AN ANALYSIS OF THE LEGAL FRAMEWORK GUIDING THE RIGHTS OF JUVENILE DELINQUENTS IN KENYA

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT FOR THE AWARD OF BACHELOR OF LAWS DEGREE. (LLB)

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DECLARATION.

I, KOSGEI CAROLINE CHEPKORIR, 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.

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Table of Contents

[CHAPTER ONE 5](#_Toc37564686)

[INTRODUCTION 5](#_Toc37564687)

[STATEMENT OF THE PROBLEM 8](#_Toc37564688)

[RESEARCH QUESTION 9](#_Toc37564689)

[STATEMENT OF OBJECTIVES 9](#_Toc37564690)

[JUSTIFICATION OF THE STUDY 10](#_Toc37564691)

[HYPOTHESIS 10](#_Toc37564692)

[THEORETICAL FRAMEWORK 10](#_Toc37564693)

[LITERATURE REVIEW 11](#_Toc37564694)

[RESEARCH METHODOLOGY 16](#_Toc37564695)

[LIMITATION 17](#_Toc37564696)

[CHAPTER BREAKDOWN 17](#_Toc37564697)

[CHAPTER TWO 18](#_Toc37564698)

[The Children Act 18](#_Toc37564699)

[The Penal Code 22](#_Toc37564700)

[The Constitution of Kenya 23](#_Toc37564701)

[Conclusion 24](#_Toc37564702)

[CHAPTER THREE 24](#_Toc37564703)

[Shortcomings 24](#_Toc37564704)

[Conclusion 25](#_Toc37564705)

[CHAPTER FOUR 26](#_Toc37564706)

[Introduction 26](#_Toc37564707)

[Provisions of the Child Justice Act 26](#_Toc37564708)

[The Best Interests of the Child 26](#_Toc37564709)

[Primacy of Alternative Measures to Judicial Proceedings 27](#_Toc37564710)

[Conclusion 31](#_Toc37564711)

[CHAPTER FIVE 32](#_Toc37564712)

[Recommendations 32](#_Toc37564713)

[Conclusion 33](#_Toc37564714)

[BIBLIOGRAPHY 34](#_Toc37564715)

**INTERNATIONAL INSTRUMENTS**

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

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

The UN standard minimum rules for non-custodial measures (Tokyo rules)

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

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

**DOMESTIC LEGISLATIONS**

Borstal Institution Act CAP 92 Laws of Kenya

Children’s Act CAP 141 Laws of Kenya

Constitution of Kenya 2010

Evidence Act CAP 80 Laws of Kenya

The Criminal Procedure Code CAP 75 laws of Kenya

The Penal Code CAP 63 laws of Kenya

The Police Act CAP 84 laws of Kenya

The Probation of Offenders Act CAP 64 laws of Kenya

**SOUTH AFRICAN** **LEGISLATIONS**

The Child Justice Act No. 75 of 2008

**AUTHORITIES**

Dennis Motanya Mokua & another v Republic [2014] eKLR

Kazungu Kasiwa Mkunzo & another v Republic [2006] eKLR

Re Gault

Republic v Dorine Aoko Mbogo & another [2010] eKLR

Republic v Nzaro Chai Karisa & others [2011] eKLR

# CHAPTER ONE

## INTRODUCTION

Black’s law dictionary defines juvenile delinquency as an antisocial behavior by a minor; especially behavior that would be criminally punishable if the actor were an adult, but instead is usually punished by special laws pertaining only to minors.

Statistics show that almost a half of the population of Kenya is made up of individuals below the age of 18 years. Statistics also show that almost 45% of the population lives below the poverty line, this coupled with other challenges puts children in need of care and protection in a precarious position.[[1]](#footnote-1) Therefore children who receive inadequate care and protection from their guardians tend to engage in criminal activities in quest for survival. However, the society fails to acknowledge that it is in most cases the law that is in conflict with their survival instincts.[[2]](#footnote-2) In the end results these vulnerable children who are in need of care and protection come into conflict with the law and as a result they get caught up in the adult criminal justice system. They are arrested and detained, tried through the formal and rigid judicial system, sent to correctional institutions including prison. The process of arrest, trial and custody juvenile delinquents in most occasions destroys their childhood as they are denied certain essential rights and needs.[[3]](#footnote-3)

This position has been held by the African Charter on the Rights and Welfare of the Child (ACRWC) which states that a child occupies a unique and privileged position in the African Society and that for a full and harmonious development in his personality; the child should grow up in a family environment of happiness, love and understanding.[[4]](#footnote-4) According to research, children who come into conflict with the law to a large extent are a reflection on the failure of the society to provide adequate care and protection to these children.[[5]](#footnote-5) Therefore, protecting the rights of children who come in contact with the law either as children in conflict with the law or children in need of care and protection becomes a primary concern.

There are international instruments which provide for universally agreed rights for children such as; the United Nations Convention on the Rights of the Child (CRC) which has been ratified by majority of the nations. The regional instrument that provide for rights of a child is the African Charter on the Rights and Welfare of the Child (ACRWC) the charter upholds the letter and spirit of CRC however it attempts to address the unique circumstances facing the African child.[[6]](#footnote-6) The rights of the child under these instruments can be classified into protection, participation and developmental rights. However, the rights of juvenile delinquents cut across the board.[[7]](#footnote-7) There are set international standards for child justice, they include: the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs Rules), United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).[[8]](#footnote-8) Even though these guidelines and rules are non-binding, they possess a strongly persuasive quality akin to law when read together with other related instruments. Moreover these rules and guidelines have been incorporated in the CRC.[[9]](#footnote-9) There are four main principles that permeate these international instruments, these principles are; non-discrimination, best interest of the child, participation of the child and the right to life, survival and development.[[10]](#footnote-10)

These international instruments have been domesticated in Kenya vide article 2(5) & (6) of the constitution of Kenya in order to promote children rights. The Children Act of 2001 is the main legal framework providing for the rights of children in Kenya. The Constitution of Kenya 2010 in article 53 strengthens the commitment to upholding the interests of the child. A child’s best interest being paramount in every matter that concerns the child is the underlying theme in the Constitution, the Children Act, international and regional instruments.[[11]](#footnote-11) The Best Interest of the Child principle is the main principle that governs the justice system in regard to matters that affect children nationally and globally. Even though there is no standard definition of best interests of the child, the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child with the child’s ultimate safety and well-being the paramount concern. Hence the rules concerning the Best Interest of the Child are regarded by the goal of maximizing the child’s developmental outcomes, with the assumption being that a child whose best interests are protected stands a better chance to become a socially well-adjusted, productive and prosperous citizen.[[12]](#footnote-12)

Articles 37 and 40 of the CRC are the ones that deal specifically with the administration of juvenile justice. The provisions in the Constitution 2010 and in the Children Act domesticate most of the provisions as set out by Articles 37 and 40 of the CRC and Article 17 of the ACRWC.

