

Strathmore University

Law School

**ASSESSING KENYA'S LEGAL FRAMEWORK WITH REGARDS TO THE BEST
INTEREST OF THE CHILD PRINCIPLE.**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School.

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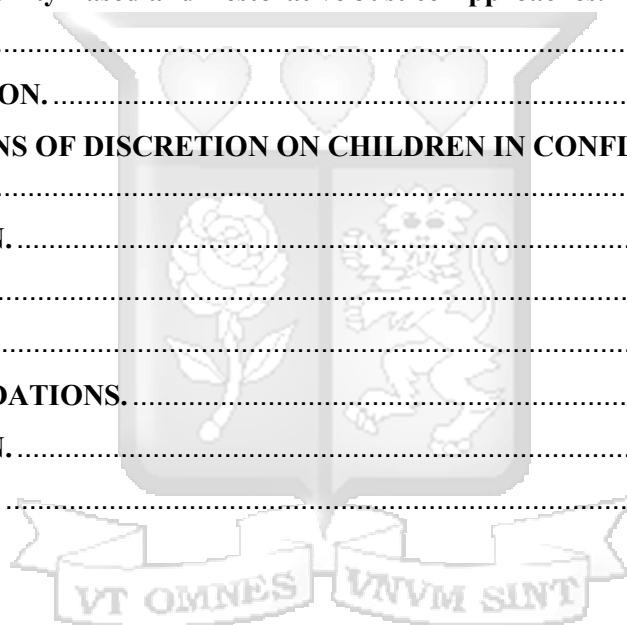
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TABLE OF CONTENTS.

ACKNOWLEDGMENT.....	iii
DECLARATION.....	iv
ABSTRACT.....	v
LIST OF CASES.....	vi
LIST OF LEGAL INSTRUMENTS.....	vii
LIST OF ABBREVIATIONS.....	viii
CHAPTER ONE.....	1
1.1 BACKGROUND.....	1
1.2 PROBLEM STATEMENT.....	5
1.3 RESEARCH OBJECTIVES.....	5
1.4 RESEARCH QUESTIONS.....	5
1.5 SIGNIFICANCE OF THE STUDY.....	6
1.7 THEORETICAL FRAMEWORK.....	6
1.10 RESEARCH METHODOLOGY.....	11
1.11 LIMITATIONS.....	12
1.12 CHAPTER BREAKDOWN.....	12
CHAPTER TWO.....	13
2.1 INTRODUCTION.....	13
2.4 ALTERNATIVE DISPUTE RESOLUTION.....	16
CHAPTER THREE.....	18
3.1: INTRODUCTION.....	18
3.2.1 United Nation Convention on the Rights of the Child (UNCRC).....	18
3.2.2 The African Charter on the Rights and Welfare of the Child (ACRWC).....	19
3.2.3 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).....	19
3.3 DOMESTIC LEGAL FRAMEWORK.....	20
3.3.1 Constitution of Kenya 2010.....	20
3.3.2 The Children Act, 2022.....	21
3.3.3 Diversion Guidelines and Explanatory Notes.....	22
3.3.4 The Child Justice Strategy 2021-2025.....	23
3.3.5 Sentencing Guidelines, Kenya Gazette No. 2970.....	24
3.4 CONCLUSION.....	25
CHAPTER FOUR.....	26
4.1 INTRODUCTION.....	26

4.2 THE ROLE OF DIVERSION IN KENYA.	26
4.3 ASSESSMENT OF OTHER JURISDICTIONS THAT KENYA CAN LEARN FROM.	28
4.3.1.1 Legal Framework	29
4.3.1.2 Specialized Juvenile Courts and Decision Making.	30
4.3.1.3 Funding for Diversion and Rehabilitation.	30
4.3.2 South African Diversion Program.	31
4.3.2.1 Legal Framework	31
4.3.2.2 Specialized Child Justice Courts and Procedures.	32
4.3.2.3 Institutional Framework.	33
4.3.2.4 Investment in Probation Services.	33
4.3.2.5 Community Based and Restorative Justice Approaches.	34
CHAPTER FIVE	36
5.1 INTRODUCTION.	36
5.2 IMPLICATIONS OF DISCRETION ON CHILDREN IN CONFLICT WITH THE LAW.	37
5.3 CONCLUSION.	39
CHAPTER SIX.	40
6.1 FINDINGS.	40
6.2 RECOMMENDATIONS.	43
6.3 CONCLUSION.	44
BIBLIOGRAPHY.	45



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DECLARATION.

I, SHARON KAWIRA MUTEMBEI, 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: 2nd April 2025.

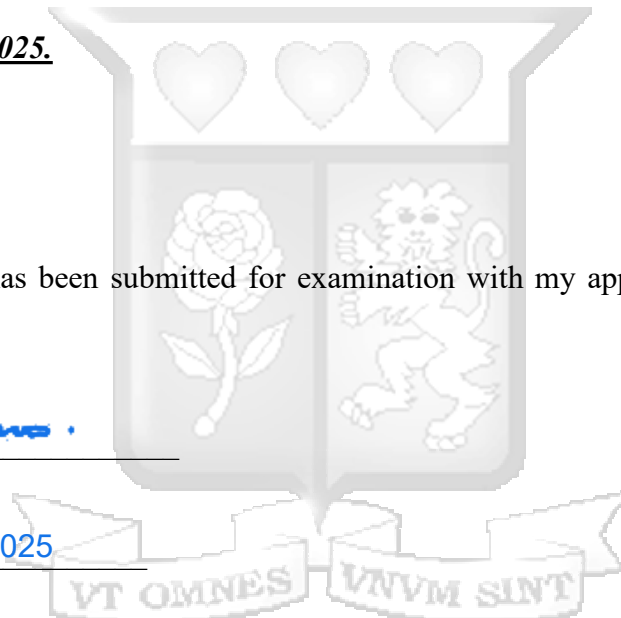
This dissertation has been submitted for examination with my approval as University Supervisor.



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Supervisor's Name: Dr. L. Osiemo



ABSTRACT.

The research discusses the situation concerning the handling of children in conflict with the law in Kenya and applies the principle of the Best Interest of the Child. Although Kenya has the Constitution of Kenya and international instruments such as the United Nations Convention on the Rights of the Child (UNCRC), the application of this principle is far from adequate. Ratified by Kenya, the UNCRC requires that the welfare of children be a primary consideration in all matters that affect them. Kenyan laws, however, including the Penal Code, barely consider their special needs as children and instead treat child offenders with similar procedures and penalties as adults.

The dissertation identifies diversion as a way that can fill a gap in the judicial system by integrating the use of rehabilitation of children and their reintegration into society. Diversion aims at decreasing stigmatization of child offenders, offering support services to child offenders, and deterring recidivism, thus serving the best interest of the child for children in conflict with the law. The Children Act, 2022, allows courts to use discretionary measures in relation to diversion. There are, however, inconsistencies in its application, which defeats its effectiveness. This dissertation identifies challenges within Kenya's juvenile justice system, assesses the shortfalls of existing legal frameworks, and calls for reforms that focus on restorative approaches to justice, which promote both children's rights and their well-being.

LIST OF CASES

1. *Republic vs BC* (2022) eKLR
2. *Republic vs NAS* (2024) eKLR
3. *EK Alias E v Republic (Criminal Appeal E031 of 2023)*
4. *VKR vs Republic*,
5. *NKR v Republic*,



LIST OF LEGAL INSTRUMENTS.

INTERNATIONAL INSTRUMENT

United Nations Convention on the Rights of the Child.

REGIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child

DOMESTIC LAWS

Constitution of Kenya.

Children Act.

Penal Code

Judicial Service Act.



LIST OF ABBREVIATIONS.

ADR - Alternative Dispute Resolution

UNCRC - United Nations Convention on the Rights of the Child.

SIDA - Swedish International Development Cooperation Agency

ACRWC - African Charter on the Rights and Welfare of the Child

PACS - Probation and aftercare service.

NPA - National Prosecuting Authority

MDT - Multidisciplinary Team



CHAPTER ONE

INTRODUCTION.

1.1 BACKGROUND.

A child in Kenya is defined as “ *an individual who has not attained the age of eighteen years* ”.¹ The Children Act 2022 defines a child in conflict with the law as a person who is above 12 years, but below the age of eighteen and has been dealt with or punished in accordance with Part XV of the Act or any other written law for contravention of the law.² The Constitution of Kenya provides that the best interests of a child are paramount in every matter concerning a child.³ The United Nations Convention on the Rights of the Child also provides for the primary consideration of a child’s best interests.⁴ The UNCRC forms part of the law in Kenya, as Kenya ratified the convention in 1990 and went ahead to domesticate the principles through the Children Act, 2001, which was later revised in the Children Act, 2022, ensuring the protection and promotion of the rights of children in keeping with the provisions of the UNCRC.

Kenya’s legal framework that governs children in conflict with the law has not sufficiently taken into consideration the salient principle of the Best Interest of the Child in instances where children are in conflict with the law. The application of this principle is crucial for ensuring that decisions affecting children are made with their welfare as the primary consideration.⁵ Diversion is a concept which focuses on rehabilitating children in conflict with the law and reintegrating them into a society that meets their needs, rather than relying on the formal justice system⁶ is one that adequately incorporates the Best Interest of the Child principle in such circumstances.

Diversion refers to interventions and programs aimed at reducing the stigmatization of children in conflict with the law, identifying at-risk children, providing support services, preventing

¹ Section 2 *Children Act* (Chapter 141)

² Section 2 *Children Act* (Chapter 141)

³ Article 53(2), *Constitution of Kenya* (2010)

⁴ Article 3 (1), *United Nations Convention on the Rights of a Child*, 20 November 1989, 27531

⁵ Gor G, Moraa T, ‘The nexus between the best interests of the child and detention of children in conflict with the law’ 7 *Kabarak Journal of Law and Ethics*, 2023, 27

⁶ Social Transformation through Access to Justice Child Justice Strategy, 2023 - 2030, 6

further involvement in the criminal justice system, and reducing recidivism.⁷ A well-rounded strategy that upholds children's rights, lowers recidivism, and acts in children's best interests is crucial for effective implementation of diversion programs.⁸ The Penal Code of Kenya that establishes the code of criminal law and governs courts' approach to criminal matters is silent on the diversion of matters concerning child offenders.

Furthermore, the Children Act of Kenya 2022 gives effect to Article 53 of the Constitution. It grants the courts the discretion to either apply diversion or to solely rely on the Penal Code and Criminal Procedure Code.⁹ This leads to challenges as it defeats the principle of the Best Interest of the Child which the Children Act mainly seeks to promote and uphold. Courts that rely on the Penal Code treat children in conflict with the law in a similar way as other categories of offenders as they are investigated and indicted in the same way as adults.¹⁰

The following are cases that have recognized the Best Interest of the Child principle in matters relating to children in conflict with the law:

In the case, *Republic v BC*¹¹ A child named BC was charged with murdering her own child. She was a victim of early marriage and defilement. She was sent away by her husband and faced rejection. The Directorate of Children Services (DCS) recommended her to a rescue center. The Court emphasized the welfare of BC, following diversion principles and ordered interventions for her rehabilitation. The application of diversion in the context of child offenders clearly depicts the Best Interest of the Child principle. The case discusses the importance of treating child offenders as children in need of care and protection, which is a core tenet of diversion. It emphasizes the role of the Directorate of Children Services of Kenya in rehabilitation and the need for supportive interventions rather than punitive measures.

⁷ Section 2, *Children Act* (Chapter 141), 2022

⁸ Njiru D and Washisino M, 'Efficacy and Adequacy of Criminal Justice Agencies in Kenya: The Case of Children in Conflict with the Law' National Crime Research Centre, 2023, <https://www.crimeresearch.go.ke/wp-content/uploads/2024/07/EFFICACY-AND-ADEQUACY-OF-CRIMINAL-JUSTICE-AGENCIES-IN-KENYA-THE-CASE-OF-CHILDREN-IN-CONFLICT-WITH-THE-LAW-REPORT.pdf> on 21 November 2024.

⁹ Section 224, *Children Act* (Chapter 141), 2022

¹⁰ https://www.unafei.or.jp/activities/pdf/Public_Lecture/Public_Lecture2023_Mr.Okech_Slides.pdf on 21 November 2024.

