

**SENTENCING OF CHILD OFFENDERS WHO TURN EIGHTEEN AT
THE TIME OF OR PRIOR TO SENTENCING IN KENYA**

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By

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Declaration

I, ANDERE TRACEY ANYANGU, 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:

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



13th October 2021

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Abstract

Recognition that a young person does not magically gain full maturity and all the attributes of adulthood when they turn 18 is increasingly widespread within the criminal justice system. Courts in many jurisdictions worldwide have affirmed this when considering whether a certain sentence can be applied to a child offender who has turned 18 during proceedings. The England and Wales Court of Appeal has posited that reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. The Western Cape High Court has also confirmed that there is no arbitrary end to childhood for children who have committed offences before they attained the age of adulthood, and are still being processed through the criminal justice system when they turn 18. As per these courts, the youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has turned 18.

Following this, this study discusses the concerns that arise when it comes to sentencing child offenders who turn 18 before or at the time of sentencing in the Kenyan context. These include whether such offenders will no longer be eligible for the special protections afforded to child offenders, and whether they will be facing adult sentences. Other concerns are on how such offenders should be restituted where courts make a mistake sentencing them; and what can be done to ensure that such offenders are reintegrated back into society if they are able to successfully appeal against sentences derived from a mistake. In doing so, this study adopts the principle of best interests of a child and uses mainly case law to look into the approach that courts in Kenya should adopt when imposing sentences on child offenders who turn 18 during proceedings. The reason for this is that there is limited scholarly work on this matter and the law does not speak on it. Ultimately, the study concludes by giving recommendations to all duty bearers to respect, protect and fulfil the rights of children when fashioning an appropriate sentence for child offenders who turn 18 during proceedings. The recommendations include minimizing system delays by dealing with cases involving children in a timely manner and putting the best interests of the child first by considering how the sentence will influence the course of their development as young adults.

List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
COA	Court of Appeal
COK	Constitution of Kenya
CRC Committee	Committee on the Rights of the Child
UNCRC	United Nations Convention on the Rights of the Child

List of Cases

- A O O & 6 Others v Attorney General & Another* (2017) eKLR.
- Arthur MuyaMuriuki v Republic* (2015) eKLR.
- Benson Ochieng & France Kibe v Republic* (2018) eKLR.
- Daniel Langat Kiprotich v State* (2018) eKLR.
- DKC v Republic* (2014) eKLR.
- Duncan Okello Ojwang v Republic* (2019) eKLR.
- Francis Karioko Muruatetu & Another v Republic* (2017) eKLR.
- Fredrick Nzioki Wambua v Republic* (2015) eKLR.
- J M K v Republic* (2015) eKLR.
- JKK v Republic* (2013) eKLR.
- JOO v Republic* (2019) eKLR.
- Josiah Mutua Mutunga & another v Republic* (2019) eKLR
- Mandla Trust Mpopfu v Minister for Justice and Constitutional Development and Others* (2013), Constitutional Court of South Africa.
- R K S v Republic* (2018) eKLR.
- Regina v Morgan Clarke, Declan Andrews and Anton Craig Thompson* (2018), England and Wales Court of Appeal (Criminal Division).
- Republic v P M K* (2018) eKLR.
- Richard Mwaura Njuguna & another v Republic* (2019) eKLR.
- S C N v Republic* (2018) eKLR.

List of Legal Instruments

- i. *African Charter on the Rights and Welfare of the Child.*
- ii. *Borstal Institutions Act, Cap 92, Laws of Kenya.*
- iii. *Children Act, Act No. 8 of 2001.*
- iv. *Constitution of Kenya (2010).*
- v. *Penal Code, Cap 63, Laws of Kenya.*
- vi. *United Nations Convention on the Rights of the Child.*
- vii. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*

CHAPTER ONE: INTRODUCTION

Background of the Problem

Children differ from adults in their physical and psychological development;¹ hence, are likely to become offenders, as the range of their behaviour that would constitute offence is wide in comparison to that of adults.² The reasons for deviant behaviour in children can range from neglect by their guardians to simply an attempt to survive through the harsh realities in their lives such as poverty.³ While engaging in this deviant behaviour some of these children commit crimes that are totally reprehensible. Consequently, they come into contact with the law and find themselves entangled in the criminal justice system, which is typically set up for adults.⁴ Significant inequities arise for those offenders who commit offences as children but attain adulthood during the proceedings.

System delay in concluding cases involving child offenders is the main reason children attain the age of adulthood between the time when they committed an offence and when they are sentenced.⁵ The system delay can result from poor police investigations that often take months (or years) to conclude and unavailability of courts.⁶ Despite there being explicit international standards and norms on the proper administration of justice when it comes to child offenders,⁷ the issue of dealing with children who commit offences but attain the age of majority before or at sentencing is one that courts have grappled with in several cases in the Kenyan jurisprudence.

¹ Justice Muhammad Imman A, 'Towards a Justice Delivery System for Children in Bangladesh: A Guide And Case Law On Children In Conflict With The Law' UNICEF Bangladesh, 2010, 413 – <[untitled \(supremecourt.gov.bd\)](#)> on 5 January 2021; See also UN Committee on the Rights of the Child *General comment No. 24 (2019)*, para. 2.

² Ongaro B, 'Perils of Child Offenders in a Criminal Justice System That Ignores Them', *The Nairobi Law Monthly*, 8 December 2015 – <[Perils of child offenders in a criminal justice system that ignores them - Nairobi Law Monthly](#)> on 25 March 2020.

³ Nkirote Joyce K, 'An Analysis Of The Adequacy Of The Legal Framework In Protecting The Rights Of Child Offenders In Kenya' Published LLM Thesis, University of Nairobi School of law, Nairobi, 2016, 1.

⁴ Nikhil R and Wong M, 'Juvenile Justice-Modern Concepts of Working with Children in Conflict with the Law' *Save the Children UK*, 2006, 11.

⁵ Youth Justice Legal Centre Standing up for Kids Just for Kids Law, 'Timely Justice: Turning 18 A briefing on the impact of turning 18 in the criminal justice system' <[https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20\(June%202020\).pdf](https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20(June%202020).pdf)> on 27 December 2020.

⁶ Kervick Á, 'Legal limbo for children: The risks of turning 18' *Kingsley Napley*, 26 June 2020 <<https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/legal-limbo-for-children-the-risks-of-turning-18>> on 24 December 2020.

⁷ Nikhil R and Wong M, 'Juvenile Justice-Modern Concepts of Working with Children in Conflict with the Law' *Save the Children UK*, 2006, 11.

Statement of the Problem

The legal framework in Kenya does not address whether to sentence children who commit offences but turn 18 before or at sentencing as minors or adults. This is evidenced by recent jurisprudence in Kenya such as the decisions of *JKK v Republic*, hereinafter referred to as *JKK case*,⁸ and *DKC v Republic*, hereinafter referred to as *DKC case*.⁹ These two Court of Appeal (hereinafter referred to as COA) cases demonstrate the serious dilemma posed to the Courts in Kenya over this matter. On one hand, the Courts have expressed that for an offender who was at the time of the commission of the offence a minor he or she ought to be tried and sentenced according to the provisions of the Children Act.¹⁰ However, on the other hand, the Courts have also expressed that an offender above the age of 18 years is not suitable to be subjected to any of the sentences provided for under the Children Act.¹¹

Since the Kenyan statutory scheme does not state how juveniles who commit serious crimes but turn 18 before or at sentencing should be dealt with, the Courts have had to coin a solution to this predicament and have found a ‘right approach’ to sentencing in such cases. Notably, the fact that the law is silent regarding sentencing of child offenders after they turn 18 is only one out of the many challenges facing Kenya’s juvenile justice system. However, this research limits itself to this particular challenge, as it is one of the issues that the law is yet to properly address.

The main factor causing this problem as stated earlier is delays in the judicial system.¹² The police are also a contributing factor to these delays. They are not properly funded to carry out effective and efficient investigations, which leads to children and young people being left in limbo for years as their cases are not progressed.¹³ In addition, they are not adequately trained on how to handle children’s matters;¹⁴ therefore, they end up mishandling child offender cases. For example, by holding child offenders in custody for a longer time than that prescribed by the law, or conducting

⁸ *JKK vs Republic* (2013) eKLR.

⁹ *DKC v Republic* (2014) eKLR.

¹⁰ *DKC v Republic* (2014) eKLR.

¹¹ *JKK vs Republic* (2013) eKLR, para. 18.

¹² Pidd H, ‘Revealed: hundreds of children pushed into adult courts by delays’ *The Guardian*, 5 November 2019 – <<https://www.theguardian.com/society/2019/nov/05/revealed-hundreds-of-children-pushed-into-adult-courts-by-delays>> on 20 December 2020.

¹³ Keenan M, ‘Youth Justice: Is reform on the way for young people who turn 18 while in the criminal justice system?’ Kingsley Napley, 19 March 2021 – <<https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/youth-justice-is-reform-on-the-way-for-young-people-who-turn-18-while-in-the-criminal-justice-system>> on 21 May 2021.

