



Strathmore University

Law School

Examining Kenya’s Diversion Policy 2019: Reforming the Diversion Criteria to align with the Children Act 2022 and include a broader range of cases for diversion.

A Research Proposal Submitted in Partial Fulfilment of the Requirements of the Bachelor of Laws Degree, Strathmore University Law School

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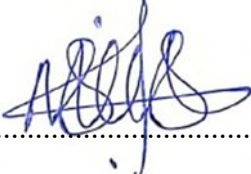
Declaration

I, DAVID KIMATHI MWENDA, 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.

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

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Date:9th April, 2025.....

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List of Legal Instruments

National Legislation

Children Act No 29 of 2022

Constitution of Kenya 2010

Diversion Policy 2019

ODDP Diversion Guidelines & Explanatory Notes 2019

International Instruments

African Charter on the Rights and Welfare of the Child 1990

United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990

United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) 1990

United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo rules)

United Nations Convention on the Rights of the Child 1989

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985

List of Abbreviations and Acronyms

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

COK- Constitution of Kenya

CRC- Convention on the Rights of the Child

CYPFA-Children Young Persons and their Families

FDC-Family Group Conference

JDLs- United Nations Rules for the Protection of Juveniles Deprived of their Liberty

Abstract

The Diversion Policy 2019 guarantees the promotion of Diversion in the juvenile justice system. However, in many cases diversion is limited by the same policy because it grants prosecutors discretion to grant or deny diversion in cases of petty offences and felony offences which essentially leads to more children being excluded from benefitting from diversion which defeats the purpose of diversion. This policy contravenes section 227 (2)(c) of the children act 2022 which affords diversion to each child offender with the exception being when it comes to capital offences. Through the theory of restorative justice, this study through a restorative lens will show that there is a prevailing cost in limiting diversion in cases of petty offences and felony offences in the juvenile justice system. Through a comparative study with New Zealand the study will suggest a way forward by promoting a broader context of diversion which is in line with the Children Act 2022. The study recommends amending clause 2.8 of the ODPP Diversion Guidelines which will make diversion broader by ensuring children who have committed petty offences and felonies to automatically be viable for diversion without any discretion from the prosecutors.

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CHAPTER 1: INTRODUCTION

1.1 Background of the Legal Problem

Children are the foundation of a nation's future, which is why they are granted special protection within the criminal justice system. This is highlighted in the preamble of the Convention on the Rights of the Child (CRC), which acknowledges that children, due to their physical and mental immaturity, require specific safeguards, care, and legal protection.¹ Child protection is guided by the principles of equality, prioritizing the child's welfare, ensuring their survival and development, and valuing their involvement. As such, children involved in criminal behavior should receive legal safeguards during court processes, as removing them from the harsh realities of the criminal justice system aligns with their best interests.² A key challenge in the juvenile justice system today is finding effective ways to address juvenile offenses without pushing young offenders back into such behavior, while also encouraging them to recognize and take responsibility for their actions.³

Diversion involves redirecting juvenile offenders away from the formal criminal justice system, aligning with the principle of prioritizing the child's best interests. This approach helps prevent the damaging consequences often associated with incarceration, whether in juvenile detention facilities or adult prisons.⁴ Diversion for children is important as children are in a process of development and different needs of development from adults, they possess significant potential for rehabilitation, they are vulnerable. In addition, diversion theoretically has two objectives, rehabilitation and reintegration of the children. These objectives can lead to crime prevention and prevent offences by the child offender.⁵ The CRC emphasizes that the goal of diversion is to promote the well-being and best interests of the child.⁶

¹ Preamble, *UN Convention on the Rights of the Child*.

² Rudiana D, Setiabudhi K, 'Reconstruction of the diversion concept in a child criminal jurisdiction system based on dignified justice' *Prizren Social Science Journal*, 2021, 1.

³ Warner, C, 'Juvenile diversion programs: High-risk youth and their effect of offence targeting' *Bemidji State University*, 2014.

⁴ Abramson B, 'The right to diversion: Using the Convention on the Rights of the Child to turn juvenile justice rights into reality' in Sørensen JJ and Jepsen J (eds), *Juvenile justice in transition: Bringing the Convention on the Rights of the Child to work in Africa and Nepal*, The Danish Institute for Human Rights, Copenhagen, 2005, 51-52.

⁵ Vidjia P, 'Diversion from juvenile justice system in Japan, South Africa and England: Lessons Learnt for Cambodia' *Published LLM Thesis Central European University, Budapest*, 2008, 14.

⁶ Article 3 and 40(4), *UN Convention on the Rights of the Child*.