¹¹ *Republic vs BC (Criminal Case E061 of 2022)* eKLR

In the case *EK Alias E v Republic*¹² EK alias E was convicted for defilement under the Sexual Offences Act, 2006, despite claiming inconsistencies in the evidence. The High Court upheld the lower court's conviction but ordered a review of the sentence. The Court emphasized the need for legislative action to address gaps in the Children Act, 2022, regarding sentencing minors. The existing legal framework lacks provisions for dealing with minors in conflict with the law, highlighting the need for diversion which prioritizes rehabilitation over punitive measures. The Court also emphasized the importance of judges considering individual circumstances, including the offender's age and background, when determining appropriate sentences. The Diversion Policy was also seen to be of the best interest of the child in conflict with the law.

In the case *VKR vs Republic 2021*,¹³ Vincent Kipngeno Rugut, a minor accused of stealing 14 head of cattle worth Kshs.560,000, was convicted and sentenced to five years in prison. Despite being a minor, Rugut appealed the sentence, arguing that the trial magistrate failed to consider mitigating factors and that his age and circumstances were not adequately established. The Court of Appeal found that the Court's failure to consider these factors breached his rights. The Court decided against a retrial, stating that the time he had served was sufficient punishment. The judgment emphasized the need for the judicial system to uphold the rights of minors and ensure fair trials. This case highlights the Best Interest of the Child principle in the judicial process, emphasizing the need for courts to protect minors' rights to fair trial rights and rehabilitation over punishment. Courts must ensure that children in conflict with the law receive age-appropriate treatment, are not detained except as a last resort, and are given opportunities for reintegration rather than punitive sentencing and uphold their best interests in legal proceedings. In this case the focus is on the child getting a punishment that is of his best interest.

In the case *NKR v Republic 2021*¹⁴, The Appellant, NKR, was charged with gang rape in association with another person. The appellant was charged alongside another individual, but his co-accused was not before the court. Therefore, he was tried alone even though the offense was alleged to have been committed with another person. The trial magistrate convicted NKR and

¹² *EK Alias E v Republic* (Criminal Appeal E031 of 2023) eKLR

¹³ *VKR v Republic* (2021) eKLR

¹⁴ *NKR v Republic* (2021) eKLR

sentenced him to life imprisonment. During the appeal, it was revealed that NKR was a minor at the time of both the offense and the conviction, making him 15 years old at the time of the offense and barely 16 at the time of conviction. Throughout the legal process, NKR was treated as an adult, placed in an adult remand home, and imprisoned in an adult facility without the legal protections afforded to minors. The High Court quashed the conviction and set aside the sentence, recognizing that he should not have been tried as an adult and emphasized the importance of adhering to legal protections for minors in the justice system. The Court ordered NKR to be set at liberty unless otherwise lawfully held in custody, highlighting the need for the Judiciary to ensure that the rights of minors are protected in all legal proceedings. Similarly, in this instance, the emphasis is on the child receiving a punishment that is optimal for him. That is seen as the child's best interest.

In the case of *Republic vs NAS*¹⁵ NAS, a 10-year-old minor, is charged with the murder of another 8-year-old, T.D.O, on November 2, 2023. The charge was brought against him in March 2024. Defense counsel argued that NAS is not criminally responsible due to his age, while the prosecution argued the case should proceed to trial to assess the minor's understanding of right and wrong. The Court mainly focused on the lack of criminal responsibility due to NAS's age. The defense had requested for the consideration of diversion to the prosecution but the prosecution denied the request for diversion.

In Kenya, children are defined as individuals under 18 years, with those aged 12-17 considered in conflict with the law if dealt with for offenses. The Constitution and the UNCRC emphasize the best interests of the child, yet Kenya's legal framework inadequately incorporates this principle. Diversion aims to rehabilitate and reintegrate child offenders, reducing stigmatization and recidivism. In *EK Alias E v Republic*, the Court recognized the best interest of the child by ordering a review of the sentence and advocating for legislative reform and diversionary measures that prioritize rehabilitation over punishment, reflecting concern for age and individual circumstances. In *VKR vs Republic*, the Court found that failing to consider the minor's mitigating factors and circumstances breached his rights, emphasizing that sentencing should align with his best interests by focusing on fair trial rights and rehabilitation. *NKR v Republic*,

¹⁵ *Republic vs NAS* (Criminal Case E007 of 2024) eKLR

the Court determined that subjecting a minor to adult trial conditions and a life sentence violated the protective legal standards afforded to children, quashing the conviction and underscoring that punishment must be age-appropriate and in the minor's best interest. However, gaps remain, as seen in the *Republic v BC* case, where diversion was applied, and *Republic v NAS*, where a 10-year-old's diversion request was denied despite age-related defenses. These cases highlight challenges in aligning Kenyan law with child-centric approaches.

1.2 PROBLEM STATEMENT.

Section 224 of the Children Act 2022, gives courts the discretion to choose to either apply diversion or judicial process. The Penal Code of Kenya on the other hand, does not provide for diversion. There is a possibility of problems when it comes to interpretation as it begs the question which of the two laws are of the best interest of the child in conflict with the law. There are disparities in results of similar cases as some courts will rely on the Penal Code and others will use the Children Act 2022. These disparities have undermined the principle of the best interest of the child, that is recognized nationally and internationally.

1.3 RESEARCH OBJECTIVES.

1. To assess the level to which the legal framework in Kenya integrates the principle of the Best Interests of the Child for children in conflict with the law.
2. To assess the effectiveness of diversion in rehabilitating and reintegrating children in conflict with the law back into society.
3. To assess the implications brought by the discretion of the courts under the Children Act, 2022, and the effect they have on the application of the principle of the Best Interest of the Child

1.4 RESEARCH QUESTIONS.

1. To what extent does the Kenyan legal framework uphold the principle of the Best Interest of the Child in addressing cases of children in conflict with the law?
2. What is the role played by diversion in rehabilitating and reintegrating children in conflict with the law, and to what extent does it achieve its objectives?

3. What are the implications brought forth by the discretion of the courts under the Children Act, 2022, and what effect do these have on the application of the principle of the Best Interest of the Child?

1.5 SIGNIFICANCE OF THE STUDY.

The basis of this dissertation, therefore, lies in its potential to advance the understanding and application of the best interest of a child in Kenya's legal framework concerning children in conflict with the law. As it analyzes the infusion of the Diversion, the study also analyses the deficits in the legal system so that care and rehabilitation but not punitive measures are given to children. It emphasizes that the juvenile justice system needs to adopt a child-friendly approach and calls for legal reforms that will put the interest of a child foremost. The outcome may be to address the need to develop a more efficient, humane, and rights-based practice concerning juvenile offenses in Kenya.

1.6 HYPOTHESIS.

The dissertation assumes that the legal framework in Kenya, though intended to give the best interests of the child primacy of place in its provisions, does not necessarily apply this principle consistently in matters that bring children into conflict with the law. The study assumes that when applied, diversion has the potential to result in better rehabilitation of the children and reduce recidivism, but it suffers from the challenge of courts' discretion. The dissertation also assumes that the absence of clear guidelines on diversion in the Penal Code and the discretion under the Children Act, 2022, may undermine the consistency and effectiveness of the diversion process in practice.

1.7 THEORETICAL FRAMEWORK.

The dissertation will use the Restorative Justice theory. Some of the proponents of this theory are John Braithwaite, Howard Zehr, and Mark Umbreit.¹⁶ Howard Zehr states that restorative justice involves involving victims and community members in criminal justice cases, focusing on their

¹⁶ Meadow C, "Restorative Justice: What Is It and Does It Work?", Georgetown University Law Center, 2007, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1588&context=facpub#:~:text=OF%20RESTORATIVE%20JUSTICE,of%20punishment%20for%20wrongful%20acts>. On 1st March 2024.

needs such as information, truth telling, empowerment, and restitution. It encourages offender accountability and encourages communities to take responsibility for their actions.¹⁷ The three pillars of Restorative Justice theory are harms and needs, obligations, and engagement. The goal is to put key decisions in the hands of those most affected by crime, make justice more healing, and reduce the likelihood of future offenses.¹⁸ Models of restorative justice include victim offender conferences, family group conferences, circles, diversionary programs, and transitional programs.¹⁹

Restorative justice is viewed as an imperfect paradigm by some critics, such as Gregory Shank and Paul Takagi, because it does not address the systemic, underlying disparities that predispose some individuals to crime more than others.²⁰ Gregory Shank and Paul Takagi advocate for resolving the underlying reasons of many one-on-one offenses as well as for the creation of a socioeconomic system that will be more favorable to peaceful, healthy life generally. They question the fundamental fairness of institutions and the structure of society.²¹ The researcher intends to use this theory as it is very inclined to the researcher's topic and the objectives theory talks of are the same the researcher will put across.

1.8 LITERATURE REVIEW.

In the journal by Aron Degol and Shimelis Dinku titled ‘*Notes on the Principle “Best Interest of the Child”*’: *Meaning, History and its Place under Ethiopian Law*’, the authors go into detail what the principle of the Best Interest of the Child entails. The best interest principle, originating from the 1924 Geneva Declaration of the Rights of the Child, was further reinforced by the 1959 Declaration, emphasizing the importance of special safeguards and care for children due to their

¹⁷ Zehr H, *Little Book of Restorative Justice*, First Edition, Sky horse publishing, United States of America, 2002, Abstract.

¹⁸ Zehr H, *Little Book of Restorative Justice*, First Edition, Sky horse publishing, United States of America, 2002, Abstract.

¹⁹ Zehr H, *Little Book of Restorative Justice*, First Edition, Sky horse publishing, United States of America, 2002, Abstract.

²⁰

<https://learn.saylor.org/mod/book/view.php?id=30499&chapterid=6401#:~:text=Additionally%2C%20some%20critics%20like%20Gregory,to%20be%20offenders%20than%20others>. On 6th March 2024.

²¹

<https://learn.saylor.org/mod/book/view.php?id=30499&chapterid=6401#:~:text=Additionally%2C%20some%20critics%20like%20Gregory,to%20be%20offenders%20than%20others>. On 6th March 2024.

physical and mental immaturity.²² The principle aims to ensure that the children are given the opportunity to develop healthily under conditions of freedom and dignity. Article 2 of the 1959 Declaration states categorically that the best interest of the child shall be the paramount consideration in the enactment of laws and policies affecting children.²³

Despite its universal recognition, the best interest of the child principle faces challenges in its interpretation and application. The authors of the journal, Aron Degol and Shimelis Dinku, note that the concept is inherently subjective, with varying interpretations influenced by cultural, social, and legal contexts.²⁴ Robert Mnookin highlights the lack of a clear consensus on the values that should inform decisions regarding a child's best interests, emphasizing that the choice of criteria is often value-laden and context-dependent.²⁵

Determining the best interest of the child mostly requires a nuanced case-by-case analysis. The authors postulate that although the principle should inspire the best decision, it should be balanced against other competing interests such as those of justice and societal concerns. This flexibility is critical in handling the peculiar situation of each and every child since the principle is not an exclusive standard but a framework which calls for an attentive analysis of singular needs and contexts.²⁶ The Best Interest of the Child principle is crucial for child rights, emphasizing the need for continuous discussion and refinement among legal scholars, practitioners, and policymakers.