¹⁴ Mugo Mukuni R, ‘Application of the Best Interest Principle to the Criminal Justice Juvenile System: A Review of Emerging Case Law’ 1(1) *Interdisciplinary Journal on the African Child Special edition*, 2019, 14.

investigations that last for too long before a matter involving a child offender is forwarded to the courts.

Despite the huge implications a charge will have on a child's future, there is no requirement or incentive for expedition when a suspect is approaching the age of 18.¹⁵ Further, there is no guidance on time scales for police investigation and/ or a decision to charge when a child or young person is involved.¹⁶ This is contrary to the Child Offender Rules, which require the expediting of cases involving children and avoiding unnecessary delay.¹⁷ Children cases should be expedited where possible as children change quickly as they grow and over time mature out criminal behaviour.¹⁸ In order to protect the rights of all children in conflict with the law, including those who have turned 18 prior to or at sentencing, and ensure fair treatment, legal reform is needed.

Justification/Rationale of the Study

Kenya is a state party to the United Nations Convention on the Rights of the Child, hereinafter referred to as UNCRC,¹⁹ as well as the African Charter on the Rights and Welfare of the Child, hereinafter referred to as ACRWC.²⁰ By virtue of Article 2 of the Constitution of Kenya (hereinafter referred to as COK), having been ratified by Kenya, these two treaties form part of the law of Kenya under the COK.²¹ These treaties obligate Kenya to develop specialized responses for dealing with children in conflict with the law that take into account their young age and are aimed at promoting their reintegration and development as productive citizens. These responses include, inter alia, ensuring that its system of justice espouses fairness, effectiveness and humanity in

¹⁵ Youth Justice Legal Centre Standing up for Kids Just for Kids Law, 'Timely Justice: Turning 18 A briefing on the impact of turning 18 in the criminal justice system' – [https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20\(June%202020\).pdf](https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20(June%202020).pdf)

¹⁶ Youth Justice Legal Centre Standing up for Kids Just for Kids Law, 'Timely Justice: Turning 18 A briefing on the impact of turning 18 in the criminal justice system' – [https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20\(June%202020\).pdf](https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20(June%202020).pdf)

¹⁷ Rule 12(1), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹⁸ Pidd H, 'Revealed: hundreds of children pushed into adult courts by delays' *The Guardian*, 5 November 2019 – <https://www.theguardian.com/society/2019/nov/05/revealed-hundreds-of-children-pushed-into-adult-courts-by-delays> on 20 December 2020.

¹⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

²⁰ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

²¹ Article 2(6), *Constitution of Kenya* (2010).

dealing with children who commit offences.²² These treaties also mandate Kenya to ensure that this system ensures that the best interests of child offenders are considered.²³

In compliance with Article 21(3) of the COK, which obligates all State organs and all public officers to address the needs of vulnerable groups in society including children,²⁴ and the UNCRC as well as the ACRWC, the COK has a specific provision on children (Article 53). In addition, Kenya has enacted the Children Act,²⁵ which is a specific law with respect to children. The Children Act replicates the provisions in the UNCRC and the ACRWC, which are designed to safeguard the rights of children.²⁶ This is evident from various provisions of the Children Act: section 186 provides guarantees to child accused of an offence,²⁷ in tandem with Articles 40(2) of the UNCRC,²⁸ and 17(2) of the ACRWC.²⁹ Section 190 of the Act restricts the penalties that a court may apply to a child offender to punish any crime committed by them,³⁰ in line with Articles 37 of the UNCRC,³¹ and 17(2) of the ACRWC.³² Section 191 of the Children Act provides for the methods with which to handle a child offender when the court is satisfied as to their guilt,³³ which is similar to Article 40(3) of the UNCRC.³⁴

Despite the children rights advancement through the various laws and provisions mentioned above, the dilemma of sentencing juveniles who attain age of majority after committing an offence is evidence of a lacuna in the Kenyan law regarding juvenile justice. It poses calls for a reform to Kenya's juvenile justice system to provide a more nuanced statutory scheme. This nuanced statutory scheme is one that focuses on balancing the purposes of the criminal justice system.

²² Ongaro B, 'Perils of Child Offenders in a Criminal Justice System That Ignores Them', The Nairobi Law Monthly, 8 December 2015 – <[Perils of child offenders in a criminal justice system that ignores them - Nairobi Law Monthly](#)> on 25 March 2020.

²³ Ongaro B, 'Perils of Child Offenders in a Criminal Justice System That Ignores Them', The Nairobi Law Monthly, 8 December 2015 – <[Perils of child offenders in a criminal justice system that ignores them - Nairobi Law Monthly](#)> on 25 March 2020.

²⁴ Article 21(3), *Constitution of Kenya* (2010).

²⁵ *Children Act* (Act No. 8 of 2001).

²⁶ Ongaro B, 'Perils of Child Offenders in a Criminal Justice System That Ignores Them', The Nairobi Law Monthly, 8 December 2015 – <<http://nairobiawmonthly.com/index.php/2015/12/08/perils-of-child-offenders-in-a-criminal-justice-system-that-ignores-them/>> on 25 March 2020.

²⁷ Section 186, *Children Act* (Act No. 8 of 2001).

²⁸ Article 40(2) (b), *Convention on the Rights of the Child*.

²⁹ Article 17(2) (c), *African Charter on the Rights and Welfare of the Child*.

³⁰ Section 190, *Children Act* (Act No. 8 of 2001).

³¹ Article 37(a), *Convention on the Rights of the Child*.

³² Article 17(2) (c), *African Charter on the Rights and Welfare of the Child*.

³³ Section 191, *Children Act* (Act No. 8 of 2001).

³⁴ Article 40(3) (b), *Convention on the Rights of the Child*.

These purposes, according to the Beijing Rules,³⁵ are to rehabilitate against just deserting, to assist against to repress and punish, to react in accordance with the merits of an individual case against to react in accordance with protecting society generally, or to deter generally against incapacitating the individual.³⁶

Significance of the Study

This research is of policy relevance because it highlights the need for Parliament to amend the Children Act in order to fill the gap in the Kenyan juvenile justice system on sentencing child offenders who turn 18 prior to or at sentencing. This can prevent the vicious cycle that undermines the effectiveness of the criminal justice system – every time a child offender evades punishment simply because the existing law does not suffice to hold them accountable, or such an offender gets unfair adult punishment. The key proposed solution to this lies in striking a balance of intentions of the criminal justice system as mentioned above by considering the circumstances of the case wholesomely.

Aim(s) and Objectives

This study aims to investigate the laws in Kenya regarding sentencing of child offenders, focus being on those who are adults at the time of sentencing or appeal.

This study therefore purposes to:

- i. Analyse the current legal framework concerning child offenders in Kenya.
- ii. Find out whether the existing legal framework protecting the rights of child offenders in Kenya is adequate when it comes their sentencing and if so, to what extent.
- iii. Find out the extent to which courts apply Article 53(1) (f) and 53(2) of the COK during sentencing of child offenders.
- iv. Make recommendations that can be employed in addressing the challenges facing the Kenyan juvenile justice system concerning sentencing of child offenders who have turned 18.

³⁵ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules'), 29 November 1985, A/RES/40/33.

³⁶ Commentary on Para. 17, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); See also Ongaro B, 'Perils of Child Offenders in a Criminal Justice System That Ignores Them', The Nairobi Law Monthly, 8 December 2015 <http://nairobiawmonthly.com/index.php/2015/12/08/perils-of-child-offenders-in-a-criminal-justice-system-that-ignores-them/> on 25 March 2020.

Research Questions

The following question will act as a guide for this research:

What is the most appropriate way of treating offenders who were under the age of 18 when they committed an offence but have turned 18 at sentencing time?

Hypothesis

This research is founded on the following hypotheses:

- i. There are challenges facing the existing legal framework concerning punishment of child offenders who attain the age of majority before or at sentencing.
- ii. These challenges will impede the effectiveness of the overall criminal system in correcting and rehabilitating offenders in Kenya.

Conceptual Framework

Children have rights that are distinct from other people's rights. They are considered as special,³⁷ and vulnerable,³⁸ hence, they receive specialized treatment in almost all the activities they engage in that an adult would otherwise not receive.³⁹ Special protection is accorded to child offenders, as they are considered as vulnerable groups in the criminal justice system.⁴⁰ The COK (Article 53) and the Children Act (Section 4[2]) prioritize children's rights by stressing that the best interest of the child is the paramount concern in dealing with any matter concerning children.⁴¹ Therefore, their best interests must be considered even when attempting to tame criminal behaviour on their part. This study will center itself on the concept of best interests of a child; therefore, it is important to understand the meaning this concept carries in this study.

The Concept of Best Interests of a Child

The concept of best interests of a child emphasizes the need for the impact of all actions on children to be assessed in advance.⁴² The concept takes center stage in all 'actions' or matters concerning

³⁷ *Republic v S.A.O. (a Minor)* (2004) eKLR.

³⁸ *Republic v S.A.O. (a Minor)* (2004) eKLR.

³⁹ Ombaso Mang'ate F, 'Sentencing of Child Offenders in Kenya: A Latent Contradiction in Law' Academia.edu, 1.

⁴⁰ National Council on the Administration of Justice (NCAJ), *Criminal Justice System in Kenya: An Audit*, 2016, 46.

