice system, hence the importance of special protective measures.⁴⁰ This literature guided this study to evaluate the protective measures adopted in criminal justice administration involving minors. Further, how these measures apply the best interest principle.

Yvette McGee et al focus is on the framework used by the courts, to ensure that the child's best interest is applied effectively.⁴¹ They argue because of the competing, yet equally important values at play, the criminal justice questions involving children facing state supreme courts are often the most difficult issues they tackle.

However, an effective framework to balance these interests has been developed.⁴² 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.⁴³ This literature was of great use in this study especially during the examination, of the concept of due process. In matters involving a child, the need of legal counsel provision at state costs is of great importance. Further, the literature enabled the elaboration on why the human rights principle was preferred to the labeling theory.

⁴⁰ Scholastica (n16) 53.

⁴¹ Yvette McGee et al, 'Chief Justice O'Connor's Juvenile Justice Jurisprudence: A Consistent Approach to Inconsistent Interests' (2015) Akron Law Review 56-77.

⁴² *ibid.*

⁴³ *ibid* 65.

In Kenya, in the year 2014 there were two thousand and seventy three (2073) child offenders, serving various sentences as directed by the criminal justice system.⁴⁴ The statistics guided this study in ascertaining the efficiency of this system. Rogers argues that in addressing children harms, the legal system have developed peculiar response, that differ remarkably from what applies to adults.⁴⁵ It is his view that children now have greater independent rights to services.⁴⁶ This study applied this literature, in relation to the human rights principles adopted, to distinguish why there is need to have a different legal system for adults and children. A civil justice approach⁴⁷ is also mentioned as an alternative legal system. It was this study's mandate to figure out, why and how this can be done, also whether the approach works effectively to address the problem.

In this study, the answer to the following question was sought; does the best interest of a child standard place no limit on the judges' discretion?⁴⁸ The answer will enable understanding the extent to which certain relationships, are recognized and privileges over others considered by the courts. In addition to know when state can intervene, in family structure to protect the child or society.

Dowd was of the view, that in addressing delinquency among children, there is a need to look at the current information about adolescent development and societal norms regarding weapon, sex, gender, technology, health and family structure.⁴⁹ This literature enabled this study present the

⁴⁴ Government of Kenya, 'Statistical Abstract 2015' (2015) Kenya National Bureau of Statistics 267-268.

⁴⁵ Roger J.R, *Child Maltreatment and the Law: Returning to First Principle* (Springer 2008) 5-18.

⁴⁶ *ibid* 9.

⁴⁷ *ibid* 6.

⁴⁸ *ibid* 33.

⁴⁹ Nancy E. Dowd, '*A New Juvenile Justice System; Total Reform for a Broken System*' (James Bell ed, New York University Press 2015) 38.

view, on how an appropriate legal system can be crafted. This is to ensure that an approach that allows for deprivation of liberty will look at how to successfully integrate the child in the community through other means like mediation.⁵⁰ It is within this context that the role of the civil society as an advocate of human potential whose vision is to shape minds, touch souls and motivate bodies is discussed⁵¹

Sheldon implies that children court judges always face challenging duties.⁵² This is because it is their sole responsibility to come up with a formula to help them, recognize the probable future criminal and separate him, from an accidental victim of circumstances or a child who may from time to time appear in their court as a delinquent.⁵³ This study focused on what role the judicial officers play, in a system of criminal justice, to enable determination of the truthfulness behind Sheldon's statement, and propose how to make this formula searching easier.

Johnstone et al⁵⁴ and Kinyanjui⁵⁵ talk more about retributive and restorative justice; Johnstone argues that under both theories, there must be a proportional relationship between the act and the response. Kinyanjui on the other hand, supports the observation that restorative justice values has been the basis from which most criminal justice systems are founded on for a lot of nations. In this study, an elaboration was done, to show that despite the system adopted, the best interest perspective can be achieved, as it plays a part in ensuring fairness. This literature, guided this study, in examining the processes that precede the sentencing stage.

⁵⁰ *ibid.*

⁵¹ *ibid* 39.

⁵² Sheldon (n 12).

⁵³ *ibid* 32.

⁵⁴ Gerry Johnstone et al, (eds), *Handbook of Restorative Justice* (Willan Publishing 2007) 80-85.

⁵⁵ Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-colonial, " Criminal Justice Systems" in Kenya' Vol 10 (2010) *Tribal Law Journal* 1.

1.9.3 Human Rights Principles

Omondi discusses how human rights came to be and its importance to children in particular.⁵⁶ This informed this study in relating it to the administration of justice and its relevance to the child's best interest. According to Achilihu, he does recognize that family structure, is a fundamental unit of society, and it can only be disrupted where the best interest of a child demands it.⁵⁷ He discusses the provisions of the CRC, in his view this was the first binding universal treaty solely dedicated to the children rights.⁵⁸ This study further advanced the basis for reliance on the human right principle.

Purdy argues that it is important to provide children, with conditions they need to flourish, although no specific person are entrusted with this duty.⁵⁹ She discusses some of the basic rights of a child which include, right to adequate housing, food, education, an appropriate environment and medical care. It is from the society, where the child's best interests can be traced; therefore this notion was carefully examined and related with the arguments for human rights.

Moeller in *Youth Aggression and Violence; A Psychological Approach*,⁶⁰ argues that children and adolescents have a natural tendency to commit anti-social behavior and that the tendency must be controlled by society.⁶¹ His book assisted this study, in conceptualizing the human right principles which is applied. The term moral development is referred to in his arguments to show that as a child grows, they may develop aggression depending on a number of factors.

⁵⁶ Scholastica (n 16).

⁵⁷ Stephen N. Achilihu, *Do African Children have Rights? A Comparative and legal Analysis of the United Nations Convention on the Rights of the Child* (Universal Publishers 2010) 18.

⁵⁸ *ibid* 19.

⁵⁹ Laura M. Purdy, *In their Best Interest The Care against Equal Rights for Children* (Cornell University Press 1992) 3-26; See also Jan Wouters (n21).

⁶⁰ Thomas Moeller, *Youth Aggression and Violence; A Psychological Approach* (Taylor & Francis Group 2001) 37.

⁶¹ *ibid*.

1.10 CHAPTER OUTLINE

Chapter two discusses the conceptual and theoretical foundations of this study in detail. Chapter three examines the trial process up to sentencing stage and interrogates whether the best interest principle is observed throughout this process. In chapter four, conclusions and recommendations are put forth.

CHAPTER 2

2.0 CONCEPTUAL AND THEORETICAL FRAMEWORK

To understand the best interest principle a historical analysis of the same and the extent to which it has been accepted, and applied in matters involving child offenders needs to be elaborated. In addition how it co-relates to the human rights principles becomes clear. It is the responsibility of countries, to make suitable legal and other provisions to ensure compliance with the best interest principle. The importance of the principle is paramount noting its wide acceptance and historical underpinnings.

The criminal justice system as a concept does ensure the success of the trial process, in particular how other concepts in this case; the best interest is applied. The system encompasses a set of bodies and processes as set by the state, to impose sanctions to those who violate the law. The formulation of any criminal justice system, integrates the police service, the courts of law and after service care or correctional, through which the legal procedure of criminal justice is managed. The discussion in the subsequent chapters, has delved deeper into the operations of each of these parties, and their contribution or lack of thereof in application of the best interest principle.

2.1 Conceptual Framework

This chapter presents a historical analysis of the best interest principle and the extent to which it has been accepted, and applied in matters involving child offenders. This study discusses the importance of this principle, hence justifying the grounding of this thesis on the principle.

Further, elaboration on how the approach in applying human rights, as a theoretical framework was necessary, to show the evolution and application of the best interest principle will be done. In conclusion of this chapter, a discussion on how understanding the human rights principle adds knowledge, on how the best interest principle is useful in analysis of the criminal justice system.

2.1.1 Origin and Evolution of Best Interest Principle

The best interest principle concept is not an alien concept; indeed, its existence can be traced, to before the CRC, this is because it was set down already in other conventions. This includes the Declaration of the Rights of the Child (paragraph. 2) 1959, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (articles. 5 (b) and 16, paragraph. 1 (d)), also in other national, regional and international legal instruments.⁶²

At the conclusion of the First World War, states had to come to terms with the effects of the war, which included wanton destruction of property and loss of human life. The most affected groups were ethnic and religious minorities and vulnerable groups of children and women.⁶³ It was

⁶² United Nations Committee on the Rights of the Children, ‘General comment No. 14 (2013) on the child’s right of to have his or her best interests taken as a primary consideration (article. 3, paragraph. 1) (2013) United Nations 3.

⁶³ Scholastica (n 16) 51.

realized then that children, needed special protection to safeguard their survival and development; their best interest had to be considered in all matters.

The best interest principle, historical analysis enables proper clarity, on the expectations in the future. It is continuously applied as a guiding principle, notwithstanding their being other general principles such as survival and development, non-discrimination and participation. This is because of the appreciation, of the fact that it acts as a basis, for effective application of the other principles, with regard to children matters. This principle enables the child's interest, to continuously remain as a primary focus where decisions must be taken with regard to their welfare.