The authors fail to use an empirical study that evaluates how cultural and societal influences bear specifically on the practical application of the best interest principle across diverse legal systems. A dissertation by Caroline Kosgei titled “*An analysis of the Legal Framework guiding the Rights of Juvenile Delinquents in Kenya*”, She discusses the Kenyan legal framework that upholds the

²² Degol A and Dinku S, ‘Notes on the Principle “Best Interest of the Child”: Meaning, History and its Place under Ethiopian Law’ 5 *Mizan Law Review* 2, 2011, 5

²³ Degol A and Dinku S, ‘Notes on the Principle “Best Interest of the Child”: Meaning, History and its Place under Ethiopian Law’ 5 *Mizan Law Review* 2, 2011, 5

²⁴ Degol A and Dinku S, ‘Notes on the Principle “Best Interest of the Child”: Meaning, History and its Place under Ethiopian Law’ 5 *Mizan Law Review* 2, 2011, 6

²⁵ Degol A and Dinku S, ‘Notes on the Principle “Best Interest of the Child”: Meaning, History and its Place under Ethiopian Law’ 5 *Mizan Law Review* 2, 2011, 6

²⁶ Degol A and Dinku S, ‘Notes on the Principle “Best Interest of the Child”: Meaning, History and its Place under Ethiopian Law’ 5 *Mizan Law Review* 2, 2011, 7

principle of the Best Interest of the Child particularly through its constitutional provisions and specific legislation. Article 53 of the Constitution of Kenya emphasizes that a child's best interests are paramount in all matters concerning them, which aligns with international standards such as the Convention on the Rights of the Child (CRC).²⁷

The Children Act of 2022 provides the legal framework in Kenya for child protection and incorporates the best interest principle in its provisions. This Act, together with other relevant pieces of legislation, deals with the issues of ensuring that children in conflict with the law will be treated with dignity and respect and their rights, therefore, ensured at all stages of the judicial process.²⁸ The researcher says that there are some inadequacies such as lack of procedural safeguards and Institutional shortcomings as there is the absence of child-friendly facilities and trained personnel in the justice system.²⁹ She also mentions the gaps in the legal framework that fail to fully align with international standards, particularly regarding the treatment of children in conflict with the law. This includes the need for measures that prioritize rehabilitation over punishment and the use of detention only as a last resort.³⁰

While the Kenyan legal framework provides a good basis on which the best interest of the child can be protected, significant challenges to implementation persist. The practice of these laws is often compromised by well-acknowledged procedural and institutional inadequacies that allow the occurrence of a miscarriage of justice concerning children in conflict with the law. The dissertation does not analyse community-based rehabilitation programs, which are put in place to address the reintegration of juvenile delinquents into society as part of holistic child welfare.

A report was written on the diversion program in Kenya by the Swedish International Development Cooperation Agency (SIDA). It stated that diversion in Kenya is an important means for the rehabilitation and reintegration of children in conflict with the law, basing itself on

²⁷ Kosgei C, 'An analysis of the Legal Framework guiding the Rights of Juvenile Delinquents in Kenya' published LLB Thesis, Strathmore University, Nairobi, 7

²⁸ Kosgei C, 'An analysis of the Legal Framework guiding the Rights of Juvenile Delinquents in Kenya' published LLB Thesis, Strathmore University, Nairobi, 7

²⁹ Kosgei C, 'An analysis of the Legal Framework guiding the Rights of Juvenile Delinquents in Kenya' published LLB Thesis, Strathmore University, Nairobi, 8

³⁰ Kosgei C, 'An analysis of the Legal Framework guiding the Rights of Juvenile Delinquents in Kenya' published LLB Thesis, Strathmore University, Nairobi, 9

restorative justice principles.³¹ Accordingly, an offense is viewed as a violation of a relationship that generates an obligation to restore the injury caused, which would be in compliance with the best interest of the child under the Convention on the Rights of the Child. The report states that diversion should be to consider detention truly as a last resort, and for the shortest appropriate period, to minimize the number of children exposed to the juvenile justice system.³²

The report stated that the diversion had achieved a few objectives such as the reduction of children in the Juvenile Justice system.³³ The report states that the program changed the attitudes among stakeholders as many people recognise the importance of treating children with care and ensuring their rights are protected.³⁴ Overall, the rehabilitation and reintegration of children in conflict with the law through diversion have indeed taken a giant stride, but further work is required to alleviate these many challenges so that the objectives can be fully met.³⁵ There is a need to establish the long-term effect of diversion on recidivism rates and if rehabilitation mechanisms are effective to ensure that children are successfully integrated back into society.

Finally a journal by Terry Moraa and George Gor which is titled '*The nexus between the best interests of the child and detention of children in conflict with the law*' states that the Best Interest principle per se is subjective and calls for differential application by judges.³⁶ This leads to inconsistencies in the administration of justice, with children suffering the consequence of this incoherence in inconsistent treatment, thereby defeating the very purpose of this supposedly universal guiding principle.³⁷

³¹ Swedish International Development Cooperation Agency (SIDA), *The Diversion Program in Kenya*, January 2009, 11.

³² Swedish International Development Cooperation Agency (SIDA), *The Diversion Program in Kenya*, January 2009, 11.

³³ Swedish International Development Cooperation Agency (SIDA), *The Diversion Program in Kenya*, January 2009, 16- 17.

³⁴ Swedish International Development Cooperation Agency (SIDA), *The Diversion Program in Kenya*, January 2009, 25

³⁵ Swedish International Development Cooperation Agency (SIDA), *The Diversion Program in Kenya*, January 2009, 41

³⁶ Gor G, Moraa T, 'The nexus between the best interests of the child and detention of children in conflict with the law' 7 *Kabarak Journal of Law and Ethics*, 2023, 27

³⁷ Gor G, Moraa T, 'The nexus between the best interests of the child and detention of children in conflict with the law' 7 *Kabarak Journal of Law and Ethics*, 2023, 27

The Best Interests of the Child principle is a universal standard designed to make the welfare and rights of children paramount in legal proceedings. However, the inconsistency in application can lead to unpredictable and inconsistent outcomes that result in decisions failing to adequately safeguard children's rights or well-being. This has the effect of rendering this principle to lose its purpose in giving a clear, consistent, and universally protective approach to decisions involving children, thus inept in serving justice and protection for all children in similar situations. The authors state that judicial discretion, while crucial for unique case circumstances, can sometimes lead to decisions that prioritize punitive measures over rehabilitative ones, potentially harming the child's best interests.³⁸ The impact of socioeconomic factors on judicial discretion and application of the best interests principle in diverse cultural contexts, especially in resource-limited settings, is not highly focused in the journal.

1.10 RESEARCH METHODOLOGY.

This dissertation shall adopt a Doctrinal Legal Research approach. The study will be done through analyzing legal principles, statutes, and case law to critically assess the integration of restorative justice within the Kenyan juvenile system, the Best Interest of the Child principle and the use of diversion. Doctrinal Legal Research involves a close analysis of legal principles, statutes, case law, and other authoritative legal sources for the interpretation and understanding of the law as it is. It focuses on examining existing legal frameworks to identify gaps, inconsistencies, or areas for improvement within a specific area of law.

Using a Doctrinal Legal Research approach would, therefore, allow for critical analysis and interpretation of current laws, statutes, and judicial decisions that govern the rights and welfare of the child through the Best Interest of the Child principle where children are in conflict with the law. The rationale behind this approach is that it enables the researcher to systematically explore the legality of the legal provisions in Kenya as far as international standards, like UNCRC, are concerned and establish if the existing legal framework effectively guarantees the interest of the child is paramount in juvenile justice processes. Primary sources in law will allow

³⁸ Gor G, Moraa T, 'The nexus between the best interests of the child and detention of children in conflict with the law' 7 *Kabarak Journal of Law and Ethics*, 2023, 5

the examination of legal gaps, contradictions, or areas where the law might not work best for the protection of children who come into conflict with it.

1.11 LIMITATIONS.

The researcher encountered some difficulties while conducting the investigation. One of the issues is time constraints. There was not enough time for the researcher to do thorough research. The researcher could not get enough case law as the Children Act, 2022 is recent. In contrast to the victims and society at large, the researcher has a bias in favor of the children in conflict with the law and how they might reintegrate into society. Despite these restrictions, the researcher continued to write about the subject.

1.12 CHAPTER BREAKDOWN.

Chapter one will give an overview of what the best interest of the child's principle is in Kenya, its application to children in conflict with the law, and legal inconsistencies in its implementation. Chapter Two discusses the theoretical framework and finally narrows down to restorative justice and best interest of the child principle as the main guiding concepts.

Chapter Three analyses the legal framework adopted by Kenya for dealing with children in conflict with the law and domestic and international legal standards.

Chapter Four looks at the potential of diversion in the rehabilitation and reintegration of child offenders and presents challenges that confront it.

Chapter Five will explore implications of judicial discretion under the Children Act, 2022, for upholding the best interest of the child principle.

Chapter Six will summarize findings, identify gaps in the legal framework, and provide recommendations for improving Kenya's juvenile justice system to align with restorative justice principles.

CHAPTER TWO

THEORETICAL FRAMEWORK.

2.1 INTRODUCTION.

This dissertation will use Restorative Justice theory and analyse the Best Interest of the Child principle. The dissertation will examine what the theory is, how it is connected to the Best Interest of the Child principle and how it supports it. There are four principles that guide the making of children's rights which are non-discrimination, best interest of the child, the right to survival and development and the views of the child.³⁹ The dissertation will focus on the principle of the Best Interest of the Child that is provided for in the United Nations Convention on the rights of the child⁴⁰ and specifically those in conflict with the law. This dissertation will also analyse the Alternative Dispute Resolution and how it relates to diversion and the Best Interest of the Child principle.

2.2 RESTORATIVE JUSTICE THEORY.

The Restorative Justice theory entails a method of dealing with crime that is primarily concerned with mending the harm that the wrongdoing has caused and, to the extent that it is feasible, restoring the wellbeing of all parties concerned.⁴¹ The main theory of this dissertation will be the Restorative Justice theory. The three pillars of Restorative Justice theory are harms and needs, obligations, and engagement. The needs and harms pillar and the obligation pillar require offenders to take responsibility for their actions and compensate for whatever harm they may have caused. This can be achieved through a range of reparations, such as community service or compensation payments, which demonstrate the pillar of engagement that benefits both victims and offenders.⁴²

³⁹ <<https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>> on 10 December, 2024.

⁴⁰ Article 3(1), *United Nations Convention on the Rights of the Child*, 20 November 1989, 27531.

⁴¹ 'E4J University Module Series: Crime Prevention and Criminal Justice' United Nations Office Drugs on Drugs and Crime, April 2019, <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept-values-and-origin-of-restorative-justice.html#:~:text=Restorative%20justice%20refers%20to%20a,being%20of%20all%20those%20involved>. On 10 December 2024.

⁴² <https://restorativejustice101.com/the-three-pillars-of-restorative-justice-harms-and-needs-obligations-and-engagement/#:~:text=It%20is%20based%20on%20three.create%20a%20more%20just%20society>. On 7 January 2025

The goal is to put key decisions in the hands of those most affected by crime, make justice more healing, and reduce the likelihood of future offenses. Models of restorative justice include victim offender conferences, family group conferences, circles, diversionary programs, and transitional programs.⁴³ Restorative justice models place priority on the best interest of the child in conflict with the law through direct involvement of victims, offenders, families, and communities in justice processes. These models have the potential to address the particular needs and contexts of child offenders that support their development and reintegration into the community.⁴⁴

Proponents of this theory include; John Braithwaite, Howard Zehr, and Mark Umbreit.⁴⁵ According to Howard Zehr, restorative justice is a relational and people-centered approach focused on dialogue, accountability, and restoration rather than punishment, and seeks to balance the needs of victims, offenders, and communities.⁴⁶ Howard's restorative justice approach looks more to a healing approach rather than punishment. It concentrates on dialogue, accountability, and restoration. The approach seeks to create an atmosphere in which the child can learn from their mistakes and develop empathy so that they can reintegrate with society as a responsible person. To this extent, justice would be restorative rather than punitive, assuring that it promotes the best interests of the child.

A major challenge for the theory underlying restorative justice is that its practice and vocabulary are narrow and exclude victims. The use of the word "restoring" may be offensive or misleading for victims in cases where the harm cannot be repaired or where offenders are not identified or unwilling to participate. This emphasis on face-to-face mediation, in turn, shuts out victims who cannot or should not participate in such processes due to severe violence, domestic abuse, or sexual assault. Restorative justice continues to be surrounded by skepticism over its actual value

⁴³ Zehr H, *Little Book of Restorative Justice*, First Edition, Skyhorse publishing, United States of America, 2002, Abstract.

⁴⁴ Zehr H, *Little Book of Restorative Justice*, First Edition, Skyhorse publishing, United States of America, 2002, Abstract.

⁴⁵ Meadow C, "Restorative Justice: What Is It and Does It Work?", Georgetown University Law Center, 2007, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1588&context=facpub#:~:text=OF%20RESTORATIVE%20JUSTICE,of%20punishment%20for%20wrongful%20acts>. On 1st March 2024.

