

**REALISING ARTICLE 53(1)(F) OF THE CONSTITUTION: PRETRIAL
DETENTION AS A MEASURE OF LAST RESORT**

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By
NEREAH MARY
STUDENT NO: 077524

Prepared under the supervision of
MS MUKAMI WANGAI

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Declaration

I, NEREAH MARY, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

[MS MUKAMI WANGAI]

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List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
Beijing Rules	Standard Minimum Rules for the Administration of Juvenile Justice
CBSSC	Community Based Support System for Children
CCI	Charitable Children Institution
CRC	United Nations Convention on the Rights of the Child
CYPA	Children and Young Persons Act
DCS	Department of Children Services
JDLs	UN Rules for Juveniles Deprived of their Liberty
MHC	Methodist Home for Children
NCCS	National Council for Children Services
NGO	Non- Governmental Organization
Riyadh Guidelines	UN Guidelines for the Prevention of Juvenile Delinquency
SCHR	Standing Committee on Human Rights
TJS	Traditional Justice Systems.
VBTE	Value-Based Therapeutic Environment
VOM	Victim- Offender Mediation

List of Cases

Re Gault 387 U.S 1(1967).

R v SAO (2004) eKLR

Republic v Matano Katana Mombasa High [2004].

Republic v ST, Nakuru High Court Criminal [2003].

Abstract

This study explores the principle of detention as a measure of last resort, particularly pre-trial detention and whether it is in keeping with first, Article 53(1)(f) of the constitution of Kenya and second, the international standards with regard to children held in remand.

The study adopts the labelling theory of juvenile delinquent behaviour and the principle of detention as a measure of last resort. It further examines the experiences of how juveniles have been dealt with historically in the pre- colonial era and colonial era. It then follows to examine the experiences of how juveniles are dealt with, the barriers within the Kenya Juvenile Justice System and effects of detention of juveniles. In doing so it seeks to identify the gaps between the legal provisions and the practices in relation to the detention of juveniles.

Following this, the study examines some of the alternatives to detention of juveniles through a comparative analysis of three states, namely: USA, UK and Sweden in contrast to the practices in Kenya. In doing so it provides a platform through which Kenya can adopt some of the practices from these states which will enable Kenya to have a comprehensive juvenile justice system that enables juveniles to be reintegrated back into the society and reduce recidivism. In this study, it is the peer role model.

It finally concludes by giving recommendations to various state actors and stakeholders on the way forward that can be put into consideration. Some of the recommendations include, entrenchment of diversion programmes in the Constitution and Children Act, training of child protecting stakeholders and developing legal and policy guidelines on alternative care systems.

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

A remand home under the Children's Act¹ provides for temporary detention of children pending court attendance. Remand fulfills three broad objectives: ensures the integrity and credibility of the justice system so that offenders will attend court and witnesses and victims are protected, protects the community from the offender's reoffending and assists the care and protection of the rights of the defendant.²

Remanding juvenile offenders in remand homes provides numerous challenges for government service delivery as well as for considerations of offender rehabilitation, recidivism, and justice. Labeling theory maintains that processing the young person in court results in their stigmatization as they are labeled as deviant³. This stigmatization is also hypothesized to restrict life opportunities which may also lead to further offending⁴.

Research has consistently shown that children and young people in the criminal justice system have high levels of social, health and educational disadvantage.⁵ Hundreds of children risk abuse every day in most police stations across the country due to stringent bail terms and a lack of special cells to cater for them. A Judiciary task force on development of bail and bond policy found that some of the minors are held in remand for more than three months despite every child having a right not be detained when it comes to bond and bail matters. The task force appointed by Chief Justice Willy Mutunga to review bail and bond terms for suspects observed the following:⁶

- Children are generally granted cash bail so long as their parents or guardian undertake to produce them when required. In cases of children in conflict with the law, the police normally call a member of the family and ask them to guarantee their attendance in court.

¹ Section 50, *The Children's Act* (2010).

² Bamford D and Sarre R, Criminology Research Council, *Factors that influence remand in custody*, November 2005.

³ Becker HS, *Outsiders: studies in the sociology of deviance*, Free Press of Glencoe, London, (1963).

⁴ Bernburg JG & Krohn, MD, 'Labeling, life changes and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood' 41 *Blackwell Publishing Ltd*, 4 (2003), 1287-1318.

⁵ Jacobson J, Bhardwa B, GyatengT, Hunter G and Hough M. *Punishing Disadvantage: A profile of children in custody*. London: Prison Reform Trust. (2009),

⁶ 'Allan Odhiambo, Tough-bail terms expose children in custody' <http://www.businessdailyafrica.com/Tough-bail...custody.../-/index.htm> on 2 February 2016.

- Although most police stations have child protection desks and children or gender officers, the safety and security of minors are heavily compromised by a lack of special detention facilities that left them facing harsh confinement conditions.
- In Kisumu, the taskforce observed that children were mixed with child offenders despite a law providing for separate accommodation for children from adults in custody.
- Cases of children in remand for more than three months were also reported. Often, they overstay due to resource constraints.
- If it is a serious offence or for their own security the police may put them in secluded cells but they are not adequate.

The remand population therefore presents significant demands on the juvenile justice system not only in terms of the resources required to institutionalize youth but also in terms of the missed opportunities to intervene effectively to assess the critical risks and needs that require appropriate treatment intervention.

1.2 Statement of Problem

Detention in remand is of concern as it involves the maximum penetration into the formal justice system through the detention of juveniles. This detention occurs before the youth are sentenced before their guilt or innocence has been established. It thus calls for the need to address the problem as the juvenile defendants are at a high risk to gravitate toward groups of deviant peers which pre-disposes them to further criminal socialization and increases the risk of re-offending.

1.3 Statement of Objective

To determine whether the remand homes are in keeping with Article 53(1)(f) and whether they can be improved in order to meet the needs of children in remand.

1.4 Research Questions

Does Kenya's management of juvenile defendants comply with Article 53(1)(f) of the Constitution and international standards on juvenile justice?

1. How are the juveniles dealt with in remand?
2. Is it in accordance with Article 53(1)(f) and if not how else can the juveniles be dealt with?
3. In what ways, can the juvenile justice system make changes and how can these changes be supported in society?
4. Can we learn anything from the way other countries respond to juvenile justice?

1.5 Justification of the Study

Following the findings of the taskforce appointed by the Chief Justice it is clear that there are shortcomings in our laws thus, the results of this paper will be of utmost importance in finding these shortcomings and provide a platform to entrench diversion in order to shield the juvenile defendant from a punitive criminal justice system.⁷

1.6 Research Methodology

The methodology that will be adopted in evaluating pre-trial detention as a measure of last resort include: Review of reports by key stakeholders from government and non-government agencies involved in the Juvenile Justice system and library research and internet sources for comparative studies on juvenile justice with regard to detention of children in remand.

1.7 Scope and limitations of the study

The study seeks to utilize and heavily rely on secondary sources and the research will mainly be library based. Secondary sources used will include published and unpublished works of criminology scholars, i.e. books, reports, newsletters and Journals. Access to these may prove difficult. The major limitations of the study are the unavailability of adequate material on the subject which has special emphasis on the Kenyan scenario. Some of the data would better have been collected from persons concerned and dealing with juvenile cases, namely: the police, the prisons department, the Juvenile Court and the civil society. Obtaining information from these

⁷'Apollo Mboya, Juvenile Justice in urgent need of reforms' <http://www.standardmedia.co.ke/article/2000102391> on 2 February 2016.

persons would need introductory letters, time to collect data. The study will thus be premised on data from library sources and very minimal information from civil society.

1.8 Definition of Terms

Diversion – Diversion refers to programmes, interventions, and processes that divert children from entering into or continuing their involvement in the criminal justice system. It includes processes whereby children are dealt with informally by police as well as interventions at later stages of criminal proceedings that minimize penetration into the justice system.⁸ It also refers to the channeling of children away from the formal justice system through alternative procedures and programmes.

Juvenile: In the context of this study, juveniles are those people who have not reached adulthood or the age of majority or children in the age of ten to eighteen years.