It is for this reason that the principle is to be applied to all actions dealt with by the courts, state, administrative and legislative bodies, all welfare institutions and even within the family.⁶⁴ The importance of a child and the finding, of best solutions is what the best interest principle is concerned with.

2.1.2 The Concept of Best Interest

The child's best interest means to consider the child's interest before any finding affecting his/her life is made.⁶⁵ There are certain questions that confront the decision makers in making this consideration, including but not limited to;⁶⁶

⁶⁴ Marta Santos Pais, 'A Human Rights Conceptual Framework for UNICEF' (1999) UNICEF International Child Development Centre IV.

⁶⁵ Yvonne Dausab, ' The best interest of the child'(2009) In 'Children's Rights in Namibia' (Oliver C, eds) Ruppel Macmillan Education Namibia.

⁶⁶ *ibid* 147.

- a) Which particular interest is at issue?
- b) What is the nature of such an interest?
- c) The duration of that interest; long, medium or short-term duration?
- d) The objectivity of the criteria for determining such interest or are the basis of the same, are they on the child's subjective wishes?

This study has demonstrated that as much as there is no specific definition of the concept, it does refer to the considerations, legal and administrative that decision makers, take before arriving at a finding. These considerations occur when making a decision on what orders and actions, will best serve a child, as well as how the orders will be implemented, to take care of a child offender. For the purposes of this study, the word court is to be construed to mean, the trial process up to sentencing. This is to ensure it is not interpreted in a wider scope, as discussions on the same is not the subject of this study. It therefore follows that best interest's determinations are arrived at, after considering a number of interests that are in relation to the child's circumstances and that of the parent, including capacity to parent, with the child's ideal comfort the paramount concern.⁶⁷

The United Nations Committee to the CRC emphasizes that the best interests of a child is a threefold concept.⁶⁸ Firstly, a substantive right whereby a child has a right to have his or her best interests appraised and taken as a primary consideration, when competing interests are under consideration at any particular time.⁶⁹ Secondly, as a necessary, interpretation legal principle in that: if any provision is open to a variety of interpretation, the one which most efficiently serves

⁶⁷ Determining the Best Interests of the Child (2012) Child Welfare Information Gateway available on https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm accessed on 20/04/16.

⁶⁸ United Nations Committee on the Rights of the Children (n 59) 4.

⁶⁹ See Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

the best interests of the child should be selected.⁷⁰ It is in line with this thought process, of interpretation that this study chose; to have certain terms looked at in a particular way, to effectively discuss the problem stated earlier.

Thirdly, as a procedural rule to ensure whenever a finding is to be reached, which will affect a child or an identified grouping of children, the process of decision-making should include an evaluation of the possible impact whether positive or negative on the children concerned. Furthermore, the justification of the finding must show that the child's best interest was taken into account. In this study, an examination, whether the time limits, providing conducive environment for trials among other measures live up to the best interest principle was made.

Therefore the criminal justice system of in Kenya, does take into account the legal and administrative obligations imposed by the principle and effectively ensures implementation of the same. These include obligations of states, under articles 37 and 40 of the CRC. The best interests concept, places a heavy responsibility, in terms of legal, administrative and budgetary allocations on states to ensure a redesign of their justice system, especially those that deal with child offenders.

It is through an evaluation of the criminal justice system in Kenya, that the basis for recommendations on the challenges or breaches of application of the best interest principle encountered can be made. This requires a justice system specific to a child's needs; the underlining basis for this is the rationale that child offenders are different when compared to

⁷⁰ *ibid.*

adult offenders. In addition, children being at a developmental stage; are more flexible to transformation than their adult counterparts.⁷¹

It is noteworthy, that the best interest principle as a basis for other general principles can be seen, in the concept of survival and development. As all the actions, need to ensure the child is able to survive and develop with minimal hindrance. This contemplates the development of a child as a holistic concept therefore; the improvement of the child's well-being should be associated, with his or her overall development. Where the child's capabilities are promoted to their maximum potential, the dignity of the human person is achieved.

In terms of participation of the child, the decision makers should respect the child's views. This affirms, in very clear terms, the values attached, as a child is a fully-fledged person having the right to access information and freely express views in all matters affecting him or her. Indeed, this is the idea of a civil society where freedoms are guaranteed and protected, as pointed out by Amartya Sen and Gregory J.⁷²

In addition, the right not to discriminate is a direct obligation, prohibiting all forms of discrimination in the enjoyment of rights under the CRC. This is because it requires appropriate spirited measures to be taken by the government, to ensure equal opportunities for all persons, in particular children to enjoy the rights under the CRC. In furtherance of that responsibility on states, certain obligations as categorized below are created; it is important to note that Kenya, has

⁷¹ Yvonne Dausab (n 65) 127.

⁷² Marta Santos Pais (n 64) 11; Amartya Sen (n19); Gregory J (n20).

implemented most of this obligations, though an improvement may be needed on certain aspects as discussed substantively in the next chapter.

a) An obligation of result

In general terms, states, are mandated to ensure the attainment of the rights recognized by the CRC to every child under their territory. This is provided for in article 2 of the CRC, therefore a responsibility placed on the state.

b) An obligation of conduct

By virtue of article 4 of the CRC, states are obligated to ensure, the adoption of all appropriate measures whether legislative or budgetary to ensure the implementation of the Convention. This will in turn enable application of the best interest principle.

c) An obligation of transparent self-assessment

It is a requirement for state parties, to submit reports on a periodic basis to the Committee on the Rights of the Child comprising information on the implementation process of the Convention.⁷³This is a way of tracking how the Convention principles are being implemented and also acts as a form of appraisal of the system in place.

⁷³ See Committee on the Rights of the Child, 'Consideration of reports submitted by States parties under article 44 of the Convention Combined third, fourth and fifth periodic reports of States parties due in 2012 Kenya' (2013) United Nations 2-32.

It is a suggestion by Goldstem that at times, the best interest principle may not be effectively applied, and that the least detrimental alternative can be invoked.⁷⁴ This in effect shows that the best interest of a child is still considered, especially when a child offender is involved, and the government has to intervene.⁷⁵ This is to ensure that even the least detrimental alternative, still considers the best interest principle, and the state ensures compliance with the principle.

2.2.1 Legal Analysis of the Best Interest Principle⁷⁶

The CRC affords the child, the right to have his or her best interests evaluated, and thought about as a primary consideration in actions or findings that interest him or her, both in the public and private capacity. Article 3(1) CRC explicitly provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁷⁷

The detailed analysis of this provision is as below, a view which this study's shared subject to the views expressed;

1. In all actions concerning children

The phrase "in all actions" seeks to make sure that the right is affirmed in all findings and actions concerning children. The word "action" is construed widely to include not only findings, but also all conduct, actions, services, procedures and other measures. Therefore, failure to act and omissions are under "actions", for example, when courts fail to act in shielding children from abuse or neglect because the neglect, is not brought to its attention.

⁷⁴Joseph Goldstem et al (n 24) 53-54.

⁷⁵ibid.

⁷⁶ United Nations Committee on the Rights of the Children (n 62) 7-10.

⁷⁷ ibid.

As regards the word “concerning” this refers, to measures and findings directly touching on a child, either as a group or in general, and secondly, to other directives that may have an effect on children in general, even if they are not the explicit targets of the measure. In this study a child, means all persons less than eighteen (18) years of age within the territory of a state party, without placing any discrimination.

2. By public or private social welfare institutions, courts of law, administrative authorities or legislative bodies

The term public and private is to be construed widely, to encompass all institutions, whose functions and findings have an impact on the child and the attainment of the rights under CRC. As stated earlier, the word court is to be associated with all proceedings especially judicial, in all instances whether staffed by professional officials or laymen and all incidental procedures concerning children, without placing any restriction.

This includes the arbitration processes which are conciliation, mediation and others. In criminal cases, as is the focus of this study, the best interests’ principle applies to child offenders who find themselves under the system of justice either as alleged or accused persons. The Committee underscores that protecting the child's best interests means that the traditional directives and objectives of criminal justice, such as repression or retribution, must pave way to rehabilitation and restorative justice objectives, when dealing with child offenders.⁷⁸ This study further discussed the processes, preceding sentencing of the child, who is found to have been in conflict with the law.

⁷⁸ *ibid* 8.

An administrative authority otherwise is used to emphasise that the scope of decisions made by other bodies acting on behalf of state in child matters at all levels is to be very broad. This ensures all bodies, covering findings touching on general care, education, health, the environment, protection; among others in relation to the child apply this principle. Individual findings taken by these bodies must be evaluated, and guided by the child's best interests, as for all implementation measures.

The term legislative bodies, is a clear indication that the principle, relates to children in general, either as an individual or in groups. The bodies mandated to adopt any rule or regulation as well as collective decisions in relation to trade or peace treaties, which affect children, should be governed by the best interests of the child.