⁴¹ Article 53(2), *Constitution of Kenya* (2010).

⁴² Waithira Mbugua J, Munene M and Ambwaya J, 'Reflections on key processes of children sector in Kenya from 1989 onwards as recorded by some national civil society actors' Save the Children Finland, 2012, 9.

children, including the protection of child offenders in the criminal justice system. In child justice, the meaning and scope of the best interests of the child are multifaceted and under international children's rights law, the best interests principle performs multiple functions. It can shape the content of other rights of children in the criminal justice system. Additionally, it can be directly applied to a specific factual situation. It can also be an interpretative legal principle or a rule of procedure.⁴³ The flexibility of the concept allows any person, authority or court to tailor its application to the context. In practice, courts use the concept to evaluate whether laws and court processes protect the rights of children involved in the justice system. Further, the concept can be used to justify, support or clarify a specific approach to dealing with a matter concerning a child offender.

The best interests of the child is a powerful legal principle to ensure that children are only detained as a measure of last resort. The right not to be detained, except as a measure of last resort and for the shortest appropriate period, aims to protect children from the harmful effects of incarceration. The concept of best interests of a child is based on the understanding that childhood (particularly adolescence) is mostly a period of experimentation and learning. At that stage of life, children are striving to understand many issues, and their mental capacities are still developing. Given their ability to accept correction, children have a better claim to rehabilitation, reorientation and reintegration. That is why child offenders should only be sent to prison if there is no other suitable alternative response to the crimes they commit.

In the pre-trial stage, the best interests of the child principle obligates the police to ensure child offenders are not detained in police cells, except as a last resort. During arrests, the police are required to respect the dignity and best interests of the child. Courts in Kenya have made it clear that the police must use child-friendly justice approaches. Some of the measures required by Kenyan law include allowing the child offender to sleep at home and instructing a parent or guardian to bring her or him to court. However, in practice, child offenders are always detained in police cells before appearing in court. This may be that police lack knowledge of child justice laws. Detaining children may also reflect police attitudes and the belief that children must be punished in order to learn. Also at the post-trial stage, the best interests of the child play a central

⁴³ Fambasayi R and Moyo A, 'The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' 36(1), *South African Journal on Human Rights*, 2020, 28-29.

role in sentencing. Kenyan courts are progressively interpreting the best interests of the child as a special protection mechanism in the context of detention as a measure of last resort. This approach is commendable and ensures that child offenders are given a second chance.

There are however immense challenges to the principle of a child's best interests. An example is seen in the case of *Daniel Langat Kiprotich v State*, hereinafter referred to as *DLK case*,⁴⁴ which accurately captures the dilemma courts face when sentencing child offenders who have turned 18. In that decision, the petitioner was convicted of robbery with violence and given a death sentence. In his petition for a new trial, he argued that he was a minor at the time of his trial and conviction, thus, both his trial and sentence were irregular.⁴⁵ Justice Joel Ngugi, who was the judge in that case, stated that the Kenyan statute conceives only two types of offenders, namely, child offenders and adult offenders.⁴⁶ He further pointed out that the Kenyan legislative regime does not recognize the development stages of children as being different, especially teenage hood, in which these children most of the time need to be cared for and protected, but can be dangerous to the society due to their deviance and rebellious tendencies.⁴⁷

He made these statements after considering the approach taken in the COA decisions of the *JKK case* and the *DKC case* regarding fashioning an appropriate sentence for child offenders who are over 18 years. According to him, the fact that the COA relied on section 191(1) (l) of the Children Act in both precedents shows that the COA is rousing focus to the gap in Kenyan law with respect to juvenile justice.⁴⁸ He elaborated on two dilemmas that result in this gap. This research will focus specifically on the second dilemma which speaks directly to the research topic.

Justice Joel Ngugi in the *DLK case* laid out the dilemma a court faces in sentencing an offender who was a minor when they committed a serious offence but has turned into an adult at sentencing or appeal. He posited that a dilemma is created for the trial courts when faced with a juvenile who committed a serious offence but turns eighteen during the proceedings.⁴⁹ In this situation, the Courts are tasked with balancing the gravity of the offence committed against the alternative of setting the offender free. Releasing an offender who committed a particularly violent or serious

⁴⁴ *Daniel Langat Kiprotich v State* (2018) eKLR.

⁴⁵ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 4.

⁴⁶ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 10.

⁴⁷ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 10.

⁴⁸ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 10.

⁴⁹ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 12.

offence back to the society is not an option that Courts would want to easily consider.⁵⁰ The Court may, on analysis and evidence, be convinced that the offender poses a threat to society.⁵¹ The Court may find it inappropriate to release the offender to the society before he or she acknowledges his fault in their act or omission and takes responsibility for it while being assisted to understand the subsequent result of his wrong doing.⁵² According to Justice Joel Ngugi, it may be utterly dangerous for the society for the court to do that.⁵³ Moreover, it might deny the offender an opportunity to think carefully about his actions, giving them due consideration, and accept to be rehabilitated.⁵⁴

This situation becomes difficult to untangle as the offender is no longer a minor. Usually, one of the arguments raised by the offender is that he or she was a minor at the time they committed the offence (during the trial and conviction), hence, ought to be sentenced within the confines of section 191 of the Children Act. Going by the fact that such an offender is above 18 years, he or she is not suited for subjection to either of the sentences prescribed under the Children Act.⁵⁵ However, in preserving the life of the child and his best interests,⁵⁶ it must be taken into consideration that the offender was a minor during perpetration of the offence, hence, he or she ought to be tried and sentenced in a manner corresponding to the provisions of the Children Act.

This dilemma calls for a reform to the Kenyan juvenile justice system to provide a more nuanced statutory scheme.⁵⁷ Against this background, this study discusses the approach that should be adopted within the Kenyan Juvenile Justice system when imposing sentences on children who commit offences but have attained the age of adulthood at the time of sentencing. This approach will help in implementing and developing the best interests of child offenders.

Research Methodology

The overall methodological approach for this research study is the doctrinal methodology. This study is solely qualitative and it is based on the review of different relevant primary and secondary

⁵⁰ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 12.

⁵¹ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 11.

⁵² *JKK vs Republic* (2013) eKLR, para. 18.

⁵³ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 12.

⁵⁴ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 12.

⁵⁵ *JKK vs Republic* (2013) eKLR, para. 18.

⁵⁶ *JKK vs Republic* (2013) eKLR, para. 18.

⁵⁷ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 13.

sources. These include statutes, case law, books, books chapters, journals, reports and internet resources. Reliance will be placed a lot on case law as these are more specific in showing the interpretation of the problem in the study.

Literature Review

During sentencing, children should be treated differently from adults and be given sentences that are more lax and permissive than those applied to adults. Fernandos Ombaso, in his paper on *'Sentencing of child offenders in Kenya: A latent Contradiction in law*, posits that minors are taken to have a whole life lying before them. He opines that their many years cannot therefore be ruined by a few years they are sentenced for an offence. He adds that sentencing minors in a similar way as adult offenders would serve an injustice to the minors in that, some of the offences they may be involved in may be as a result of unawareness. He further notes that even though ignorance of the law is no defense, minors' case may be special because being minors they may not have developed the requisite knowledge of what is wrong and right.

The importance of this reasoning is that it shows that consideration must be given to whether the principles protecting children who commit offences when they are being sentenced can be applied in the same way to child offenders who become adults during the course of the proceedings of the court. In response to this, the Committee on the Rights of the Child (hereinafter referred to as CRC Committee) recommends that the systems dealing with justice in relation to children should also protect individuals who were under 18 when they committed an offence but later attain adulthood at trial or sentencing.⁵⁸ The rationale behind this is that the criminal action took place at a time when the offender was still a child, and thus he or she must also be tried taking that into account.

Kenyan courts have highlighted the significant place that children's rights have secured in the Kenyan constitutional framework through the entrenchment of the principle of best interests of the child in the Bill of Rights. This is indicative of the legislature's intention to make children's rights and interests a priority. Rongedzayi Fambasayi and Admark Moyo argue that treating the best interests principle as a substantive right requires courts to reflect on laws and policies that intersect with all the rights of the child, including the right to be detained only as a measure of last resort

⁵⁸ UN Committee on the Rights of the Child *General comment No. 24 (2019), Children's rights in the child justice system*, 18 September 2019, CRC/C/GC/24, para. 31.

and for the shortest appropriate time.⁵⁹ They posit that to ensure detention for a ‘shortest appropriate period’, law enforcement authorities and the courts must consider the child’s age, evolving capacities and level of maturity.