Juvenile defendant: in the context of this study shall refer to those children who have not attained the age of majority and have been accused of crimes and are detained at the remand homes. Other terms that shall be used interchangeably to refer to juvenile defendant in the study shall include, children in remand or young people in remand or juveniles in remand.

Remand– A person who is arrested and charged with a criminal offence but not released on bail is said to be ‘remanded in custody’.⁹ In the context of this study a child shall be considered to be on remand when they are detained in a remand home but have not yet been sentenced.

Remand home: place where remand service for children and young person’s pending court appearance or police investigation. It thus provides temporary custody and care for children and young person’s pending court disposal.¹⁰

⁸ Australian Institute of Criminology, *Examining adult on-setting offending: A case for adult cautioning*, October 2011.

⁹ Department of justice Victoria, *Annual Report 2012-13*, 30 June 2013.

¹⁰ Section 50, *The Children’s Act* (2010).

1.9 Chapter Summaries

Chapter one comprises of the background to the study, problem statement, the objectives, research questions, scope and limitations of the study, definition of key terms and an overview of the chapters.

Chapter two provides a review of the juvenile justice system. It begins by first addressing the historical evolution of the juvenile justice system in general followed by that in Kenya by looking at traditional justice systems, colonial era, post-independence and current legal frameworks in dealing with juveniles. Following this, it explores the impact on remanding children by looking at the labelling theory of delinquent behaviour and the principle of measure of last resort which sets out the theoretical framework of the research.

Chapter three examines the international legal framework with regard to children in conflict with the law. It also seeks to determine whether national laws in Kenya are in keeping with the international standards particularly with regard to the principle of measure of last resort. It also examines the experiences of juveniles held in remand, assesses the barriers within the current system and the effects of detaining them.

Chapter four focuses on the trends/practices that provide juveniles an alternative to detention in USA, UK and Sweden and contrasts the same with the situation in Kenya. The aim of this is to undertake a comparative analysis of the level of protection accorded to juveniles in these states in comparison to that of a Kenyan juvenile. The study focuses on these three states as they have more comprehensive juvenile justice systems and therefore provides a wide scope of some of the alternatives Kenya can adopt from these states. It concludes by determining the ideal model that can be adopted which can facilitate the development of a more responsive remand support service for juvenile at risk.

Chapter five concludes by giving an overview of main ideas in the study and gives recommendations accordingly.

CHAPTER TWO: HISTORICAL DEVELOPMENT OF JUVENILE JUSTICE

This chapter shall provide a review of the juvenile justice system. It begins by first and foremost addressing the historical evolution of the juvenile justice system in general followed by that in Kenya by looking at: the traditional justice systems, colonial era, post-independence and current legal frameworks in dealing with juveniles. In doing so it shall set an understanding of how juveniles have been dealt with and how they are dealt with currently. Following this, it explores the impact on remanding children by looking at the labelling theory of a delinquent behaviour and the principle of measure of last resort which sets out the theoretical framework of the research. This shall later be expounded on in chapter three when discussing the experiences of the juvenile placed in remand in Kenya.

2.1 Historical Evolution of the Juvenile Justice System Models in General

2.1.1 The Welfare Model

The origins of juvenile justice can be traced to the two most dominant models, the welfare model and the justice model. The welfare approach was initiated in the USA until 1960. Before the eighteenth century no special status was accorded to children and the protection of juveniles by virtue of their age. Juveniles were subjected to the same procedure as adults with no separation from adults during imprisonment.¹¹ The Parkhurst Act of 1838 established a separate system of justice to deal with children and young adults in the USA which then extended to the establishment of juvenile courts and institutions that dealt with juveniles. ‘Parens patriae’ was the principle behind the welfare system and this meant state control. Therefore, the state was expected to act in the best interest of the child.¹² As a result, many juveniles were removed from their families and put into state care for rehabilitation. Another underlying principle of the welfare system was that young persons were considered to be more vulnerable and amenable to rehabilitation than adults¹³ thus the juvenile courts placed emphasis on treatment, supervision and control rather than punishment.

¹¹ https://www.ncjrs.gov/html/ojjdp/juris_tap_report/ch2_01.html on 17 December 2016.

¹² Re Gault 387 U.S 1(1967).

¹³ Bunch MM, ‘Juvenile Transfer Proceedings: A place for Restorative Justice Values’ 47, *Howard Law Journal*, (2004)

This model became the basis for the establishment of the juvenile courts in the USA and Western Europe. The courts were assisted by various personnel such as social services department, probation officers among others. Thus, it considered juveniles as victims of their environment and circumstances and were therefore not regarded as rational agents.¹⁴ However, this model had criticisms for instance, children were not accorded procedural safeguards such as legal representations and rules of evidence which then led to the emergence of the justice model.

2.1.2 The Justice Model

This model emerged in the late 1970s and early 1980s. The underlying principle was punishment rather than treatment of juveniles. The justice model recognized the legal rights of the juvenile and dealt with those found guilty through punishments for specific offences based on defined sentences.¹⁵

The function of juvenile justice was therefore to assess the degree of culpability of the juvenile and administer punishment accordingly. Unlike the welfare model the juvenile was granted the right to due process and the juvenile court judge or social worker was left with the decision on the appropriate treatment at their discretion. This model involves two important precepts that is, the need to protect the society against crime and the need to accord special treatment to the juvenile taking into consideration his personal circumstances. In this model, it can thus be said emphasis was placed on retribution and protection of society over the welfare of the child.¹⁶

2.1.3 Restorative Justice Model

Restorative justice gained its prominence in juvenile justice as an alternative approach which seeks to address the ills of the welfare justice approach in the 1980s. It responds to crime and conflict focusing on reparation of harm and offers a broader framework that challenges the role of punishment and treatment as primary currencies of intervention. The three basic principles

¹⁴ Mack J, 'The Juvenile Court' 23 *Harvard Law Review* (1909), 107.

¹⁵ Re Gault 387 US 1(1967)

¹⁶ https://www.ncjrs.gov/html/ojdp/juris_tap_report/ch2_01.html on 17 December 2016.

underlying restorative justice are: crime is a violation of people and interpersonal relationships, violations create obligations and the central obligation to put right the wrong done.¹⁷

It seeks to repair harm as much as possible by addressing the needs not only of the offender but the victim and community at large. This entails tackling the root causes of crime and provide healing for all parties affected by the crime. It emphasizes offender accountability and responsibility. Thus, the offender is made to understand the harm caused and the consequences of their behaviour and to accept the responsibility of the harm caused.¹⁸

Unlike retributive justice which focuses on the need to satisfy the rules of law or the need of the community to give out punishments restorative justice is more concerned about the needs of victims and offenders. The victims are given an active role in a dispute and offenders are encouraged to take responsibility for their actions, to repair the harm they have done.¹⁹ Some of the jurisdictions that have adopted this model include Canada, England and Wales which provide for court ordered community service as a sanction to youth offenders.

¹⁷Zehr, H, 'Commentary: Restorative justice: Beyond victim-offender mediation' 22, *Conflict Resolution Quarterly*, (2004), 305–315.

¹⁸ Zehr, H. Commentary: Restorative justice: Beyond victim-offender mediation' (2004),310–315.

¹⁹ Bazemore G & Umbreit M, 'Balanced and Restorative Justice: Program Summary: Balanced and Restorative Justice Project' *U.S. Department of Justice*, (1994).