3. Shall be a primary consideration

In relation to primary consideration expression, this is to imply that the child's best interests should not be placed on an equal level as other considerations. This assertion is justified by the special circumstance the child find himself or herself in, with regard to dependency and legal standing.

It follows therefore that the principle of best interests, is to be seen as the paramount consideration. It was a task of this study, to employ an analytical approach in relation to the description above.

2.2.2 Elements when assessing the child's best interests

Yvette McGee, observed that there is a framework used by courts, to confirm that the child's best interest is effectively applied. It was noted that despite competing, yet equally important values at play, the criminal justice questions involving children facing state supreme courts are often the most difficult issues they tackle. Therefore adoption of an effective framework, to balance these interests has been developed to aid in the application of the best interest principle. The elements to be taken into account are discussed below;⁷⁹

Firstly, the child's views; any finding should consider the child's opinion and give it, due weight while placing attention to their age and maturity. This will ensure upholding and respect of their best interests. The fact that the child is seen as being immature or in a vulnerable circumstance should not deprive him or her of the right of expression of views, since this will be going against their human rights.

Secondly, the identity of the child which includes; characteristics such as age, religion, and beliefs must be taken into account when evaluating their best interests. This diversity is key to ensuring 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.

As rightly observed, by the Committee to CRC it is important, to carry out the evaluation and determination of the best interests of the child, in the context of eventual separation of a child

⁷⁹ *ibid* 13-17; *See also* Yvette McGee et al (n 41).

from her guardians (arts. 9, 18 and 20 CRC). The structure of the family remains the fundamental unit of the environment, and society to foster growth and well-being of its inhabitants, children in particular as described in preamble of the CRC. Fourth, the child's safety; when carrying out the evaluation to determine the best interests in general remains a state obligation. The state has a duty, to confirm that the child has protection and care as prescribed by law and that it necessitates their well-being to develop fully.

Fifth, as noted during the First World War; it is important to appreciate the child's situation of vulnerability, noting that they belong to a minority group, which also includes women. This enables the legal systems ensure the child is brought to some level to be able to enjoy his or her rights. Lastly, it is in the child's best interests, to be afforded access to education, emphasis being on the quality, at an affordable fee, in most cases free of charge. The impact any decision will have on education should be considered broadly to uphold the principle. It follows that the decision making process, is guided by these elements to achieve the objectives of CRC and protect the child.

2.2.3 Balancing the elements in the best-interests assessment

It should be stressed that the fundamental best interests' determination, is a general evaluation of all pertinent elements of the best interests of the child. The weight of each element depends on the others, this is because not all the factors will be important to each case, and this depends on individual cases or circumstances.⁸⁰

⁸⁰ *ibid* 17-18.

An example, family unit or structure preservation, may conflict with the need to safeguard the child, from any risk of violence and abuse by guardians.

In these situations, the factors will have to be weighed against each other and find the best result that upholds the child's best interests. In balancing through measuring the elements, the purpose of ascertaining the best interests of the child remains key. This is to make certain effective enjoyment of the rights as recognized, in the CRC and its optional protocols, and the holistic development of the child.

2.3.0 Theoretical Framing of Best Interest Principle

The CRC requires that all the child rights, be addressed in a comprehensive approach.⁸¹ This is in recognition of the child as a person like other human beings, with developing capacity and responsibility in findings affecting his or her life. It is within an approach based on rights that the child's best interest is discussed in this study. This rights-based approach, which has been adopted widely, means describing situations in terms of the obligation to respond to the rights of individuals, and not only in terms of human needs and areas for development, in this case the child. This leads to empowerment of the society, to ask and make demand for justice as a right, this realization is what informs the justice system of a state.⁸² The obligations associated with the best interest principle appreciate this phenomenon.

It is within this confine that human rights should not be seen as merely a form of attachment rather, as a basis to develop and guide policies when formulating a framework for any criminal justice system. Moreover, human development can only be sustainable and meaningful, when it

⁸¹ Convention on the Rights of the Child (n 2).

⁸²Marta Santos Pais (n 64) IV.

is constructed, to ensure the attainment of human rights.⁸³ This confirms our earlier assertion that, the treatment of child offenders has a huge impact on recidivism, as well as the fact that children are at a developmental stage and must therefore be dealt with utmost care.⁸⁴

2.3.1 Human Rights Principle

As the name suggests, UDHR is a declaration, and not a directly legally binding treaty, it is of formidable force though, representing the first internationally agreed protection document for all persons as a result of violations. It laid the foundation for later binding treaties some of which have been domesticated by states, forming the domestic laws.⁸⁵ Of relevance to this study, is the recognition by the UDHR that due to their immaturity and physical make up, children generally need specific safeguards including of a legal nature. The provision is an affirmation, of the whole worlds concern and appreciation of the fact that children are vulnerable, hence the need for special safeguards. It highlights the role of the state, in taking appropriate deliberate measures that recognize the vulnerability of children to ensure compliance, with the best interest principle.

The UDHR was followed by the 1959 Declaration, which declared an array of rights to children based on the premise that humanity owed to children the best it could offer them at any particular moment. This declaration is the origin of the best interest principle; however, it failed to provide for children's freedoms, liberties or autonomy. As a result of this deficit, it was followed by the Convention of 1989 and the World Summit of 1990 leading to the adoption of the United Nations Convention on the Rights of the Child (CRC).

⁸³ *ibid* 1.

⁸⁴ Laura M. Purdy (n 59).

⁸⁵ *Scholastica* (n30) 56.

This principle though formally declared through the UDHR, it can be traced back to the situation during the Cold War that came after the World Wars. These events directly impacted the debate in terms of political and academic revolving around the issue of rights.⁸⁶ Two important tensions emerged at this time: (a) the debate on civil, political, economic and social rights; and (b) the debate on the universality of human rights and the realization that their value, i.e. their privileged status, that their violation is universally condemned.⁸⁷

This development appreciated the need for all persons to be afforded their rights. It created a correlation between domestic and international law and, more precisely, the applicability of international law on a national front which have occupied the center stage in this debate. This academic human rights development has become, to a very large extent, an equivalent of the international law of human rights.⁸⁸

Human rights are not an option in the United Nations (UN) system; they constitute the foundation of the UN.⁸⁹ They are of relevance to both the normative and operational activities, and every person or body is required to assess the impact of their policies and strategies, on a periodic basis on the enjoyment of these rights. Therefore, the Committee to the CRC periodically prepares reports, to assess how nations have applied the CRC and their underlying principles, in this case the best interest principle.⁹⁰

⁸⁶ Emilio García Méndez, 'Origin, Concept and Future of Human Rights: Reflections for a New Agenda'(2004) International Journal on Human Rights Human Rights University Network 10. See also Scholastica (n 16).

⁸⁷ *ibid* 11.

⁸⁸ *ibid* 13.

⁸⁹ *ibid*; See also Jan Wouters (n 21).

⁹⁰ See Committee on the Rights of the Child Reports (n 73).

Secondly, they are neither complex nor a set of inspirational principles, they have a real actual meaning and are of relevance to everyday life; and need to be practiced and experienced. In this regard, an evaluation of the criminal justice system in Kenya will highlight application of the same, and the challenges experienced therein while considering the best interest principle. They have clear significance for *what* should to be done, towards their effective realization, and *the way* it should be achieved, with the free and direct participation of individuals.

Thirdly, it is accepted that all human rights, are intrinsic to the dignity of every human person, children included. They have been appreciated and reaffirmed in universally accepted standards, from the UDHR to the almost universally ratified CRC. As such they impose an obligation and do not constitute an option for application. Further, they are not open to arbitrary and free translation and cannot be referred to only within a convenient time.

Lastly, human rights position on neutrality is known, they are not, this is because they stand for precise and clear values that require commitment to make them work. These commitments include; those actions that will secure their realization and foster change in cases of deniability and neglect. In this regard the Judiciary in Kenya has introduced a framework to guarantee a child legal representation, this is an example of commitment which this study analyzed, in relation to the best interest principle.⁹¹

⁹¹ Government of Kenya, 'Judiciary Transformation Framework 2012-2016 Laying the foundations for the transformation of the Kenyan Judiciary' (2012-2016) 3, *see also* Government of Kenya, 'Gazette Notice No 370 in Vol. CXYII-No. 8' (2016) 29th January, 2016' Government Printers Nairobi.

The study appreciated; there are other relevant theories in particular the labeling theory which can be applied, when discussing the best interest principle. The basic premise of labeling theory assumes *"that society reaction in the form of labeling or official typing, and consequent stigmatization, leads to an identity which is altered in the actor, necessitating self reconstitution."*⁹² It is this study's view that the labeling theory, limits the inquiry, and effective analysis of the justice system in Kenya.