The Children Act, however, fails to comply with the CRC and the ACRWC in the following ways:[[13]](#footnote-13)

1. The Children Act does not provide for concepts such as minimum age of criminal responsibility, diversion, restorative justice system, and crime prevention mechanisms.
2. There are no procedural rules put in place to ensure enjoyment of the various guarantees in the Act like legal aid, privacy, and expeditious trial among others.
3. There are insufficient institutional safeguards like separate child friendly facilities like the courts, remand and rehabilitation homes and trained personnel which hinder enjoyment of these guarantees.

All these factors have violated or, at the very least, threatened the rights of children who are in conflict with the law. The result is a miscarriage of justice since the rights of children embodied in both international and regional legal instruments, as being the bare minimum requirements, are not reflected in Kenya’s domestic legal regime.[[14]](#footnote-14) This deviates from best practices as such child offenders are too young to appreciate the impact of their choices or follow in the court process during their trial. Such failure to comply with international legal instruments on access to justice for children defeats the essence of the law and puts Kenya at a precarious situation where it is unable to protect the rights of its children, despite agreeing to be bound by the obligations arising from international law.[[15]](#footnote-15)

It is evident that Kenya has adopted and legislated best practices in respect to children rights in the civil, political, social, economic, cultural and justice spheres. However the issue in contention is whether the adoption of these international instruments is holistic in all the aspects of children rights or whether it is skewed by putting more emphasis on certain children rights and ignoring others.[[16]](#footnote-16) This research seeks to address the extent to which Kenya’s legal framework protects the rights of juvenile delinquents.

## STATEMENT OF THE PROBLEM

The legal framework in Kenya does not adequately protect the rights of children in conflict with the law.[[17]](#footnote-17) Despite the children rights advancement, reform on legislation touching on child offenders is the most marginalized, disregarded and unwanted issue. This is because children rights are advanced on child protection, child education and health care but minimally on children in conflict with the law as they are viewed in the narrow perception as law breakers and a threat to the public.[[18]](#footnote-18) In consequence legislative regimes on child offenders have been described as the unwanted child of state responsibilities. The United Nations Committee on the Rights of the Child report of 2007 observed that, many state parties have a long way to go in achieving full compliance with the Convention on the Rights of the Child, for example in areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.[[19]](#footnote-19)

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

## RESEARCH QUESTION

This research seeks to answer the following questions:

1. What are the existing legal frameworks that protect the rights of children in conflict with the law in Kenya?
2. What gaps exist in the legal framework in protecting the rights of children in conflict with the law?
3. How has South Africa dealt with the issue of rights of children in conflict with the law?
4. What are the recommendations that can be drawn from South Africa’s approach?

## STATEMENT OF OBJECTIVES

The following are the aims my study seeks;

1. To examine the adequacy of the legal framework in protecting the rights of children in conflict with the law.
2. To identify gaps in the legal framework in protecting the rights of children in conflict with the law.
3. Comparative analysis with South Africa on the approach they have taken in protecting the rights of children in conflict with the law.
4. To make recommendations on measures to enhance the protection of the rights of children in conflict with the law.

## JUSTIFICATION OF THE STUDY

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

The findings of the research will be important in the formulation of legislation and policy reform on the rights of children in conflict with the law. Program development that enhances effectiveness and efficiency in the implementation of the legal framework on the rights of children in conflict with the law will also benefit on the findings of this study.

## HYPOTHESIS

The study is based in the following hypothesis

1. The inadequacy of the legal framework has led to the violation of the rights of children.
2. Such inadequacies can be addressed by formulating a comprehensive legal, procedural and institutional framework after a thorough comparative analysis.

## THEORETICAL FRAMEWORK

1. **Sociological School of Thought**

This is the use of social sciences to study the role of law as a living force in the society and seeks to control this force for the betterment of the society.[[20]](#footnote-20) Essentially, law takes up a functional approach. Law is viewed as an instrument of social control backed by the authority of the State, and the ends towards which it is directed and the methods for achieving these ends may be enlarged and improved through a consciously deliberate effort. Law in effect is a tool to serve society. The sanctions of law lies in social ends which law is intended to serve as law is examined in connection with some specific problem of the everyday work of the legal order.[[21]](#footnote-21) Roscoe Pound, the main proponent of sociological jurisprudence formulated practical objectives in this regard. The objective of ascertaining the means by which legal rules can be made more effective in the existing conditions of life is apt in the analysis on how the legal regime on children in conflict with the law complements the present narrative on children matters whose underlying theme is a child rights approach.[[22]](#footnote-22)

Roscoe Pound further propounds that the working of law should be considered rather than its abstract content. He argues that law should be regarded as a social institution which may be improved by human effort and endeavor to discover and effect such improvement.[[23]](#footnote-23) Emphasis should be on social ends of law as opposed to sanctions and that emphasize should be on use of legal precepts as guides to socially desirable results rather than inflexible molds.[[24]](#footnote-24)

As law is viewed as a means to further the ends of society, the conscious improvement of law as a means to address societal problems should take into account the type of law which is desirable to particular issues and most importantly which the society will willingly embrace.[[25]](#footnote-25) In this regard, the sociological school of thought will be employed in analyzing the legal framework on children in conflict with the law; on whether the law is adequate in protecting the rights of child offenders in Kenya.