In Kenya, adoption of diversion was embarked in 2019 by the development of the Diversion policy which has the vision of reducing the backlog of cases faced within the Kenyan courts, and to expedite the trial process, leading to enhanced access to justice. The Diversion project was started in March of 2001. The African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), The Children's Legal Action Network (CLAN), carried out reviews on the Juvenile Justice system in Kenya between 1987 and 2000. This review established a number of shortcomings that resulted in a series of recommendations from Save the Children to divert children from the justice system as a priority.⁷ This has been a positive move in ensuring that children in conflict with the law are protected from the rigors of the criminal justice system. However, the scope of children in conflict with the law who have the benefit of diversion may be limited by the current diversion policy. This is because of the discretion it affords to prosecutors to decide whether or not a child is eligible for diversion including for petty offences.⁸

The discretion afforded to prosecutors is not unfettered and is guided by the Diversion policy 2019. The policy provides for mandatory considerations for factors weighing against diversion and factors that are in favor of diversion. However, when deciding on diversion when it comes to children and felony offence, a public prosecutor can consider several factors, including the age and apparent maturity level of the offender. The prosecutor may also consider the apparent mental capacity of the child. They will look at alternatives to prosecution available to the court and assess whether the child's parents or guardians are able and prepared to exercise effective control over them. Additionally, the child's background, including any previous record, can be taken into account.⁹

From the list of factors provided, the factors considered by a public prosecutor tend to be more exclusive than inclusive, potentially limiting the number of children who can benefit from alternative measures outside the criminal justice system. By emphasizing criteria such as age, apparent maturity level, and mental capacity, the focus shifts towards a narrow definition of who is deemed suitable for diversion, often excluding those who may not fit conventional expectations but still require support. Furthermore, the requirement for parents or guardians to demonstrate

⁷<https://www.unodc.org/easternafrika/en/Stories/the-odpp-kickstarts-country-wide-sensitization-on-diversion-policy-and-guidelines-and-plea-bargaining-policy.html> on 15th October 2019.

⁸ *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.8, No 37.

⁹ *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.8 , No 37-40.

effective control over the child can unfairly disadvantage those from challenging backgrounds, where such control may be difficult to establish. Additionally, placing significant weight on a child's previous record may perpetuate a cycle of exclusion, as even minor infractions could disqualify them from diversion opportunities. This approach risks overlooking the broader context of each child's circumstances and the potential for rehabilitation, ultimately denying many young offenders the chance to reintegrate positively into society.

1.2 Problem Statement

The current Diversion Policy 2019 aims to improve juvenile justice by diverting children in conflict with the law from the formal criminal justice system and reducing the judiciary's caseload. However, its limited application to cases excluding petty offenses and felonies raises concerns about whether it adequately serves the best interests of the child and promotes rehabilitative justice for a broader range of young offenders. While the policy incorporates specific factors to guide prosecutorial discretion in diversion decisions, the extent to which these factors, in practice, may inadvertently limit access to diversion for children who could benefit remains unclear. This study examines how the exclusion of certain offenses from diversion and the application of specific decision-making factors affects the availability of diversion for children in conflict with the law

1.3 Statement of Objectives

1. To investigate the role of diversion in the juvenile justice system for children in conflict with the law.
2. To analyze the legal and institutional frameworks supporting diversion in Kenya, and how effective are they in addressing juvenile justice.
3. To benchmark lessons that Kenya can learn from New Zealand's implementation of diversion in juvenile justice.

1.4 Research Questions

This study will be steered by the ensuing questions.

1. What is the role of diversion in the juvenile justice system for children in conflict with the law?

2. What are the key legal and institutional frameworks supporting diversion in Kenya, and how effective are they in addressing juvenile justice?
3. What lessons can Kenya learn from New Zealand's implementation of mandatory diversion in juvenile justice?

1.5 Significance and Justification of Study

The study will go a long way in complementing scholarly literature in respect of children offenders and how they interact in the criminal justice system. This study will be beneficiary to the Judiciary, Public Prosecutors, Advocates, Other Scholars, Police and Children in conflict with the law. The study will be beneficiary as it will help public prosecutors when it comes to the application of the Diversion Policy as it highlights the challenges faced by the policy and how it fails in the aims of diversion due to its discretionary nature. The conclusions and recommendations of this study will be invaluable to the intended policy and as it regards the rights of juveniles who are in conflict with the law.

1.6 Hypothesis

The reconstruction of the Diversion Policy 2019 to remove the discretion given to prosecutors and making diversion be applied more broadly in that it applies to all offenses committed by children in conflict with the law with the exception of capital offences will lead to the inclusion of more children in conflict with the law and lead to more children benefiting from the diversion policy

1.7 Theoretical Framework

The Theoretical Framework for this study is anchored on dignified justice theory and restorative justice theory both of which emphasize rehabilitation over punishment for juvenile offenders.

1.7.1 Dignified Justice theory

Dignified justice theory posits that law provides a sense of justice that is dignified and justice that can humanize humans. The character of justice is dignified, namely directing all rules and principles, including the value of the network of rules and principles in which there are virtues that bind one another. Dignified justice also explains the purpose of law in terms of justice, the certainty and benefit that exist in each legal principle and rule that are interrelated with one another in the

system. Dignified justice is of the opinion that the benefit and legal certainty is an integral part of justice. Dignified justice can be interpreted as that punishment is still carried out for the sake of legal certainty, but the spirit of humanizing humans should not be ignored but still upheld.¹⁰

When it comes to diversion, the theory of dignified justice views the importance of the implementation of diversion for children facing the law, because in essence diversion is a diversion of the process of solving children's cases from a generally accepted procedural law process to a juvenile case settlement process that uses special procedural law to resolve juvenile criminal cases. It's said that it's a special procedural law because the procedural law used to settle children's cases is special.¹¹ Therefore, the law must be able to harmonize and balance the existing needs in the context of legal flexibility, regulate human behavior, because these laws exist to regulate society and not society for laws.¹² The meaning of humanizing a human being in the concept of diversion based on dignified justice in the context of Kenya's Diversion Policy is that even though a child is charged with a petty offence or a felony the child must still be treated as a human being in accordance with the rights of the child attached to him, justice with dignity must be justice that balances rights and obligations. Hence it is not just to limit diversion.