2.2 Historical Evolution of Juvenile Justice Models in Kenya

2.2.1 Traditional Justice System in Dealing with Juveniles

Traditional justice systems (TJS) refer to the systems of adopting multiple and varied systems as the local societies they derive from. Their primary role is to maintain peace and harmony in local usually village communities. In practice, they often exhibit a distinctively restorative character in the management of disputes and conflict on the basis that parties will have to continue to live together in relatively inter-dependent social settings.²⁰

Conflict resolution amongst African communities has since time immemorial taken the form of negotiation, mediation, reconciliation or 'arbitration' by elders, diviners, healers and other respected members of the society. Communally, disputing parties would sit together informally and resolve disputes and conflicts to maintain social harmony and restore social bonds. Thus, all the methods of dispute resolution had the aim of restoring social order.²¹ Some of the principles that guided the elders in Kenya in conflict resolution were social cohesion, harmony, openness/transparency, participation, peaceful co-existence, respect, tolerance and humility. Virtually all African communities depict adherence to these values explaining why the African model of dispute resolution using elders fostered reconciliation and social justice.²²

With regard to juveniles it involves the use of these traditional dispute mechanisms by the elders and the manner in which they handled children in conflict with the law. For instance, in the Kamba community, the Kamba justice system made use of the social ties that made the individual a part of the community, hence dictating individual behaviour. Social practices as well as the justice system governed individual conduct. Individuals acted in accordance with the social norms for them not to lose the benefits that accrued from being a part of the community. Relationships had to be maintained as they formed the foundation of the community.²³ In addition, discipline was not just a role played by the family but also that of elders and community at large thus they effectively controlled the behaviour of juveniles as a matter of course. The Kamba people understood from an early age that they were dependent on the community for progression to the next stage in life.

²⁰ Dinnen S, 'Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste (2009)

²¹ Kariuki F, 'Conflict resolution by elders in Africa: success, challenges and opportunities' 3, *Chartered Institute of Arbitrators in Kenya*, 2 (2015), 13.

²² Kariuki F, 'Conflict resolution by elders in Africa: success, challenges and opportunities' (2015), 13.

²³ Kinyanjui S, 'A Genealogical Analysis of The Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juveniles?' PHD Thesis, The University of Leicester, September 2008, 129.

When it came to juveniles if one was found guilty or had wronged a certain family the process of dealing with them involved the families and would determine the most appropriate form of punishment. The most common form of punishment was *kata ka ndu* which was basically inflicting pain at body joints, for example making the offender clench a fist and inflicting pain at finger joints. If the offence was committed against another clan then the elders would involve the elders of that victim's clan and would come to an agreement as to compensation due. In general, their justice system was geared to preserve the community. If for instance the individual was seen to constantly do, then the community would be labelled as bad thus individuals were deterred from wrong acts because they would miss out on some of the community benefits.²⁴ It was therefore a restorative justice model.

2.2.2 Dealing with Juveniles in the Colonial Era

Colonization brought a cultural conflict between the African and western cultures. The western culture was viewed as superior and dominant, thus subjugating African cultures. Cultural imperialism was extended to the world of dispute resolution. The westernized justice system was retributive in nature as it emphasized on a winner-loser paradigm in dispute resolution that does not resolve the underlying causes of the conflict.²⁵

The settler community in Kenya was greatly outnumbered by the indigenous people and lived in fear of attacks by the African majority.²⁶ The management of juvenile delinquency in colonial Kenya was influenced by the metropolitan trend towards a more rehabilitative and separatist system. Consequently, the introduction of separate treatment for child offenders in Kenya was founded on the one hand with a genuine need to rehabilitate the juveniles and on the other a need to separate the society from these children which was tinged with racial stereotypes that treated African offenders differently from those of other races.

Kabete Reformatory Centre was the only institution at the time. It was founded in 1909 because of the concern about the corrupting effects of life in the townships on boys and idlers. It lacked clear direction in its early years as the juvenile boys who were institutionalized were turned into labourers at the Kabete Farm. However, in 1916 there was an outburst of complaints about the

²⁴ Kinyanjui S, 'A Genealogical Analysis of The Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juveniles?' PHD Thesis, The University of Leicester, September 2008, 133.

²⁵ Kariuki F, 'Conflict resolution by elders in Africa: success, challenges and opportunities' (2015), 14.

²⁶ Campbell C, 'Juvenile delinquency in Colonial Kenya, 1900-1939' 45 *The Historical Journal*, 1 (2002), 129.

management of the institution and the then Provisional Commissioner wrote to the management complaining that the boys seemed uncared for which then led to the introduction of practical skills such as carpentry, masonry and thatching.²⁷ The reformatory failed to a great extent to meet the rehabilitation objective.²⁸

Although there is introduction of practical skills form of education in this era which is an advantage as the juveniles are equipped with skills, it does not outweigh the restorative justice model of the juvenile justice system at the time. As is seen, there already exists the two models one of rehabilitation which can be likened to the restorative justice model and that which was hinged on racial segregation. In the colonial era, the juveniles were kept separate from the settler community and in their detention centres they were used more as a source of cheap labour. It therefore failed to fulfill the rehabilitation objective as was the case in the pre-colonial era with the use of traditional justice system. This colonial era is however of great importance to the development of the juvenile justice system as the rehabilitative programmes in Kenya are greatly informed by this era.

2.2.3 Post Independence and Current Legal Framework in Dealing with Juveniles

Upon gaining of independence the primary law in Kenya concerning children in conflict with the law was the Children and Young Persons Act (CYPA). The CYPA established the juvenile courts for the purpose of hearing all charges against persons under eighteen years of age, except in cases where children were charged jointly with adults where they were heard in regular adult courts. The jurisdiction of juvenile courts extended to both criminal matters and to non-criminal "protection or discipline" matters.²⁹ However in 2001 there was implementation of the Children's Act 2001 which provides a broad framework with which to inform the provision of services and support for children on remand.

²⁷ Campbell C, 'Juvenile delinquency in Colonial Kenya, 1900-1939' (2002), 135.

²⁸ Kenya, *Committee on prevalence of crime in Nairobi and its neighborhood, Crime Committee Report*, May, 1932 at Nairobi Government Printer. It stated that "the reformatory was rather the nature of a prison than a school there was little if any reformation and inadequate education."

²⁹ https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.html on 16 December 2016.

2.2.3.1 Children Act 2001

The Children Act 2001 provides a framework from which to inform the provision of services and supports for children in remand. Such provisions include: the best interest of the child principle,³⁰ non-discrimination,³¹ right to health care³² and protection from child labour³³ which apply to children in conflict with the law. Courts are required to ensure that children have the right to be heard and to participate in any proceedings of the court that can affect them. The period of detention should only be used as a measure of last resort.

2.2.3.2 Constitution of Kenya

The Constitution recognizes the right of every one, including children, to pursue action in the courts in the event of a denial of any of the guaranteed rights. The Constitution places an obligation on the state to 'observe, respect, promote and fulfil' the rights and freedoms in the Bill of Rights and to enact and implement legislation to fulfil its international obligations in respect of human rights and freedoms.³⁴ Further, Article 53 of the Constitution which is the crux of this research provides that:

53. (1) Every child has the right—

- (a) to a name and nationality from birth
- (b) to free and compulsory basic education
- (c) to basic nutrition, shelter and health care
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour
- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not
- (f) not to be detained, except as a measure of last resort, and when detained, to be held

—

b) for the shortest appropriate period of time

c) (ii) separate from adults and in conditions that take account of the child's sex and age.

³⁰ Section 4, *Children Act* (Act no 8 of 2001).

³¹ Section 5, *Children Act* (Act no 8 of 2001).

³² Section 9, *Children Act* (Act no 8 of 2001).

³³ Section 10, *Children Act* (Act no 8 of 2001).

³⁴ Article 21, *Constitution of Kenya* (2010)

2.3 Theoretical Background to Juvenile Detention

2.3.1. Nature and Scope of Labelling Theory

The origins of Labeling Theory date back to 1938. Frank Tannenbaum the criminologist describes a young delinquent who starts off his mischievous acts at first, these acts are seen as a mere nuisance. However, over time the attitude of the community hardens. This therefore causes a gradual shift from the definition of the specific acts as evil to a definition of the individual as evil so that his acts come to be looked upon with suspicion. This in turn on the labelled person becomes a process of self-identification with the criminal. He states that “the young delinquent becomes bad because he is defined as bad and because he is not believed if he is good.”³⁵

There are two major theoretical perspectives. First, deviant labeling may influence subsequent deviance by altering the person’s self- concept. This approach highlights the role of the self and the dynamics of symbolic interaction: deviance amplification occurs when the labeled person conforms to the stereotypical expectations of others. The second approach focuses on the more tangible (social structural) aspects of social exclusion. Deviance is stabilized due to blocked access to structured opportunities and conventional others.³⁶ In particular, it is seen as a transitional event that can substantially alter the life course by reducing opportunities for a conventional life. Thus, labeling is seen as being indirectly related to subsequent behaviour through its negative impact on conventional opportunities.³⁷

With regard to remand detention, in the words of Stubbs (2009) ‘they expose young people to negative influences and result in increased recidivism.’ This negative labelling leads the juvenile offender to gravitate toward groups of deviant peers which provides further criminal socialization and increases the risk of reoffending.³⁸ It is consequently in the best interest of the community to manage juvenile defendants in a manner that prevents the development of a young person’s self-perception as ‘deviant.’