The theory, observes that where a person is labeled or attached to the concept of being good by others in society, likelihood is that they will be good. The vice versa occurs, where one is labeled a criminal or bad person. The theory thus states that once a person has been labeled as a criminal, especially the young, they are more likely to commit an offence. The idea is that when one is labeled by the justice system and the public as a criminal that person begins to believe that he/she is really a criminal and identifies her /him with that particular identity.⁹³

A child, being in a development stage, needs their best interest to be considered as where they are seen in a bad light, upon labeling, this will lead to stigmatization. An application of the labeling theory therefore, will limit the discussion, on the analysis of the criminal justice system and its role in the child's overall development. Labeling of the primary deviation leads to the secondary deviation. What gives rise to difficulties is not the behavior itself but reaction to it; for the societal reaction functions *in* such a way that it intensifies deviant behavior.⁹⁴

⁹²Joseph A. Scimecca, 'Labeling Theory and Personal Construct Theory: Toward the Measurement of Individual Variation' Volume 68 Issue 4 (1977) Journal of Criminal Law and Criminology 652.

⁹³ Matthias (n1) 473 ; *ibid*.

⁹⁴ Johannes Knutsson, 'Labeling Theory; A critical examination' Report No.3 (1977) Scientific Reference Group Stockholm, Sweden 90.

2.3.2 The Influence of Human Rights Principle

It is through the influence of human rights, that both national policies and international cooperation on children matters has been achieved. The civil society has played a critical role in the fulfillment of these policies, and plays a decisive public inquiry role. The bedrock for this influence is the UN Charter.⁹⁵ The Charter points out the promotion and encouragement of human rights values to be respected, for all without discrimination as one of the three purposes of the organization.⁹⁶ It is appreciated that further influence is guided by the UDHR and other instruments of human rights it has inspired, including the CRC and the CEDAW.

All these conventions of human rights are relevant to children with regard to their rights.⁹⁷ In the wake of the CRC, children are not to be seen as mere recipients of services or beneficiaries of measures that are protective to them rather, as subjects of rights and equal participants in actions touching on their rights. They therefore need to be respected in their individual capacity and in their ever evolving and developmental nature to influence findings relevant to their lives.

As part of the human species, children have natural human rights and freedoms.⁹⁸ These are inherent to the human person dignity. As severally stated, privilege imposes a general duty on everyone, including the government, to respect the rights and to refrain from any act that may prevent their enjoyment.

⁹⁵ See Charter of the United Nations and Statute of the International Court of Justice.

⁹⁶ Emilio García Méndez (n 86) 2.

⁹⁷ *ibid* 4.

⁹⁸ Achilihu (n 57).

It is noteworthy that this influence, has led to human rights based approaches in development, as well as in other state actions relating to children. This is because cooperation in terms of development, does contribute to the improvement of the capacities of all duty-bearers to meet their obligations, and of holders of rights to claim their rights.⁹⁹

This developmental perspective, has led to the meaning of resources to be construed widely to not only include those of a financial or budgetary nature but also technological, organizational and human resources. Moreover, it is important to note that the CRC in referring to resources includes those existing at the national level, and also those available by the international community, in the context of technical cooperation and assistance programmes.¹⁰⁰

Human rights code; offer the prospect of fairness in three magnitudes of justice: structural, procedural and normative The structural extent consists of accountability and participation, and particular attention being paid to the rights of groups those not strongly represented, who include women, and children. Secondly, justice in the procedural sense consists of guidance for settlement processes, to ensure that the parties to a dispute are treated in a fair and equal manner.

Further, that their dispute is settled, by an impartial person, who is obliged to reach a finding solely on the basis of objective facts rather than on personal choices. This is the basis upon which the trial process, the basis of this study will be analyzed and that any person making an accusation should provide credible corroboration, to support their case through the procedures set. Finally, normative justice consists of substantive rules that offer protection to the vulnerable,

⁹⁹ Jan Wouters (n 21) 40-42 *See also* Emilio García Méndez (n86) 5.

¹⁰⁰ *ibid.*

in this case children. Examples include the separation of holding facilities and reporting desks, having special courts with different rules to those of adults among other measures.

In many contexts, the best access to justice and human rights protection will be sustained when the different legal mechanisms, are allowed (a) to share information through learning from each other, (b) to encourage cooperation with each other, (c) to determine how best to divide labor, guided by the laws in place, and (d) to further develop to meet existing and new challenges.¹⁰¹

These ideas forms the basis, upon which this study is carried. It is therefore evident that the influence of human rights, on application of the best interest principles is beneficial to the children.

2.3.3 Conclusion

In this chapter, this study provided a detailed examination of the best interest principle and its relation to human rights. Further a discussion on the labeling theory has been advanced. The study appreciated; the other theories in particular the labeling theory which can be applied, when discussing the best interest principle, but noting the influence of human rights, chose to apply the latter.

It is with this in mind, that a human rights approach enables the reader to understand the concept and its application, in simple terms. An analysis can also be done, upon using the best interest as a yardstick while incorporating the human rights perspective; the labeling theory appears to be an

¹⁰¹ *ibid.*

opposite of this.¹⁰² The best interest principle, as applied in this study contributes to further develop comprehensive analysis of the criminal justice system as opposed to the labeling theory which can be seen as making children become delinquent due to labeling.¹⁰³

¹⁰² Judicial Training Committee (n 32) 4.

¹⁰³ UNDP, UNICEF and UN Women, 'Informal justice systems: charting a course for human rights-based engagement, A Summary' available at www.unicef.org/protection/Informal_Justice_Systems.pdf accessed on 14/03/2016 8-13.

CHAPTER 3

3.0 Introduction

The criminal justice system in Kenya, in relation to children in conflict with the law, establishes the structure of the trial process, and defines the role of the parties during the trial process. The purpose is to ensure, the developmental stage of the child is not hampered, and that their best interest, remains a primary consideration in attaining justice. In this study, the parties whose roles were analysed, included the officers at the judiciary, the police, the probation department, the prosecutors/defense counsel and the prison service. Analysis was also done on the overall function, of the government, to understand its role within the system. The Criminal Procedure Code (CPC) is the statute that provides for the procedure, to be followed in criminal cases during the trial process, especially with regard to adults and was worth a mention.¹⁰⁴

The discussion in this chapter fall under three themes which were the research questions namely;

A. What are the implications and demands of the best interest principle on the criminal justice system?

It is through a discussion under these themes that findings in the next chapter were able to be made. The implications and demands of the best interest principle on the criminal justice system require a co-ordinated approach from the police and the judicial officers as shown below in their respective roles. There are certain expectations placed on these two bodies to ensure application

¹⁰⁴ Cap 75 Laws of Kenya.

of the best interest principle. The children contact with the criminal justice system follows the following steps;¹⁰⁵

(1) Arrest: it is mostly the role of the police, to arrest the child offenders, and the discretionary decisions they make before a child is arraigned in court, marks the first step of contact with the justice system. As to be discussed, this role is key and at all times the child's best interest, is paramount and is to be considered. The police are assisted by other parties including children officers, when handling the child, an indicator of the attempts to uphold the principle.

(2) Arraignment: this is the introductory appearance, for the purpose of appraising the child, parents or guardians, of the complaint and their legal rights. A judicial officer, will also make a decision where and under what setting, the child will stay until the subsequent appearance in court. This process will be elaborated further, as other parties play a role in assisting the judicial officers, uphold the best interest principle.

(3) The trial: this process includes, but is not limited to hearing of evidence of the offence, as alleged. It is the same as a trial for the adults, albeit the structures and process are different, to uphold the principle.

(4) Sentencing: At this stage, the decision on how the offender, will be handled once found culpable, of the offence is made. The probation or after care service, plays a key role, in promoting the best interest principle. This is because the decision, on how the child should be handled carries a lot of weight, since they have an obligation, to assure the child rights of education and general development are considered. These actions by the police of ensuring the

¹⁰⁵ Matthias (n 1) 476.

parents or guardians are informed, having separate reporting desks go to show the implications and demand of the best interest principle.

3.1 Trial Process

The right to a legitimate trial, in criminal proceedings goes hand in hand, with the trial process itself and has over a long time, achieved international recognition, through collation in various international instruments; this follows many years of fulfillment and practice. As early as 1789, the French Declaration on the Rights of Man provided for the presumption of innocence and prohibited the arrest and detention in an arbitrary way of citizens, unless authorized by law.¹⁰⁶

It is this realization that ensures when it comes to issues of children, the presumption of innocence is observed., The 6th Amendment to the United States Constitution provides that every person, has a right to a speedy trial by parties who are impartial, and to be informed of the nature of the complaints against him/her, to question witnesses against one and, to have a right to call one's own deponents and a right to defense counsel assistance.

This right to a fair trial therefore, has a long history and has to a large extent retained its original form over a period of time, indicating, its universal character and status as an important rule of customary international law. This right is codified in the UDHR, under Article 10 and is clearly defined, in Articles 14 and 16 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR lays a ground for the observation of basic right to a fair trial, and presumption of innocence until proved guilty.

¹⁰⁶ Scholastica (n16).