1.7.2 Restorative Justice Theory

Restorative justice refers to the process of solving a criminal act by focusing on repairing the victim's loss, determining the perpetrator responsible for his actions, and engaging the community in resolving conflicts that occur. The process of restorative justice is any process in which victims and perpetrators or other individuals or members of the community who are affected by a crime, actively take part in solving various problems that arise as a result of the crime with the help of a facilitator. Thus, restorative justice is one way to answer the problem of criminal behavior by balancing the needs of the community, victims and perpetrators of criminal acts.¹³ Restorative justice theory posits that justice is one that improves or restores circumstances, is victim-oriented,

¹⁰ Rudiana D and Setiabudhi K, 'Reconstruction of the diversion concept in a child criminal jurisdiction system based on dignified justice' Prizren Social Science Journal,2021,8.

¹¹Prasetyo T and Eliandi T, 'Handling of children by diversion in children protection (Diversion and Restorative Justice)' Research, Society and Development,2021,2.

¹² Rudiana D and Setiabudhi K, 'Reconstruction of the diversion concept in a child criminal jurisdiction system based on dignified justice' Prizren Social Science Journal,2021,8.

¹³ United Nations Office on Drugs and Crime, *Handbook on restorative justice programmes*, United Nations, New York, 2006, 7

gives the perpetrator the opportunity to express his remorse for the victim and at the same time takes responsibility for his actions, gives the perpetrator and victim the opportunity to meet to reduce hostility and hatred, restore balance in society and involve community members in recovery efforts.¹⁴ A restorative outcome is a product that champions the best interest of the young offender¹⁵

Restorative justice prioritizes alternative solutions without imposing criminal penalties on the perpetrator. Examples of such alternative solutions include victim-offender mediation or dialogue, peace-making cycles, and family or community conferencing models.¹⁶ These alternative solutions are all driven by the diversion and volition of the parties. They are hence outside or parallel to the formal justice system which is punitive.¹⁷ However criminal behavior cannot be solved if diversion is limited as is in the case of the Kenyan diversion policy which limits cases of petty offences and felony case

1.8.1 Introduction to Literature Review

This Literature review expounds on the concept of diversion within juvenile criminal justice systems and its ability to facilitate restorative justice principles. The review of the literature examines the limitations and challenges facing diversion policy in Indonesia and Nigeria and contrastingly compares it with Kenya's juvenile justice system. Diversion as a tool of case determination through non-adjudication of formal courts attempts to maximize rehabilitation over punishment, encouraging responsibility and minimizing the stigmatization of young criminals. Yet, restrictive legal regimes and discretionary practices usually undermine its effect.

The literature review will take a look at Indonesia's SPPA Law, which applies stringent criteria for diversion based on offense severity and repeated offenses, in the process keeping many children out of restorative measures. Also, Nigeria's over-reliance on discretionary diversion powers leads to inconsistency in application, reinforcing punitive measures instead of restorative justice. These are among the issues that resonate with Kenya's challenges in translating diversion policies into international child protection standards.

¹⁴ Schmid DJ, *Restorative Justice: A New Paradigm for Criminal Justice Policy*, Victoria University of Wellington, 2003,96.

¹⁵ United Nations Office on Drugs and Crime, Handbook on restorative justice programmes, 9 - 13.

¹⁶ United Nations Office on Drugs and Crime, Handbook on restorative justice programmes, 14 - 15.

¹⁷ McCold, P, 'Toward a holistic vision of restorative juvenile justice: A reply to the maximalist model' 3(4) *Contemporary Justice Review*, 2000,34.

1.8.2 Literature Review

In *Reconstruction of the diversion concept in a child criminal jurisdiction system based on dignified justice* Nyoman Dipa and Ketut Rai discuss the concept of diversion in the juvenile criminal justice system of Indonesia as a pivotal shift from a retributive to a restorative justice framework. Whereby the transition emphasizes the need for a victim-oriented approach, allowing child offenders to express remorse and take responsibility for their actions while minimizing the negative impacts of formal judicial proceedings. However, Republic Indonesia Law Number 11 / 2012 concerning the Criminal Justice System for Children (SPPA Law), outlines specific criteria for diversion, permitting it only for offenses punishable by imprisonment of less than seven years and not involving repeat offenses. They argue that this is a narrow interpretation that can undermine the principle of dignified justice, as it limits the applicability of diversion to a select group of cases, potentially excluding many children who could benefit from such restorative measures. This goes against the principles of child protection enshrined in international conventions, such as the Convention on the Rights of the Child that emphasize non-discrimination and the best interests of children. The Author argues that reforming the diversion criteria within the SPPA Law to encompass a wider range of cases could enhance its effectiveness in promoting dignified justice for all children.¹⁸