⁴⁶ Casals E and Domingo S, Interview with Howard Zehr 'The Culture of Punishment: A Critical Approach', International Catalan Institute of Peace, <https://www.icip.cat/perlapau/en/article/interview-with-howard-zehr-pioneer-of-the-concept-of-restorative-justice/> on 10 December 2024

in enhancing safety and meeting victim needs because of a lack of stringent assessment and evidence of its performance.⁴⁷

The theory aligns with the Best Interest of the Child principle in that, they both guide the justice system to focus on a child's developmental outcomes and assume that the child's best interests are protected and the child gets an opportunity to be well adjusted back into the community.⁴⁸ The United Nations Convention on the Rights of the Child, UNCRC, recognizes that there is a manner of treatment of child offenders that promotes their sense of dignity and worth⁴⁹, which further promotes their reintegration into society.

Furthermore, diversion has a child-centered approach as it focuses on a child's best interests being of paramount importance in every matter concerning the child.⁵⁰ Restorative Justice theory is meant to support the provision of a safe environment where children can be freely expressive and involved in the process, taking responsibility for their actions and understanding them. This process is to be driven first and foremost by healing and respect, with the needs and rights of the child at the forefront to ensure rehabilitation and reintegration into the community.⁵¹

2.3 DIVERSION.

Diversion is described as the process where children in conflict with the law are dealt with outside the formal criminal justice system that promotes reintegration of the children into society and is aimed at reforming those children in conflict with the law.⁵² The study relates the policy to the Restorative Justice theory for the rationales discussed below.

⁴⁷ Achilles M, Amstutz L, Halbert E, Mika H, and Zehr H, 'Listening to Victims - A Critique of Restorative Justice Policy in the United States' 68(1) *Federal Probation*, 5

⁴⁸ Mugo R, 'Application of the Best Interest Principle of the Criminal Justice Juvenile System: A review of Emerging Case Law' 1 (1), *Interdisciplinary Journal on the African Child Special edition*, 2019, 2

⁴⁹ Article 40, *United Nations Convention on the Rights of the Child*, 20 November 1989, 27531.

⁵⁰ Ngusale G, 'The Best Interest Principle of a Child in Kenya' Department of Public and Private Law, 2021, 11, https://www.academia.edu/46210243/THE_BEST_INTEREST_PRINCIPLE_OF_A_CHILD_IN_KENYA_FACULTY_OF_LAW_DEPARTMENT_OF_PUBLIC_AND_PRIVATE_LAW on 11 December, 2024

⁵¹ Sylwander K, 'Promoting Restorative Justice for Children' SRSG on Violence Against Children, 2013, 37

⁵² Weru E, 'Diversion of Children in Conflict with the law: The need for its Enactment n Kenyan Legislation' published LLB Thesis, Kenyatta University, Nairobi, 2013, 1

Both Diversion Policy and Restorative Justice theory focus on the shift from the use of punitive measures to the use of rehabilitative and reintegrate methods. Both the Diversion Policy and Restorative Justice theory are based on preventing a child from entering the formal criminal justice system and have focused on rehabilitation and reintegration into society.⁵³ Restorative Justice underpins Diversion by addressing the root causes of offending, repairing harm, fostering accountability, and promoting positive reintegration. They both put the best interest of the child in focus and, through that, reduction of recidivism and humane and supportive treatment of the child offender.⁵⁴

This dissertation analyses the Restorative Justice theory that aims at mending the harm, promoting offender accountability, and reintegrating the offenders into society in a juvenile justice system. Guided by the Best Interest of the Child principle and supported by the Kenyan Children Act 2022, the dissertation advocates for healing and respect-based child-centered approaches focused on developmental outcomes. By linking restorative justice with diversion, the study underlines the rehabilitative and community-based solutions that reduce recidivism and support the humane treatment of child offenders.

2.4 ALTERNATIVE DISPUTE RESOLUTION.

The study acknowledges the Diversion Policy as a form of Alternative Dispute Resolution (ADR). ADR is a range of dispute-solving methods used without a formal court system, including mediation, arbitration, and traditional dispute resolution mechanisms (TDRMs), which were informal methods used in Kenya during the precolonial era, encompassing indigenous methods.⁵⁵ The Constitution of Kenya, 2010 advocates for the use of ADR.⁵⁶ Diversion Policy is a way in which child offenders are redirected from the formal criminal justice procedures to informal dispute resolution mechanisms. Both Diversion Policy and ADR aim to secure more just and valuable solutions for children involved in the criminal process by enlisting community-

⁵³ Hambali A and Zainuddin Z, 'Implementation of Diversion for Children in Conflict with the Law by the National Police of Indonesia' 2(6) *European Journal of Law and Political Science*, 2023

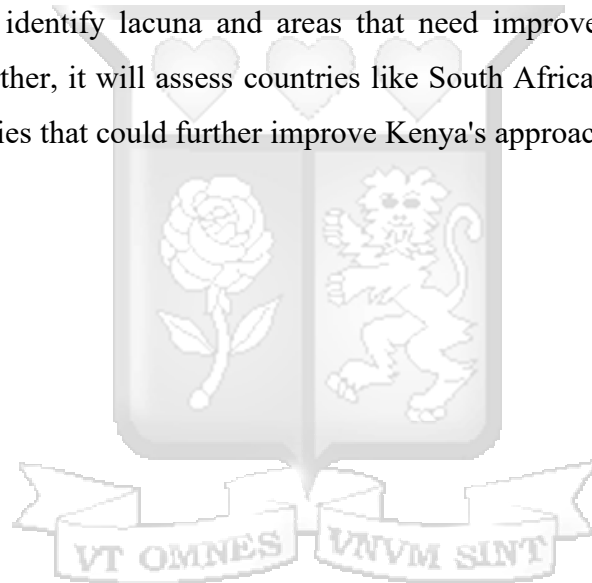
⁵⁴ Hambali A and Zainuddin Z, 'Implementation of Diversion for Children in Conflict with the Law by the National Police of Indonesia' 2(6) *European Journal of Law and Political Science*, 2023

⁵⁵ Onyango A, 'Putting Children First: Prioritising Minors in the Application of ADR in Criminal Cases in Kenya' 10(1) *Journal of Conflict Management & Sustainable Development*, 2023, 66

⁵⁶ Article 159 (2(c)), Constitution of Kenya (2010)

based interventions that could avoid the potentially damaging effects of formal judicial proceedings.⁵⁷ ADR mechanisms support both the advantages of including the kid's best interests in dispute settlement and the best interests of the child theory. By addressing the root causes of the dispute, the restorative aspect of TDRMs fosters social harmony for all community members.⁵⁸

This dissertation explores the status of integrating restorative justice in Kenya's juvenile justice system. As seen in this chapter, diversion can be an ADR mechanism that diverts child offenders from the formal process of justice to the community. Using a Doctrinal Legal Research approach, it examines Kenyan legal principles, statutes, and case law considering international standards such as the UNCRC to identify lacuna and areas that need improvement regarding the Best Interest of the Child. Further, it will assess countries like South Africa and Norway to highlight best practices and strategies that could further improve Kenya's approach to juvenile justice.



⁵⁷ Arifin R, 'Model of Diversion and its Implementation in the Criminal Justice System' 11(4) *International Journal of Business, Economics and Law*, 2016, 88

⁵⁸ Onyango A, 'Putting Children First: Prioritising Minors in the Application of ADR in Criminal Cases in Kenya' 10(1) *Journal of Conflict Management & Sustainable Development*, 2023, 78.

CHAPTER THREE

KENYAN LEGAL AND INSTITUTIONAL FRAMEWORKS OF THE BEST INTEREST OF THE CHILD PRINCIPLE FOR CHILDREN IN CONFLICT WITH THE LAW.

3.1: INTRODUCTION.

The Best Interest of the Child principle is enshrined in both national and international legal frameworks of Kenya. This chapter examines both domestic and international laws that govern Kenya's legal framework in regard to the principle of the Best Interest of the Child and in particular, children in conflict with the law. The chapter first analyses International legal and institutional framework and then domestic legislations thereafter.

3.2 INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK.

3.2.1 United Nation Convention on the Rights of the Child (UNCRC).

Kenya ratified the UNCRC in 1990 and incorporated its principles into its law in the Children Act of 2022. The Convention protects and prioritizes children in conflict with the law, and the best interests of the child in both public and private institutions.⁵⁹ This provision seeks to ensure that all decisions taken for children in conflict with the law prioritize their welfare and developmental needs and that they are treated fairly and humanely. Children should not be subjected to inhuman or cruel treatment, such as torture or death penalty, and should not be arrested, imprisoned, or jailed except in exceptional cases and for the shortest possible time. Imprisonment of children with adults and respectful treatment are not acceptable.⁶⁰ This aligns with the Best Interest of the Child principle.

The Convention further provides that a child accused of breaking the law should be treated with dignity and respect, entitled to legal assistance and a fair trial, and governments should set a

⁵⁹ Article 3 (1), *United Nations Convention on the Rights of a Child*, 20 November 1989, 27531, see also article 2, article 6, article 12,

⁶⁰ Article 37, *United Nations Convention on the Rights of a Child*, 20 November 1989, 27531

minimum court age and manage a justice system for reintegration into society.⁶¹ The provision prioritizes rehabilitation and reintegration of children according to their age and position in society. It encourages child-sensitive justice systems, with a focus on rehabilitation, alternative detention, and restorative justice over punitive justice. This is crucial in guiding national laws like Kenya's Children Act, 2022 and conforming to the UNCRC's child-centered approach.

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

The ACRWC is part of Kenyan laws that provides for the principle of the Best interest of the Child and prioritises the child's wellbeing.⁶² The ACRWC provides that a child in conflict with the law shall not be sentenced to death.⁶³ Children accused of an offense must be treated with dignity and self-esteem, with detention or imprisonment as a last resort. Community-based care and rehabilitation should be prioritized over institutional care, with appropriate sanctions determined based on the child's age and case circumstances.⁶⁴ The ACRWC promotes child-centered juvenile justice that focuses on reintegration, rehabilitation, and dignity over punishment. It endorses Best Interest of the Child principles by supporting individualized legal systems, alternatives to detention, and intertwined measures that promote physical, emotional, and social development.

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

The Beijing Rules are non-binding UN guidelines that serve as a model for best practices in juvenile justice rather than a formal treaty. Although Kenya has not formally adopted them as law, their principles have influenced domestic reforms and are reflected in policy documents like the Revised Sentencing Policy Guidelines and the Children's Act. These soft law standards emphasize rehabilitation, separation of juvenile and adult offenders, and the child's best interests. Many countries, including Kenya, have effectively integrated these recommendations into their national legal frameworks without formal ratification.

⁶¹ Article 40, *United Nations Convention on the Rights of a Child*, 20 November 1989, 27531

⁶² Article 4, *African Charter on the Rights and Welfare of the Child*, 29 November 1999

⁶³ Article 5, *African Charter on the Rights and Welfare of the Child*, 29 November 1999

⁶⁴ Article 17, *African Charter on the Rights and Welfare of the Child*, 29 November 1999

Beijing Rules emphasizes the doctrine of Best Interests of the Child, wherein welfare of juveniles who offend and appropriate and suitable measures of reaction to the offence and particular circumstance of juveniles are secured under the system of juvenile justice.⁶⁵ The rules promote diversion, in which cases of children are disposed of outside judicial process, so as not to stigmatize and criminalize them, and instead adopt community-based solutions such as counseling and restitution to the victim.⁶⁶ The rules emphasize detention as a last resort, only being implemented where unavoidable, and also recommends that detention be the shortest appropriate period of time. They firmly discourage institutionalization of youths and prefer alternative ways to deal with children in conflict with the law which allow them to remain in their communities.⁶⁷

The rules guarantee a fair trial for juvenile offenders, presumed innocent, and legal representation, ensuring child-sensitive proceedings and prioritizing rehabilitation over punishment.⁶⁸ The standards emphasize rehabilitation and social reintegration of the children in compliant situations, emphasizing provision of education, vocational advice, and psychological counseling, and conditional release as a mechanism to prevent arbitrary detention.⁶⁹

3.3 DOMESTIC LEGAL FRAMEWORK

3.3.1 Constitution of Kenya 2010.

Article 53 of the Constitution provides for the Best Interest of the Child principle.⁷⁰ This provision ensures that court, police, or administrative rulings are in the best interests, development, and reintegration of children in conflict with the law, safe from detention, abuse, neglect, and violence, and are kept separate from adults and under suitable conditions.⁷¹ There is

⁶⁵ United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, A/RES/40/33, 29 November 1985, 6

⁶⁶ United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, A/RES/40/33, 29 November 1985, 19

⁶⁷ United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, A/RES/40/33, 29 November 1985, 24

⁶⁸ United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, A/RES/40/33, 29 November 1985, 25

⁶⁹ United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, A/RES/40/33, 29 November 1985, 45

⁷⁰ Article 53 (2), Constitution of Kenya, 2010

⁷¹ Article 53 (1), Constitution of Kenya, 2010

emphasis on rehabilitative measures and humane treatment, ensuring detention is used sparingly and under dignity-preserving conditions.