## LITERATURE REVIEW

A critical analysis has been given by Janet E. Ainsworth in her journal article on the courts effectiveness in protecting the rights of children in conflict with the law. The correlation between the evolution of the juvenile justice system and its impact on the effectiveness in protecting the rights of children in conflict with the law is pointed out. Ainsworth traces the juvenile justice system to the doctrine of *parens patriae* where parental authority is subjected to government authority by the state intervening to secure the welfare of children who lacked proper parental care and thus engage in criminal activities.[[26]](#footnote-26) In *parens patriae* emphasis was laid on the courts determination of moral and social condition of the offender and how best to reform his behavior rather than the hearing focusing on whether the child has violated the law.[[27]](#footnote-27) Thus significant discretion and latitude was given to the judges in adjudicatory practices and sentencing making the system prone to abuse. Ainsworth notes that the ***Re Gault*** decision of Supreme Court in 1967 imposed procedural requirements on juvenile court adjudication

David J. Smith articulates the many facets that contribute to the effectiveness of the juvenile justice system. He opines that the juvenile justice system exists at a point of collision between competing principles; mature adults are treated as moral beings that make choices and are held responsible for the consequences of their actions, whereas children are regarded as a force of nature and not as independent moral agents.[[28]](#footnote-28) Despite the progressive reforms made in respect to child participation, parents and guardians make choices for children where they explain and justify their choices as being in the best interest of the child.[[29]](#footnote-29) The children are restrained, trained, supervised and prepared to assume the status of independent moral agents when they reach maturity. The article acknowledges that juvenile justice is the site of conflict between these two principles. There is uncertainty on whether to treat children in conflict with the law as children requiring help and guidance or as morally responsible agents who deserve to be punished. Smith adds that each juvenile justice system represents a specific accommodation to this tension and as the system is an attempt to reconcile opposing principles, the question as to how effective the juvenile justice system is, is bound to be contested.[[30]](#footnote-30)

The article enumerates various interpretations of what an effective juvenile justice system entails: an effective juvenile justice system could be when the primary goal is meeting the needs of children in conflict with the law in contrast to punitive responses to youth crimes geared towards behavioural change; it could mean providing a legally and morally appropriate response to criminal behaviour by children in conflict with the law whose main objective is delivering a justice response to the offence committed regardless of any change in the behaviour of the children in conflict with the law who have been sanctioned; additionally, an effective juvenile justice system entails keeping troublesome young people out of trouble by closely controlling and supervising them while they remain with their own families by use of measures such as being under supervision, electronic tagging; an effective juvenile justice system could mean satisfying the victims of the crimes committed through among others, mediation, restoration or apology the restorative justice approach provides for benefits to the victims as well as influencing the behaviour of children in conflict with the law; an effective juvenile justice system entails communicating to the general public through appropriate symbolic gestures that the juvenile justice system in place is capable of delivering the right message in response to crimes committed by children; an effective juvenile justice system deters majority of children from getting involved in crime the influence of the system is stressed to the young people in that they should not be allowed to think that they can get away with anything; lastly, an effective juvenile justice system could mean changing the way children in conflict with the law will behave when they are not under direct control or supervision by use of various approaches including addressing the root cause of the deviant behaviour, by addressing needs that increase the risk of offending and negating them though provision of vocational training, social skill teachings and by meting out punishment to deter the individual child offender from offending in future.[[31]](#footnote-31)

Julia Nielsen and Benyam D. Mazmur’s article focuses on identifying research themes and topics of special relevance to the furtherance of children rights in the African context aimed at sharpening and strengthening Africa’s capacity to promote good practice and promising solutions.[[32]](#footnote-32) It is acknowledged that under the CRC child rights are regarded as part and parcel of international human rights. The article asserts that children cannot be merely regarded as only subject to their own national laws. Due to their vulnerability and in their need for care, protection and justice, children have a place on the international platform.[[33]](#footnote-33) The African context in regard to child rights is captured by the ACRWC. The ACRWC upholds all the universal standards outlined in the CRC whilst outlining the unique and specific issues that African children confront. It is argued that although the concept of children's rights is widely accepted, it has not fully obtained primary societal value informing social policy in the African countries.[[34]](#footnote-34)

However, it is noted that the field of juvenile justice is a priority area internationally. The article recommends further research and capacity building seeking to expand the pan Africa’s collaborative best practice approach to children in conflict with the law.[[35]](#footnote-35) The article asserts that the African perception of human rights manifests itself by acknowledging that children are valuable in society and thus require special protection due to their special, precarious and fragile state. This research seeks to analyze the Kenyan legal framework in protecting the rights of child offenders.

Don John O. Omale makes a case on rebuilding African restorative traditions and examines its influence and contribution in the emergence of restorative justice as a global paradigm.[[36]](#footnote-36) The article asserts that traditional and cultural restorative practices which were timid and weak in asserting their dominance to imported retributive cultures were wiped out. Omale further makes a review of restorative justice in order to understand factors that contributed to the abandonment of restorative justice to criminal justice model and the subsequent emergence of interest in restorative justice in the current social context globally.[[37]](#footnote-37) Restorative justice is defined as a problem-solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies.[[38]](#footnote-38) This definition recognizes the supervisory role of statutory criminal justice and government agencies. This is contrasted with a definition which does not recognise the supervisory role of statutory criminal justice and government agencies which states that restorative justice is a process whereby victims, offenders, and communities are collectively involved in resolving how to deal with the aftermath of an offence and its implications for the future.[[39]](#footnote-39)