They further argue that in many instances, there is a significant disconnect between the rules governing the pre-trial detention of child offenders and reality. For example, Rule 12 of the Child Offender Rules under the Children Act, which is premised on the principle that lengthy trials or placements on remand are not in the child’s best interests. Godfrey Odongo observes that a critical survey of court practices reveals that Kenyan courts have yet to fully embrace the time limits and the CRC’s explanation of the desired pedagogic value of limiting pre-trial detention and delayed hearing of cases involving children.⁶⁰ According to Rongedzayi Fambasayi and Admark Moyo, there is need to harmonise the applicable rules and the prevailing reality.⁶¹

In Kenya, this lack of harmonization of the applicable rules and the prevailing reality is shown by the system delays that lead to the courts being faced with a conundrum in sentencing an offender who was a minor when they committed a serious offence but has turned into an adult at sentencing or appeal time. The anomaly caused by child offender cases not being dealt with in a timely manner means that young people are losing important protections due to circumstances which are no fault of their own. This is well demonstrated in the COA decision of the *DKC case*.⁶² In that case, the appellant, DKC, had appealed a High Court judgement wherein a life imprisonment sentence had been pronounced on him for murder. At the time of the charge with the offence he was 15. The appellant argued that the sentence imposed was very harsh and cruel. The COA acknowledged that the appellant was a minor at the time of the offence, therefore, he ought to have been tried and sentenced on the basis of section 191(1) of the Children Act. However, the COA was in perplexity because the appellant was 20 years at the time of the appeal.

The COA in the *DKC case* referred to a similar COA decision in the *JKK case*.⁶³ In that case, the appellant was handed the death sentence for murder. The COA found that the appellant was a

⁵⁹ Fambasayi R and Moyo A, ‘The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe’, 35.

⁶⁰ Odongo G, ‘Kenya’, 39.

⁶¹ Fambasayi and Moyo A, ‘The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe’, 37.

⁶² *DKC v Republic* (2014) eKLR.

⁶³ *JKK vs Republic* (2013) eKLR.

minor back then when he committed the offence but was about 21 years old at sentencing time. The Court relied on the Children Act and found that a death sentence or a sentence to imprisonment for life cannot be applied on any person below 18 years.⁶⁴ The Court was guided by section 191(1) of the Children Act in finding that the Court can sentence a young offender who has reached 16 years old in any other lawful manner.⁶⁵ The Court therefore substituted the death sentence with imprisonment for a 12-year imprisonment term.⁶⁶ The Court in the *DKC case* relied on the same reasoning and substituted the life imprisonment sentence on the appellant with a 10-year imprisonment term.

In the *DLK case*,⁶⁷ the Court followed the COA precedents of the *DKC case* and the *JKK case*, and substituted the appellant's death sentence with twelve years imprisonment for each of his two counts of robbery with violence.⁶⁸ Similarly, in the High Court case of *S C N v Republic*,⁶⁹ the appellant impugned the decision of the trial court in imposing a life sentence on him despite him being a child at the time the offence was committed. The Court cited the *DKC case* and the *JKK case* and held that the court that tried the appellant should have prescribed any other lawful sentence in conformance to section 191(1)(g) and (l) of the Children Act.⁷⁰ Accordingly, the Court reduced the sentence of the appellant to ten years in custody.⁷¹

In all these aforementioned cases, the Courts have latched on to the omnibus proviso in section 191(1)(l) of the Children Act to style a sentence that it deemed appropriate for the context where it is faced with the dilemma of what should be done in circumstances where the appellant was no longer a minor. That is, to deal with the offender in question in any other lawful manner. This provision may, however, give leeway to varied interpretation as to what is considered lawful by various entities having mandate in respect of child offenders. Such ambiguity in the law needs to be addressed.

⁶⁴ *JKK vs Republic* (2013) eKLR, para. 16.

⁶⁵ *JKK vs Republic* (2013) eKLR, para. 18.

⁶⁶ *JKK vs Republic* (2013) eKLR, para. 19.

⁶⁷ *Daniel Langat Kiprotich v State* (2018) eKLR.

⁶⁸ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 14.

⁶⁹ *S C N v Republic* (2018) eKLR

⁷⁰ *S C N v Republic* (2018) eKLR, para. 30.

⁷¹ *S C N v Republic* (2018) eKLR, para. 30.

Definition of terms

In the context of this study, the following terms are defined as follows:

Adult	An individual who has attained the age of eighteen. ⁷²
Child offender/Child in conflict with the law	An individual under the age of eighteen, who has been charged for failing to conform to any law. ⁷³
Child	Any individual under the age of eighteen. ⁷⁴
Minimum age of criminal responsibility	the age below which children are legally presumed not to be capable of committing crimes
Offence	An action, attempt or omission punishable by law.
Young adult	An individual between the ages of eighteen to twenty five.

Chapter Breakdown

Chapter I: This chapter introduces the topic of research by outlining the background to the study, the problem and laying down the justification as well as the significance, objectives and scope of the study.

Chapter II: This chapter examines specific international and regional instruments legal instruments on child offenders in Kenya. The chapter also covers the specific laws in Kenya that protect the rights of child offenders.

Chapter III: This chapter looks at sentencing of child offenders in Kenya and discusses the law that the Courts rely on to guide them in fashioning an appropriate sentence for child offenders.

Chapter IV: The chapter analyses sentencing child offenders who committed murder. The Chapter also discusses the Courts' position on imprisonment during the President's pleasure.

Chapter V: This chapter elaborates on the findings, conclusions and recommendations on how to improve the sentencing of child offenders who turn 18 at sentencing and ensure the effectiveness of the juvenile justice system in Kenya.

⁷² Article 260, *Constitution of Kenya* (2010).

⁷³ National Council on the Administration of Justice (NCAJ) Special Task Force on Children Matters, *Status Report on Children in the Justice System in Kenya*, 20 November 2019, 8.

⁷⁴ *Children Act*, (Act No. 8 of 2001).

CHAPTER 2: LEGAL FRAMEWORK IN KENYA DEALING WITH CHILDREN WHO COMMIT OFFENCES

This chapter explores the legislative structure in Kenya protecting all the legal entitlements of children who commit offences. It analyses international instruments and standards on the principles distinguished as well-defined procedures. These principles produce results that are almost optimum when it comes to defending the entitlements of children who commit an offence and they set standards keeping those entitlements safe. This chapter also analyses Kenyan laws defending the rights of children who commit offences in comparison to the background laid down under treaties and conventions.

International Regulatory Regime

Kenya has ratified key international human rights treaties aimed at ensuring better protection of children's rights all over the world, mainly the UNCRC and the ACRWC. These treaties are incorporated into Kenyan law by virtue of Article 2 of the COK, which stipulates that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the COK.⁷⁵ Kenya's obligations under these two treaties concerning juvenile justice can be discerned from six features from which the treaties form a standard for juvenile justice. Through these six features, the UNCRC and the ACRWC respectively set out the requirements of a child rights-oriented juvenile justice system. State parties are legally bound to implement these requirements. They are:

- a) the establishment of separate laws, institutions and procedures applicable to children accused or alleged of committing crimes;
- b) the setting of a minimum age of criminal capacity;
- c) the principle of detention as a last resort and for the shortest period of time;
- d) the desirability of diversion;
- e) procedural guarantees being accommodated in a juvenile justice framework and
- f) the limitation of certain sentences and need for alternative dispositions at the sentencing stage.⁷⁶

The provisions of these two treaties in relation to juvenile justice will now be discussed.

⁷⁵ Article 2(6), Constitution of Kenya (2010).

⁷⁶ Odongo G, 'Kenya', 31.

a) United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC preceded all others as it was the foremost authoritative legal instrument directing its attention towards ensuring that the rights of children are protected to the fullest extent. The convention imposes stipulations and requirements that must be honored by the state parties to the convention.⁷⁷ The intention of adopting it was, *inter alia*, providing unique defenses and close attention to children such as the law keeping them safe.⁷⁸ The four guiding principles of the UNCRC as enunciated by the CRC Committee are:⁷⁹

- a. Having distinctions that are not discriminatory;⁸⁰
- b. Regard for child's best interests as a principal factor in all deeds with respect to the child;⁸¹
- c. Acknowledging a child's intrinsic entitlement to life, and the duty of every Party to guarantee to the highest feasible extent the continued existence and directed change of the child;⁸²
- d. Considering the entitlement of a child to convey their perspectives without restriction and those perspectives being afforded appropriate importance.⁸³

The CRC Committee has expressed the need for further government action to give full effect to these four principles, and has called upon the Kenyan Government to adopt legislative, administrative and other measures to ensure the fulfilment of the principles.⁸⁴ Article 3 of the UNCRC makes it clear that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'⁸⁵ Rights of children under the UNCRC influences all matters regarding children, among which justice for juveniles is included.⁸⁶

⁷⁷ Ekundayo O, 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC', 146.

⁷⁸ Preamble, *Convention on the Rights of the Child*.

⁷⁹ UN Committee on the Rights of the Child *General comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 27 November 2003, CRC/GC/2003/5, para. 12; See also – < <https://www.unicef.org/child-rights-convention/frequently-asked-questions> > on 4 December 2020.

⁸⁰ Article 2, *Convention on the Rights of the Child*.

⁸¹ Article 3, *Convention on the Rights of the Child*.

⁸² Article 6, *Convention on the Rights of the Child*.

⁸³ Article 12, *Convention on the Rights of the Child*.

⁸⁴ United Nations Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2, para. 25, 27, and 29.

⁸⁵ Article 3(1), *Convention on the Rights of the Child*.

⁸⁶ Odongo G, 'Kenya', 31.