In *Reformulation of Criminal Procedural Law Policies by Strengthening Diversion in Juvenile Criminal Cases in Indonesia* by Faidatul Hikmah and Andri Yanto they both argue the need to reformulate the criminal procedural law policies in Indonesia in order to strengthen diversion mechanisms in juvenile criminal cases. Diversion, as a restorative justice approach, allows for the resolution of cases involving minors outside the formal judicial process, focusing on rehabilitation rather than punishment. However, they argue that the current limitation of diversion to offenses punishable by less than seven years of imprisonment restricts its application and undermines its potential to address broader juvenile issues. They argue that Expanding diversion to all juvenile cases could ensure that children are not unnecessarily subjected to formal criminal proceedings, aligning with the principles of restorative justice and child protection. The rise in bullying and harassment cases in Indonesia, particularly in educational institutions, highlights the urgency for

¹⁸ Rudiana D and Setiabudhi K, 'Reconstruction of the diversion concept in a child criminal jurisdiction system based on dignified justice' *Prizren Social Science Journal*,2021.

policy reform in diversion. Such incidents often result in severe consequences for victims, including physical harm and psychological trauma. Despite existing legal provisions under the Criminal Code and child protection laws, these issues persist due to insufficient implementation and limitations in addressing systemic problems. Diversion offers an opportunity to resolve such cases effectively by involving all stakeholders' victims, offenders, and the community to foster accountability and healing while avoiding stigmatization of young offenders. Restorative justice principles embedded in Indonesia's juvenile justice system aim to balance accountability with rehabilitation. The SPPA Law (Law No. 11 of 2012) provides a framework for diversion but imposes strict criteria that exclude many cases from its scope. Reforming these criteria to include a wider range of offenses would enhance the system's ability to protect children's rights while promoting their reintegration into society. Such reforms would also align with international standards on child protection, ensuring that legal responses prioritize the best interests of children over punitive measures.¹⁹

In Handling of children by diversion in children protection (Diversion and Restorative Justice) Teguh Prasetyo and Tito Eliandi discuss the implementation of restorative justice in handling juvenile delinquency, emphasizing a paradigm shift from traditional punitive measures to a more rehabilitative approach. This shift recognizes that children in conflict with the law require special treatment that prioritizes their best interests and focuses on recovery rather than punishment. The authors argue that the current juvenile justice system, which often relies on imprisonment, fails to address the underlying issues of delinquency and may exacerbate criminal behavior by exposing young offenders to negative influences while incarcerated. They advocate for a diversion process that involves all stakeholders, including victims and families, to collaboratively resolve conflicts and restore relationships within the community. The authors highlight the importance of deliberation and consensus in resolving juvenile cases. This approach emphasizes respect for children's opinions and rights during the legal process, ensuring their voices are heard and considered. The authors assert that successful diversion programs must involve agreement among all parties, fostering a family-like atmosphere that mitigates trauma for children involved in legal proceedings. By focusing on restorative justice principles, the authors contend that it is possible to

¹⁹ Hikmah F and Yanto A, 'Reformulation of Criminal Procedural Law Policies by Strengthening Diversion in Juvenile Criminal Cases in Indonesia' *Jurnal Peradaban Hukum Islam* ,2023.

achieve a more equitable resolution that benefits both victims and offenders. Furthermore, the authors critique the SPAL law in Indonesia because of the limitations regarding juvenile justice, noting that while there are provisions for diversion, they often do not align with the goal of protecting children's rights. The authors call for a reevaluation of legal frameworks to ensure they support restorative practices effectively. They emphasize that restorative justice should not only aim to hold children accountable but also facilitate their reintegration into society as productive members. This holistic approach seeks to address the root causes of delinquency while promoting healing for all affected parties.²⁰

In *Failure of Diversion and Fulfillment of The Best Interests of Children in Conflict With the Law* Waluyadi, Muslikhahi and Montisa Mariana explore the failure of diversion in juvenile justice and its implications for fulfilling the best interests of children in conflict with the law. They argue that diversion, a restorative justice mechanism, aims to resolve juvenile cases outside the formal judicial process to avoid stigmatization and promote rehabilitation. However, they identified several factors contributing to its failure, such as disagreements between victims and offenders' families, non-implementation of agreed terms, and inconsistent interpretations of legal provisions by law enforcement. Despite these challenges, the authors emphasize that diversion remains a critical tool for protecting children from the negative impacts of conventional judicial processes. They argue that successful diversion requires collaboration among all involved parties, including victims, offenders, families, and community representatives. It also stresses that diversion should prioritize children's welfare by avoiding punitive measures like imprisonment. The study conducted underscores that restorative justice approaches are designed to achieve reconciliation, community harmony, and a sense of responsibility among juveniles. However, limitations in legal frameworks and societal attitudes often hinder the effectiveness of these processes, leading to continued reliance on punitive measures. The authors argue that addressing the root causes of delinquency through diversion can prevent recidivism and facilitate the reintegration of juveniles into society. They advocate for a holistic approach that balances accountability with rehabilitation while ensuring that children's rights and best interests remain central throughout the process.²¹

²⁰Prasetyo T and Eliandi T, 'Handling of children by diversion in children protection (Diversion and Restorative Justice)' Research, Society and Development,2021.