³⁵ Tannenbaum F, *crime and the community*, Columbia University Press, New York and London, 17.

³⁶ Liska AE and Messner SF, *Perspectives on Crime and Deviance* 3rd Edition 118.

³⁷ Becker HS, *Outsiders: studies in the sociology of deviance*, Chapter 10: labelling theory reconsidered, Free Press of Glencoe, London, (1963).

³⁸ Mazerolle P & Sanderson J, "Understanding Remand in the Juvenile Justice System in Queensland" Griffith University 2008, 1.

2.3.2 Nature and Scope of Detention as a Measure of last resort

Detention with regard to juveniles can be defined as a process that includes the temporary and safe custody of juveniles whose alleged conduct is subject to court jurisdiction while pending legal action.³⁹

Detention as a measure of last resort is provided for under various international legal instruments which include Rule 13.1 and 19 of Beijing rules, article 37(b) of the United Nations Convention on the Rights of the Child (UNCRC) and Rule 2 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules) which provides that the arrest, detention or imprisonment of a child may be used only as a measure of last resort.⁴⁰ It is therefore necessary as part of a comprehensive policy for juvenile justice system to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed.⁴¹ Some of these measures include supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care.⁴²

2.3.4 Link of the Theories to Juvenile Justice

With regard to the juvenile justice system, when a juvenile is either committed to an institution or undergoes the juvenile justice system from the trial process, to being placed in a remand home and finally convicted. Upon being released at any of these stages there are high chances that the society will label them as criminal because of the fact that they have been through the juvenile system. In the long run this forces the person into further delinquency as they conform to the stereotypical behaviour label of criminal.⁴³ Sampson and Laub (1997) suggest that labeling is one factor that leads to “cumulative disadvantage” in future life chances and, thereby, increases the probability of involvement in delinquency and deviance during adulthood.⁴⁴ Thus, the mere fact that they have any connection to the juvenile justice system sets them on a path that reduces their opportunities for the future. An illustration of this would be for instance when a young person is detained in a

³⁹Justice Policy Institute Report, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 28 November 2006.

⁴⁰ Article 37(b), UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577.

⁴¹ *UNCRC Committee General Comment No 10: Children's Rights in Juvenile Justice* 2007, 20 October 2008, 23.

⁴² Article 40(4) UN General Assembly, *Convention on the Rights of the Child*.

⁴³ Bernburg JG & Krohn, MD, 'Labeling, life changes and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood' 41 *Blackwell Publishing Ltd*, 4 (2003), 1287-1318

⁴⁴ Laub, John H., and Robert J. Sampson, 'Understanding desistance from crime. *Crime and Justice*' 28 (2001) 11-69

remand home for about three months. During this period, the young person is unable to continue with their education and upon their release they are at a disadvantage when resuming school.

However, it must be noted that it is not predetermined that if a juvenile is placed in a remand home or committed to a rehabilitation facility that upon release they shall subsequently conform back to their criminal behaviour. The likelihood of them falling back to the criminal behaviour is dependent on having a support system which in many cases the juveniles in the system lack.

This then brings us to the second theory, the principle of detention as a measure of last resort. Juveniles who commit these crimes need to be provided with a support system that encourages them to model good behaviour, deter themselves from bad behaviour, surrounded by love and care as their criminal act may be as a result for lack of care love and support. Thus, committing them to detention may not be the best solution for them as it models a retributive kind of justice and not one that is restorative. Adopting alternative measures therefore is a better way of dealing with juveniles as they are able to reintegrate to the society and adopt good behaviour.

2.4 Conclusion

This chapter in summary has highlighted the manner in which juveniles have been dealt with in the past. It sought to create an understanding of the models adopted over the years which then informs the model in which Kenya can adopt in order to understand the manner in which juveniles should be dealt with.

It has equally reviewed the theoretical background with regard to juveniles particularly the labelling theory of delinquent behaviour which highlighted the negative impact of detaining juveniles and the principle of detention as a measure of last resort. In doing so it established the theoretical framework of the research.

The next chapter shall further assess the manner in which juveniles are dealt with particularly looking at the international legal framework of juvenile justice making a comparison as to whether Kenya national laws are in keeping with international standards.

CHAPTER THREE: INTERNATIONAL LEGAL FRAMEWORK WITH REGARD TO CHILDREN IN CONFLICT WITH THE LAW

The following chapter shall seek to explore the international legal framework with regard to children in conflict with the law. It shall also determine whether national laws in Kenya are in keeping with the international standards particularly with regard to the principle of measure of last resort by reviewing the experiences of children held in remand, the barriers within the current system and the effects of detaining them.

3.1 International Legal Framework

The international legal framework can be looked at from two perspectives that is, the international standards required for the treatment of children in conflict with the law and international legal framework for the protection of children in conflict with the law. The international standards provide guidance for developing an expedient and supportive system for addressing the needs of children in remand while the international legal framework for the protection of children in conflict with the law such as the UNCRC contain elaborate set of guidelines for maintaining human rights standards in juvenile justice systems.⁴⁵ Similarly, the ACRWC also incorporates a number of basic principles on which a juvenile justice system should be based.⁴⁶ They also guarantee special treatment for a child in conflict with the law in a manner consistent with the child's sense of dignity and worth, which reinforces the child's respect for human rights.⁴⁷

⁴⁵Neilson JS, 'The international framework' in Julia Sloth- Neilson & Jacqui Gallinetti (eds), *Child justice in Africa: A guide to good practice* (2004) 22.

⁴⁶Articles 37 and 40, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577.; Article 17, Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

⁴⁷ Article 17(1), Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*.

3.1.1 UN Standard Minimum Rules for the Administration of Child Justice (The Beijing Rules)

The Standard Minimum Rules for the Administration of Child Justice (The Beijing Rules)⁴⁸ was adopted in 1985 by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders.

The Beijing Rules provide a framework for fair and humane treatment of juveniles. For instance, rule 5(1) refers to the wellbeing of juveniles. It upholds the principle of proportionality that at all times the courts have to take into consideration not only the gravity of the offence but also the personal circumstances when dealing with juveniles.⁴⁹

3.1.2 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules)

These rules deal with the category of child offenders deprived of their liberty. These include those held in custody at pre-trial and trial stage as well as those committed to rehabilitation institutions.⁵⁰ The principle in the JDL rules is to uphold the right to safety and promote physical and mental well-being of juveniles. Detention should be of last resort and limited to the minimum necessary period and exceptional cases. They also provide a comprehensive manner in which the detention facilities should be maintained. Under rule 32, it provides that the detention facilities should be in keeping with the aim of rehabilitation and residential treatment. There should be due regard to privacy, opportunities for association and participation in leisure activities and limited to exceptional cases.⁵¹

3.1.3 UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)

These guidelines were adopted in 1990. They make provision on measures necessary to prevent children from committing crimes. The Riyadh Guidelines offer priority to the family unit. There is emphasis of the need to uphold the well-being of the family as it is the central unit responsible for socialization of the child. It therefore advocates that the government should make social efforts to preserve the integrity of the family and have policies that are conducive for the upbringing of the

⁴⁸ UNGA, *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, UN A/RES/40/33 29 November 1985.

⁴⁹ Rule 5.1, UNGA, *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, UN A/RES/40/33 29 November 1985.