The right to dignity for all individuals, including children.⁷² Article 159 mandates courts to apply Alternative Dispute Resolution (ADR) mechanisms.⁷³ Among these, is the diversion policy. The policy aligns with the Best Interest of the Child Principle in juvenile justice, focusing on rehabilitation and reconciliation over punishment. The Constitution provides a solid legal foundation for such a principle, focusing on rehabilitation, humane treatment, and detention alternatives in ensuring the rights and welfare of children in conflict.

3.3.2 The Children Act, 2022

The Act harmonizes the Best Interest of the Child principle, covering children in conflict with the law, to the level of Kenya's Constitution, UN Convention on the Rights of the Child, and African Charter on the Rights and Welfare of the Child.⁷⁴ No one shall discriminate against a child based on their age, sex, religion, creed, language, opinion, conscience, color, birth, health, pregnancy, social, political, economic, race, disability, tribe, place of residence, or other status.⁷⁵ The provision guarantees equality, equity, and freedom from discrimination in all matters affecting children.

A child in conflict with the law has a right to legal representation at the state's expense.⁷⁶ The provision safeguards children's rights and ensures equality of treatment to secure them against unrepresented litigation and uphold the Best Interest of the Child principle. Institutionalization and detention for children in trouble with the law who are waiting to be tried are mandated, considering alternative measures such as placement with their families or school. Detention must be grounded on explicit needs and health.⁷⁷ This provision prioritizes alternative, child-centered

⁷² Article 28, Constitution of Kenya, 2010

⁷³ Article 159(2), Constitution of Kenya, 2010

⁷⁴ Section 8, *Children Act (Chapter 141)*, 2022

⁷⁵ Section 9, *Children Act (Chapter 141)*, 2022

⁷⁶ Section 96, *Children Act (Chapter 141)*, 2022

⁷⁷ Section 223, *Children Act (Chapter 141)*, 2022

measures over detention. It considers the child's unique needs and circumstances, protecting their welfare, development, and safety while minimizing exposure to harmful influences.

A child in conflict with the law can go through two processes; diversion or the judicial process as stipulated in the criminal procedure code.⁷⁸ This thesis explores the best practice in line with the Best Interest of the Child principle, demonstrating how domestic and international legal systems consider this principle, particularly in law-violation cases.

3.3.3 Diversion Guidelines and Explanatory Notes.

The Diversion Guidelines and Explanatory Notes of Kenya outline procedures to redirect juvenile offenders from the conventional criminal justice system towards alternative, rehabilitative measures. They provide a clear framework and practical guidance for implementing community-based interventions that focus on the best interests of the child. These documents aim to minimize the negative impact of formal legal proceedings on youth while promoting their effective reintegration into society.

The Diversion Guidelines have a priority of the Best Interest of the Child principle, paying particular attention to the special circumstances of children in conflict with the law. They are also obligatory, requiring Public Prosecutors to consider diversion as a viable option in all criminal cases before them involving children, with a view to pursuing alternatives more conducive to child development and well-being.⁷⁹ Alternatives to diversion are chosen proportionally to the child's circumstances and offense, considering factors such as education, intellectual abilities, cultural background, and developmental requirements.⁸⁰ This is done to ensure that the individual needs of each child are met rather than using a one-size-fits-all approach.

⁷⁸ Section 224, *Children Act (Chapter 141)*, 2022

⁷⁹ Office of the Director of Public Prosecutions, *Diversion Guidelines and Explanatory Notes*, 2019, 10

⁸⁰ Office of the Director of Public Prosecutions, *Diversion Guidelines and Explanatory Notes*, 2019, 16

Parents' or guardians' views are relevant in restorative justice processes to ensure decisions serve the best interests of the child, with appropriate supervision and assistance.⁸¹ The selection of diversion options for children is based on age, maturity, mental capacity, and parental control, ensuring the best interests of the child and effective rehabilitation.⁸² Diversion aims to facilitate the rehabilitation and social reintegration of children with a criminal record, following restorative justice principles.⁸³ Guidelines prioritize children's unique needs and rights in criminal justice decision-making, promoting a more humane and constructive attitude towards young offenders.

3.3.4 The Child Justice Strategy 2021-2025

The Child and Youth Justice Strategy 2021–2025 was drafted by a multi-sectoral team led by the Ministry of Gender, Children and Social Development, in close collaboration with key stakeholders including the National Council on the Administration of Justice. Hosted by the Ministry of Gender, Children and Social Development, the strategy sets out a comprehensive framework aimed at reforming the juvenile justice system in Kenya. It is applied nationwide to ensure that all responses to youth offending are child-focused, emphasizing diversion, rehabilitation, and the protection of young people's rights.

Kenya's national vision for revamping its juvenile justice system is outlined in The Child Justice Strategy 2021-2025, which was drafted by the Ministry of Gender, Children, and Social Development in cooperation with important justice system partners. This strategy, which is hosted by the Department of Children Services, has a strong emphasis on restorative and rehabilitative methods that put the child's best interests first. It is used across Kenya's juvenile justice system, directing practices in police detention, judicial proceedings, and rehabilitation facilities to guarantee that children in conflict with the law are treated fairly and constructively.

The strategy prioritizes the child's best interest, especially children in conflict with the law, with the objective of keeping them out of the justice system and their prospects for recidivism are

⁸¹ Office of the Director of Public Prosecutions, *Diversion Guidelines and Explanatory Notes*, 2019, 15

⁸² Office of the Director of Public Prosecutions, *Diversion Guidelines and Explanatory Notes*, 2019, 10

⁸³ Office of the Director of Public Prosecutions, *Diversion Guidelines and Explanatory Notes*, 2019, 6

reduced through rehabilitation and preventative measures, thus their innocence is preserved.⁸⁴ The strategy mandates child detention as a last resort, ensuring separation from adults and age- and gender-appropriate conditions, ensuring a conducive environment for their development.⁸⁵ The rights of children to participate in their legal proceedings—either directly or through representation—are upheld, ensuring that their voices and concerns are heard. This participation is crucial for respecting their dignity and agency.⁸⁶ The strategy places significant emphasis on providing specialized attention to children in conflict with the law, ensuring that interventions cater specifically to their developmental needs and circumstances, rather than treating them merely as offenders.⁸⁷ Overall, these provisions demonstrate a comprehensive approach to ensuring that the best interests of children in conflict with the law are prioritized in the judicial process.

3.3.5 Sentencing Guidelines, Kenya Gazette No. 2970

The Sentencing Guidelines, as published in Kenya Gazette No. 2970, provide a comprehensive framework for delivering fair and consistent sentences across the judicial system. They were drafted by experts at the National Council on the Administration of Justice in close collaboration with key judicial stakeholders. Hosted by the Ministry of Justice and Constitutional Affairs, these guidelines are applied in Kenyan courts to ensure that sentencing practices are proportionate, rehabilitative, and aligned with national legal standards.

The guidelines emphasize the Best Interest of the Child when dealing with children in law-abiding situations, advocating for non-custodial orders as a last resort to prevent negative impacts of incarceration on young offenders and support their rehabilitation and reintegration into society.⁸⁸ The overarching goal when addressing cases involving children should be reformation, social integration, and rehabilitation. The guidelines support orders that best realize

⁸⁴ Judiciary of Kenya, *The Child Justice Strategy 2021–2025*, 2021, 21.

⁸⁵ Judiciary of Kenya, *The Child Justice Strategy 2021–2025*, 2021, 22

⁸⁶ Judiciary of Kenya, *The Child Justice Strategy 2021–2025*, 2021, 19

⁸⁷ Judiciary of Kenya, *The Child Justice Strategy 2021–2025*, 2021, 6

⁸⁸ National Council on the Administration of Justice, *Sentencing Guidelines*, Kenya Gazette No. 2970, April 29, 2016, 6

these objectives, ensuring that the punishment does not hinder the child's development and rights.⁸⁹

The guidelines prohibit the death penalty or imprisonment for children, suggesting alternatives like rehabilitation schools or borstal institutions that prioritize their developmental needs and rights.⁹⁰ The guidelines prohibit the death penalty or imprisonment for children, suggesting alternatives like rehabilitation schools or borstal institutions that prioritize their developmental needs and rights.⁹¹ The child's individual circumstances must be evaluated to ensure any measures imposed serve their best interests, considering their age, maturity, and specific needs.⁹² The guidelines aim to establish a sentencing environment that prioritizes children's unique circumstances and their rehabilitation potential in judicial decisions.

3.4 CONCLUSION.

In summary, this chapter has examined the comprehensive framework of both international and domestic legal instruments that underpin the Best Interest of the Child principle for children in conflict with the law in Kenya. International instruments such as the UNCRC, ACRWC, and the Beijing Rules have set critical benchmarks that have influenced Kenya's legal reforms, while domestic legislation including the Constitution, the Children Act 2022, Diversion Guidelines, and Sentencing Guidelines further operationalizes these principles within the national juvenile justice system. Collectively, these legal and institutional frameworks underscore a robust, multi-dimensional approach aimed at prioritizing rehabilitation, ensuring fair treatment, and fostering the reintegration of young offenders into society.

⁸⁹ National Council on the Administration of Justice, *Sentencing Guidelines*, Kenya Gazette No. 2970, April 29, 2016, 11

⁹⁰ National Council on the Administration of Justice, *Sentencing Guidelines*, Kenya Gazette No. 2970, April 29, 2016, 6

⁹¹ National Council on the Administration of Justice, *Sentencing Guidelines*, Kenya Gazette No. 2970, April 29, 2016, 11

⁹² National Council on the Administration of Justice, *Sentencing Guidelines*, Kenya Gazette No. 2970, April 29, 2016, 2

CHAPTER FOUR

THE ROLE OF DIVERSION IN REHABILITATION AND REINTEGRATION.

4.1 INTRODUCTION.

The study will evaluate Kenya's diversion programs and its effectiveness in ensuring the Best Interest of the Child principle. It will compare Kenya's approach to those in South Africa and Norway and explore its potential to prevent child offenders' recidivism. The policy aims to rehabilitate children in conflict with the law, integrating them into a society that meets their needs.⁹³

4.2 THE ROLE OF DIVERSION IN KENYA.

In 2001, Save the Children UK collaborated with Kenya's Children's Department and stakeholders to create diversion programs in 14 areas, aiming to reduce minor offenses and reduce children entering the formal justice system.⁹⁴ A 2009 assessment identified that over 6,000 children had been successfully diverted away from formal court processing, underscoring the replicability of the program and the lessons that it offers to future programs.⁹⁵ In 2019, the Office of the Director of Public Prosecutions (ODPP) with UNODC technical assistance developed diversion guidelines to address Kenyan court backlogs and speed up trial proceedings. The ODPP also initiated a nationwide sensitization program to boost stakeholder acceptance and confidence in the criminal justice system.⁹⁶

Diversion is a technique used to move case settlements from criminal justice procedures to non-criminal justice procedures.⁹⁷ The Kenyan policy for children's justice is based on restorative justice principles, focusing on harm repair, accountability, and reintegration. The Children Act, 2022 provides a diversion framework, emphasizing rehabilitation rather than punishment. The

⁹³ Chapter one, page 7.

⁹⁴ Dandurand, Yvon, 'A Second Chance - Alternatives to Imprisonment and the Social Reintegration of Offenders in Kenya', UNOCE-ROEA, Nairobi, 2012.

⁹⁵ Dandurand, Yvon, 'A Second Chance - Alternatives to Imprisonment and the Social Reintegration of Offenders in Kenya', UNOCE-ROEA, Nairobi, 2012.

⁹⁶ UNODC, *Kenya Kickstarts Countrywide Sensitisation on Diversion and Plea Bargaining*, 2019, 1.