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

A restorative justice conception has its roots in both western and nonwestern traditions. The article deconstructs the assertions that relegate African law to a form of custom and primitive practices which predate law though the article notes, it would take a great deal of convincing to change the held opinion of anything good coming out of Africa.[[40]](#footnote-40) It is argued that restorative justice is part and parcel of the African tradition and a word which exemplifies this is ubuntu; organic wholeness of personhood or the natural connectedness of the humanity of persons.[[41]](#footnote-41) In pre-colonial Africa, the people resolved their disputes using traditional justice forums but the colonialist regarded the forums as obstacles to development.[[42]](#footnote-42) Omale in the article supports the averments of Christiaan Keulder who states that those who have criticised the African traditional justice system as being too traditional to promote development are often too simplistic in their arguments.[[43]](#footnote-43) It is asserted that the argument that development only occurs within a ‘modern’ framework is misguided. This view is based on simplistic and very static view of tradition because the fact that tradition is often invented and thus very modern in context is ignored. The critics of African traditions, the article notes, thought that as Africa develops and modernizes the African traditional justice model would eventually die out.[[44]](#footnote-44)

The converse is true as the African traditional justice model is receiving international recognition and attention in the form of restorative justice paradigm. Parallels are drawn in that regard as the two justice models aim is to restore social harmony and reconcile the parties and justice is about restitution as the penalty usually focuses compensation rather than punishment. Imprisonment is labelled a foreign concept as in African tradition it never existed as a penalty for any offence. The author therefore argues that in respect to the restorative justice paradigm, both the West and Africans have to reciprocally learn from each other. The article examines the criminal justice model and the restorative justice model highlighting their evolvement and the present global shift in embracing the restorative justice model.[[45]](#footnote-45) This study examines the Kenyan legal framework on child offender rights which is anchored on the criminal justice model. The question then becomes, are the rights of child offenders adequately protected in criminal justice model? Is the restorative justice model more amenable in protecting the rights of the child offenders? This study seeks to examine the Kenyan legal framework in protecting the rights of child offenders basing it on international instruments and their underlying principles which propounds the restorative justice model. This will be contrasted with the South African Child Justice Act which encapsulates the Ubuntu principle and the restorative justice model.

Reichel, P.L in his book Comparative Criminal Justice Systems, he discusses the international perspective on juvenile justice. This book also discusses the problems facing administration of juvenile justice all over the word. The first problem that it points out is the variance indetermination of juvenile offenders in different legal systems and how the Beijing rules have created ambiguity in the provision that they provide under Rule 4.1.[[46]](#footnote-46) This book will be of importance in this thesis as it discusses the minimum standards of administration of juvenile justice in the world.

A survey by Cradle entitled Street children and the juvenile justice in Kenya was conducted to find out the problems faced by street children who are either found in the wrong side of the law or they are arrested and accused falsely due to their social and economic status in the society. This research paper will be of assistance in my research as it provides statistics of how street children are treated in administration of justice in Kenya.

In his research Kinyanjui discusses the juvenile justice system in Kenya since independence and the various achievements and criticism of the juvenile justice system in Kenya in ensuring the full realization of the right to access to justice.[[47]](#footnote-47)

## RESEARCH METHODOLOGY

This study places emphasis on an analysis of the relevant available literature on the subject. In this regard, the study relies on secondary sources including international law instruments, the Kenyan constitution, various child care and juvenile justice legislation, report of Kenya law reform commission, case law, resolutions, declarations, general comments and the CRC and ACRWC concluding observations.

The study also places considerable reliance on background papers, books and academic articles. Various internet sites have been consulted for relevant data and information.

## LIMITATION

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

## CHAPTER BREAKDOWN

This research will be divided into five chapters;

The first chapter will address the Statement of the problem, research question and the statement of objectives, the justification of the study and the hypothesis. The theory supporting the research is also discussed in this chapter together with the research methodology and Limitations of the study.

Chapter two delves in the specific legislation in respect to child offenders in Kenya. The legal framework discussed include: the Constitution, the Penal Code, the Sexual Offences Act and the Children Act.

Chapter three delves into the inadequacies of the Kenyan legal framework on the protection of children offenders and carefully analysing the impact of these shortfalls on the child in conflict with the law.

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

Chapter five gives a recommendations Kenya needs to make to its legal framework in order to comply with internationally accepted standards on protection of the rights of children in conflict with the law offenders.

# CHAPTER TWO

**AN ANALYSIS EXISTING LEGAL FRAMEWORKS THAT PROTECT THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW IN KENYA**

This chapter seeks to analyze the applicable laws in Kenya that seek to protect the rights of juvenile delinquents. The laws that will be analysed in this chapter are; the Constitution of Kenya 2010, the Penal Code CAP 63 (2009) and the Children Act CAP 141 Laws of Kenya.

## The Children Act

The Children Act is the most comprehensive legal framework on children rights providing a catalogue of rights on welfare of the child, parental responsibility, custody and maintenance, guardianship, children in need of care and protection and children in conflict with the law.

The provisions of the Children Act on children in conflict with the law are the most comprehensive law having incorporated the tenets of the CRC and the ACRWC. Section 4 of the Act states that: in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[[48]](#footnote-48) There are various provisions in the children act that attempt to achieve juvenile justice:

**Establishment of specialized courts for children offenders**

Part VI section 73 of the Children Act provide for separate courts to handle children matters and the general principles as enunciated in international instruments to be observed in their proceedings however, with an exemption of a charge of murder or a charge in which the child is charged together with person above the age of eighteen years. Section 74 of the Act states that a Children’s Court shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children’s Courts are held.[[49]](#footnote-49) Additionally, the Children’s Court shall have a setting friendly to the child offender as provided by Section 188 of the Act. In the absence of a specific Children’s Court, Section 185 (5) of the Children Act provides that a court shall comply with the provisions of the Act in respect to safeguards to be accorded a child offender.[[50]](#footnote-50)

Proceedings in offences committed by a child are governed by section 194(1) of the Children Act which provides that such proceedings shall be conducted in accordance with rules set out in the Fifth Schedule. Even though there exists a special procedure for these proceedings, the system remains adversarial in nature. According to research the mere fact that the proceeding is adversarial in nature, this tends to have a negative impact against the child offender. The juvenile offender may fail participate due to intimidation, fear or inadequate knowledge and this can lead to an injustice being committed upon the child offender. Study has confirmed that the adversarial system in most cases is detrimental to child offenders.