⁵⁰ Paulsen MG, 'Fairness to the juvenile offender' 41 *Minnesota Law Review*, 547 (1956-1957), 548.

⁵¹ Rule 32, UNGA, *Rules for the Protection of Juveniles Deprived of Their Liberty*, UN A/RES/45/113 2 April 1991.

child.⁵² In the event of conflict within the family unit there should be requisite services to resolve these disputes.⁵³ It therefore provides a practical approach to prevention of delinquency as they are aimed to minimize the circumstances which drive children to crime and encourage an environment conducive to healthy development and integration.⁵⁴

3.1.4 The United Nations Convention on the Rights of the Child (UNCRC)

The United Nations Convention the Rights of the Child (CRC) was adopted in 1989.⁵⁵ The convention concerns itself with a wide range of child rights including civil and political, social, cultural and economic rights. It also provides under Article 37 and 40 a framework within which juvenile justice is to be understood. Article 40(1) provides that a child alleged to have or who has committed an offence shall be treated “in a manner consistent with the promotion of the child’s sense of dignity and worth which reinforces the child’s respect for human rights and fundamental freedoms of others and which take into account the child’s age and the desirability of promoting the child’s reintegration and the child assuming a constructive role in society.” The UNCRC proposes a child centered approach setting a very high standard to be achieved by state parties. It also emphasizes the need for diversion⁵⁶ and alternative sentences.⁵⁷

3.1.5 African Charter on the Rights and Welfare of the Child

In 1990, The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the Organization of African Unity (OAU) and entered into force in 1999. The Charter sets out rights and defines universal principles and norms for the status of children. Such is illustrated under article 4(1) which provides that the best interest of the child shall be the primary consideration in all actions concerning children. It further provides under article 43 the state obligation to submit to the African Children’s Committee periodical reports on measures that the state party has put in place in order to give effect to the provisions under the charter.

⁵² Rule 12, UN *Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)*, A/RES/14/112, 14 December 1990.

⁵³ Rule 13, UN *Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)*, A/RES/14/112, 14 December 1990.

⁵⁴Viccica AD, ‘The promotion and protection of children’s rights through the development and recognition of an international notion of child justice and its child centered perspective in the United Nations’,70.

⁵⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS 1577.

⁵⁶ Article 40(3)(b), UN General Assembly, *Convention on the Rights of the Child*.

⁵⁷ Article 40(4), UN General Assembly, *Convention on the Rights of the Child*.

3.2 Whether Kenya National Laws are in Keeping with International Standards

This analysis shall examine pre-trial detention as a measure of last resort by looking at experiences of children held in remand, the effects of detaining them and the barriers within the current system. In doing so we shall be able to determine whether Kenya national laws are in keeping with international standards.

3.2.1 Pre- Trial Detention as a measure of last resort

The legal framework provide for the restriction of institutionalization in quantity by requiring it to be a measure of last resort and in time that it should be for the minimum necessary period.⁵⁸ These two standards introduced by the Beijing Rules, were an improvement to the common rule preventing arbitrary and unlawful detention provided for in the international legal instruments.⁵⁹ Detention pending trial shall be as a last resort for the minimum time possible⁶⁰ and as much as possible pre- trial detention should be replaced with alternative measures such as close supervision and placement with families or education institutions.⁶¹ The CRC Committee recommends that the duration of pre-trial detention should be limited by law and be subject to regular review.⁶² Upon apprehension of the child the judge or other competent official should consider release at the earliest opportunity possible⁶³ and where pre-trial detention is unavoidable then measures should be taken to prevent criminal contamination by separating the children from the adults⁶⁴ and by any other effective measures.

The principle is embodied domestically under section 53 of the Kenyan constitution. The Children Act goes on to provide that no child shall be held in imprisonment.⁶⁵ But it does provide for the committal to remand homes and borstal institutions.⁶⁶ Regardless, the biggest challenge is to put this well-known principle into practice.

⁵⁸ Rule 13.1 and 19, UNGA, *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*; Article 37(b), UN General Assembly, *Convention on the Rights of the Child*.

⁵⁹ *UNCRC Committee General Comment No 10: Children's Rights in Juvenile Justice* 2007, 20 October 2008,28.

⁶⁰ Rule 13.1, UNGA, *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*.

⁶¹ Rule 13.2, UNGA, *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*.

⁶² *UNCRC Committee General Comment No 10: Children's Rights in Juvenile Justice* 2007, 20 October 2008,28.

⁶³ Rule 10.2, UNGA, *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*.

⁶⁴ Rule 13.4, UNGA, *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*.

⁶⁵ Section 90, *Children Act* (Act 8 of 2001).

⁶⁶ Section 191, *Children Act* (Act 8 of 2001).

3.2.1.1 Experiences of Children Held in Remand

According to a 2002 report by the governmental Standing Committee on Human Rights (SCHR) found that one in particular – the Nairobi Juvenile Remand Home – held more than 4 times its capacity of 100 detainees. Another NGO with close links to remand homes in Kitale also criticized the Kenyan remand system, referring to the homes as ‘draconian’, with ‘no education and little food’ and ‘completely inadequate for any sort of child rehabilitation or development to take place.’ It further stated that children are often detained in remand homes for far longer than they actually should be.⁶⁷ This is partly because of the excessive workloads which heavily contribute to the delay. Another factor delaying their release is that police from the arresting location are responsible for serving court summons and for picking up remandees from the prison each time the courts hear their cases. The police often fail to show up or lack the means to transport the remandees, who then must await the next hearing of their case usually a month or later.⁶⁸ In another report by the International Centre for Prison Studies it showed that as of June 2009, 43.4% of the total prison population consisted of pre-trial detainees.⁶⁹

However, there have been efforts made by the courts to uphold the provisions of the Children Act. In a number of court cases since 2003, the Kenyan High Court has upheld the provisions of the Act and the Child Offender Rules – made under schedule 5 of the Children's Act. These provisions relate to the process of expediting cases involving child offenders by setting time limits for these trials and the pre-trial detention of children. For instance, in the case of *R v SAO* the High Court enforced the provisions on time limits by ordering the release on bail, pending trial, of a 13-year-old girl charged with murder. The Court cited the inordinate delay at the start of the trial in applying the provisions of the Child Offender Rules.⁷⁰ In a second set of decisions, the High Court ruled that the Act and Rules made under it do not have the effect of imposing time limits within which to ‘complete trials’, but provide a basis for ensuring an expeditious handling of criminal cases involving alleged child offenders.⁷¹ The effect of both sets of decisions can be seen as to implement

⁶⁷ U.S. Department of State, *Kenya Country Report on Human Rights Practices* for 2001, 3 April 2002.

⁶⁸ U.S. Department of State, *Kenya Country Report on Human Rights Practices* for 2001, 3 April 2002.

⁶⁹ International Centre for Prison Studies Prison Brief of Kenya, <http://www.prisonstudies.org/country/kenya> on 25 November 2016.

⁷⁰ *R v SAO* [2004] eKLR.

⁷¹ In *Republic v Matano Katana Mombasa High* [2004] (unreported) and *Republic v ST*, Nakuru High Court Criminal [2003] (unreported). In both cases, the High Court decisions interpreted the purpose of the explicit wording of the Child Offender Rules (Rule 12) which set a time limit of three months for the trial of children for non-capital offences

the principle of detention as a last resort and for the shortest period of time for children. Needless to say, these efforts are positive indication that the child justice system can improve. However, there are still several barriers in the current system that need to be addressed.

3.2.1.2 Barriers within the Current System

First, the Department of Children Services (DCS) runs 25 statutory institutions countrywide, being subdivided according to three main categories: four child protection centres, 10 remand homes and 11 rehabilitation schools. There is also one assessment centre for children in transit to rehabilitation schools.⁷² The problem with this is that there is heavy emphasis on institutionalizing children in conflict with the law instead of returning them home under supervision thus the principle of measure of last resort is not adhered to. In addition, the 10 remand homes are inadequately equipped to cater for the growing number of juveniles. As of 2007 the remand homes held a total population of 3350 children.⁷³ This would consequently mean that the remand homes are overcrowded and would thus force some children to be detained together with adults in adult remand institutions.