The import of rights, under the Constitution of Kenya, and Children Act is in appreciation of the fact that individuals, children in particular, conflict with the law for varied reasons. In Kenya, an accused persons right, in criminal proceedings is protected by the Constitution. To ensure a solution is found a trial, widely recognized as a means for settling such disputes and the basis of this study's, is conducted. In Kenya, a trial is an adversary process; the parties involved do make an attempt to apply the best interest principle, to ensure delivery of justice, albeit with limitations and challenges.

This study's focus was on how and why parties involved during this process, do uphold the principle and at the same time, contribute to the limitations and challenges. It is not forgotten that the importance of the Constitution of Kenya and Children Act stresses the demands of the principles and the implications thereof of non-compliance.

3.1.1 The Role of National Police Service in Criminal Justice

As mentioned, the child offenders' first interaction point, with a system of justice is upon their arrest. This is solely the mandate of the police, though other individuals can effect an arrest, case in point is citizen arrest. The police service is established under Article 243(1) of the Constitution, as the role they play is crucial, to facilitate the commencement of trial process, within the criminal justice system. It is widely accepted that it is the police who in most cases, will first come into contact with any offender, in the course of executing their duties. Once they determine that an offence has been committed and have apprehended a suspect, in the case of a

minor, they have an option of referring the minor to the office of the prosecutor, returning the him to his/her parent or requesting they be detained at the police station.¹⁰⁷

It is noteworthy, that they do exercise discretionary decision making, at the first instance of coming into contact with a child. The placement of children reporting desks at the station, use of child friendly techniques, when conducting interviews and the procedures adapted therein, do promote the best interest principle. They have and as this study found, through an interview with Mary Anne, make an attempt to place the child's best interest as paramount, when they inform;¹⁰⁸

(a) the parent or guardian of the child, upon taking necessary actions to locate them, including but not limited, to using the police patrol car to visit their home, make phone calls, of such arrest. They also indicate, the time, date and name of the police station and children court where the child may be presented and

(b) the children officer, to assist him/her obtain relevant information, concerning the child which may be of assistance to the trial process, and the parties involved therein.

(c) the court in particular where a child is accused of a serious offence, to facilitate presentation before the court within the shortest time possible, for directions and in no case no later than twenty-four hours from such arrest.

As an institution of justice, the police service should have adequate personnel, be well-structured and financed to make, promulgate, enforce and adjudicate the law in a manner that promotes the

¹⁰⁷ Matthias (n 1) 474.

¹⁰⁸ Interview with Mary Anne, Police Officer (Nakuru 28th December 2015); Anne-Catherine (n4)38 *there is a requirement for the police officers to consider the use of other measures before making a decision to charge a minor; also on exercise on restriction on issues of a child, all this to promote best interest of a child ;ibid.*

equal enjoyment of human rights for all.¹⁰⁹In Kenya, the Independent Policing Oversight Authority (IPOA) a civilian oversight body was established to provide a civilian oversight over the work of the police in Kenya.¹¹⁰ This body ensures accountability and in particular the best interest principle is upheld, where children are involved.

However, the body is yet to release any report, on its proposals to have police cells well-built to cater for children while in detention, despite this being one of its core functions. This is a clear indication of an existing challenge to the best interest principle application. This limitation is confirmed, going by in its recent released newsletter. The public is not made aware, of what constitutes, a good police detention center despite certain police stations, being awarded as having achieved this fete.¹¹¹The body has also not questioned, the allocation of resources, through the recent 2016/2017 budget, this point will be elaborated on further.

The role of IPOA is crucial noting that children, are not supposed to be mixed with the adult offenders, upon detention. This was confirmed to be the case in some of the police stations, according to interviews conducted, and it cannot be authoritatively confirmed that this is the position, throughout the country. Further, it was the opinion of some officers that lack of adequate funds, does effect implementation of certain programmes that promote the best interest principle. This programmes include, follow up upon release, in depth counseling at the stations etc.¹¹² The aspect of government support, in provision of adequate resources, financially or otherwise, does have a direct impact, on the application, limitations and challenges, highlighted to earlier.

¹⁰⁹ United Nations ‘Guidance Note of the Secretary-General (n 3) 4.

¹¹⁰ See <http://www.ipoa.go.ke/> accessed on 17/6/16.

¹¹¹ *ibid*; IPOA Quarterly Newsletter Issue 4 April 2016, where the first runner up of best detention facilities awarded to Mogotio Police Station in Baringo.

¹¹² Interview with John Paul, Police Officer, Kamiti Youth Correctional Training Center, (Nairobi, Kenya 5th December 2015).

In Kenya, the police investigate and in certain instances, prosecute the cases found by or reported to them.¹¹³

As stated, having children-friendly police cells and properly-trained police officers in children matters, goes a lot in promoting the child's best interest. Where these do not exist, it will be a challenge to implement the principle, as the requisite personnel will be lacking and detention facilities not adequate.¹¹⁴ To address this aspect, there has been introduction of separate child reporting desks at the police station. In addition, the police assigned with investigating and prosecutorial responsibility are well trained, and knowledgeable on children issues.¹¹⁵

It is of relevance, to address the issues of police bonds, to secure the freedom of the child offenders. Moreover, further reforms are encouraged and must be facilitated, to safeguard the child's best interest.

1. Issue of Bond

The child offenders are usually allowed to post bond, to avoid unnecessary detention. As observed by Mrs. Omondi, many charged children come from humble families, the court does not insist on sureties or cash bails and that relatives of these children have invariably, been obliged to take back to the court, children released on bond.¹¹⁶ For example, in a particular case, the child offenders were released on free bond, with a condition to report to the police, every Saturday for one month. Once the month was over, they had not been charged. This delay goes to show that despite favorable bond terms, the child is kept waiting for justice which defeats the purpose, of the best interest principle.

¹¹³ Judicial Training Committee (n 32) 13.

¹¹⁴ *ibid.*

¹¹⁵ Interview (n 108).

¹¹⁶ *See* (n 113).

This measure is applied, to ensure the best interest of a child remains paramount. As has been observed, there are specific attempts being made, to further fortify the application the child's best interest, and avoid unnecessary separation with parents. However, it is a fact that not all police stations, are able to move fast and locate the child parents or guardians to facilitate this process, this depends on how funds provided are applied.¹¹⁷

2. Police reforms

The Government of Kenya first initiated police reforms agenda in 2002, following appointment of a task force made up of state and non-state actors.¹¹⁸ It is in line with these reforms, that child offenders also benefited, as their interests were factored. The provision of the Constitution does provide a framework, to safeguard the best interest principle, with regard to duties to be executed by the police.¹¹⁹

The availability of police vehicles does enable quick access, to crime scenes and check up on child offenders' relative, to inform them of certain issues including, but not limited to bail and bond. The police have attempted to ensure protection of human rights, through the National Police Service (Promotion of Human Rights) Guideline, 2014.¹²⁰ This ensures that child offenders' human rights, are protected in effect promoting the best interest of the child.

According to policy directions, police officers should release suspects, who are children on a favorable bond terms to avoid detention. This confirms Mrs. Omondi assertion, however due to

¹¹⁷ Interview (n 112); Phone Interview with Jane Kris Prosecutor, Sotik Law Courts, (Sotik, Kenya 27th December 2015).

¹¹⁸ See Audit of the Status of Police Reforms in Kenya; A joint report by the Kenya National Commission on Human Rights & Centre for Human Rights and Peace (The University of Nairobi '(2015) 8.

¹¹⁹ See (n7).

¹²⁰ See (n 118) 21; also National Police Service (Promotion of Human Rights) Guidelines, 2014.

lack of supervision to ensure compliance, especially with regard to child offenders; there still are limitations in achieving this direction.¹²¹

3.1.2 The Role of Courts in Criminal Justice¹²²

It is generally accepted that children courts within the justice system exist, due to a widespread belief that children may not always be fully responsible for some of their delinquent actions. The society is not best served, by treating them like adults.¹²³ The judiciary, as one of the three arms of government, is tasked with the responsibility of facilitating disputes resolution in a just manner. It performs this function by providing independent, accessible and responsive justice for the resolution of disputes despite the criminal justice system in Kenya being adversarial.¹²⁴

The children court normally determines cases of children, who are in conflict with the law except in two circumstances as per Section 185 (1) of the Children Act which provides;

“subject to any rules or directions made or issued by the Chief Justice, where it appears to a court, other than a Children’s Court, at any stage of the proceedings that a child is charged before it with an offence other than murder and is not charged together with a person or persons of or above the age of eighteen years, the court may, and where within the area of a subordinate court’s jurisdiction there is established a Children’s Court having jurisdiction, the subordinate court shall, remit the case to a Children’s Court.”

¹²¹ Interview (n 108 & 112); *See also* The Judiciary Kenya, ‘Bail and Bond Policy Guidelines’ (2015) National Council on the Administration of Justice 30-32 also Child Offender Rules, Fifth Schedule, Children Act, No. 8 of 2001, Rule 5.

¹²² Francis (n 27) 56 -57 courts hold the juveniles responsible for their behavior as per minimum set standards.

¹²³ Matthias (n 1) 474.