**Arrest Procedure**

Internationalinstruments provide the ideal framework to be followed when arresting a child offender to include: dignity, best interest of the child, primacy of alternative measures to judicial proceedings and detention as a measure of last resort. The children act under the Fifth Schedule lays down the rules to be observed in respect to court proceedings of a child offender.[[51]](#footnote-51) Rule 4 (1) of the Child Offenders Rules of the Children Act state that; where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the court as soon as possible and that no child shall be held in custody for a period exceeding twenty four hours from the time of his apprehension, without the leave of court.[[52]](#footnote-52)

When a child offender is apprehended and cannot be brought forth before a court, he may be released by a police officer upon his inquiry into the case on recognition being entered into by his parent or guardian or other responsible person with or without sureties. The Children Act does not make any provision for alternative measures of diverting children in conflict with the law from judicial procedure and processes. The Child Offender Rules prohibits a juvenile offender from being detained in a police station, or be detained with an adult who is not related to the child offender.[[53]](#footnote-53) A child offender should be detained in a separate institution or a separate part of a police cell.

**The Trial Process**

The special Children’s court tries a child of any offence except for the offence of murder or an offence with which the child is charged together with a person(s) above the age of eighteen years.[[54]](#footnote-54) Safeguards have been guaranteed to a child offender during the trial, these safeguards include; right to be informed promptly about the charges against him/her, provision of legal assistance by the state, expeditious trial, not to be compelled to give testimony that implicate him/her or to confess guilt, right to an appeal, right to privacy.[[55]](#footnote-55)

The Court may release a child brought before it on terms it deems appropriate. If the child offender is not released on bail he/she is supposed to be remanded in custody and the remand period shall not exceed six months in case of an offence punishable by death or three months in case of any other offence.[[56]](#footnote-56) This position was held in the case of ***Republic v Dorine Aoko Mbogo & another [2010] eKLR*** where the court held that under the Child Offender Rules the maximum period of remand for a child is six months after which a child be granted bail as a matter of right, except where there are compelling reasons for denial of bail under Article 49 (1) (h) of the Constitution.[[57]](#footnote-57) The Court is mandated to observe the best interests of the child offender at all times and the court is supposed to take steps for removing him from undesirable surroundings and for securing proper provision be made for his/her maintenance, education and training. A child offender in remand or custodial care has a right to medical care. The duration of the case has been set out in the Fifth Schedule of the Child Offender Rules. All cases are to be handled expeditiously and without unnecessary delay, and where a case is not completed within three months after the child offender takes a plea, the case shall be dismissed and the child shall not be liable to any further proceedings of the same offence.[[58]](#footnote-58) Where a court superior to The Children’s Court is handling the case, a child offender is to be held in remand for a maximum of six months after which the child shall be released on bail and if the case is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child discharged and shall not be liable to further proceedings for the same offence.[[59]](#footnote-59)

However, of Rule 10(4) Child Offender Rules is not absolute. This issue was addressed in the case of ***Republic v Nzaro Chai Karisa & 3 others [2011] eKLR*** where it was stated that Article 49(1)(h) of the Constitution provides that every accused person is entitled to bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to released, therefore where for compelling reasons a child has been remanded in custody, a juvenile cannot demand automatic release after the end of either three months or six months as provided by Rule 10(4) of the Child Offender Rules where those reasons persist. The Court further stated there will be instances where the provisions of Rule 10(4) must give way to the provisions of Article 49(1)(h) of The Constitution.[[60]](#footnote-60)

Even though the law protects the child from being detained for a long duration, the implementation of these laws is always a problem. Child offenders are presumed innocent and should be treated as such and have a right to legal counsel however, most of these juvenile offenders are not provided with legal representation when they go for trial. Research has also revealed that majority of the juvenile offenders are not informed of the court process and procedures to enable them fully understand their rights and responsibilities.[[61]](#footnote-61)

**Sentencing**

When the specialized children’s Court finds a child guilty of an offence, it is mandated to deliver the verdict without the use of the words conviction or sentencing rather the term a finding of guilt or an order upon such finding may be used. Section 191(1) of the Children Act provides for methods of dealing with child offenders upon the court’s satisfaction of his guilt:[[62]](#footnote-62)

1. By discharging the offender under Section 35(1) of the Penal Code (Cap 63);
2. by discharging the offender on his entering into a recognizance, with or without sureties;
3. by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap 64);
4. by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;
5. if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
6. by ordering the offender to pay a fine, compensation or costs, or any or all of them;
7. in case the child has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
8. by placing the offender under the care of a qualified counsellor;
9. by ordering him to be placed in an educational institution or a vocational training programme;
10. by ordering him to be placed in a probation hostel under the provisions of the Probation of Offenders Act (Cap 64);
11. by making a community service order; or
12. in any other lawful manner.

The Children Act further provides for committing child offenders to custody. A restriction on the punishment of child offenders is provided by the Children Act which prohibits imprisonment and the death sentence. A child offender is committed to a rehabilitation school if he is above the age of ten years and under the age of fifteen years whilst if the child has attained the age of sixteen years, he is committed to borstal institutions. And in addition, corporal punishment is prohibited.

In the case of ***Dennis Motanya Mokua & another v Republic [2014] eKLR***, the court held that, section 191(1) is not mandatory and the court has the discretion to deal with the child in any other lawful manner as section 191(1) (l) specifically provides. It follows that section 25 (2) of the Penal Code and section 191(1) of the Act are not mutually exclusive but rather complementary.[[63]](#footnote-63)

## The Penal Code

The Penal Code outlines the minimum age of criminal culpability.

**Age of Criminal Culpability**

In Kenya, a person under the age of eight years is not criminally responsible for any acts or omission while a person under the age of twelve years is not criminally responsible for acts or omissions, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.[[64]](#footnote-64) The CRC does not explicitly set the age of criminal responsibility; the obligation is left to State Parties to establish the minimum age of criminal responsibility. The ACRWC provides the same obligation to States. Rule 4 of the Beijing Rules recommends that any minimum age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.[[65]](#footnote-65) However, the Kenyan current age of criminal responsibility has been criticized as being too low. The Committee on the Rights of the Child upon observation of the Initial Report by Kenya under the CRC concluded in its concluding observations that the minimum age of eight years is too low.