Second, is with regard to the Children's Court. The Judiciary, comprising all magistrates and judges, are trained to deal with cases involving children. However, the training is conducted on an ad hoc basis. There is a high turnover of magistrates and as a consequence many have not been appropriately trained. The Nairobi Children's Court remains the only physically separate, child-friendly court in the country.

Third, it is unclear which ministry has the overall responsibility for justice for children as the NCCS is a policy and regulatory body with respect to children rights and services while the role of the DCS is to enforce the provisions and carry out field based initiatives conceived by the policymaker. Thus, their roles relate to overall child protective services. It then follows that lack of a clear statutory guidance as to which ministry is the lead agency in matters pertaining to children in the

and one year for capital offences to be a safeguard to prevent delays in the completion of criminal cases involving alleged child offenders. According to the Court's decisions, the Rules provided trial court's jurisdiction to grant bail pending the hearing and disposal of cases against children, especially where there was a delay. The Court was of the view that, despite the prescriptive nature of the Rules, which set a time frame within which to complete the trial process, the Rules did not have the effect that cases regarding children accused of committing offences would have to be halted based on these time limits

⁷² National Council for Children's Services (NCCS), *Summary of the outcome of mapping and assessing Kenya's child protection system; Strengths, weaknesses and recommendations* on 1 December 2010.

⁷³ <https://softkenya.com/women/childrens-correction-and-rehabilitation-centers-in-kenya/> on 11 January 2017

justice system consequently leads to lack of coordination between actors involved in justice for children, lack of advocacy, inadequate provision of services to children in justice, and social mobilization on issues relating to justice for children.

3.2.1.3 Effects of Detention of Children in Remand

Overall it can be noted that detaining these juveniles has negative social outcomes for remandees such as the social disruption caused by the young person being removed from their usual social supports. For instance, delays in processing and constant postponements are common due to lack of transport between the institutions and the court, delays in contacting parents or guardians, unavailability of judicial personnel at weekends, lack of coordination between departments responsible for investigating and writing reports, excessive workloads of probation and social services staff consequently lead to social disruption.⁷⁴ In addition, the removal from family and friends also interrupts the young person's capacity to assume their family and social responsibilities and places an individual into detention at a time of high vulnerability with a potential increase in the risk of physical and psychological self-harm.⁷⁵

3.3 Conclusion

The national frameworks have complied with international standards, but in practice there are many challenges in implementing these laws. Thus, recognizing that children are most likely to experience violations of their rights while in custody, the overarching principle of the child justice system is the rule that the arrest, detention of children may only be employed as measures of last resort. Where detention is the appropriate course of action in the circumstances, it must be for the shortest period of time.⁷⁶ It also calls for a system of juvenile justice that is sufficiently distinct from the adult criminal justice system and which focuses on the needs of the children. Accordingly, their treatment and successful reintegration into society should be the main goals of child justice. The next chapter shall therefore look at the alternative measures to detention from different states.

⁷⁴ U.S. Department of State, *Kenya Country Report on Human Rights Practices* for 2001, 3 April 2002.

⁷⁵ Mazerolle P & Sanderson J, "Understanding Remand in the Juvenile Justice System in Queensland" (Griffith University 2008).

⁷⁶ Article 37(c), UN General Assembly, *Convention on the Rights of the Child*.

CHAPTER FOUR: COMPARATIVE ANALYSIS

This Chapter will focus on the trends/practices that provide juveniles an alternative to detention in USA, UK and Sweden and will contrast the same with the situation in Kenya. The aim is to undertake a comparative analysis of the level of protection accorded to juveniles in these states to that of a Kenyan juvenile. The study focuses on these three states as they have a more comprehensive juvenile justice system that can be likened to restorative practices models and therefore provides a wide scope of some of the alternatives Kenya can adopt from these states. It shall finally conclude by determining the ideal model that can be adopted which can facilitate the development of a more responsive remand support service for juvenile at risk.

4.1 Alternatives to Detention

4.1.1 USA

In the USA, there is provision of secure detention which allows for supervision of youth offenders pending trial. Alternatives to detention and confinement serve several purposes. They are intended to reduce crowding, cut the costs of operating juvenile detention centres, shield offenders from the stigma of institutionalization, help offenders avoid associating with youths who have more serious delinquent histories, and maintain positive ties between the juvenile and his or her family and community.⁷⁷ Alternatives to detention and confinement can be imposed by police officers, court staff, judges, or prosecutors. These community-based programmes vary in their location, length, treatment, and level of supervision. However, the overall aim of keeping youth out of detention or confinement facilities is consistent regardless of program type. These community based programs have proven to be effective as detention admissions have decreased 38 percent since 1992.⁷⁸ Measures of juvenile crime have also decreased during this time frame. For example, juvenile arrest data for 2011 indicates that arrests were down 11 percent since 2010 and down 31 percent since 2002.⁷⁹ Some of the community based programmes include home confinement, shelter care and group homes.

⁷⁷ Washington, D.C.: U.S. Department of Justice, *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, September 2005.

⁷⁸ Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative: 2011 Annual Results Report*, February 2013.

⁷⁹ Puzzanchera C, Washington, D.C.: U.S. Department of Justice. *Juvenile Arrests 2011*, 2013

4.1.1.1 Home Confinement

A home confinement program is designed to restrict the activities of offenders in the community. In this case, the offenders live at home, attend school or work and fulfill other necessary responsibilities. However, they are closely monitored (electronically, or through frequent contact with staff, or both) to ensure that they comply with the conditions that the court has set. An example of this type of alternative is an electronic monitoring programme implemented in Florida. In this program, the offender wears a tamper-resistant bracelet and carries a tracking device that is able to calculate the offender's position and transmits the data to a monitoring centre.⁸⁰

4.1.1.2 Shelter Care

Shelter care is an alternative that offers non-secure residential care for youths who need short term placement (1- 30 days) outside the home. Shelter care is an option for juveniles who require more supervision than non-residential options, as well as for youths who need placement because no parent or family member can provide a residence. Here the juveniles have a daily schedule of educational recreational activities.⁸¹

4.1.1.3 Group Homes

These are community based treatment facilities in which a small number of troubled youth live under the supervision of a trained staff. It is an effective and inexpensive type of care as it involves non-directive counselling and peer relationships. It fosters personal relations character growth while exercising an overall positive influence. Since they are located in residential neighbourhoods they further provide opportunities for the youth to benefit from the neighbourhood services and therefore create a sense of belonging and self-reliance.⁸²

An example of this type of alternative is the Methodist Home for Children's Value-Based Therapeutic Environment (VBTE) Model. The VBTE Model is a non-punitive treatment model that concentrates on teaching juvenile justice-involved youth about social behaviour as alternatives to antisocial behaviours.⁸³ The VBTE Model is used in juvenile group homes operated by the Methodist Home for Children (MHC) in North Carolina, which provides residential services for

⁸⁰ Development Services Group, Inc. Washington, DC: Office of Juvenile Justice and Delinquency Prevention *Alternatives to Detention and Confinement*, 2014.

⁸¹ Development Services Group, Inc. Washington, DC: Office of Juvenile Justice and Delinquency Prevention *Alternatives to Detention and Confinement*, 2014.

⁸² Thomsen EJ, 'Residential Group Homes for Nebraska's Troubled Youth: An Attractive Alternative to Institutionalization', *77 Nebraska Law Review*, (1998).

⁸³ <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=286> on 10 January 2017.

youths involved in the juvenile justice system who are referred for treatment through the state's Department of Juvenile Justice and Delinquency Prevention. The MHC VBTE Model has five treatment components provided to youth in the group homes: service planning, a skills curriculum, learning theory, motivation systems, and therapeutic-focused interactions. Youths are taught that their behavior should reflect six important values: respect, responsibility, spirituality, compassion, empowerment, and honesty.⁸⁴

4.1.2 UK

The main alternatives to detention include: bail information schemes, bail support schemes and bail hostels. These programs have been implemented in several countries including England and Ireland. These are the countries that shall form the basis for comparative jurisdiction as they have had high success rates with regard to implementation of these alternatives to detention.