Article 37 and Article 40 of the UNCRC address juvenile justice. Article 37 provides, inter alia, that the arrest, detention or imprisonment of a child should be used as a measure of last resort and should be for the shortest appropriate period of time.⁸⁷ Article 40(1) entitles child offenders to be subjected to humane and dignified treatment, advocating for the child to be reintegrated into society and assume a constructive role in society.⁸⁸ Article 40(2) stipulates the presumption of innocence for children,⁸⁹ and their entitlement to their case being concluded expeditiously.⁹⁰ The UNCRC also emphasizes the need for diversion⁹¹ and alternative sentences.⁹²

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

One reason for developing the ACRWC was the disproportionately low participation by Africa in the making of the UNCRC.⁹³ Another concern was that there was a requirement in Africa for a Children's legal document that mirrored the distinctive circumstances of Africa.⁹⁴ This would ensure that the specific needs and situation of children in Africa were addressed.⁹⁵ Under the ACRWC, provisions on justice when it comes to juvenile are encapsulated in Article 17. This provision is important because it guarantees that each child who commits an offence ought to be afforded treatment that upholds their reintegration into society coupled with their family as well as social rehabilitation.⁹⁶ Like the UNCRC, the ACRWC also stipulates the taking into account of the best interests of the child.⁹⁷ Article 17(1) upholds that a child who commits an offence must be treated child in a special manner.⁹⁸ Article 17(2) provides guarantees to a child who commits an offence.⁹⁹

⁸⁷ Article 37(b), *Convention on the Rights of the Child*.

⁸⁸ Article 40(1), *Convention on the Rights of the Child*.

⁸⁹ Article 40(2) (b) (i), *Convention on the Rights of the Child*.

⁹⁰ Article 40(2) (b) (iii), *Convention on the Rights of the Child*.

⁹¹ Article 40(3)(b), *Convention on the Rights of the Child*.

⁹² Article 40(4), *Convention on the Rights of the Child*.

⁹³ Ekundayo O, 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC', 147.

⁹⁴ Ekundayo O, 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC', 147.

⁹⁵ Waithira Mbugua J, Munene M and Ambwaya J, 'Reflections on key processes of children sector in Kenya from 1989 onwards as recorded by some national civil society actors' Save the Children Finland, 2012, 5.

⁹⁶ Article 17(3), *African Charter on the Rights and Welfare of the Child*.

⁹⁷ Article 4, *African Charter on the Rights and Welfare of the Child*.

⁹⁸ Article 17(1), *African Charter on the Rights and Welfare of the Child*.

⁹⁹ Article 17(2), *African Charter on the Rights and Welfare of the Child*.

Domestic Regulatory Regime

a) The Constitution of Kenya

The COK includes specific provisions regarding children's rights. Article 53(1) entitles every child freedom from detainment, which should only be considered at the final stage after all other options have been considered exhaustively, and such detainment must only be for a short duration, and while set apart from adults.¹⁰⁰ The COK also stipulates that the child's best interests be taken into account in every issue pertaining to the child.¹⁰¹

b) The Children Act (2001)

The Children Act is the legal framework that handles matters regarding children, including children who commit offences.¹⁰² The Children Act aims to put into practice Kenya's obligations under the UNCRC as well as the ACRWC,¹⁰³ by making children its central point of focus. The Children Act promotes a set of rights and services that need to be provided to vulnerable children, and focuses on community and family contexts.¹⁰⁴

Key Provisions in the Children Act Regarding Child Offenders

These key provisions significantly advance Kenya's compliance with its obligations under UNCRC and the ACRWC as regards juvenile justice. Section 4 entrenches the principle of a child's best interests.¹⁰⁵ The Children Act provides for children's right to non-discrimination.¹⁰⁶ Section 18 prohibits subjecting a child to capital punishment or to life imprisonment.¹⁰⁷

Part XIII provides for further safeguards in relation to child offenders. Section 186 stipulates the legal assurances of a child accused of engaging in criminal activity. Section 189 prohibits the use

¹⁰⁰ Article 53 (1) (f), *Constitution of Kenya* (2010).

¹⁰¹ Article 53 (2), *Constitution of Kenya* (2010).

¹⁰² Dela Agotse C, 'Juvenile Justice in Africa: An Assessment of Adherence to International law on Preserving the Rights of Child Offenders' Published Master of Arts Thesis, The University of Manitoba, Winnipeg, Manitoba, 2018, 57.

¹⁰³ Preamble, *Children Act* (Act No. 8 of 2001).

¹⁰⁴ Della Casa G, Kagwi D, Kitwe I, Njeri Ngugi A, Otieno F, Randazzo S, Wachira Maina P, and Wangari J, *Guidelines Manual on Juvenile Justice Best Practices: An Evidence-Based Approach to the Justice Reforms in Kenya*, CESVI, Nairobi: Kolbe Press, 2016, 26.

¹⁰⁵ Section 4(2) and (3), *Children Act* (Act No. 8 of 2001).

¹⁰⁶ Section 5, *Children Act* (Act No. 8 of 2001).

¹⁰⁷ Section 18, *Children Act* (Act No. 8 of 2001).

of the words *conviction* and *sentence* while referring to a child who has committed or accused of an offence.¹⁰⁸

The Children Act also contains provisions restricting the punishment that can be given to children.¹⁰⁹ The Act prohibits ordering of a child to imprisonment or placement in a detention camp.¹¹⁰ It prohibits the sentencing a children to death.¹¹¹ It also forbids the sending of children below ten years to a rehabilitation school.¹¹² The use of corporal punishment for child offenders is also prohibited.¹¹³

The Child Offender Rules prescribe the manner in which court proceedings concerning children who commit offences are to be carried out.¹¹⁴ The Rules stipulate that a child who commits an offence be presented in court at the immediate moment it is capable of being accomplished and that can only be kept in custody for no more than 24 hours.¹¹⁵ The Rules also prevent child offenders from associating with adult offenders.¹¹⁶

Rule 10 requires children who commit offences and are denied bail to be remanded in custody to children's remand homes or a place of safe custody.¹¹⁷ The remand period ought not to go beyond 6 months for an offence whose punishment is death,¹¹⁸ or 3 months for other offences.¹¹⁹ Nevertheless, these Rules suggest using other choices to remand custody at any time feasible.¹²⁰ The Rules stipulated that cases of children who commit offences be heard promptly,¹²¹ setting a 3-month timeline after plea-taking for completion of for a case being heard in a Children's Court.¹²²

¹⁰⁸ Section 189, *Children Act* (Act No. 8 of 2001).

¹⁰⁹ Section 190, *Children Act* (Act No. 8 of 2001).

¹¹⁰ Section 190 (1), *Children Act* (Act No. 8 of 2001).

¹¹¹ Section 190 (2), *Children Act* (Act No. 8 of 2001).

¹¹² Section 190 (3), *Children Act* (Act No. 8 of 2001).

¹¹³ Section 191 (2), *Children Act* (Act No. 8 of 2001).

¹¹⁴ Section 3, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹¹⁵ Rule 4(1), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹¹⁶ Rule 6(1), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹¹⁷ Rule 10(1), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹¹⁸ Rule 10(4) (a), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹¹⁹ Rule 10(4) (b), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹²⁰ Rule 10(6), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹²¹ Rule 12(1), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

¹²² Rule 12(2), Child Offender Rules, Fifth Schedule, *Children Act* (Act No. 8 of 2001).

Whether the Legal Framework in Kenya Is Adequate In Protecting the Rights of Child Offenders

The existing legal framework in Kenya does not adequately protect the rights of child offenders. There are concerns that the Children Act fails to fully comply with Kenya's legal obligations concerning juvenile justice under the UNCRC and the ACRWC.¹²³ This is seen from how, to date, the age of criminal responsibility remains eight. This is even after the CRC Committee recommended, twice, that Kenya should raise its minimum age of criminal responsibility from the current age of eight years to 12 years and consider raising it.¹²⁴ This is a clear violation of UNCRC and the ACRWC.¹²⁵ In addition, the Children Act does not explicitly recognise the possibility of a formal referral of children away from criminal justice process (diversion, crime prevention and restorative justice) before trial. The limited scope for diversion under the Children Act does not comply with the general spirit of UNCRC and the ACRWC.¹²⁶

Another significant limitation in the Children Act that remains unaddressed is that it does not adequately protect the rights of children in conflict with the law when it comes to sentencing, more so, those who turn 18 before or at sentencing. Under Section 191 of the Children Act, a trial court has an array of alternative sentences or disposition measures to resort to upon finding a child guilty of an offence, including Borstal institutions. Strictly construing this provision, it is noticeable that not all offenders can be referred to the Borstal Institutions.¹²⁷ Subsection (1) (g) of section 191 provides that a child offender can only be referred to a Borstal Institution if he has attained sixteen years. Subsection (1) (e) provides that where the offender is above ten years, but below fifteen years, he should be sent to a rehabilitation school. This raises an implication that the only offenders to be referred to Borstal Institutions are those aged between fifteen and seventeen years.¹²⁸ This leaves child offenders who attain the age of 18 during proceedings hanging.

¹²³ Odongo G, 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms', 12, *African Human Rights Law Journal*, 2012, 128.

¹²⁴ United Nations Committee on the Rights of the Child 'Concluding Observations on Kenya's initial report', 7 November 2001, CRC/C/15/Add 160, para 22; United Nations Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2, para. 68.