⁹⁷ Farid, D.F.S.M.H.M.K., 'The Diversion of the Crime Committed by the child' *Academia Letter*, Article 1066. <https://doi.org/10.20935/AL1066>

Judiciary collaborates with various stakeholders, including the Office of Public Prosecutions, law enforcement, probation officials, and children officers.⁹⁸ Diversion advocates for the principle of the Best Interest of the Child. This principle ensures that in all actions concerning children, their best interests, development, and participation rights are observed.

Diversion programs aim to reduce juvenile recidivism by addressing underlying causes like family issues, substance abuse, and lack of education. They focus on rehabilitation and providing support systems to help children develop skills and resilience. Studies show that diversion significantly lowers recidivism rates by avoiding the negative influences of formal criminal proceedings.⁹⁹ Diversion prevents the stigma of a criminal conviction that results from processing offenders through the criminal justice system, which can impact a young person for years to come.¹⁰⁰ The policy aims to prevent the stigmatization of children as criminals, reducing negative outcomes like low self-esteem and reoffending. It advocates for humanitarian responses and removes children from the criminal justice system, focusing on rehabilitation rather than punishment.¹⁰¹

Diversion often sends young offenders to community support services, which can provide more appropriate and constructive responses to their behavior than formal judicial processes.¹⁰² This approach addresses the needs of the child and helps him reintegrate into his community without the stigma of a criminal record.¹⁰³ Under this, there has been a successful result in the diversion policy in Nakuru, whereby such diversions allowed the children to integrate back into society and minimize stigma since they would not have been committed together with hardcore criminals; this helps retain a low degree of contamination among such children.¹⁰⁴ Through this

⁹⁸ Judiciary, 'Child Justice Strategy 2023-2030', 10

⁹⁹ Gakuo I, 'Promoting Restorative Practices and Child Friendly Justice for Children in Conflict with the Law: The Kenyan Context' Published, Strathmore University, Nairobi, 2018, 40

¹⁰⁰ Gakuo I, 'Promoting Restorative Practices and Child Friendly Justice for Children in Conflict with the Law: The Kenyan Context' Published, Strathmore University, Nairobi, 2018, 3

¹⁰¹ King'ori E, 'Strengthening Access to Justice for a Child in Conflict with the Law' Published, University of Nairobi, Nairobi, 2015, 52

¹⁰² Gakuo I, 'Promoting Restorative Practices and Child Friendly Justice for Children in Conflict with the Law: The Kenyan Context' Published, Strathmore University, Nairobi, 2018, 3

¹⁰³ King'ori E, 'Strengthening Access to Justice for a Child in Conflict with the Law' Published, University of Nairobi, Nairobi, 2015, 79.

¹⁰⁴ 'Diversion of Children in Conflict with the Law: The Need for its Enactment in Kenyan Legislation' published, Kenyatta University, Nairobi, 2013, 4

program, fewer kids are sent to detention facilities or processed through the courts. This is important since it does not expose kids to hardcore criminals that could further influence their behavior in a negative way and lead to subsequent crimes.¹⁰⁵

Most diversion projects in Kenya are affected by a lack of clear legal frameworks, which has cut short the implementation and sustainability of such programs.¹⁰⁶ Government budgetary allocations are a concern for children's rehabilitation and reintegration, with inconsistent understanding of the policy on diversion among law enforcement and judicial personnel, leading to inequities in its application and deficiencies in supporting children in conflict with the law.¹⁰⁷ Although the Children Act of 2022 has provisions for diversion, there may be a lack of sufficient guidelines on how these policies can be implemented. This might create confusion among judicial officers on when to apply diversion or when to go ahead with formal charges, hence the possibility of arbitrary decisions.¹⁰⁸

4.3 ASSESSMENT OF OTHER JURISDICTIONS THAT KENYA CAN LEARN FROM.

There are things Kenya can learn from the best practices of jurisdictions like Norway and South Africa in terms of implementing diversion programs for children in conflict with the law so they can be corrected rather than punished. Both two countries place high values on the child's best interest by having suitable legal frameworks with well-established strategy in implementation that prioritizes reintegration and restorative justice

¹⁰⁵ Rutere S and Kiura C, 'The Diversion Program in Kenya' Sida, 31, 2009

<https://cdn.sida.se/publications/files/sida52515en-the-diversion-program-in-kenya.pdf> on 16 January 2025

¹⁰⁶ 'Diversion of Children in Conflict with the Law: The Need for its Enactment in Kenyan Legislation' published, Kenyatta University, Nairobi, 2013, 14

¹⁰⁷ 'Diversion of Children in Conflict with the Law: The Need for its Enactment in Kenyan Legislation' published, Kenyatta University, Nairobi, 2013, 14

¹⁰⁸ Social Transformation through Access to Justice Child Justice Strategy, 2023 - 2030, 33

4.3.1 Norwegian Diversion Programs

Norway's early intervention and assessment provide for the identification of the needs and circumstances of children at an early stage, ensuring that an individual diversion plan is developed to address delinquent behavior.¹⁰⁹

4.3.1.1 Legal Framework

Norway has an advanced legal system that focuses on diversion of children in conflict with the law and is primarily based on the Children Act 1981 and the Criminal Procedure Act. These acts are focused on alternative sanctions such as mediation, community service, and rehabilitation in contrast to punitive sanctions.¹¹⁰ The Children Act 1981 is the central Norwegian law on the welfare and rights of children, and protection, parental responsibility, and the justice system for the young, all regarding the best interests of the child.¹¹¹

According to section 4 -24, the law enables children in conflict with the law to be taken into child welfare institutions instead of prison so that interventions focus on rehabilitation rather than punishment. The Criminal Procedure Act 1981 of Norway provides the primary procedural model for handling child cases. The Act establishes that prosecutors and courts must take diversionary actions before they can initiate criminal proceedings against a child.¹¹² The section makes diversion a mandatory step so that every alternative available in the form of mediation, conflict resolution, and restorative justice is attempted before prosecution is resorted to. The Act provides for minors' cases to be resolved through mediation promoting structured dialogue and preventing unnecessary court involvement.¹¹³

The Penal Code 2005 of Norway also reinforces Norway's diversionary programs by rigorously restricting the use of custodial sentences against young people. Custodial sentences for young people below the age of 18 years are reserved only for exceptional circumstances and must be

¹⁰⁹ UNICEF General Comment 24 *Diversion of Children in Conflict with the Law from Formal Judicial Proceedings in Europe and Central Asia*, 2019

¹¹⁰ Smith R, 'Child-Centered Justice: A Comparative Analysis', Hart Publishing, 2018.

¹¹¹ Section 48, *Children Act* (1981) - Norway

¹¹² Section 71a, *Criminal Procedure Act*, 1981 - Norway

¹¹³ Section 59, *Criminal Procedure Act*, 1981 - Norway

the option of last resort.¹¹⁴ Norway's approach to child justice aligns with international best practice under Article 37(b) of the UN Convention on the Rights of the Child. Kenya can learn from Norway's social welfare system, which uses diversion principles to prevent formal court proceedings for children. By making diversion a statutory mandate, Kenya can enhance its juvenile justice system by offering rehabilitative intervention rather than punitive judicial action.

4.3.1.2 Specialized Juvenile Courts and Decision Making.

Norway's juvenile courts employ a multidisciplinary approach, comprising trained judges, child psychologists, social workers, and probation officers, to determine child welfare, review home conditions, recommend rehabilitation programs, and monitor compliance with diversion plans.¹¹⁵ The Dispute Act mandates child welfare professionals to provide input in children's cases, ensuring decisions align with restorative justice ideals by filing reports on the child's background, psychological state, and social history.¹¹⁶

Norway employs dedicated juvenile courts that handle juvenile cases with a rehabilitative justice system through the application of the child's best interests under Article 104 of the Constitution of Norway. These courts utilize multidisciplinary teams like child psychologists, social workers, and probation officers in their endeavors to develop a holistic juvenile justice system.¹¹⁷

4.3.1.3 Funding for Diversion and Rehabilitation.

A major part of Norway's success with juvenile diversion is its large budgetary investment in rehabilitation and social reintegration programs. Government funding makes sure probation services, vocational training, and family interventions are adequately funded.¹¹⁸ Norway invested approximately €424.78 million in its judiciary in 2020, equivalent to €78.8 per inhabitant, above

¹¹⁴ Section 33, *Penal Code*, 2005 - Norway

¹¹⁵ Section 61, *Criminal Procedure Act*, 1981 - Norway

¹¹⁶ Section 36, *Disputes Act*, 2005, -Norway

¹¹⁷ Havard J, *The Norwegian Juvenile Court System: A Restorative Approach*, Oxford University Press, 2020.

¹¹⁸ Johansen R, 'State Funding and Juvenile Rehabilitation: A Scandinavian Model' 45(2) *International Journal of Juvenile Justice*, 2022, 67.

the Council of Europe (CoE) median.¹¹⁹ The budget ensures well-funded family interventions, vocational training, and probation services, facilitating effective diversion programs for young people.

Kenya, on the other hand, does not have sufficient financing, and as such, is overly dependent on custodial sentencing due to an inability to offer a solid diversion option.¹²⁰ During the 2020/2021 financial year, the government expended Ksh 148.9 billion in Ministries, Departments, and Agencies (MDAs), with only 2% (Ksh 2.85 billion) going towards children's services.¹²¹ Kenya's diversion program could be strengthened by increased budget allocation to probation departments and rehabilitation facilities, ensuring strong monitoring and evaluation mechanisms for adherence, enabling informed decision-making for children's needs. Although Kenya is a third world nation whose budget may not be much. The Norwegian budget is substantially higher due to the difference in the levels of development, Kenya can learn from Norway and add on the allocated funds for diversion and rehabilitation of children in conflict with the law.

4.3.2 South African Diversion Program.

4.3.2.1 Legal Framework

South Africa boasts a highly developed legal framework which prioritizes diversion and rehabilitation over punishment for child offenders. The Child Justice Act mandates diversion of children's contact with the criminal justice system, providing a formal legal framework for this process.¹²² The Act explicitly integrates diversion as a core value of the child justice system and enshrines it as a mandatory factor in all stages of criminal proceedings.

It requires prosecutors to make a determination about whether or not a child is eligible for diversion before prosecuting them.¹²³ It mandates that a child who accepts responsibility for a crime ought to be considered for diversion unless the crime is severe enough.¹²⁴ It Incorporates

¹¹⁹ <https://rm.coe.int/country-profile-norway> on 26th February 2025.

¹²⁰ Ochieng S, 'The Funding Gap in Kenya's Juvenile Justice System' 12(1) Kenya Law Review, 2020, 77.

¹²¹ <https://www.kenyanews.go.ke/limited-funds-hampers-justice-for-children-report-says> on 26 February 2025.

¹²² Section 6, *Child Justice Act* 75 of 2008 (South Africa)

¹²³ Section 41, *Child Justice Act* 75 of 2008 (South Africa)

¹²⁴ Section 52, *Child Justice Act* 75 of 2008 (South Africa)

diversion as part of the criminal justice process and demands its application where necessary.¹²⁵ It Differentiates between minor crimes and serious crimes by categorizing various levels of diversion programs to ensure proportionality.¹²⁶ It Details the different types of diversion programs, including community-based rehabilitation, life skills training, and victim-offender mediation.¹²⁷ It Contemplates Family Group Conferences (FGCs) and Victim-Offender Mediation (VOM) as formal interventions.¹²⁸

Kenya's Children Act 2022 offers diversion but lacks detail in implementation. It could benefit from adopting a more formal instrument binding judicial officers and prosecutors, similar to South Africa's Child Justice Act, which has effective practices for rehabilitating children in conflict.¹²⁹ Examples are Family Group Conferences, which include the child, their family, victim, and community members in a mediated discussion; and Youth Empowerment Schemes, which provide vocational training, education, and life skills to help the child develop positive competencies for the future.¹³⁰

4.3.2.2 Specialized Child Justice Courts and Procedures.

South Africa's justice system has specialized Child Justice Courts, which are particularly responsible for handling children's cases in a manner that is appropriate to their developmental needs.¹³¹ South Africa's Child Justice Act provides a unique structure for children's courts, focusing on rehabilitation and restorative approaches. Separate from criminal courts, these courts offer specialized education for magistrates, prosecutors, and court staff. They use child-centered, non-adversarial procedures, prioritizing the child's best interest in descending order of preference.¹³²

¹²⁵ Section 53, *Child Justice Act 75 of 2008* (South Africa)

¹²⁶ Section 54, *Child Justice Act 75 of 2008* (South Africa)

¹²⁷ Section 55, *Child Justice Act 75 of 2008* (South Africa)

¹²⁸ Section 56, *Child Justice Act 75 of 2008* (South Africa)

¹²⁹ *UNICEF General Comment 24 Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 18

¹³⁰ *UNICEF General Comment 24 Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 18

¹³¹ Skelton A & Tshehla B, *Child Justice in South Africa*, Juta 2019, 46.