²¹ Waluyadi, Muslikhahi and Mariana M, 'Failure of Diversion and Fulfillment of the Best Interests of Children in Conflict With The Law' Pandecta Research Law Journal,2024.

In *Asking for Young Offenders: What is the Fate of Restorative Justice within Nigeria's Discretionary Diversion Policy?* Collins Okoh examines the limitations of Nigeria's diversion policy for young offenders, emphasizing its failure to align with the best interests of children as mandated by international standards. The diversion policy remains ineffective due to its reliance on discretionary powers granted to state officials. This discretion allows for inconsistent application of diversion practices, often resulting in young offenders being subjected to punitive measures rather than restorative justice approaches. The author argues that this discretionary framework undermines the intended protective measures for vulnerable youth and perpetuates their involvement in the formal justice system. The author advocates for a mandatory diversion policy as a solution to these limitations, drawing lessons from successful models in other jurisdictions like New Zealand. The author states that by removing discretionary powers from state officials and establishing clear guidelines for diversion practices, Nigeria can better align its juvenile justice system with restorative principles. This shift would not only enhance the treatment of young offenders but also promote community involvement and healing, ultimately fostering a more just and effective approach to juvenile delinquency in Nigeria.²²

1.8.3 Gap in the Literature Review

The findings of the above analysis are based on Indonesia and Nigeria. This is because like Kenya, both Indonesia and Nigeria grapple with balancing restorative justice principles against the realities of limited resources, varying interpretations of legal frameworks, and the challenges of implementation. Indonesia's experience with its SPPA Law highlights the tension between codified diversion policies and their practical application, particularly concerning offense severity and prosecutorial discretion issues directly relevant to Kenya's own diversion policy limitations. Similarly, Nigeria's struggle with discretionary diversion powers and its impact on consistent application resonates with the concerns about potential disparities in access to diversion within the Kenyan system. The reviewed literature highlights critical challenges in implementing diversion policies within developing nations like Indonesia and Nigeria and they advocate for expanding diversion to encompass a wider range of offenses to better align with international child protection standards, revealing parallels with Kenya's own struggles in juvenile justice. This study

²² Okoh C, 'Asking for Young Offenders: What is the Fate of Restorative Justice within Nigeria's Discretionary Diversion Policy?' *Strathmore Law Review* ,2021.

investigates the extent to which Kenya's limited diversion policy risks or affects and undermines restorative justice in respect of the Kenyan context and seeks to determine whether a shift towards making diversion broader to encompass most cases such as felonies and petty offenses would benefit more children in conflict with the law within the Kenyan system.

1.9 Research Methodology

This study will employ a doctrinal and comparative approach to critically analyze the existing legal and policy frameworks governing diversion in Kenya and their effectiveness in promoting restorative justice outcomes for juvenile offenders. The doctrinal component will involve a rigorous examination of primary sources, including the Constitution of Kenya, the Children Act, and the diversion policy 2019. Secondary sources, such as academic books, journal articles, government reports, and dissertations, will be utilized to provide a comprehensive understanding of the theoretical underpinnings of diversion and its practical implementation. Furthermore, this study will undertake a comparative analysis between Kenya and New Zealand, focusing on the latter's well-established diversion system, to identify best practices, policy innovations, and key factors contributing to successful restorative justice outcomes. This comparative approach will provide a legal and empirical basis for recommending targeted reforms to enhance Kenya's diversion policy, ensuring greater alignment with restorative justice principles, international standards, and the best interests of children in conflict with the law.

1.10 Research Limitations

The limitation of this study may be restricted on the basis of reliance on existing literature and secondary sources may restrict the depth of analysis, as primary data collection methods such as interviews or surveys will not be utilized. This limitation may affect the study's ability to capture nuanced perspectives and experiences directly from stakeholders involved in juvenile justice reform in Kenya. The scope of the study is focused primarily on evaluating the efficiency of the diversion policy 2019 and exploring whether it benefits children in conflict with the law.

1.11 Chapter Breakdown

Chapter 1: Introduction

This chapter laid out the research problem, objectives, and questions. It also highlighted the significance of the study, the theoretical framework, and the methodology that was used.

Chapter 2: The Role of Diversion in Juvenile Justice

This chapter gave the role and benefits of diversion, emphasizing its role in rehabilitation, reintegration, and crime prevention for children.

Chapter 3: Legal and Institutional Frameworks for Diversion in Kenya

This chapter reviewed international legal frameworks like the CRC and Beijing Rules alongside the domestic legal frameworks like Kenya's Constitution, Children Act 2022, and Diversion Policy 2019 in order to identify gaps in Kenya's diversion policy

Chapter 4: Lessons from New Zealand's Mandatory Diversion Model

This chapter examined New Zealand's diversion system in order to draw the best practices for Kenya.

Chapter 5: Findings, Recommendations, and Conclusion

This chapter summarized the findings, noting the limitations of Kenya's diversion policy while giving the recommendations and conclusions

CHAPTER 2:

THE ROLE OF DIVERSION IN JUVENILE JUSTICE FOR CHILDREN IN CONFLICT WITH THE LAW.