4.1.2.1 Bail Information Schemes

Bail information schemes involve the 'provision of factual verified information to the court that addresses objections to bail.'⁸⁵ These schemes are available in England and Wales, Northern Ireland, Canada and Australia. They are intended to give the court more detailed background information concerning the juvenile offender with regard to their offending behaviour. This is of importance as it assists in speeding up the decision-making process as the courts are well informed when conducting the trials of the juvenile offenders and thus make more informed decisions and expedient trial process.

4.1.2.2 Bail Support Schemes

These schemes are intended to reduce the use of detention and improve bail compliance by providing supervision and support to young people who would not otherwise be granted bail⁸⁶ These support schemes are of importance to those who are not in a position to afford the bail posted

⁸⁴ Strom, Kevin J., Cowell A, Dawes D, Hawkins S, Moore M, Wedehase B, and Steffey MD. Evaluation of the Methodist Home for Children's Value-Based Therapeutic Environment Model: Final Report. Research Triangle Park, N.C.: RTI International, 2010.

⁸⁵ Youth Justice Board, *National Evaluation of the Bail Supervision and Support Schemes funded by the Youth Justice Board for England and Wales*, April 1999-March 2002, 24.

⁸⁶ Youth Justice Board *Intensive Supervision and Surveillance Programme: The Initial Report*. London, 2004.

thus one who is supported by the scheme avoids detention.⁸⁷ According to the Audit Commission of Youth justice of 2004 these schemes contribute towards the reduction of the number of juveniles remanded.⁸⁸ An example of where this scheme is used is in Northern Ireland⁸⁹

4.1.2.3 Bail Hostels

The purpose of bail hostels is to reduce the use of detention by providing enhanced residential supervision in the community for those who might otherwise have been denied bail.⁹⁰ While residing in the bail hostels, they are encouraged to reduce their criminal activities and address any education, social or behavioral problems.⁹¹

⁸⁷ In Northern Ireland where these schemes are useful in assisting juveniles obtain bail and comply with their bail conditions by lining them with relevant community services and providing information and support.

⁸⁸ Audit Commission Youth Justice, *A Review of the Reformed Youth Justice System*, (2004)

⁸⁹ Northern Ireland office, *Northern Ireland Office 2006 departmental report*, 11 May 2006.

⁹⁰ National Association for the Care and Resettlement of Offenders (NACRO), *Youth Crime Briefing: Reviewing remands in custodial establishments*, London, (2003).

⁹¹ http://ymca.vbnlive.com/site/upload/document/NewYoung_Offenders.pdf on 10 January 2017.

4.1.3 SWEDEN

4.1.3.1 Victim Offender Mediation

Victim Offender Mediation (VOM) is a programme that solely includes the victim, the offender and the mediator. There is no intention of including the community, relatives, friends or anybody else. No other stakeholders can be involved. In this case, the offender acknowledges guilt and this is followed by dialogue between the victim and the offender. The aim of the dialogue is to arrive at some form of settlement or resolution. Restorative justice is necessary because the offender is considered as a person that requires special treatment.⁹² One of the most significant developments that have taken place within the Swedish child justice system has been the introduction of victim–offender mediation (VOM) which is regulated by the Mediation Act, an Act that primarily focuses on children in conflict with the law.⁹³ The role of VOM is said to be

“for the benefit of both parties, and according to Swedish law its goal is to increase the offender’s level of insight into the consequences of the offence, while the victim is provided with the opportunity to work through his or her experiences. The mediator’s role is to help the parties communicate with one another, and to ensure that a balance is maintained and that neither party is further harmed.”⁹⁴

This assessment is based on the role that Social Services and local authorities perform within the system and the limited application of imprisonment as a form of punishment for children in conflict with the law. The VOM programme strengthens preventive measures against juvenile delinquency by, for example, supporting the role of the families and communities.

⁹² Kankasa NS, ‘The Child Justice System and the Rights of the Child in Conflict with the Law: A Case Study of Zambia’, Master Thesis, Lund University, 2006, 64.

⁹³ Mediation Act (Swedish Code of Statutes, 2002:445).

⁹⁴ Prison Fellowship International, Restorative Justice at <http://www.restorativejustice.org/editions/2006/august06/vomsweden> accessed on 10 January 2017.

4.2 Diversion in Kenya

The Beijing Rules under Rule 11(1) encourage diversion wherever appropriate to deal with juvenile offenders without resorting to formal trial processes. In addition, the consent of the juvenile and parents/guardians is required before diverting juveniles to the programmes.

The Kenya Government ratified the UNCRC and ACRWC in the years 1999 and 2000 respectively. By signing the treaties, Kenya is obligated to enact legislation focusing on children. While the legal and policy framework with regard to child rights in Kenya has improved tremendously with the coming into force of Children's Act on March 2001 which domesticated the provisions of the UNCRC and ACRWC more still needs to be done to improve the juvenile justice system. One major area is the implementation of a diversion programme which is the channeling of children from the criminal justice system into programme make them accountable for their actions.⁹⁵ In Kenya although the Children Act does not make express provisions for diversions it does give the trial magistrate the discretion to make certain non-custodial orders/alternative orders.⁹⁶

In 2001, Save the Children (UK) initiated a pilot pre-trial diversion project in the country. The Diversion Program in Kenya was established in order to protect children from inappropriate institutionalization and demonstrate a viable alternative to custodial care. Its main aim is to ensure that children in conflict with the law and other categories of marginalized children are better protected against abuse and rehabilitated and re-integrated back into the community. The project was implemented in phases since January 2001 and expanded to 14 programme areas. The diversion programme is however faced by a number of challenges including legal, financial, structural and low awareness. Legally, diversion is not yet entrenched in the Kenyan constitution a situation that poses several challenges in the implementation of the programme. Structurally, some of the stakeholders do not complement each other as much as they should. For example, the link between the police, children's department and the Community Based Support System for Children (CBSSC) seem quite weak to an extent that each is operating almost independent of each other. Financially, the pilot diversion project proved unsustainable as it was largely depended on donor

⁹⁵ Apollo Mboya, Juvenile Justice in urgent need of reforms' <http://www.standardmedia.co.ke/article/2000102391> on 24 November 2016.

⁹⁶ Section 25, *Children Act* (Act 8 of 2001).

support so essentially at the moment no diversionary measures are employed as regards child offenders in Kenya.⁹⁷

Other than the pilot Diversion Kenya, the Children Act also provides for the Foster Care system⁹⁸ Foster care has to be done through a Charitable Children Institution (CCI). Although the Children Act provides for placement of children in CCIs as a measure of last resort, in practice, CCIs have become the first placement for children who are rescued from various risky situations, including removing them from their families due to poverty, and as a response to orphan-hood due to HIV and AIDS. As such, it is a form of alternative measure however only with regard to children in need of care and protection and not those in conflict with the law. Currently, The Law Society of Kenya with assistance of the Canadian Bar Association has been implementing the Strengthening Access to Justice for Children project that entails a case management system in the Nairobi Children's Court, and lobbying for policies on child protection within the juvenile justice system.⁹⁹This is a positive indication towards improving the children justice system.

With regard to the alternative measures discussed in the various jurisdictions above some of the alternatives that can be considered include: from the USA, the home confinement would be suitable in instances where the juvenile offender pending trial and has parents thus can continue with their education as they await in the case where the juvenile has no parent or guardian Kenya could opt for group homes. From the UK, the bail information system would equally be a suitable measure as it reduces on the workload of the probation officers and improves on an expedient trial process. Lastly, from Sweden the VOM is a positive programme as it encourages the child offender to take responsibility of their actions and serves as a preventive measure against juvenile delinquency.

⁹⁷ Consortium for Street Children 'Promoting and Protecting the Human Rights of Street Children in Juvenile Justice Systems', January 2002 –December 2003.

⁹⁸ Section 147, *Children Act* (Act no 8 of 2001).