¹³² Section 42 - 46, *Child Justice Act 75 of 2008* (South Africa).

Children's cases in Kenya are heard in regular courts with minimal specialized treatment, unlike the South African approach to guaranteeing child justice principles-specialized training of magistrates and other court officers.¹³³ Kenya would be better served by having the same specialized courts with trained personnel to facilitate the effective use of diversion.

4.3.2.3 Institutional Framework.

South Africa's Department of Social Development, in collaboration with the National Prosecuting Authority and NGOs, offers structured diversion programs like life skills training and vocational training.¹³⁴ The Child Justice Act provides for prosecutors to consider whether a child offender can be diverted before they can prosecute.¹³⁵

The discretion by the NPA allows referral to diversion programs, cooperation with probation officers and social workers, and consideration of a child's age, background, and circumstances before a decision is made on prosecution.¹³⁶ Section 28(2) of the Constitution mandates the National Prosecutor's Office (NPA) to minimize the negative impacts of the justice system on child offenders, with prosecutors needing to consult with multidisciplinary teams in making informed decisions.¹³⁷ The presence of a Multidisciplinary Team (MDT) ensures coordinated case management, which Kenya lacks. The Kenyan legal system can be enhanced by enhancing coordination between the judiciary, probation officers, and social services to enable diversion to be effective.

4.3.2.4 Investment in Probation Services.

Probation services are central to the juvenile justice system, especially in diversion programs, which divert juveniles from judicial processes to community-based interventions that are rehabilitative in nature rather than punitive.¹³⁸ The South African juvenile diversion system is aided by a well-funded probation service, which is a central component in making it successful.

¹³³ Gallinetti J, *Getting to Know the Child Justice Act*, UNICEF 2009, 72.

¹³⁴ Wood C, *Diversion in South Africa: A Review of Policy and Practice*, NICRO, 2003, 109.

¹³⁵ Section 41(3) *Child Justice Act no 75 of 2008* (South Africa).

¹³⁶ *Child Justice and the Law: A Comparative Analysis of Juvenile Justice Systems in Africa*. Strathmore Law School.

¹³⁷ *Child Justice and the Law: A Comparative Analysis of Juvenile Justice Systems in Africa*. Strathmore Law School.

¹³⁸ Crawford, A, *Youth Justice and the Role of Probation Services*, Routledge, 2006,

According to the South African Department of Social Development.¹³⁹ The government employs a large team of social workers and probation officers to evaluate juvenile offenders, recommending appropriate diversion programs like counseling and community service.

The Probation Services Amendment Act mandates probation officers to effectively implement diversion programs, recommending interventions based on individual child needs. South Africa has invested in specialized training for officers to handle complex cases and conduct thorough assessments, facilitating rehabilitative justice and reducing recidivism among youthful offenders.¹⁴⁰

Investing in probation service can reduce recidivism, improve rehabilitation outcomes, and treat children with dignity. This involves recruiting and training officers, providing case management resources, transportation, and services for children in need. Probation officers operate diversion programs, assess eligibility, create individualized interventions, and monitor compliance. Expenditure in probation services leads to lower recidivism and reintegration into society.¹⁴¹ Investment in probation services can reduce recidivism, improve rehabilitation outcomes, and uphold children's rights and dignity. This includes recruiting and training officers, providing resources like case management tools, transport, and specialized services, and ensuring proper assessment and supervision of children.¹⁴²

4.3.2.5 Community Based and Restorative Justice Approaches.

Family Group Conferences (FGC) form part of the diversion in South Africa. In a mediated discussion, it involves the child and their family, the victim, and members of the community in addressing the harm caused and agreeing upon a plan for the rehabilitation of the child.¹⁴³ FGCs offer a non-threatening environment for the child and allow the community to be involved in the

¹³⁹ Department of Social Development, *Probation Services Annual Report*, South African Government, 2012.

¹⁴⁰ South African Youth Justice Forum, *Assessing the Role of Probation Officers in Juvenile Justice Systems*. Youth Justice Research, 2013.

¹⁴¹ Kenya National Commission on Human Rights, *Report on the State of Juvenile Justice in Kenya*, 2020.

¹⁴² International Juvenile Justice Observatory, *Investing in Juvenile Justice: The Role of Probation Services*, 2019.

¹⁴³ Department of Social Development of South Africa, 'Reviewed Policy Framework for Accreditation of Diversion Services in South Africa' 2018

rehabilitation process. Kenya can implement FGCs to strengthen family and community ties and support the reintegration of juvenile offenders.

The dissertation analyses Kenya's non-punitive diversion, based on restorative justice principles and the Children Act, 2022. It highlights challenges like inconsistent application, limited legal frameworks, and inadequate resources. Comparing Kenya's practices with South Africa's Child Justice Act and Norway's early intervention strategies could provide lessons for improved rehabilitation and reintegration outcomes.



CHAPTER FIVE

JUDICIAL DISCRETION UNDER THE CHILDREN ACT, 2022: IMPLICATIONS FOR THE BEST INTEREST OF THE CHILD PRINCIPLE.

5.1 INTRODUCTION.

As seen earlier in chapter three, courts have the discretion to choose between judicial system and diversion for children in conflict with the law. The study will analyze the discretion given to courts and its implication on the principle of the Best Interest of the Child. The Best Interest of the Child principle is the primary consideration in the application of discretion by the courts.

The Children Act, 2022 appreciates that offences by children should be dealt with outside the usual court system because criminal records could have disastrous repercussions on children. The National Council on the Administration of Justice (NCAJ) has also developed guidelines on diversion to align its application and enhance its implementation.¹⁴⁴ However, despite the law, there is still variability in its application since judicial officers vary in interpreting provisions as seen in chapter one.¹⁴⁵ This inconsistency affects the uniformity of justice for children in conflict with the law and is not in the best interest of the child.

The recognition that several offenses, especially minor offenses, are best handled outside the juvenile justice system and hence avoid some devastating consequences of criminal records. Such discretion may avoid the stigmatization of minor offenses, relieve caseload burden emanating from juvenile courts, and focus resources on serious offenders.¹⁴⁶ Diversion also supports the rehabilitation of young offenders by reintegrating them into the community and offering necessary support to prevent re-offending. However, children should not be coerced into accepting diversion or admitting guilt, and their rights should be always protected.¹⁴⁷

¹⁴⁴ National Council on the Administration of Justice (NCAJ), Diversion Policy, 15.

¹⁴⁵ Sang B, 'Child Law in Kenya under the Children Act, 2022: A Legal Appraisal of Its Legislative Advances' 2, *Journal of Appropriate Dispute Resolution (ADR) & sustainability*, 2, 2024, 266.

¹⁴⁶ Kiniti J, 'The Criminal Justice Process: The Enforcement of Rights of the Children in Kenya' Published, University of Nairobi, Nairobi, 2013, 63.

¹⁴⁷ Kiniti J, 'The Criminal Justice Process: The Enforcement of Rights of the Children in Kenya' Published, University of Nairobi, Nairobi, 2013, 64.

In South Africa, the Child Justice Act, 2008, provides a formal mechanism for diversion, with the hope that the decision to divert a child is taken based on standardized criteria as seen in Chapter four. The Act establishes a clear process by which prosecutors and judicial officers decide whether a child can be diverted.¹⁴⁸ In the *Director of Public Prosecutions v. The Minister of Justice and Constitutional Development*¹⁴⁹ has reminded us of the necessity for even-handed and equitable application of diversion programs. Judicial officers in South Africa, like Kenya, however, sometimes are faced with the challenge of upholding evenness of application, as discretion can reinforce disparities in outcomes for similar offenses.¹⁵⁰

The courts can apply discretionary powers to ensure that rehabilitation takes precedence over punishment, referring children to programs that target their development and societal reintegration. This enables judges to tailor interventions according to the individual circumstances of a case, ensuring proportionate and effective responses to a child's behavior, given the seriousness of the offense and the background of the child.¹⁵¹

5.2 IMPLICATIONS OF DISCRETION ON CHILDREN IN CONFLICT WITH THE LAW.

Judges may be pressured by interested parties, including law enforcement and the community, to pursue formal judicial processes rather than diversion.¹⁵² This can compromise their ability to make impartial decisions in the best interest of the child. In other instances, this discretion might result in the overuse of detention as a default option, especially where judges are not well trained on the benefits and how to apply diversion strategies.¹⁵³ This may further lead to unnecessary detentions among children, which is contrary to detention being used only as a last resort.

¹⁴⁸ Sec 52 and 53, *Children Justice Act* (no. 75 of 2008) - South Africa

¹⁴⁹ *Director of Public Prosecutions v. The Minister of Justice and Constitutional Development* - South Africa

¹⁵⁰ Mujuzi J, 'Diversion in the South African criminal justice system: Emerging jurisprudence' 1, *SACJ*, 2015, 42.

¹⁵¹ Kosgei C, 'An Analysis of the Legal Framework Guiding the Rights of Juvenile Delinquents in Kenya' Published, Strathmore University, 7

¹⁵² Social Transformation through Access to Justice Child Justice Strategy, 2023 - 2030

¹⁵³ Social Transformation through Access to Justice Child Justice Strategy, 2023 - 2030,

This discretionary power might bring about inconsistency in the handling of the cases as seen in chapter one of this study. The various judges might interpret the criteria of diversion differently, hence treating similar cases unequally. This kind of inconsistency could violate the principle of fairness within the justice system.¹⁵⁴ As such, it may lead to decisions that are not in line with the Best Interest of the Child principle. The discretion accorded to judicial officers implies that decisions are subject to personal interpretation, which may result in biases in decision-making.¹⁵⁵ Formal judicial procedures are used by some courts even where diversion would be more suitable because of ignorance or lack of resources.¹⁵⁶ The lack of an overall monitoring mechanism further worsens the situation, and it becomes challenging to ensure uniform application of diversion.¹⁵⁷

In Kenya, even though there are legal provisions for diversion, challenges in implementation persist.¹⁵⁸ Lack of awareness and capacity gaps hinder effective execution, as some law enforcement officers and judicial officers remain uninformed about diversion programs and policies.¹⁵⁹ Inconsistent application across different counties and courts further weakens the system, with some judicial officers favoring punitive measures over rehabilitation due to societal pressure¹⁶⁰. Resource constraints also pose a challenge, as Kenya lacks adequate diversion centers and vocational training programs, with government funding being insufficient.¹⁶¹

Urban courts with better access to rehabilitative programs and probation officers may apply diversion more frequently than courts in rural areas, where such resources are scarce.¹⁶² Additionally, there have been cases where judicial officers have outright refused to apply

¹⁵⁴ Social Transformation through Access to Justice Child Justice Strategy, 2023 - 2030, 21.

¹⁵⁵ Musau A, 'Judicial Discretion: Its Application in the Kenyan Courts' unpublished, Mt.Kenya University, Nairobi, 2013, 1

¹⁵⁶ [THE CHILDREN ACT, 2022 – What's changed? – A legal backline](#). On 6th March 2025

¹⁵⁷ Dr. Ang'ana G, 'Need for Judicial Accountability in Kenya', [Need for Judicial Accountability in Kenya - Scholar Media Africa](#) on 6 March 2024.

¹⁵⁸ Sang B, 'Child Law in Kenya under the Children Act, 2022: A Legal Appraisal of Its Legislative Advances' 2, *Journal of Appropriate Dispute Resolution (ADR) & sustainability*, 2, 2024, 229.

¹⁵⁹ National Council on the Administration of Justice, *Status Report on Children in the Justice System in Kenya*, Nairobi, 2019.

¹⁶⁰ Odhiambo J, 'The Challenges of Implementing Diversion in Kenya' *Kenya Law Review* Vol. 12, 2021,45.