¹²⁵ Odongo G, 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms', 12, *African Human Rights Law Journal*, 2012, 128.

¹²⁶ Odongo G, 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms', 12, *African Human Rights Law Journal*, 2012, 128.

¹²⁷ Ombaso Mang'ate F, 'Sentencing of Child Offenders in Kenya: A Latent Contradiction in Law' Academia.edu, 5.

¹²⁸ Ombaso Mang'ate F, 'Sentencing of Child Offenders in Kenya: A Latent Contradiction in Law' Academia.edu, 5.

CHAPTER 3: FASHIONING AN APPROPRIATE SENTENCE FOR A CHILD OFFENDER

The point of interconnection between a child and the penal law is an issue which should be of great concern.¹²⁹ Commonly, the punishment meted out to offenders for an offence committed when they were under the age of majority is disproportionate to the offence. This is demonstrated in the High Court decision of *R K S v Republic*,¹³⁰ wherein R K S was condemned to be locked away for a twenty-year period on the ground of defilement. The High Court established that the appellant was aged about 14 when he was arraigned in court; and about 17 when the sentence was imposed.¹³¹ The Court considered the facts, context and circumstances of the case and held that the punishment suffered by the appellant for an offence committed when he was, at most, fourteen years old was disproportionate to the offence.¹³² The Court determined that the only fair outcome was to revise the sentence to the time already served in prison.¹³³

Such sentence that is disproportionate to the offence is in contravention with Article 53 of the COK entrenching the fundamental rule that the welfare of a child has to be considered as supreme. For a case involving a child who has committed an offence, the court is mandated to employ all the material in reserve for its use in styling a sentence that can be described as suitable to offenders.¹³⁴ This chapter discusses what law the courts rely on in doing so as well as other factors that guide the Courts in fashioning an appropriate sentence for child offenders.

Sentencing of Child Offenders in Kenya

Sentencing children who commit offences is more complicated in contrast to sentencing adults who are charged with criminal offences in their adulthood. Youth has always been considered as a mitigating factor.¹³⁵ Sentencing of children is an affair touching on the constitution and it is an issue that is of substantial interest and significance to the penal system, exceeding the interest of a

¹²⁹ National Council on the Administration of Justice (NCAJ), *Criminal Justice System in Kenya: An Audit*, 2016, xxix.

¹³⁰ *R K S v Republic* (2018) eKLR.

¹³¹ *R K S v Republic* (2018) eKLR, para. 7.

¹³² *R K S v Republic* (2018) eKLR, para. 15.

¹³³ *R K S v Republic* (2018) eKLR, para. 15.

¹³⁴ *Republic v P M K* (2018) eKLR, para. 15.

¹³⁵ *A O O & 6 others v Attorney General & another* (2017) eKLR.

single individual.¹³⁶ The rights of children are of the utmost importance, hence, the requirement upon the courts to distinguish between child offenders and adult offenders when sentencing. In doing this, children must be favoured during sentencing.¹³⁷ The trial Court is required to exercise judicial discretion in determining the manner in which to deal with a child offender.¹³⁸ In exercising that discretion, child offenders should be sentenced with due regard to Article 53 (1) of the COK.¹³⁹ That is that they can only be put under custody as a last-ditch effort and only for little duration as is appropriate. The question, however, becomes what is the most appropriate way of treating offenders who were under the age of 18 when they committed an offence but have turned 18 at sentencing?

Determining the Appropriateness of a Sentence

The High Court in the decision of *Arthur MuyaMuriuki v Republic (Arthur MuyaMuriuki case)*,¹⁴⁰ stated that the court that is conducting a trial holds the discretion when it comes to determining what the sentence should be for any offender. However, the court continued, this discretion has to be exerted in a judicious manner as opposed to without caution or concern. In *Fredrick Nzioki Wambua v Republic*,¹⁴¹ it was expressed that although a court has discretion in passing a sentence, in a position in which a minimum sanction is prescribed, the court passing the sentence is mandated to abide by that legal rules.¹⁴²

In the *Arthur MuyaMuriuki case*, the court further stated that the court conducting the trial has to follow the substantiated proof in the case as well as the criterion that are founded in law. In addition, it is mandated to consider all pertinent elements and shun away from any immaterial elements.¹⁴³ During the time of deciding the punishment to be meted out, there must be a deliberation of the actual events in the case and any elements or incidences relating to or in some way affecting it.¹⁴⁴ The court should follow the legal rules regulating infliction of penal sanctions.

¹³⁶ *Mandla Trust Mpopu v Minister for Justice and Constitutional Development and Others* (2013), Constitutional Court of South Africa, para. 18, 9.

¹³⁷ *Mandla Trust Mpopu v Minister for Justice and Constitutional Development and Others* (2013), Constitutional Court of South Africa, para. 58, 25-26.

¹³⁸ *Duncan Okello Ojwang v Republic* (2019) eKLR.

¹³⁹ *A O O & 6 others v Attorney General & another* (2017) eKLR.

¹⁴⁰ *Arthur MuyaMuriuki v Republic* (2015) eKLR.

¹⁴¹ *Fredrick Nzioki Wambua v Republic* (2015) eKLR.

¹⁴² *Fredrick Nzioki Wambua v Republic* (2015) eKLR.

¹⁴³ *Arthur MuyaMuriuki v Republic* (2015) eKLR.

¹⁴⁴ *Arthur MuyaMuriuki v Republic* (2015) eKLR.

Finally, the decision of the *Arthur MuyaMuriuki case* gave the finding that in putting into practice its discretion and coming to a conclusion regarding the sentence it should prescribe, a court ought to take note of the following:

- i. the sentence should be proportionate to the offence. Here, the court must also take into account the components that mitigate and those that aggravate the case.
- ii. the sentence should be one that will deter the offender from repeating the offence, or being involved in a similar one, and
- iii. the sentence meted out should be one that can rehabilitate the offender, by training and assisting him or her restore their position in society.

An Offenders' Age When an Offence was Committed as a Mitigating Factor in Sentencing

In the COA decision of the *DKC case*,¹⁴⁵ the Court found even though the appellant, DKC, was 20 years old at the time of the appeal, since he was at the material time of committing the offence under 18, his case should have been adjudicated following the authority of the Children Act, section 191(1), (both the trial and the sentence). In reaching its decision, it relied on the *JKK case*,¹⁴⁶ in which the COA found DKC as having been a minor at the time he murdered someone but was about 21 years old when he was sentenced to death. As stated earlier on in this research, the Court in the *JKK case* found that a death penalty or a sentence of incarceration for life cannot be applied to an individual aged below eighteen.¹⁴⁷

In both decisions of the *DKC case* and the *JKK case*, the COA relied on the Children Act, section 191(1) (l) in procuring a punishment that it deemed appropriate for the context and circumstances where in which a minor committed an offence but has become an adult in law at sentencing or appeal. The COA has, thus, shown that when a Court is faced with the dilemma pointed out above, the right approach lies in the Children Act, section 191(1) (l).

¹⁴⁵ *DKC v Republic* (2014) eKLR.

¹⁴⁶ *JKK vs Republic* (2013) eKLR.

¹⁴⁷ *JKK vs Republic* (2013) eKLR, para. 16.

Interpreting Section 191(1) (l) of the Children Act

Section 191 of the Children Act offers an array of rehabilitative orders that the Courts should consider when meting out punishment to a child who has committed an offence and their culpability has been confirmed. It is comprised of clauses (a) to (l). Clause (l) allows a court to handle a child whom it is contented with their guiltiness for an offence in any other lawful manner.¹⁴⁸ The interpretation of this provision is crucial for the determination of the issue herein of the appropriate sentence for an offender who was a minor during the commission of the offence in issue but later attained the age of majority during proceedings.

The COA decision of *Richard Mwaura Njuguna & another v Republic*,¹⁴⁹ (hereinafter referred to as *Richard Mwaura case*) attempted to give an interpretation to the Children's Act section 191 (1). In the case, the appellant had been accused of one count of robbery with violence. The court convicted him and gave him the punishment of being imprisoned during the President's pleasure. The appellant's counsel questioned the sentence, arguing that when the appellant perpetrated the offence he was a minor and an assessment into how old he was then was not carried out as required by the law prior to his sentencing. The prosecution counsel conceded that the appellant's age was not assessed prior to sentencing and most probably he was a minor at the time of the incident.

The COA established that at the time the trial court was imposing the sentence the appellant was 18 years old and that during the commission of the offence he was 17 years old. The COA noted that the trial magistrate took cognizance of the appellant being a child at commission when it sentenced him as constituted in the provisions of the Penal Code, section 25(2). To determine whether this sentence was appropriate, the Court in the *Richard Mwaura case* stated that the answer lies with the consideration and interpretation of the Children Act, section 191(1).¹⁵⁰

The COA in the *Richard Mwaura case* posited that from a reading of the provision, the opening phrase denotes that notwithstanding any other law or statute which prescribes the punishment of children offenders, a court is required to take into account the provision in question when it comes to sentencing a minor.¹⁵¹ In its view, the proviso is phrased as being discretionary in that a sentencing court is required to exercise its judicial discretion in determining the manner in which

¹⁴⁸ Section 191(1) (l), *Children Act*, (Act No. 8 of 2001).