Additionally, In General Comment No. 10, the CRC Committee recommends that States increase the existing low minimum age of criminal culpability to an internationally acceptable level.[[66]](#footnote-66) The Committee strongly encourages States to increase the minimum age of criminal responsibility to for instance fourteen or sixteen years of age.

## The Constitution of Kenya

Article 53 of the Constitution makes provision for the protection of the child by providing that every child has the right:[[67]](#footnote-67)

1. to a name and nationality from birth;
2. to free and compulsory basic education;
3. to basic nutrition, shelter and health care;
4. to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
5. to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
6. not to be detained, except as a measure of last resort, and when detained, to be held:
7. for the shortest appropriate period of time; and
8. separate from adults and in conditions that take account of the child’s sex and age.

The Constitution also provides for the overarching principle of the best interests of the child to be considered in all matters concerning the child. The Constitution provides that every accused person has a right to a fair trial, to have the trial begin and conclude without unreasonable delay.[[68]](#footnote-68) Right to legal representation is also guaranteed by the Constitution, Article 50(2)(h) provides that every accused person has a right: to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.[[69]](#footnote-69)

## Conclusion

Kenya has made great steps in the enactment of legislations to protect the rights of child offenders as provided for by international instruments. However, as analysed, the present legal framework does not fully protect the rights of children in conflict with the law.

# CHAPTER THREE

**SHORTCOMINGS OF THE KENYAN LEGAL FRAMEWORK IN PROTECTING RIGHTS OF CHILD OFFENDERS**

## Shortcomings

In the case of ***Kazungu Kasiwa Mkunzo & another v Republic [2006] eKLR***, the court held that the time limits stipulated in the Fifth Schedule of the Child Offender Rules were considered a violation of the Children Act itself and unconstitutional in respect to the then Constitution.[[70]](#footnote-70) It was argued that Section 186(c) of the Children Act does not set the time limits within which trials must be completed nor does it purport to define the period which would qualify as amounting to without delay.[[71]](#footnote-71) Section 31(b) of the Interpretation and General Provisions Act provides that: no subsidiary legislation shall be inconsistent with the provisions of an Act. Thus Rule 12 of the Fifth Schedule of the Child Offender cannot override Section 186(c) of the Children Act. It was further stated that Article 77(1) of the then constitution did not define what reasonable time entails.[[72]](#footnote-72)

There is lack of legal consistency in various legislations on provisions on corporal punishment. Though Section 191(2) of the Children Act prohibits corporal punishment, Section 55(1) of the Prisons Act authorises for corporal punishment: Where corporal punishment is awarded the number of strokes shall be limited to a maximum of ten strokes in the case of persons of or under the apparent age of sixteen years, and in all other cases to eighteen strokes, and shall be inflicted with such type of cane as may be prescribed. In addition, Section 36(3) of the Borstal Institutions Act provides that no sentence of corporal punishment shall be carried out until the lapse of a period of twenty four hours from the time of the order. Female inmates are however exempted from corporal punishment.[[73]](#footnote-73)

Though the provisions of alternative sentencing are progressive and in tandem international instruments, there has been criticism in that regard as Ann Skelton states: it was found that the Kenyan conceptualization of the criminal justice process for children is generally a benign one, putting more focus on rehabilitation and education instead of punishment.[[74]](#footnote-74) This is seen in the fact that even the current law does not use the terms conviction and sentence. Imprisonment is rarely used and children do not get criminal records. These features indicate a leaning towards welfarism in the criminal justice system for children. The danger in this is that in reality the system may be far less benign than it seems on paper. Children are not sent to prisons but alternatives to imprisonment may also be damaging.[[75]](#footnote-75)

Even though the Children Act provides for children friendly court, this has failed to be implemented in Kenya. In the whole country there are only three court stations that abide by this provision of having a separate court house for children offenders. Even though the children’s court in Nairobi have separate court rooms they are still situated within the main court building where adult offenders are tried hence lack of privacy. Where there are no specially designated rooms for a juvenile court, children offenders have to wait in the court corridors along with adult offenders. Allowing children and adults to share the same waiting area and courtroom and to mingle freely has the effect of violating the right of the juvenile delinquents to privacy. It exposes children to the adult criminal system from which they are supposed to be protected.

The children act stipulates that the state should provide for separate remand and rehabilitation homes for juvenile delinquents.[[76]](#footnote-76) However, the children department pointed out that there are inadequate facilities in the country therefore most of these juvenile delinquents are usually remanded in police stations or in adult remand home. The inadequacy of children rehabilitation centres and remands has the effect of incarcerating children in adult remand homes and the mixing of child offenders with children in need of care and protection. The government also acknowledged in its report to CROC that that in most remand homes there are no separate facilities for either gender and this violates the spirit and gains of CRC in protecting the rights of children offenders.

The convention on the rights of a child and the African charter demands in order to avoid harm to children offender by undue publicity, the privacy of juvenile delinquent must be fully respected at all stages of the trial. In an attempt to abide by the provisions of international instruments, the Children Act prohibits the publication of the information on the juvenile delinquents that may lead to their identification except with the written permission of the court. However, this provision is not only inadequate, it is also not strictly adhered to by the media.[[77]](#footnote-77) There have been many instances where the media use names, photos, and various descriptive terms that can easily lead to the identification of the juvenile. In the case of David Onyango and Felix Mambo the suspects in the arson attack in Kyanguli Secondary School the media published the names of the suspected juvenile delinquents which are contrary to guidelines of the various international instruments. The provision of the children act is only limited to court proceedings therefore exposing the child offender in the other stages of the criminal justice process.[[78]](#footnote-78)