2.1 Introduction

This chapter directly addresses the question of the role of diversion in the juvenile justice system for children in conflict with the law. It begins by exploring the aims and importance of diversion in promoting the best interests of children involved in the legal system, and what are the potential risks associated with it. Examining diversion from an international perspective, the chapter explores its purpose, benefits, and the challenges associated with its implementation, drawing upon established principles from the Convention on the Rights of the Child (CRC) and other relevant international instruments. Furthermore, the chapter offers a comparative analysis between Kenya's perspective on diversion, as reflected in its legal framework and policies, and broader international standards and practices. This comparison highlights areas of alignment and divergence, providing a foundation for subsequent chapters that explore specific legal and institutional frameworks in Kenya. Finally, the chapter lays the theoretical groundwork for the study by introducing the dignified justice and restorative justice theories, which underpin the argument for a more inclusive diversion policy.

2.2 Juvenile Justice and its models in the Criminal Justice System

The problem with the formal criminal justice system is that all the interested parties affected by an offence are reduced to just two which is the state and the offender. Justice is thus distributed to the victim of the offence, the offender, and the larger society when the offender is punished or sentenced.²³ In strengthening efforts to protect children, the juvenile justice system is implemented based on several important principles including the principles of protection, justice, non-discrimination, the best interests of the child, respect for children's opinions, child survival and development, deprivation of independence and punishment as a last resort, and avoidance of

²³ Akintunde OW, 'Improving the criminal justice system in Nigeria through restorative justice: Lessons from Canada and New Zealand' Published LLM Thesis, Dalhousie University, Nova Scotia, 2018, 113.

retaliation. Moreover, for children who face the law, children must receive labeling and rehabilitation.²⁴

There are two basic models designed to react to wrongdoing, which are, civil law and penal law systems. While criminal law is a part of penal law systems designed to deal with adult accused or adult criminals, a separate system, juvenile justice system, forms another part of the penal law system which is designed and perceived as a suitable system for juvenile accused or juvenile offender whose age range and maturity is taken into consideration.²⁵ Thus a juvenile justice system shall not be better understood as a system but as interconnected set of systems of polices, courts, prison, prevention, diversion, investigation, pre-trial detention, post-trial detention, treatment programs, probation.²⁶

A juvenile justice system has two models, the model could be the one to protect or to punish juveniles. The model that aims at protecting juveniles can be referred to as welfare, protection, or restorative model. The model that aims at punishing juveniles can be referred to as crime control, punitive, or retributive model. There is a need to balance these models between protection and punishment. In protection models, juveniles are viewed as vulnerable and so needed to be protected by the state if parents fail to do so and juvenile crimes are viewed as the result of family, upbringing, and education backgrounds of the juvenile or the social and economic conditions.²⁷

Based on this model, it does not seek to punish but to protect and treat juveniles by not holding juvenile responsible for the offense through formal judicial proceeding but by engaging juveniles in restorative forum or providing welfare services such as education, counseling, medical, vocational training, etc., in order to prevent future offenses. This model is however criticized for the over-emphasis on protection of juveniles but not protection of society against crime. Moreover,

²⁴ Sarwadi S and Tri Bawono B, "Restorative Justice Approach in Diversion System for Settlement of Criminal Cases for Children in Indonesia," *Jurnal Daulat Hukum* 2020,3.

²⁵ Vidjia P, 'Diversion from juvenile justice system in Japan, South Africa and England,' 2008,11.

²⁶ Abramson B, 'The right to diversion: Using the Convention on the Rights of the Child to turn juvenile justice rights into reality,' 60 & 70.

²⁷ Henkes B, *The role of education in juvenile justice in Eastern Europe and the former Soviet Union*, Constitutional and Legal Policy Institute, Hungary, COLPI Paper No. 2, December 2000, <http://www.osi.hu/colpi/files/COLPI2.pdf> on 7 July 2008,8.

this model tends to extend too much the scope of protection to include behavior that fall short of criminal offending thus it interferes too much with the life of juveniles.²⁸

Crime control models, on the contrary, perceive a juvenile as a member of society who is able to tell right from wrong.²⁹ Punishment is seen as the appropriate or effective measures to discourage juvenile wrongdoing or crimes. So, when a juvenile commit crime, he or she is processed through formal judicial proceeding and accorded with all the due process rights and punished, usually imprisonment, if found guilty of the alleged crime. This model is criticized partly because it over-emphasizes the fight against crimes at the expense of the interests of juvenile.³⁰ The crime control model is one which does not take in the best interest of a child and hence the protection model is the best model of juvenile justice as it focuses on the interests of a child.