¹²⁴ Interview with Jane Mary, Milimani Commercial Courts, Nairobi (Nairobi, Kenya, 11th April 2016 10:40 A: M); *See* (n 91) 7.

- a) where a child is charged with the offence of murder or;
- b) The child is charged jointly with an adult

The court is expected to apply, the provisions of Section 77(1) and 186 of the Children Act, and ensure that a child is granted the opportunity, for legal representation. The judiciary in discharging its role does exercise an oversight role as this study found out; it is this aspect that ensures, upholding of the best interest principle. In the case of *K. M. M. v Republic* in reversing an illegal order, the court failed to give directions to ensure re-integration into society, despite the child having spent one (1) year ten (10) months in detention.¹²⁵ This is one of the challenges that the judiciary, faces in upholding the principle. In realization of such challenges, the judiciary has adopted mechanisms to promote the child offenders best interest. Firstly, conducting trials in a favorable environment to ensure confidentiality; in that the proceedings are conducted in camera, and the public not allowed being present. This enables the child, to freely express their views with only the parent or a close guardian present.

Secondly, the trials are conducted at a special court for the children, to avoid mixing them with adults. To equip the judicial officers, conducting the trials with requisite knowledge to handle the matters, they do undergo training and are assisted by other officers of the court including but not limited to probation officer, prosecutors and the defense counsel. While the trial is conducted, counseling and rehabilitation continues, to ensure the child's' interests are considered and his/her views taken. This is in appreciation, of the participation aspect of human rights, and CRC provisions with regard to the child offender.¹²⁶

¹²⁵ [2015] eKLR (HC) 6.

¹²⁶ Interview with Elizabeth May, Nakuru Law Courts, Nakuru (Nakuru, Kenya, 5th January 2016).

To expedite the attainment and delivery of justice, the judiciary has developed and deployed a case management system that is electronic. In addition, incorporated an integrated document management system; embraced ICT and applies appropriate technology to enhance court efficiency and this does promote the child's best interest.

This efficiency, including audio-visual recording and transcription of court proceedings; appropriate staffing levels to deal with caseloads facilitate application of the principle.¹²⁷ The measures highlighted above, does ensure the trial of a child, is conducted within a specific short period.¹²⁸ It is the belief of many that these improvements will further reduce the number of child offenders, in relation to the statistics alluded to earlier.¹²⁹

Article 10 of the Constitution, provides for public participation as one of the national principles of governance. To safeguard the best interest of a child, the criminal justice system in Kenya has constantly engaged the public in the administration of justice at various levels. It has held open days, judicial marches, public and student visitation programmes and through this, measures to reduce backlog of cases, have been adapted to speed up hearing of children cases.¹³⁰

Further, the National Council for the Administration of Justice (NCAJ), as the statutory organ established by law, to provide a forum for the stakeholder collaboration in delivering justice, plays a crucial role. Within this framework, the stakeholder forums known as court user committee has been cascaded, to all court stations and enabled to function effectively. The best

¹²⁷ See (n 91) 14.

¹²⁸ Section 186 (c) Act Child Rules.

¹²⁹ See (n 44).

¹³⁰ Interview with Justice Martha Koome by the star newspaper, Milimani Judicial Children Court Service Week, Milimani Commercial Courts) Nairobi, Kenya, 12th April 2016).

interest of the child is discussed and considered at such meetings and improvements made to curb the limitations.¹³¹

It is widely accepted that a child may find it challenging, to access a court which is far. This has the effect of delaying proceedings. The judiciary has improved physical access to courts, as represented by number of new courts, and set up of mobile courts. Each court station has a linked mobile court, and all judicial officers empowered to hear children cases. This has reduced average distance to courts thereby prompting the best interest principle.¹³²

The presence of motivated staff contributes to safeguarding the interest of a child offender. Their willingness to assist in faster retrieval of files and giving timely directions assist the trial process. Through the constant engagement with stakeholders through the court user committees, the judiciary is able to pin point the existing challenges and limitation that face child offenders. It is during the trial process, that the court makes appropriate orders for detention of the child offender, to facilitate their appearance. The relevant police station must make the necessary arrangements, to transfer children to and from court to the borstal institution. Upon commitment after sentencing, to have them committed, as soon as possible, but in no case should the transition period take more than fourteen days.¹³³

The limitations with regard to this transfer, comes up due to lack of transport facilities and clear guidelines. However, with the children officers actively involved in the trial process, the challenges will reduce. It was this study's finding that it is in the child's best interest to have different holding facilities, to serve custodial sentence.

¹³¹ Anne-Catherine (n4) 18 talks of police and role of courts in reporting and collecting data "The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings...." Beijing Rules, Article 11(2); See (n 91) 15.

¹³² Interview (n 124).

¹³³ *ibid* 19.

There is a definite contrast between the offences mostly associated with boys and girls. Those committed by girls appear petty thefts when compared to those committed by boys.¹³⁴ This position may not be a widely accepted view therefore the judiciary, as a custodian of justice does employ various strategies, to protect the best interest of the child depending on each case.¹³⁵

As discussed above, it can be concluded that a child best interest is promoted where; firstly the words used when questioning children is not harsh and they are not referred to by name. Secondly, sentencing is referred to as committal; this is to avoid the harsh connotations of the word sentence. This applies to all the parties involved during the trial process, not only the judiciary. In summary, the limitations noted from the interviews conducted include;

Firstly, children courts, find it challenging when dealing with a matter, where the offender is almost eighteen. The offender is a child, within the meaning of Section 2 of the Children Act and as provided for under section 191 of the Act. It is required that a child found guilty of an offence, cannot be sentenced to serve custodial sentence, they are to be taken to an institution, in a bid to give them a chance to redeem his/ her failures and misconduct. However, committal to an institution has a minimum span of 3 years. What happens once the offender attains the age of majority?

Secondly, children who have matured beyond their ages, in that they look older than their age, and such circumstances as the offence committed. The best interest is served, when they are not mixed with adults, what happens if mixed with younger children, a conflict. Thirdly, the disorganized structure, for legal representation of children in the lower/subordinate court. Article

¹³⁴ Matthias (n 1) 474.

¹³⁵ Scholastica (n 16); *ibid* 469.

19 (1&3) of the Constitution, stresses the view that the bill of rights are an integral part of Kenya's democratic state and thus acts as the framework for social, economic and cultural policies. In addition, these fundamental rights and freedoms belong to each individual, a child included. It is noteworthy, with the provision of legal aid to children, the challenge of legal representation, will be addressed.

Fourth, the fixed period of sentencing, does bring a challenge among judicial officers, exercise of discretionary decision making. As a judicial officer, the limit to which one can stretch, in terms of sentencing is three years. It is rather difficult, in cases of a repeat offender, what may appear best for the child, may be outside the legal provisions. Lastly, the limited places whereby, child officers may be placed upon sentencing. As elaborated to earlier, this makes children to be committed far from their parents or guardians. Further there are instances, where children are committed to the said institutions, but are rejected due to limited space.

These institutions do also have different specifications, as to the kind of children that are admitted, hence proving difficult when it comes to committals, since the idea of matching specification is not clearly provided for. The process at the moment employs a lot of manual work, involving the parties to conduct interviews, as a result the time spent for the search is a lot, and further the matching may end up being inaccurate. An electronic system would aid in reducing the challenges.

B. To what extent does the criminal justice system implement the child's best interests?

The criminal justice system as discussed earlier comprises of different bodies, lawyers in particular play a crucial role in ensuring implementation of the laws and in this case the best interest principle. As officers of court, they are tasked with pointing out where in their opinion implementation of a law is not as envisaged. This point is elaborated in further below;

3.1.3 The Role of Prosecutors/Defense Counsel in Criminal Justice

In Kenya, the police, lawyers from the director of public prosecutions office and the defense counsels do prosecute and defend children cases in court. It was this study's finding that Mr. James N, a lawyer has, and continues to handle children cases; it is noteworthy that he once served for the prosecution, but is now a defence counsel. In one of the cases, he was able to get instructions immediately the minors were arrested, before presentation to court.¹³⁶ The observation, to be drawn from this is where the court, takes longer in having a lawyer appointed for the child, his/her best interest are affected negatively.

Central to the aspect of timing, is the acceptance that legal representation, is not readily available, for those whose families cannot afford. In rural areas, it was noted that due to the limited children cases, the children department office takes the primary responsibility in promoting the best interest principle.¹³⁷ Legal representation goes in handy, with the aspect of participation and human rights of the child, hence very important. Wherein a child is not legally represented, some pertinent issues may not be canvassed during trial, hence children end up, behind bars bringing to forth other limitation, in upholding the best interest principle. It was

¹³⁶ Interview with James N, Prosecutor), Malindi Law Courts, Malindi (Malindi, Kenya, 22nd June 2016) done through e-mail; follow up on interview on 12th September 2016 as a defence counsel for the Malindi arson case involving students.