## Conclusion

It can been deduced that the following areas fall short of the in the Kenyan legal framework in protecting the rights of child offenders: Lack of a separate legislation for child justice; lack of alternative measures to judicial proceedings; ambiguity and inconsistencies in various legal provisions; lack of separate and specialised infrastructure for children in conflict with the law; a low minimum age of criminal responsibility and in specific instances, discrimination and absence of proportionality on the part of the male child offender in defilement cases.[[79]](#footnote-79) In order to protect the rights of children offenders, it is important to make various amendments to the existing legal framework that attempt to protect juvenile delinquents to bring it in line with international standards.[[80]](#footnote-80)

# CHAPTER FOUR

**AN ANALYSIS OF THE LEGAL FRAMEWORKS THAT PROTECT THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW IN SOUTH AFRICA**

## Introduction

The South African Child Justice Act of 2008 establishes a criminal justice system for dealing with juvenile delinquents. The right based approach on dealing with juvenile delinquents is exemplified; advancing the values propagated by the South African Constitution and upholds its international treaty obligations in particular reference to international convention on the rights of the child and the African charter.[[81]](#footnote-81) The Child Justice Act is a detailed procedural framework capturing progressive and novel provisions of dealing with juvenile delinquents.[[82]](#footnote-82)

The detailed preamble of the Child Justice Act states the aim of the Act which include: provision of the minimum age of criminal capacity; outlines the sentencing options available for children who have been convicted and entrenches the notion of restorative justice in the criminal justice system in respect to children in conflict with the law; provision of a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; provision for the assessment of children; provision for holding a preliminary inquiry and incorporating as a central figure the prospects of diverting matter away from the formal criminal justice system; provision for child justice courts to conduct trials for children matters which have not been diverted.[[83]](#footnote-83) The objectives set out by the Child Justice Act include: promoting the spirit of Ubuntu in the child justice system; protecting the rights of children as provided in the South African Constitution; providing special treatment of children in the criminal justice system designed at breaking the cycle of crime and preventing children from being exposed to the adverse effects of the criminal justice system by provision of options more suitable to the needs of children.[[84]](#footnote-84)

## Provisions of the Child Justice Act

## The Best Interests of the Child

The preamble of the Justice Act appreciates the fact that the existing statutory law did not adequately approach the issue of juvenile delinquents in a comprehensive and integrated manner that takes into account their vulnerability and special needs. Therefore formulating a criminal justice system for juvenile delinquents underpins the uniqueness of children and the fact that they require different treatment from adults.

The act provides 10 years as the minimum age of criminal responsibility therefore raising the minimum age of criminal capacity from the previous seven years.[[85]](#footnote-85) Section 7(2) of the Act provides that a child who is 10 years or older but younger than 14 at the time of the alleged commission of the offence is presumed not to have criminal capacity unless it is subsequently proved beyond reasonable doubt that the child had such capacity at the time of the alleged commission of the offence. Children who are older than 14 years of age have full criminal capacity.[[86]](#footnote-86) There are factors to be considered when dealing with a child offender who is above 10 years but below 14 years: the impact of the alleged offence on any victim; the prospects of establishing criminal capacity and the appropriateness of diversion; education level, age and maturity of the child, cognitive ability, domestic and environmental circumstances; the nature and seriousness of the offence; probation officer’s assessment report; the interests of the community.[[87]](#footnote-87) This helps to prevent the automatic passing of the child through the trial process. Section 9 of the act Provides rules that deal with children below the age of 10 years. This is not to be construed that the child is criminally liable rather, it is acknowledging that children who get involved in crime are at risk and as such action should be taken. The interventions are civil law measures of education, welfare or non-punitive measures rather than criminal sanctions.[[88]](#footnote-88)

## Primacy of Alternative Measures to Judicial Proceedings

The aim of the Child Justice Act as stated in the preamble is to create an informal, inquisitorial, pre-trial procedure designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases.

**Presumption of Innocence**

Every accused person has the constitutional right to have a legal representative. Several requirements must be observed by a legal representative while representing a child offender: allow the child to give independent instructions concerning the case; ensure that all the proceedings under the Act in which the child is involved are concluded without delay and in a manner to ensure the best interests of the child are of paramount importance; explain the child’s rights and duties to any proceeding under the Act; to uphold the highest standard of ethical behaviour and professional conduct; promote diversion whilst not unduly influencing the child to acknowledge responsibility.[[89]](#footnote-89)

Where the child lacks legal representation when appearing before the Child Justice Court, the matter must be referred to the South African legal aid department for evaluation. No plea may be taken until a child has been afforded a reasonable opportunity to obtain a legal representative.[[90]](#footnote-90)

**Assessment**

The act provides for pre-trial assessment. This is against the issue of focusing on the child’s abilities and strengths rather than the aspects of the offence or the child’s family environment. Section 34 of the act states that; every child who is alleged to have committed an offence must be assessed by a probation officer unless the assessment is dispensed with.[[91]](#footnote-91)

The purpose of assessment to: gather any information of previous diversion, previous conviction or pending charge in respect to the child; to determine measures to be taken if dealing with a child below 10 years of age; determine whether the child is in need of care and protection and should be transferred to children’s court; establish the prospects of diversion; establish the probable age of the child; formulate recommendations regarding the release, placement or detention of the child. information acquired during assessment is confidential it is to be used for the purpose authorized by the act and for preliminary inquiry and is inadmissible as evidence during plea taking, bail application, trial or sentencing proceedings in which the juvenile delinquent is a party.[[92]](#footnote-92)

**Diversion**

The act by providing a regulatory framework for diversion makes it the first time diversion has been regulated in the criminal justice system. Diversion entails referral of matters away from the formal criminal court process.[[93]](#footnote-93) Diversion is achieved by way of prosecutorial diversion of minor offences committed, at the preliminary inquiry though an order by the inquiry magistrate or through an order of the court during the trial in the child justice court.