2.3 Understanding the Concept of Diversion in the Juvenile Criminal Justice System

The term diversion has been used so broadly and often loosely to describe such a wide range of procedures and programs that attempting to define it in any concrete fashion may prove to be an exercise in futility. Edward Lemert defines it as a process whereby problems otherwise dealt with in the context of delinquency and official action will be defined and handled by other means.³¹ Criticism has occurred regarding the definition of diversion due to problems in determining what activities lie outside delinquency and official procedures. Critics argue that diversion requires youths to have some official exposure to the juvenile justice system, so ‘true diversion’ relies on informal releases or referrals by police officers, avoiding actions bearing an official stamp. A second proposed definition, ‘minimal penetration of the juvenile justice system,’ is marred with doubt regarding what ‘minimal’ penetration could possibly be. Altogether, providing definition through concrete behavior or actions appears to be impractical, especially if defined as a process. Definitions of diversion therefore are inherently arbitrary.³² However, for some diversion refers not only to turning offenders away from the justice system but also to turning them away from a

²⁸ Henkes B, *The role of education in juvenile justice in Eastern Europe and the former Soviet Union*, 9.

²⁹ Henkes B, *The role of education in juvenile justice in Eastern Europe and the former Soviet Union*, 8.

³⁰ Henkes B, *The role of education in juvenile justice in Eastern Europe and the former Soviet Union*, 8.

³¹ Lemert, E., 1981. Diversion in Juvenile Justice: What Hath been Wrought. *Journal of Research in Crime and Delinquency*, 18(1), pp.36.

³² Lemert, 1981, p.36.

deeper to a shallower level of the system.³³ One trend in all this, therefore, has been to insist that diversion must mean something other than the usual practices of the various components of the justice system.³⁴

A second trend has been to define diversion as implying the cessation of system involvement, i.e., a diverted youngster must be free of any control by the system. This means in practice that he cannot be reinserted if he fails in treatment or rejects treatment, and that the treatment must not be connected to or controlled by the police, probation, or courts.³⁵ A third major trend has been to insist, by definition, that diversion be not only from the system but also to some alternative handling of each case. This handling is supposed generally to occur in the community and, in practice, has usually meant some form of counseling. This trend would prohibit diversion to non-treatment despite some available data that treated diverters may actually suffer from treatment. Seen another way, this trend specifies as diversion clients only those for whom community treatment is appropriate, a judgment in which it is generally conceded we are very inept.³⁶

Diversion is assumed to be a solution for a variety of flaws in juvenile justice. Some of the system's evils include denial to juveniles of civil liberties or unbiased treatment; congestion in the courts, which causes inefficiency; labeling and stigmatization of youths; failure of the juvenile justice system to curb recidivism; and failure of communities to bear responsibility in solving youths' problems. More positive reasons for diversion are to reduce the cost of processing delinquency cases and to promote the funding of required services for youth.³⁷

2.4 The Role of Diversion in Juvenile Justice for Children in Conflict with the Law

Diversion is defined as a system of directing children away from judicial proceedings and towards community solutions.³⁸ It is a component of the juvenile justice system as it encompasses the protection model approach of a juvenile system.³⁹ Abramson argues that diversion always has to

³³ Cressey, D. R. and McDermott, R. A., 1973. *Diversion from the Juvenile Justice System*. Ann Arbor, Mich.: National Assessment of Juvenile Corrections, University of Michigan, p.71.

³⁴ Cressey and McDermott, 1973, p 71.

³⁵ Cressey and McDermott, 1973, p 71.

³⁶ Klein, M. W., 1979. *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediment*. University of Southern California: Jstor, p.9.

³⁷ Lemert, 1981, p.37.

³⁸ Vidjia P, 'Diversion from juvenile justice system in Japan, South Africa and England,' 2008,1

³⁹ Vidjia P, 'Diversion from juvenile justice system in Japan, South Africa and England,' 2008,1.

be a diversion from A to B, not a mere diversion from A. For example, diversion is said to be in place only when young offender is diverted from criminal system to juvenile justice system; from detention i.e. imprisonment to non-custodial measures; from prosecution, either in the juvenile or criminal justice system, to alternatives such as restorative justice.⁴⁰ This means even the judges decide to give the chance to the children for rehabilitation and reintegration into the society, but without diversionary programs in place, the children would still end up in prison. Diversion order can be implemented at various stage of criminal procedures such as “prior to arrest, prior to charge, prior to plea guilty, prior to trial or prior to sentencing.”⁴¹

The juvenile justice system is one example of diversion because the accused children are diverted from the adult criminal law system to be tried in a juvenile court, which has facilities and special procedures suitable for the children. So, there are three possible diversion options; from the criminal system to juvenile justice system; from detention (i.e., imprisonment) to non-custodial measures; and from prosecution in the penal system (juvenile or criminal) to alternative measures within penal system or to a civil law system or to civil society, without further state involvement.⁴²

Punishment for juvenile is flexible and can be in many forms such as probation (with certain conditions such restriction on movement and certain activities, requirement for school attendance and periodically visit the judge/social workers, no commission of any other offense, etc.); imprisonment in open or less strict security facility together with rehabilitation and education programs; imprisonment for a period and then rehabilitation for next period; imprisonment with possible review for conditional release ;imprisonment in closed facility.⁴³ Any punishment measure in a state party to CRC shall not, however, violate the prohibition of use of capital punishment, corporal punishment, and life imprisonment without possibility of release for the punishment of crimes committed by juveniles.⁴⁴ Imprisonment of a juvenile law violator is a matter of last resort and for the shortest possible period.⁴⁵ If the child ends up in prison (detention

⁴⁰ Abramson B, ‘The right to diversion: Using the Convention on the Rights of the Child to turn juvenile justice rights into reality,’7.