¹³⁷ See (n 117).

through this realization that the parliament passed a law, to ensure legal representation of children, to safeguard their best interests.¹³⁸

This legislation, places a higher responsibility on the parties involved during the trial process, especially the prosecutors, defense counsel and judicial officer, to always promote the child's best interest. This is done by frequent enquiry, whether an advocate has been appointed and if not to ensure it is done. The constant engagement envisaged by this legislation, between the parties during the trial process, will address the problem of lack of legal representation. As was mentioned earlier to facilitate implementation of the same, provision of funds and management therein is important.¹³⁹

The prosecutor and defense counsels are supposed to strictly adhere, to the Constitution and the Children's Act provisions, when dealing with children cases. This is in appreciation of their role, as officers of the court to always assist in attaining justice, for the child offender. It was confirmed in the Malindi case, the minors did spend the night, in normal police cells.

Further, wherein the prosecution requested to be allowed, to detain the children for fourteen (14) days, the court granted them five (5) days. The role of legal representation can be deduced from the conduct of the court in this scenario. This assistance requires co-operation, from other government organs; to promote fully the child's best interest, though sometimes it may lack.¹⁴⁰

The children's department is charged with the responsibility and mandated by the central government to administer the Children's Act, and facilitate this co-operation. It therefore plays a

¹³⁸ Government of Kenya,' Gazette Notice No 370 in Vol. CXYII-No. 8' (2016) 29th January, 2016' Government Printers Nairobi.

¹³⁹ Henry K. Rotich, 'Budget Statement For the Fiscal Year 2016/2017' (The National Assembly, Nairobi, 8th June 2016) 21-22 & Henry K. Rotich, 'Budget Statement For the Fiscal Year 2015/2016 '(The National Assembly, Nairobi, 11th June 2015) 20.

¹⁴⁰ See (n 7 & 121).

big role, in writing reports, upon interviewing parents/guardians. It is the information contained in the reports, which aid the prosecutors/defense counsels in making sound arguments that promote the principle. It was the conclusion of our interviewees, that infrastructure is needed to further improve the justice system. This includes but not limited to witness screening and children friendly courts throughout the country.

C. What are the shortcomings undermining application of the principle and how best can they be addressed?

It is only through the eyes of an impartial party, whose sole duty is to take care of the child that any shortcoming or challenges in application of the best interest principle, can be highlighted and action taken to address the issue. Through the interviews conducted, and summarized below under the roles of the children's department and after care services, the study was able to ascertain the shortcomings and challenges and has made recommendations in the next chapter.

3.1.4 The Role of the Children's Department

As mentioned earlier, children officers, within this department, do advance rights of the child as prescribed by law, therefore facilitate certain processes, during the trial process. Through an interview with Rachel Works,¹⁴¹ it was confirmed that they do assist the police, prosecution/defense counsel and judicial officers, in discharging their duties, in matters that concern child offenders.

The purpose of the children department is to see to it, that the child is given a chance to redeem his/ her failures and misconduct. Through the probation/children officers, the roles performed can be summarized as below;

¹⁴¹ United Nations (n 2) 4; Interview with Rachel Works, Nakuru Law Courts, (Nakuru , Kenya, 5th January 2016).

- a) Social Inquiry; as the matter proceeds in court, the court may at a point, seek to be provided with a probation report. The report includes inquiries made by the probation office, regarding the status of the offender. This is done by assessing the offender and such inquiries include age, family, sex, inquiries from the local administration, if the child is a first offender.
- b) Information to court; the probation office will come up with a recommendation, after considering the nature of offence, committed by the offender. This will inform whether the offender, needs to be committed to an institution or otherwise. In the report to be submitted to court, the probation office may recommend that a child, found guilty to undergo one of the following programmes:-
1. Community Service Orders
 2. Probation Orders
 3. Sent to a Borstal institution

If it is opined that such offender, should be taken to an institution, and the court adopts the recommendation, then the probation office, has the obligation of applying for the place, best suited for the offender. This is achieved by sending emails, applying for vacancies in the different institutions.

- c) Rehabilitation-This takes place in probation centers such as probation hostels, rehabilitation schools and other corrective centers managed, by the children department and the, prison service department.

- d) Re-integration done by the probation department. It entails preparation, of the community such that they are able, to accept the offender back into the community. Where the community, is not willing to accept the offender as yet, they will be committed to half-way homes, until the community is ready to accept that offender.

It can be seen, that at all stages the children department, through its officers, do make an attempt to apply the child's best interest, by focusing on the child's welfare. However, they do experience challenges, in particular due to lack of finances, to carry out their work. The government, in its 2016 budget, has provided funds to safeguard the children rights and facilitate running of this departments.¹⁴² A sum of kes four hundred million has been allocated, to the Children Welfare Society, and kes 7.9 billion allocated for Orphans and Vulnerable Children (OVC).

Though the funds appear to be there, lack of co-ordination between the various actors, makes it difficult for the best interest to be promoted. It is noteworthy, that the amount provided, is a reduction in comparison to 2015, where a sum of kes Eight Hundred Million had been allocated to the Children Welfare Society, and kes 9.0 billion allocated for Orphans and Vulnerable Children (OVC).¹⁴³

This reduction, does affect the role the parties, play in promoting the best interest principle. In particular, the aspect of social inquiry becomes limited, where funds are diverted for other purposes, in turn making the information, provided incomplete. All the parties, during the trial process, are only able to safeguard the rights of the child, where all facts are made available at the earliest opportunity.

¹⁴² See (n 139) 2016/2017 21-22.

¹⁴³ *ibid* (2015/2016) 20.

3.1.5 The Role of the After Case Services Department

It is the role of all parties, involved during the trial process, to ensure a child offender, ends up at the best place to facilitate proper development, as they serve their sentence. The limitations that the children's offices face include, but not limited to lack of enough institutions, for child offenders to be committed. In Kenya, through the conducted interviews the following observations were made regarding the after care services.¹⁴⁴

Firstly, the borstal institutions that admit child offenders are Shikusa Borstal Institution-Kakamega and Shimo la Tewa-Mombasa. These are under the prison services and only admit boys, who are of the age of fifteen (15) years but less than eighteen (18) years. The children are committed for three years. It follows that through the course of this period, proper rehabilitation may be done, however in terms of education the time may not be sufficient.

Secondly, Kamiti Youth Corrective and Training Center (KYCTC), which is located inside Kamiti prison, admits boys aged seventeen (17) years but less than twenty one (21) years. The committal period is four months.¹⁴⁵ There was an observation that this period is short, noting that some of the children are street children, to undertake any kind of rehabilitation. As at the date of the interview, the children at this institution were fifty two (52). Further, once the children are released, there is no proper follow up, to ensure smooth integration into the society. Though there is an institution called Ravaso, which the children go through after, this is not always the case.

Thirdly, there are remand homes, and rehabilitation schools. These are former approved schools, which are run by the children department and have been converted to rescue centers e.g the

¹⁴⁴ Interview with James N, John D & Edgar E, Kamiti Youth Corrective and Training Center (KYCTC) (Nairobi, Kenya, 5th December 2015).

¹⁴⁵ *ibid.*

Machakos Rescue Center. Before the offenders are committed, to the different rehabilitation schools, they all go through these homes an example being Gitathuru. This acts as the reception, and only two of these centers admit girls; these are Kirigiti and Dagoretti. The male offenders are admitted to Wamumu, Kericho or Kakamega.

Fourth, probation hostels also serve the purpose of holding the children, for a limited period of time. These holding institutions show an attempt by the criminal justice system, to uphold the best interest principle. However, as rightly pointed out, the four month (4) period, at (KYCTC), is not sufficient as the children may end up back to committing crimes.

An aspect of limitation, is seen whereby, only, Shimo la Tewa Borstal, Shikusa Borstal and Kamiti Youth Corrective Centre, cater for boys serving a custodial order, children from other stations end up being held far away, from their home locations. There is need to establish other institutions in different counties, to facilitate parents and guardians involvement in the rehabilitation process of child offenders.¹⁴⁶ In this study, the above assertions were confirmed; where a child is held far from his/her home their best interest is affected.¹⁴⁷

3.2 CONCLUSION

This chapter, through the discussions, was able to provide answers to the below questions, while at the same time making suggestions on what improvements need to be done.

- a) What are the implications and demands of the best interest principle on the criminal justice system?

- b) To what extent does the children justice system implement the child's best interests?

¹⁴⁶ The Judiciary Training Institute, 'Report of the Judicial Taskforce on Sentencing' (2014) Government Printers12.

¹⁴⁷ Interview (n 124 & 126).

- c) What are the shortcomings undermining application of the principle and how best can they be addressed?