¹⁴⁹ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR.

¹⁵⁰ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 30.

¹⁵¹ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 30.

to deal with an offender who is a child.¹⁵² Further, the Court averred that the manner through which a sentencing court can deal with an offender as set out in the said provision is not exhaustive as evidenced by section 191(1) (l) which empowers such a court to deal with an offender in any other lawful manner.¹⁵³ In the Court's opinion, the provision allows a sentencing court to exercise its judicial discretion in determining the appropriate penalty.¹⁵⁴

As mentioned before, in the exercise of this discretion, a court should not act capriciously but within the confines of the law. Some of the elements a court will consider in exercising its discretion under section 191(1) is to give effect to the welfare of the child (his or her best interests),¹⁵⁵ as required by the COK and the Children Act.¹⁵⁶ Apart from their best interests being regarded as of paramount concern, as was stated before in this research and supported by the *Arthur MuyaMuriuki case*, the court meting out the sentence ought to note that the sentence should match the offence, it should be deterrent in nature and it should be able to rehabilitate the offender.¹⁵⁷

Additionally, other particular factors, depending on the case, should be taken into consideration. These include:

- a) whether the offender is a danger to the public and it is required that the offender be proffered a chance to give due consideration to what he or she has done, in order to improve on themselves and change for the better as well as restore themselves;¹⁵⁸
- b) How old the offender was when he or she committed the offence;¹⁵⁹
- c) whether the offender was accompanied by other people during the commission of the offence;¹⁶⁰
- d) whether the offender was armed;¹⁶¹
- e) whether the offender committed other offences or was a first time offender;¹⁶²

¹⁵² *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 31.

¹⁵³ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 31.

¹⁵⁴ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 31.

¹⁵⁵ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 32.

¹⁵⁶ Section 4(2), *Children Act*, Act No. 8 of 2001.

¹⁵⁷ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 32.

¹⁵⁸ *Republic v P M K* (2018) eKLR, para. 15.

¹⁵⁹ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 13.

¹⁶⁰ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 13.

¹⁶¹ *Daniel Langat Kiprotich v State* (2018) eKLR, para. 13.

¹⁶² *Daniel Langat Kiprotich v State* (2018) eKLR, para. 13.

- f) the current age of the offender;¹⁶³
- g) the nature and tendencies of the offender;¹⁶⁴ and
- h) whether the offender acknowledged the wrong that he or she had done and was repentant of it.¹⁶⁵

Compensating Children Who commit Offences Where Courts are wrong in Sentencing them in a Given Manner

In many of the Court decisions in which the offence in issue was committed by a child who later attained the age of majority during sentencing, the appellate courts have reversed the sentences meted out by the trial courts as they were inappropriate. However, since many of the appellant's are above the age of 18, the appellate courts have found that the penalties prescribed under the Children Act are no longer suitable to them,¹⁶⁶ or will not act as a deterrence for the offence committed.¹⁶⁷ The courts have resolved this by setting aside the inappropriate sentence and substituting it with a sentence which the court thinks is commensurate with the appellant's culpability.¹⁶⁸ Nevertheless, how do courts arrive at the conclusion of what form of restitution would be best where the trial court erred in sentencing the offender?

Release versus reviewing sentence versus custodial sentence

When issuing a new sentence for a certain offence that was committed, there is no obligation placed upon a court to lower the earlier sentence.¹⁶⁹ The court embarking on the issuing of the new sentence is only mandated to consider all the aspects that relate to or in some ways affect the case and ascertain whether the initial sentence has accomplished the aim that the offender was sentenced for.¹⁷⁰ Thus, there is no restriction on a court to just looking at the manner in which the appellant behaved that resulted in his or her sentence.¹⁷¹ A court can also consider their behaviour and events from the time of the earlier sentence.¹⁷²

¹⁶³ *Republic v P M K* (2018) eKLR, para. 15.

¹⁶⁴ *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR, para. 71.

¹⁶⁵ *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR, para. 71.

¹⁶⁶ *JKK v Republic* (2013) eKLR, para. 18.

¹⁶⁷ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR.

¹⁶⁸ *Duncan Okello Ojwang v Republic* (2019) eKLR.

¹⁶⁹ *Josiah Mutua Mutunga & another v Republic* (2019) eKLR, para. 28.

¹⁷⁰ *Josiah Mutua Mutunga & another v Republic* (2019) eKLR, para. 28.

¹⁷¹ *Josiah Mutua Mutunga & another v Republic* (2019) eKLR, para. 28.

¹⁷² *Josiah Mutua Mutunga & another v Republic* (2019) eKLR, para. 28.

In determining whether a child who commits an offence but has reached 18 at sentencing or on appeal can be released to the society, the court considers the seriousness of the offence and how old the offender is.¹⁷³ The court also considers the period served by the offender and whether such a period can be described as ‘as the shortest appropriate period of time’.¹⁷⁴ Where a court is persuaded that justice will be attained if it orders them to be set free the offender then the court is allowed to go for it.¹⁷⁵

The appellate court can also be persuaded that an offender who was a minor at the commission of an offence, but who has crossed into adulthood at sentencing ought to be held in custody or incarcerated for the offence. The Court in *Benson Ochieng & France Kibe v Republic*,¹⁷⁶ stated that there are three elements to be considered in figuring out the suitable sentence requiring keeping an offender in custody. That is, aspects surrounding the crime when it was being committed, events surrounding an offender, and events surrounding the victim.¹⁷⁷

This is seen in the case of *JOO v Republic*, where the court determined that it needed to separate the appellant, who was attaining adulthood soon, from the victim, who was still a minor, for a reasonable period.¹⁷⁸ The Court in that case held that if the appellant was released back to the community, there was the possibility of the victim living in fear and that would adversely affect the victim.¹⁷⁹ The Court thus sentenced the appellant to 10 years imprisonment.¹⁸⁰

In handing down a custodial sentence, the Court also considers whether this sentence is appropriate to give time for the offender to be taken through the process of accepting his mistake.¹⁸¹

Retrial

The Courts in Kenya have offered guidance on what the court should consider regarding whether or not to order a retrial. The COA in the case of *Ahmed Sumar v R* reasoned that generally, a retrial will be ordered only when the original trial was illegal or defective.¹⁸²

¹⁷³ *DKC v Republic* (2014) eKLR.

¹⁷⁴ *A O O & 6 others v Attorney General & another* (2017) eKLR.

¹⁷⁵ *A O O & 6 others v Attorney General & another* (2017) eKLR.

¹⁷⁶ *Benson Ochieng & France Kibe v Republic* (2018) eKLR.

¹⁷⁷ *Benson Ochieng & France Kibe v Republic* (2018) eKLR, para. 22.

¹⁷⁸ *JOO v Republic* (2019) eKLR, para. 9.

¹⁷⁹ *JOO v Republic* (2019) eKLR, para. 9.

¹⁸⁰ *JOO v Republic* (2019) eKLR, para. 11.

¹⁸¹ *J M K v Republic* (2015) eKLR.

¹⁸² *Ahmed Sumar v R* (1964) EALR 483.

In the COA decision of *Mwata Mwachinga Mwazige v Republic*,¹⁸³ one of the questions the court had to answer was whether in view of the irregularity in the trial process, an order for retrial ought to be made for the appellant to be retried in the appropriate court. In that case, the appellant was found guilty of robbery with violence by the Senior Resident Magistrate's Court and sentenced to death. Before the COA, the appellant raised the contention of being a minor during conviction, hence, he should not have been handed a death sanction as per the children Act. The COA concluded that if the appellant was a child under the Children Act when he committed the offence, he ought to have been sentenced under the Children Act, section 191 (1). The Court found the court that conducted the trial to have erred in sentencing the appellant to death as this was contrary to the Children Act.

Further, the COA concluded that in the circumstances that the appellant was below 18 at the charging stage, he ought to have been tried in a Children Court and not the Senior Resident Magistrate's Court. The Court held that to this extent, the appellant's trial was vitiated by this apparent irregularity. In considering whether to give an order for retrial of the appellant's case, the COA considered the fact that the appellant had been in custody for a period of slightly more than six years. The COA reasoned that since that appellant was no longer a minor, if he was to be retried and convicted, he would obviously be prejudiced as some of the options under section 191 of the Children Act will not be available to him. The Court, thus, held that an order for retrial will neither be fair nor just.

Therefore, in considering whether to order for a retrial the court considers whether it will be just in the circumstances of the case.

¹⁸³ *Mwata Mwachinga Mwazige v Republic* (2014) eKLR.

CHAPTER 4: APROPRIATE SENTENCE FOR CHILD OFFENDERS WHO COMMIT SERIOUS CRIMES

The punishments to be meted out to child offenders are prescribed under section 191 (1) of the Children Act. However, what would be regarded as an appropriate punishment for child offenders who commit serious crimes such as murder and defilement? This in in the context of the general topic in this research, which is an offender having become an adult during sentencing or on appeal. This chapter attempts to answer this question with regards to sentencing such child offenders who committed murder. The Chapter also discusses the Courts' position on imprisonment of such offenders during the President's pleasure.