Section 51 of the act provides for the objectives of diversion which include: deal with a child outside the formal criminal justice system in appropriate cases; provide an opportunity to those affected by the harm to express their views on its impact on them; meet the particular needs of the individual child; encourage the child to be accountable for the harm caused by him or her; promote reconciliation between the child and the person or community affected by the harm caused by the child; encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm; prevent stigmatizing the child and prevent the adverse consequences flowing from being subject to the criminal justice system; promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.[[94]](#footnote-94)

There are two levels of diversion provided for by the act. The options are determined by the seriousness of the offence. Schedule 1 contains minor offences, schedule 2 consists of more serious offences and schedule 3 consists of the most serious offences.[[95]](#footnote-95) Level one applies to offences listed in schedule 1 while level two applies to all other offences as listed in schedule 2 and schedule 3 of the Act. Some of the diversion options available in level one include: restitution of a specific object to a specific victim or victims; referral to counseling or therapy; a formal caution with or without conditions; an oral or written apology to a specific person, persons or institution; a family time order; a good behavior order; community service and payment of compensation. The diversion options available in level two include: referral to intensive therapy to treat or manage problems that have been identified as a cause of the child coming into conflict with the law, which may include a period or periods of temporary residence; and placement under the supervision of a probation officer on conditions which may include restriction of the child's movement outside the magisterial district in which the child usually resides without the prior written approval of the probation officer; compulsory attendance at a specified center or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence.[[96]](#footnote-96)

The time frame for level one diversion option may not exceed 12 months for children under the age of 14 years and 24 months for children of 14 years and older.[[97]](#footnote-97) The time period applicable for level two diversions may not exceed 24 months for children aged 14 years or older and 48 months for children aged 14 years or older.

**Preliminary Inquiry**

This is an innovative procedure established by the act. It is incompliance with Article 40(3) of the CRC which provides that: States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law. This procedure is instrumental during the juvenile delinquent’s first appearance in court.[[98]](#footnote-98) Section 43 of the act provides for preliminary inquiry which is explained as an informal pre-trial procedure which may be held in court or any other suitable place. Preliminary Inquiry is to ensure an individualized response is used of every child offender to avoid the child getting ‘lost’ in the system.

Section 43 of the act states that the primary purpose of preliminary inquiry is to: establish from the prosecutor whether the matter can be diverted; consider the assessment report and the recommendations made by the probation officer; identify a suitable diversion option; ensure the views of all concerned are taken into account; encourage the participation of the child offender and his parents or appropriate guardian in making decisions concerning the child; determine the release or placement of the child; decide on the referral of a matter to children’s court in case of a matter of a child in need of care and protection.[[99]](#footnote-99) The act provides that a child offender must appear before a preliminary inquiry unless the child is below the age of 10 years, the child has already been diverted by the prosecutor or the prosecutor has withdrawn the charges against the child.[[100]](#footnote-100) The diversion options must be sensitive to the circumstances of the victim, must be appropriate to the age and maturity of the child, harmful to the child’s physical and mental health and may not interfere with the child’s schooling, may not be exploitative.[[101]](#footnote-101)

**Proportionality, Participation and Dignity**

The act provides the following guiding principles:[[102]](#footnote-102)

1. A child must not be treated more severely than an adult would have been treated in the same circumstances.
2. All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.
3. Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.
4. Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
5. Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.
6. A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.

## Conclusion

The best interest of the Child principle runs throughout the act. The minimum age of criminal culpability is 10 years. Appreciating the fact that child offenders below the age of 10 are at risk, provision of civil law measures of education, welfare and non-punitive measures are provided for by the Act. Novel provisions on pre-trial assessment, preliminary inquiry and diversion that advance alternative measures to judicial proceedings are provided.

# CHAPTER FIVE

**RECOMMENDATIONS AND CONCLUSION**

## Recommendations

From the foregoing, the following recommendations can be made in order to equip the Kenyan legal framework in protecting the rights of child offenders:

The Children Act provides for specialized children courts that have children friendly settings, and this has been achieved in Nairobi, Nakuru and Thika Courts. It is recommended that the special children courts be replicated in all children courts all over the country.

The Child Offender Rules under the Fifth Schedule Act provides for the duration a child offender may be remanded in custody and the duration of cases. It is recommended that the said provisions ought to be incorporated in the main legislation which is the Children Act.

The research pointed out the inconsistencies in the provisions of the Children Act, the Borstal Act and the Prison Act in respect to corporal punishment. Whilst the Children Act prohibits corporal punishment, the Prison Act and the Borstal Act allows corporal punishment. It is recommended that there should be uniformity in legislation that advances the rights of the child offender; therefore, amendments need to be made on the existing legislations that allow corporal punishment.

The Criminal Procedure Code is not tailored with needs of children offender in mind. The best interests of the child, non-discrimination, proportionality and participation principles are not provided for in the criminal justice system. It is recommended that the state should develop an inquisitorial system as that of South Africa. Further it is recommended that an alternative criminal justice system should be developed for children offenders.

The Children Act provides for alternative measures of diverting juvenile delinquents from the judicial process. It is recommended that diversion and other alternative restorative justice measures ought to be legislated as a measure of channeling child offenders away from the judicial process.

The Children Act provides for alternative sentencing of child offenders though as highlighted in the study sentencing preference is on institutional sentencing a code of conduct for highlighting ethical rules and child protection rules should be developed.

Section 14(1) of the Penal Code provides for the minimum age of criminal responsibility at eight years which is low viewed against the backdrop of international rules and standards. Therefore it is recommended that the minimum age of criminal responsibility be raised to internationally acceptable standards.

## Conclusion

Progress has been had in the recognition and advancement of children rights. In Socio-economic, cultural, religious, political and administration of justice spheres, child rights have been herald with the CRC crystallizing these rights. Kenya in this regard has ratified and domesticated both the CRC and the ACRWC, made progressive provisions on children rights in the Constitution and the Children Act.

This study has shown there are gaps in the Kenyan legal framework for protection of juvenile delinquents that need to be addressed urgently. The research has shown there that the state must legislate, establish and put into practice separate institutions and procedures applicable to children accused or alleged of committing crimes; the setting of a minimum age of criminal capacity; the desirability of diversion and procedural guarantees in a juvenile justice framework in order to be compliant with Article 37, and 40 of the CRC and Article 17 of the ACRWC. The state must also allocate adequate resources to carry out the above functions.

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