⁹⁹ Apollo Mboya, Juvenile Justice in urgent need of reforms' <http://www.standardmedia.co.ke/article/2000102391> on 11 December 2017.

4.3 The Way Forward

4.3.1 Addressing the Challenges Faced with the Pilot Diversion Program

In order to know the best way forward first there is need to deal with the challenges faced with the pilot program and the four issues highlighted by the pilot program in Kenya. First, legally the diversion programs are not entrenched in the Constitution or any other legal document thus the programs are merely persuasive and non-binding. What is therefore required are standardized guidelines and procedures for protection of children in juvenile justice system. This would for instance include entrenchment of diversion programmes in the Constitution the supreme law and the Children's Act. In addition, there is need to have a system that will ensure that there are no criminal charges records maintained with regard to children and if they do they should be sealed records that will be subject to approval by the courts in order to access them. This is of importance as it will limit access of this information and give security to the child offender that their criminal records are private thus not labelled as a criminal as that information will be known to few persons.¹⁰⁰

Second issue was structural problem, the stakeholders who are involved in the juvenile justice system do not complement each other. In order to deal with this issue, it calls for coming together of the key stakeholders and redefining their roles so that there is no overlap of roles with regard to the juveniles. In doing so each party will be held accountable to their actions. Further, the stakeholders can have trainings on how to appropriately deal with juveniles in a manner that is child friendly and instills good behaviour.

The third issue was financial constraints, the pilot project being a project that was funded by donors and private persons presented the issue of sustainability of the programs. Therefore, in order to avoid this, it calls for having more stakeholders involved in the projects. Such include the government through the NCCS which can set aside funds when doing annual budgets for the juvenile justice system, private donors can also be involved through partnership with the government to fund some of the programs.

¹⁰⁰ <https://www.standardmedia.co.ke/article/2000102391/juvenile-justice-system-in-urgent-need-of-reforms> on 11 January 2017.

The fourth issue was low awareness. This can be rectified by creating more public forums for the community to attend. These forums should aim to educate the public on the importance of being involved in raising their children. In doing so parents will take the initiative to give love and support as they are made aware of the dangers of their children being involved in criminal acts and entering the criminal justice systems.

Having looked at the alternative measures with regard to juvenile detention adopted by the various jurisdictions, it can be noted that the best way forward in order to adhere to the principle of measure of last resort would be to adopt a juvenile justice model that rectifies/amends the gaps of the current system and adopt one that is more inclusive and restorative in nature taking into consideration, the past experiences of how juveniles have been dealt with, how they are being dealt with currently and the barriers within the current system. In doing so it will provide for a more comprehensive juvenile justice system that enables juveniles to be reintegrated back into the society and reduce recidivism. Such a model is the peer role model.

4.3.2 Peer Role Model

The peer role model comprises of elements of different programmes discussed from the various jurisdictions above. For instance, children who are in conflict with the law and those at risk of coming in conflict with the law may be diverted to some of the following programmes placement under a supervision and guidance. Secondly, the peer role model involves the adoption of a restorative mechanism that involves families and the community at large for instance making compulsory education of young children, emphasis of good behaviour and positive peer association and parents being involved in the parenting of their children in doing so parents are able to be in a better position to shape their children's character and positive influence. Thirdly, it comprises of referrals to appear at victim -offender mediation or other restorative justice involving family members; referral to a counseling or therapeutic intervention. This is of importance as it provides a forum for those children whose parents have either neglected them or failed to provide a love and support system. Thus, the counselors act as role models on shaping their way of thinking and taking responsibility of their actions.

In selecting a specific diversion option for a particular child at a police station or court, consideration should be given to the child's cultural, religious and linguistic background; the child's educational level, cognitive ability, domestic and environmental circumstances. In addition, it is important that proportionality of the option recommended or selected to the offence is taken into account in balancing the same with the interests of the society, the child's age and developmental needs and any other peculiar circumstances relating to the child including whether the child is a repeat offender.

4.3.2.1 Benefits of the Peer Role Model

- a) It eliminates the chances of stigmatization of children, which usually occurs when they go through the juvenile justice system.
- b) It reduces congestion in children remand homes as there is provision of alternative measures to detention. Reduces congestion in children's remand facilities and other institutions that temporarily hold children before determination of their matters.
- c) Diversion implements article 53(1)(f) as it advocates for separation of the children from the adults in detention. In addition, it avoids further criminal integration which may occur when young people are detained with criminals.
- d) It saves time and resources as it avoids delays in the processing of matters at the juvenile courts.

4.4 Conclusion

In conclusion, the diversion programmes can be said to be structured to incorporate community based interventions and, even in the absence of a direct victim are involved in the process. In addition, the procedural aspect of restorative justice is geared towards achieving substantive restorative justice by seeking to restore juveniles to being law-abiding members of the community and seeks to ensure the safety of juveniles in the community. Apart from rehabilitating the offender, the diversion process equally provides an opportunity through which community members can be involved. Therefore, it is of greater benefit and importance to put into consideration implementation of diversion programs in our country as it furthers the objective of the detention as a measure of last resort.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The study has examined the principle of detention as a measure of last resort particularly pre-trial detention. It has focused on the juvenile defendant which in the context of this study is one who has not yet been convicted of the crime he/she is accused of committing but is being detained in a remand home. The analysis of the study was mainly focused on the practices of how juveniles have been dealt with in the past and how they are currently being dealt with through reviewing the history of the juvenile justice system, the experiences of the juveniles in remand and the barriers of the current system. In addition, the study equally looked at the international legal framework. The purpose of doing so was to determine whether Kenya is in keeping with international standards. In doing so it established that with regard to adhering to the principle of detention as a measure of last resort Kenya has legally implemented the principle in the Children Act but in practice there is a major disconnect as is highlighted from the experiences of the juveniles held in remand. However, there have been instances where the courts have attempted to adhere to the principle from the decisions made such as in the case of *R v SAO* (2004).

The study further covered a comparative analysis on the trends/ practices that provide juveniles with an alternative to detention in contrast to the practices in Kenya. The aim of doing so was to answer two of the research questions which are: In what ways can Kenya make changes and can we learn anything from how other countries have dealt with their juveniles? These two questions were answered by suggesting some of the possible steps Kenya can take in order to divert juveniles from detention is adopting the peer role model as an alternative measure. This model is ideal as it a comprehensive juvenile justice system that enables juveniles be reintegrated back into the society and reduces recidivism. However, in order for this model to be implemented the study attempted to show the need for change in our juvenile justice system which would involve strategies that are required to reduce the risk of detention for children in remand and ensure those in detention are held for the shortest period possible.

5.2 Recommendations

First, amendment of the Children Act to entrench the diversion programmes. The essence of this would be to strengthen the programs and be legally binding to enforce them. In doing so it will reduce the number of children in the remand homes and improve on children being reintegrated back into society as these alternatives measures are restorative rather than punitive in nature.

Second, in order to ensure improved planning and programming on children's issues, the government, through the NCCS and other partners, should have a centralized database of children in the justice system. This would enhance service delivery to children through information sharing and efficient focused planning for children issues. Accurate data will also provide tools for planning, development and monitoring of interventions thus eliminate any inconsistencies.

Third, training of child protection stakeholders particularly those who deal with children in conflict with the law such as the police. Thus, there should be appropriate training packages on child protection within the statutory training manuals of all ministries and GOK departments dealing with children.

Fourth, strengthening the alternative care systems and diversion programs. This includes raising awareness on the importance of family care for children, as opposed to institutional care. This is of importance especially at the family level because if parents are able to care and model their children to paths of good behaviour then this would serve as a preventive measure to penetration into the criminal justice system which is the best option as it is the most cost-effective and sustainable approach for the state.

Fifth, with regard to adhering to the principle of measure of last resort, the government could take initiatives to institute a bail support system as is in the UK to support those child offenders who have been accused and are unable to pay for their bail in order to avoid them being detained in Remand homes pending adjudication of their cases.

Lastly, develop legal and policy guidelines that will promote the practice of the foster care system of children in conflict with the law. This would serve as one of the alternative measures that can be adopted in order to divert juveniles from detention.

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