The Proper Punishment for a Child who has been Convicted of Murder

Murder attracts a mandatory death sentence.¹⁸⁴ Divergent views in the courts have emerged concerning whether an individual being sentenced to die is constitutional.¹⁸⁵ However, when it comes to children, the law is very clear and specific about their exclusion from the punishment. The Children Act forbids the subjection of children who have committed an offence to death.¹⁸⁶ In line with this, the Sentencing Policy Guidelines prohibit the causing of children who commit offences to undergo the sanction of death.¹⁸⁷ In addition, the Penal Code disallows the meting out of the sanction of death to an offender whose guilt of a crime punishable by death has been ascertained, where it seems that during commission of the offence the offender was a minor.¹⁸⁸ In place of death, the doer of the crime should be detained during the pleasure of the President.¹⁸⁹

In *Duncan Okello Ojwang v Republic*,¹⁹⁰ the appellant, Duncan, was charged with murder. He pleaded not guilty to the offence, claiming that he was 15 years old when he was arrested. He was found guilty and upon considering his mitigation, and being a minor at the time, he was detained during the pleasure of the President in accordance with the Penal Code under section 25. The appellant filed an appeal challenging the trial court Judge's decision regarding the sentence. Given

¹⁸⁴ Section 204, *Penal Code*, Cap 63, Laws of Kenya.

¹⁸⁵ Mbori H, 'Discreet discretion and moderate moderation in judicial sentencing: A commentary on Kenya's Sentencing Policy Guidelines 2016, 90.

¹⁸⁶ Section 190 (2), *Children Act* (Act No 8 of 2001).

¹⁸⁷ *Sentencing Policy Guidelines*, 2016, para. 6.2.

¹⁸⁸ Section 25(2), *Penal Code*, Cap 63, Laws of Kenya.

¹⁸⁹ Section 25(2), *Penal Code*, Cap 63, Laws of Kenya.

¹⁹⁰ *Duncan Okello Ojwang v Republic* (2019) eKLR.

that he was a minor when he committed the offence, he claimed the court ought to have committed him to a Borstal institution.

The COA in its determination in that case ascertained that Duncan indeed was under 18 when he was charged and that he was 15 years old when he committed the offence, making him a child as per the Children Act. The Court expressed that the sentence detention at the President's pleasure, is not stipulated under the Children Act.

In *J M K v Republic*,¹⁹¹ (hereinafter referred to as *J M K Case*), an extremely important question that arose from it was in association with the suitable punishment to be afforded to a child who has gotten a murder conviction.¹⁹² In that case, J M K was charged and convicted of murder. He was aged sixteen when the offence was committed. The court pronounced the sentence of detainment during the President' pleasure on him since he was a minor. He lodged an appeal claiming that, as he was a minor, he ought to have been punished as per the Children Act, section 191 (1) (g) and taken to a Borstal Institution. The COA considered that when the offence took place, J M K was under 18, but had already attained 18 when the trial was taking place.

Constitutionality on Detaining Child Offenders during the President's Pleasure

The cases aforementioned raise a fundamental question touching on the constitutionality of the Penal Code under section 25 (2), particularly whether or not detaining persons aged below 18 years during the pleasure of the President contravenes Article 53 (f) (i) & (ii), (2) of the COK and conventions protecting children's rights.¹⁹³

In *A O O & 6 Others v Attorney General & Another*,¹⁹⁴ the High Court declared the sentence of holding a convicted person during the President's pleasure as unconstitutional since it violated Article 53 of the COK. In that Petition, six of the seven petitioners were convicted and punished to detainment during the pleasure of the President. When they were convicted, the petitioners they ranged in age from 12 and 17, hence, they were under eighteen when committing the offence. When filing this petition, they had been in prison for periods between 8-23 years and all of them were continuing to serve their jail terms. The Petitioners contested this sentence, arguing

¹⁹¹ *J M K v Republic* (2015) eKLR.

¹⁹² *J M K v Republic* (2015) eKLR, para. 13.

¹⁹³ *A O O & 6 Others v Attorney General & Another* (2017) eKLR.

¹⁹⁴ *A O O & 6 Others v Attorney General & Another* (2017) eKLR.

that to serve for an undefined period offends the COK and treaties protecting children's rights. They further argued that any punishment that cannot be determined from the outset is cruel, inhuman and degrading, hence unconstitutional.

The Court found that the Penal Code, under section 25 (2), is inconsistent with the legal stipulation that children can only be put under custody as a last-ditch effort and only for little duration as is appropriate.¹⁹⁵ The Court expressed that such periods as the petitioners had served, cannot qualify to be described as 'short' as the COK and treaties and conventions envisage. Therefore, the court found that detention during the pleasure of the President, whose period has not been defined or determined and which depends on the discretion of the executive cannot be said to act in accordance with the provisions of the COK.

The COA in *Duncan Okello Ojwang v Republic* stated that a sentence to detention during the President's pleasure does not only amount to indeterminate sentence but also implies that an accused person remains psychologically tormented at the whim of the executive thus taking away the discretion of sentencing from the Courts.¹⁹⁶

However, the Court in *Richard Mwaura Njuguna & another v Republic*, opined that the Children Act under section 191(1) (l) does not conflict or oust the penalty prescribed in the Penal Code under Section 25(2), save that it allows a sentencing court to exercise its judicial discretion in determining the appropriate penalty.¹⁹⁷

¹⁹⁵ Article 37(a) and (b), *Convention on the Rights of the Child*; Article 53 (1) (f), *Constitution of Kenya* (2010).

¹⁹⁶ *Duncan Okello Ojwang v Republic* (2019) eKLR.

¹⁹⁷ *Richard Mwaura Njuguna & another v Republic* (2019) eKLR, para. 31.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

Conclusion

From the extensive discussions espoused under the four chapters above, the conclusion has been that for child offenders who turn 18 during proceedings, it is up to the discretion of the Court whether it applies the sentences available for children under the Children Act or imposes an adult sentence. This study has also shown that in determining the appropriate sentence for such an offender, regard should be given to how old the offender was at the time when the crime was committed.

Further, the research has concluded in the previous chapters that both the legal provisions protecting rights of child offenders over that detaining of child offenders should not be rushed into. How the High Court analysed the case before it in the decision of *Republic v P M K*,¹⁹⁸ can be a guide for courts on when they should consider taking this last option. From that decision, a Court should consider in its view, and in the case before it, whether the period it is considering for a custodial sentence is sufficient to rehabilitate the offender fully and ensure the safety and security of the society.¹⁹⁹ The Court should also consider whether it is sufficient custodial sentence to:

- i. communicate the public's criticism over the offender's behaviour;
- ii. rehabilitate an offender and give him or her a chance to think about and rectify their behaviour; and
- iii. protect other people from violent tendencies of the offender.²⁰⁰

Recommendations

Firstly, it is essential to think through what would happen to a young offender as a consequence of any given sentence before it is passed, that is, the best interests of the offender. This study recommends that this should be considered in the context of that individual offender's situation, and any likely detriment to their rehabilitation should be flagged to the court.

Secondly, it is imperative that sentencing courts are made aware of the conditions under which child offenders who turn 18 at sentencing are detained while they are awaiting their case to be

¹⁹⁸ *Republic v P M K* (2018) eKLR.

¹⁹⁹ *Republic v P M K* (2018) eKLR, para. 16.

²⁰⁰ *Republic v P M K* (2018) eKLR, para. 16.

heard. The decision of *DKC case* highlights this as the court could not ascertain whether the five-year sentence time already served by the appellant happened according to the Children Act or whether it happened in accordance with the Penal Code. This is another aspect that should be focused on keeping in mind the need to maintain a balance of the intentions of the sentence meted out, and the impact the sentence could have on the offenders as young adults.

Thirdly, it is crucial that system delays for those who commit offences as children are avoided through timely justice.²⁰¹ Where this is not possible, the justice system should treat childhood offending as just that in sentencing.²⁰² This research recommends that the same sentencing framework afforded to children should be available to those who have turned 18 between offence and sentencing.²⁰³

Fourth, there is need to introduce measures for time limits on police investigations in matters involving child offenders. The Police could apply for permission to extend this time limit with proper and well grounded reason. There should be strict guidelines for the National Police Service on regular approval mechanics for continuing investigation over a set period of time for children.

Lastly, this research recommends that the criminal justice system should:

- i. Prioritize children matters such that they are given first priority hearing dates to avoid delays;
- ii. expedite determination of jurisdiction of trial proceedings; and
- iii. Establish a proper legal framework for sentencing child offenders who have turned 18.

²⁰¹ Youth Justice Legal Centre Standing up for Kids Just for Kids Law, ‘Timely Justice: Turning 18 A briefing on the impact of turning 18 in the criminal justice system’ [https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20\(June%202020\).pdf](https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20(June%202020).pdf) on 27 December 2020.

²⁰² Youth Justice Legal Centre Standing up for Kids Just for Kids Law, ‘Timely Justice: Turning 18 A briefing on the impact of turning 18 in the criminal justice system’ [https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20\(June%202020\).pdf](https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20(June%202020).pdf) on 27 December 2020.

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