CHAPTER 4

4.0 Conclusion

In conclusion, the review of literature has shown that there is universal consensus, on the importance of children offenders' rights, and the need to have them safeguarded. This is consistent with procedural justice theory, to ensure fairness during the trial process. It has been observed, throughout this study that indeed all the parties, mentioned play a crucial function in the criminal justice system in Kenya.¹⁴⁸

A theory, however it seems economical and elegant should be revised if it is not true. Likewise, institutions and the laws thereon, no matter how well arranged and efficient should be reformed, if they are not just and achieving desired results. Each child possesses an inseparable right, based on justice that even the welfare of society should not be allowed override. For this reason justice denies the loss of freedom, for some because of a greater good, shared by others.¹⁴⁹

Secondly, to fully realize the objectives of the best interest principle, all measures taken to address the same, must be examined critically. As highlighted in this study, the criminal justice system in Kenya has put in place measures, to ensure application of the principle. However, to ascertain, whether indeed they are achieving the desired goals, and that they are contributing to reduction of the limitations and challenges, periodic appraisals is necessary. This may be in place, but there is need on awareness among the parties, on what needs to be changed.¹⁵⁰

¹⁴⁸ Judicial Training Committee (n29) 1.

¹⁴⁹ John Rawls, *A Theory of Justice* (Revised Edition The Belknap Press of Harvard University Press Cambridge, Massachusetts 1999) 3.

¹⁵⁰ *See* (n 73).

Thirdly, this study has confirmed that there is a problem, within the criminal justice system in Kenya, on effective application of a child's best interest, during the trial process.¹⁵¹ It has also demonstrated how individual parties, contribute to the challenges or limitation, in the application of the same. Through the analysis done, the various interests, that crop up have been elaborated. It can be rightly put, that the framework adopted by the children justice system in Kenya, to apply the best interest principle with regard to children offenders, is a contributing issue to the limitations, challenges and breach of the same, as experienced by the parties during the trial process.

Fourth, legislation sometimes suffers from overambitious expectations, inadequate appraisal of costs and consequences or misguided assumptions, unrealistic expectations, and severe gaps between intention and reality, as has been the experience in many African countries.¹⁵² In Kenya, as this study has elaborated, the justice system structure for upholding the best interest of the child, within the criminal justice system exists. However, the challenges and limitation experienced by the parties, is because of the gaps, between experience and reality.

The effectiveness of a piece of legislation is hugely determined by its purpose and results. An effective legislation should have well-thought-out rules, a clear purpose and enforcement mechanisms that realistically address the problems being targeted. In addition, introduce precise,

¹⁵¹ Interview (n 124, 126, 136 & 144).

¹⁵² Jan Wouters (n 21) 258.

clear, unambiguous rules and obligations; that allow for systematic monitoring and evaluation of the results of the legislation in practical sense.¹⁵³

This should be the test done constantly, to the laws and systems created thereon, to facilitate improvements and efficiency. Moreover, apart from the reporting as prescribed by the CRC, there is need for a local vibrant checking mechanism. This can be achieved by having a clear collaboration policy, between the relevant bodies and parties involved with children in general. It is debatable, which institution or body should have this as a primary responsibility.

Lastly, it is accepted that the principles of non-discrimination and equality have a direct operational implications, for development policy and programming, revealing the strongest elements of convergence between development and human rights.¹⁵⁴ This is because they relate to the concepts of social exclusion and deprivation, whereby children are denied basic entitlements due the entire population, but enjoyed only by the rest of the population, this amounts to discrimination.

These principles require a focus on the development processes, and an evaluation of how an initiative of development is implemented; who it includes and excludes. How it takes cognizance of voice, representation, and dissent; and, ultimately, who benefits from it.¹⁵⁵ The widespread reflection, of a child's best interest as applied within the criminal justice system in Kenya, shows a possibility of identifying the gaps, within the system. Further, it guides other development parties, to contribute to realization of human rights, through their respective actions and policies.

¹⁵³ *ibid* 259.

¹⁵⁴ *ibid* 45.

¹⁵⁵ *ibid*.

This study's recommendation, will pave way for the above to be realized, and best interest principle applied effectively.

4.1 Recommendation

It is this study's recommendation that, though the criminal justice system in Kenya, has made tremendous attempts, to effectively apply the best interest principle, there still is more to be done. Firstly, the child's developmental needs including but not limited, to access to education and counseling need to be looked into, especially when the trial is in process, awaiting final determination of the case. The recent remarks attributed to a government official, clearly illustrate the challenge ahead, and how the labeling may have an adverse effect.¹⁵⁶

As discussed earlier, the basic presumption of the labeling theory, assumes a society reaction in the form of labeling, leads to the child finding a way to fit, into the created impression by society. This necessitates a change in the child's initial view of themselves. The funds provided, for the child's welfare, need to prioritize the issue of societal reaction to child offenders, and have in place mechanisms to achieve intended target, through effective counseling and follow ups.

The Constitution at Article 43 (1) (f), guarantees all persons the right to education, wherein a child offender, is separated from the parents, his/her education is affected. The law does exist, however the same has to be applied, practically for a child and society as a whole to benefit. Secondly, there should be an increase in counseling centers, and the facilitation processes

¹⁵⁶ See Matiang'i announce strict measures to curb arson in schools June 27, 2016 12:37 pm as reported by Simon Ndonga Capital News.

involving the police, speeded up to avoid delays, in prosecution of matters. This is because, a delay may be occasioned where the court orders counseling or for the police to do a specific role, and they delay or fail to act. The speed in action ensures where the child is separated, from the parents, the conditions they find themselves in are appropriate. It is through this counseling sessions, and facilitation process that the reports are prepared, and can be used to prevent recurrence, of other offences. It is currently unclear, whether and how the counseling reports, are used to aid the criminal justice system. The probation report presented to court, in this study's opinion is different from a counseling report.

Thirdly, there are very many bodies, dealing with children matters in Kenya, including but not limited to NGOs, Churches, and governmental institutions. These institutions, lack an umbrella body that checks or ensures, there is proper and effective co-ordination, to safeguard the best interest principle.¹⁵⁷ The challenge comes because of the overlapping of roles, played by each of them, since they perform similar roles, in as much as they may seem, to act independently.

For example the case of a boy named Mathew Kay, who was an offender that was committed to a Borstal Institution. He went to school, did class 8 and got sponsored by equity; on the Wings to fly sponsorship, later he ran away from school and indulged in more criminal activities in a different locality. As it would follow, he was arrested and taken into a new institution. He did his KCPE examinations once more, passed with 411 marks out of 500. He got recommendation and needed support/sponsorship to continue with his education.*¹⁵⁸

As a children's officer, called upon to give a history of the minor; which history should be given? The child offender may have gone through either of the many bodies, tracking the history

¹⁵⁷ Interview (n 136 & 144).

¹⁵⁸ *ibid.*

may prove difficult. In applying the best interest ideals, which history serves the best interest of the child?

Lastly, this study recommends further research. This is in appreciation of changing dynamics, of any justice system, and children best interest perspectives. This study was hampered by lack of sufficient time, to carry out extensive field research on some of the issues highlighted. It is recommended that this be carried out, on the issues of the counseling reports and different attitudes, on the implementation of the Act. It would be important, to speak with specific counselors, to identify what needs to be done, to facilitate change in attitude, and facilitate proper enforcement of the Act.

Further, getting the opinion of most of the bodies, handling children matters; may bring out another perspective, helpful for this subject. The criminal justice system in Kenya for children can be better served, by having public interest litigation on the subject. This is because, the Constitution of Kenya 2010 encourages the same, therefore with time, perspectives on certain issues of best interest principle, will be interpreted in other manners by the court and bodies that deal with child offenders.

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APPENDIXES

Appendix One

Research Permit



NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

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Ref. No. **NACOSTI/P/16/80761/9183**

Date:

15th April, 2016

Nick Otieno Osoro
University of Nairobi
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NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on **“*Juvenile justice systems in Kenya; A balancing of competing interests?*”**, I am pleased to inform you that you have been authorized to undertake research in **all Counties** for the period ending **14th April, 2017**.

You are advised to report to **Court Registrars of selected Courts, Chief Executive Officers of selected Government Agencies, the County Commissioners and the County Directors of Education, all Counties** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.


DR. STEPHEN K. KIBIRU, PhD.
FOR: DIRECTOR-GENERAL/CEO

Copy to:

Court Registrars
Selected Courts.

The Chief Executive Officers
Selected Government Agencies.

Appendix Two

Questionnaire

The questions that were put to the participants were as below; most of them led to other questions that enabled all relevant information was obtained;

- How long have you worked here? (To ascertain their level of experience on the matter and add weight to their answers)
- Do you understand the term best interest of a child and criminal justice system and how they relate during the trial process?
- In your opinion does the criminal justice system in Kenya with regard to child offenders work efficiently? (This to elicit an open ended response)
- In your opinion whose interest is considered to determine what is best for the child? (To invite response on how the best interest principle is seen and applied as a yardstick considering other interest.
- What are some of the challenges faced to abide by the requirements of the best interest principle?
- Who approached you to offer legal services and defend the minors?
- The process from your service as a prosecutor and defense counsel how to you measure or ascertain whether the best interest of a child is applied.
- What is the role of the parties involved during the trial process and how is this achieved?
- What reforms would you recommend to the criminal justice system in relation to child offenders?
- Any further comment on the subject discussed can be made at this stage.