¹⁶¹ United Nations Office on Drugs and Crime (UNODC), *Assessment of Diversion and Rehabilitation Mechanisms in Kenya*, UNODC, Nairobi, 2020.

¹⁶² United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, 2nd edition, Vienna, 2021, 34

diversion, either due to personal biases or a lack of understanding of the available alternative measures.¹⁶³ This further demonstrates the need for clear guidelines and regular training for judicial officers to ensure consistency in decision-making.¹⁶⁴

Resource constraints present another major challenge. Kenya lacks sufficient diversion centers and vocational training programs, with inadequate government funding exacerbating the situation.¹⁶⁵ Without proper facilities, the effectiveness of diversion remains limited, and children in conflict with the law may be subjected to punitive measures instead of rehabilitative alternatives¹⁶⁶

5.3 CONCLUSION.

Courts have the discretion to choose between formal judicial processes and diversion, which upholds the principle of the Best Interest of the Child.¹⁶⁷ Diversion is oriented towards rehabilitation rather than punishment, addressing minor offenses humanely and avoiding stigmatization.¹⁶⁸ This provides an opportunity for tailored interventions, ensuring that the rights of children are safeguarded and their development is fostered.¹⁶⁹ It is essential, however, to guard against coercion and ensure fairness, with diversion being a voluntary and rights-based option for children in conflict with the law.¹⁷⁰

¹⁶³ Mbuba JM, *Juvenile Justice Reforms in Africa: Challenges and Prospects*, Nairobi: East African Publishers, 2018, 112

¹⁶⁴ United Nations Children's Fund, *Diversion and Alternatives to Detention in Kenya: Best Practices and Lessons Learned*, Nairobi: UNICEF, 2020, 56.

¹⁶⁵ Legal Resources Foundation Trust, *Access to Justice for Children in Conflict with the Law in Kenya*, Nairobi: LRF, 2019, 78.

¹⁶⁶ Odongo G, *Child Justice and Legal Reforms in Kenya*, Pretoria: Pretoria University Law Press, 2017, 93.

¹⁶⁷ JusCorpus, 'Best Interest of the Child Principle: Judicial Evolution and Core Fundamentals', *Jus Corpus Law Journal*, 2024, [BEST INTEREST OF THE CHILD PRINCIPLE: JUDICIAL EVOLUTION AND CORE FUNDAMENTALS - Jus Corpus](#) on 6 March 2025

¹⁶⁸ [Rehabilitation vs. Punishment: Shaping the Future of Criminal Justice » Law Judicial](#) on 6 March 2025

¹⁶⁹ [Toolkit-on-Diversion-and-Alternatives-to-Detention-UNICEF.pdf](#) on 6 March 2025

¹⁷⁰ UNICEF General Comment 24, 'Diversion of Children in Conflict with the Law in Eastern and Southern Africa,' October 2023, 9

CHAPTER SIX.

CONCLUSIONS AND RECOMMENDATIONS

6.1 FINDINGS.

Kenya has made significant strides in aligning its legal framework with international standards on children's rights, particularly through the adoption of the UNCRC and the African Charter on the Rights and Welfare of the Child (ACRWC).¹⁷¹ These instruments form part of Kenya's domestic law and prioritize the Best Interest of the Child principle, ensuring children in conflict with the law are treated with dignity, respect, and fairness.¹⁷² The Kenyan legal instruments stipulate that children should be treated humanely and that their legal rights are upheld throughout the juvenile justice process. This involves ensuring that children are not subjected to the same punitive measures as adults and that their unique developmental needs are considered.¹⁷³

As seen in Chapter three of this dissertation, both the Constitution of Kenya, 2010, and the Children Act of 2022 firmly reinforce the principle of the Best Interest of a Child through drawing principles of non-discrimination and equality for all children, protection against violence and abuse, avoiding unnecessary detention, and rehabilitation and other alternative measures instead of formal judicial proceedings.¹⁷⁴ The Constitution also incorporates Alternative Dispute Resolution mechanisms supplementing restorative justice approaches.¹⁷⁵ This study found the use of Diversion for children in conflict with the law as a form of ADR. However, the Penal Code does not mention the use of diversion leading to inconsistencies in decisions made in relation to children in conflict with the law. Since courts have the discretion to choose whether to choose diversion or the judicial process,¹⁷⁶ it is highly likely for the presence of disparities in decisions made in courts.

¹⁷¹ Kinuu J, 'An Analysis of the Adequacy of the Legal Framework in Protecting the Rights of Child Offenders' Published, University of Nairobi, Nairobi, 2016, 14

¹⁷² Kinuu J, 'An Analysis of the Adequacy of the Legal Framework in Protecting the Rights of Child Offenders' Published, University of Nairobi, Nairobi, 2016, 13

¹⁷³ Kinuu J, 'An Analysis of the Adequacy of the Legal Framework in Protecting the Rights of Child Offenders' Published, University of Nairobi, Nairobi, 2016, 13

¹⁷⁴ Chapter 3, 29

¹⁷⁵ Article 159(2), Constitution of Kenya, 2010

¹⁷⁶ Section 224, *Children Act (Chapter 141)*, 2022

This study aimed to discuss whether diversion policy or the judicial process is in the best interest of children in conflict with the law. This study found that using diversion is in the best interest of the child.

This study aimed to discuss whether diversion policy or the judicial process is in the best interest of children in conflict with the law. This dissertation found that using diversion is of the best interest of the child. The Constitution of Kenya stresses the protection of children from trauma by ensuring that detention is a measure of last resort and that the best interest of the child is a primary consideration in all legal procedures.¹⁷⁷ The High Court has interpreted these provisions to stress the sensitivity that must be applied when handling children in conflict with the law, with care, compassion, and rehabilitation rather than punishment.¹⁷⁸ Kenya's Children's Act, 2022, has thus codified these principles by introducing mechanisms of diversion to minimize stigma and focus on rehabilitating the child offender.

There are complexities in implementation of the diversion policy in Kenya which are the following; Diversion has been part of practice for many years, but it has often been applied informally by police and prosecutors, resulting in inconsistency in implementation from case to case and from one jurisdiction to another.¹⁷⁹ Structured frameworks and protocols need to be established to ensure effective monitoring and consistency in the application of diversion measures. Although the development of a national framework on diversion has marked an important milestone in that respect, it also highlights that such coordination remains incomplete today. Overall, diversion must be embedded into various levels of processing child justice.¹⁸⁰ This may include the fact that not all actors in the system might be fully trained in or cognizant of the policies and their roles in the diversion process. It is for this reason that all stakeholders, in particular law enforcement and judicial officers, must be cognizant and trained in the diversion

¹⁷⁷ Article 53(1)(f), Constitution of Kenya, 2010

¹⁷⁸ Odongo G, 'The post-2010 jurisprudence on children's rights under the Kenyan Constitution' *African Human Rights Law Journal*, 2022,446-448, <http://dx.doi.org/10.17159/1996-2096/2022/v22n2a> on 27 January 2025

¹⁷⁹ UNICEF *General Comment 24 Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 12

¹⁸⁰ UNICEF *General Comment 24 Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 13

policy and its application for success.¹⁸¹ The inconsistent diversion that may lead to unequal treatment and possible overuse of detention because of inadequate training or external pressures on judicial officers. Effective judicial discretion necessitates capacity building and clear guidelines to make sure that decisions are taken in the best interest of the child.

Lessons from other jurisdictions bring into focus the South African Child Justice Act, including elements of the Family Group Conference and Youth Empowerment Scheme focusing on community-based rehabilitation and vocational training. Success through the diversion programs in South Africa has proved their efficiency regarding recidivism reduction and rehabilitation.¹⁸² With such approaches, Kenya can have better outcomes for the children in conflict with the law. The emphasis of community-based rehabilitation that South Africa has opted for underlines the importance of involvement of the community during the reintegration process.¹⁸³ This approach helps the children in Kenya build supportive networks and reduces stigma associated with formal judicial processes. Diversion plans are individualized in South Africa, ensuring interventions fit the specific needs of each child.¹⁸⁴ This might be a good experience for Kenya to help address the diverse needs of children in conflict with the law. From the experience of South Africa, Kenya should work on firming up its legal frameworks to ensure that diversion programs are well implemented and monitored.

This study found Norway to also be a great example to Kenya's legal framework when it comes to diversion policy. Norway focuses on rehabilitation rather than punishment for minors, with diversion from prosecution through warnings, community service, and restorative justice practices. Significant support, such as counseling, educational support, and social services, is provided to address the root causes of offending behavior.¹⁸⁵ The integration of child welfare ensures that interventions prioritize the development and well-being of the child. Community

¹⁸¹ UNICEF General Comment 24 *Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 13

¹⁸² UNICEF General Comment 24 *Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 8

¹⁸³ UNICEF General Comment 24 *Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 8

¹⁸⁴ UNICEF General Comment 24 *Diversion of Children in Conflict with the Law in Eastern and Southern Africa*, October 2023, 8

¹⁸⁵ UN Committee on the Rights of Children, *'The Rights of the Child in Norway'*, 2016, 43

involvement in the rehabilitative process promotes social responsibility and aids societal adjustment.¹⁸⁶

6.2 RECOMMENDATIONS.

The study will give some recommendations such as having an amendment of the Penal Code to categorically include diversion from judicial proceedings for children in conflict with the law will ensure application regardless of a jurisdiction's adoption of such policy or sole reliance on a court of law's discretion. To design a step-by-step procedure on how diversion should be done at all stages of processing in the system to ensure that this conforms with the Constitution and the Children's Act, 2022. Harmonization of Legal Instruments to ensure consistency between the Constitution, the Children's Act, the Penal Code, and other relevant laws to avoid gaps and disparities in decision-making.

By having specialized training on the principles of diversion and restorative justice. Having procedures for implementing diversion programs for law enforcement officers, judicial officers, probation officers, and other stakeholders and ensuring best practices are available on how to handle children in conflict with the law with care, empathy, and rehabilitation. Holding outreaches to communities, parents, and children about rights and the possibility of diversion should be pursued as part of minimizing stigma and promoting trust in the system. Making diversion plans drawn from South Africa's practice of tailoring interventions to the specific circumstances and developmental needs of the child.

Community-based programs, such as mentorship, counseling, and vocational training, should be established to help the children reintegrate into society with minimal stigma. Restorative justice practices, including Family Group Conferences and mediation, should be largely used to bring about reconciliation, restitution, and healing for all parties. To adopt a multifaceted, comprehensive national framework on diversion which incorporates monitoring and evaluation mechanisms to follow up the efficiency and effectiveness of its programs and reports on the exercise of discretion uniform in all the jurisdictions to ensure accountability and transparency of such decisions.

¹⁸⁶ UN Committee on the Rights of Children, *The Rights of the Child in Norway*, 2016, 50

Collaborating and coordinating with government agencies, civil society groups, and leadership within communities help in effective and sustainable implementation. Draw from the experiences of Comparative Jurisdictions, such as South Africa, in including structured community-based rehabilitation programs and vocational training schemes and develop Family Group Conferences as a core diversion mechanism. Kenya can learn from Norway how to integrate social welfare into the diversion program to address the root causes of the offender's behavior, such as poverty, lack of education, or unstable family conditions, and encourage community involvement in rehabilitation to extend support networks and reduce recidivism. Allocate adequate funding and resources for training, program development, and implementation to ensure the sustainability of diversion initiatives.

The study sums up that Kenya has to reinforce the juvenile justice system through the inclusion of explicit diversion in the Penal Code and harmonization of legal instruments. It consolidates with specific recommendations for structured, step-by-step diversion; specialized training for the stakeholders involved; and strong community-based programs for rehabilitation with minimal stigma. Drawing parallels from South Africa and Norway, Kenya can achieve better results in its diversion policies by incorporating restorative justice practices, individual-specific interventions, and community involvement to ensure the best interest of the child is served.

6.3 CONCLUSION.

The research proved my hypothesis that the legal framework in Kenya, though intended to give the best interests of the child primacy of place in its provisions, does not necessarily apply this principle consistently in matters that bring children into conflict with the law, that when applied, the policy on Diversion has the potential to result in better rehabilitation of the children and reduce recidivism, but it suffers from the challenge of courts' discretion and the absence of clear guidelines on Diversion in the Penal Code and the discretion under the Children Act, 2022, may undermine the consistency and effectiveness of the Diversion process in practice.

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