⁴¹South African Law Commission, Juvenile Justice, Issue Paper 9, Project 106, justice.gov.za/salrc/reports/r_prj106_juvjus_2000_jul.pdf on 7 July 2008.

⁴² Vidjia P, ‘Diversion from juvenile justice system in Japan, South Africa and England,’ 2008,20.

⁴³Abramson B, ‘The right to diversion: Using the Convention on the Rights of the Child to turn juvenile justice rights into reality,’ 22-29.

⁴⁴ Article 37(a), UN *Convention on the Rights of the Child*.

⁴⁵ Article 37(b), UN *Convention on the Rights of the Child*.

center/close facility), it is a concrete international rule that the state must keep minor law violators in a detention facility which is apart from adult criminal prison. Mixing both of them in one detention facility/cell can easily result in physical and emotional abuses.⁴⁶

The role of diversion in the juvenile system comes first and foremost to prevent harm to the child offenders. This is because detention blocks deny the children an opportunity to education, recreation, family and counseling support and it also exposes them not only to risks of infectious disease in detention facilities but also to being psychologically, sexually or physically abused or influenced by the fellow inmates, guards, and hardened criminals. One of the notable effects of imprisonment is stigma that negatively affects the children psychologically such as low self-esteem, alienation, anger and despondency. Thus, imprisonment of young offenders, in particular, is not an appropriate measure thus they should be placed in a diversion system to avoid negative effects of the imprisonment. In a diversion the child offenders are treated as victims because a number of surveys suggest that children committing offences have frequently been victims of serious domestic abuse in their own families. They, like other children, are at a stage of their lives at which they develop physically, intellectually, morally, and socially. Hence, state should embrace a protection model of the juvenile justice system such as diversion that aims to help them understand and be accountable for their wrongdoing and promote their healthy development.⁴⁷

Secondly, diversion aims at promoting rehabilitation of the child offenders. Diversion has positive effects of rehabilitating the child offenders by providing them with an opportunity to treat themselves psychologically through schooling, sport or recreation, job training or employment. Diversion also helps to address the family's negative effects that contribute to children's commission of offense. The ultimate goal of rehabilitation is to reduce acts of reoffending by the child offenders after receiving diversion(s). Muntingh, likewise, shares the notion that diversion promotes rehabilitation. He states that the purposes of punishment are deterrence, and its punishment is to prevent the general public and offender from committing it again. It also offers to rehabilitate by helping the offender become a good citizen and be able to reintegrate back into community especially by avoiding re-offending. However, prison sentences, in reality or as a

⁴⁶ Abramson B, 'The right to diversion: Using the Convention on the Rights of the Child to turn juvenile justice rights into reality,' 64.

⁴⁷ Abramson B, 'The right to diversion: Using the Convention on the Rights of the Child to turn juvenile justice rights into reality,' 57-59 and 73-75.

common knowledge, do not achieve these said purposes, especially rehabilitation of the offender. Diversion and restorative justice are responses to the failure of prison sentences in achieving rehabilitation and prevention of recidivism.⁴⁸

Citizens may raise concern when it comes to the public safety and the right of the victim who suffer the wrong-doing of the juvenile, all of which are failed or vaguely to express in the Beijing Rules.⁴⁹ One asks themselves what would the victim or their family or the public at large feel when they concern about their safety, grieve, while a juvenile premeditate rapist or murderer is sent to group-type living institution where they enjoy the food, facilities, activities, and healthy environment. Hence, it is up to policy makers to be able to opt for appropriate diversion that addresses the concerns of the public safety and the rights of the victim.⁵⁰

The real weakness of diversion programs is that the use of pre-trial programs and plea bargaining in criminal justice raises ethics issues concerning the voluntariness of defendants' choices. In some cases, some individuals would accept to undertake such programs or plead guilty because they do not want the aggravation and inconveniences involved in trial procedure. Though good police work, capable prosecutors, and access to defense lawyers can minimize these risks, the issue remains whether decisions are made in coercive circumstances. The issue is not that choices are provided, but that they are not presented in such a way that they coerce defendants into making decisions they would otherwise not make.⁵¹

One of the main oversights in the concept of diversion, which goes far to explain why the goals of diversion have been distorted and displaced, was the failure to appreciate the narrow limits within which police operate.⁵² The law reform commission in Canada produced a report that highlighted the problems arising from the police involvement in diversion. The commission noted that decision-making criteria within institutions, including police and prosecution, are influenced by

⁴⁸ R Shapiro, "The Question for Juvenile Justice" in LM Muntingh and RJ Shapiro (eds), *An Introduction to Diversion from Criminal Justice System*, NICRO: Cape Town, 1997, <http://www.nicro.org.za/publications/> on 7 July 2008,6.

⁴⁹ Abramson B, 'The right to diversion: Using the Convention on the Rights of the Child to turn juvenile justice rights into reality,' 70-71.

⁵⁰ Vidjia P, 'Diversion from juvenile justice system in Japan, South Africa and England,' 2008, 32.

⁵¹ Law Reform Commission of Canada, 1975. *Diversion*. Working Paper 7. Ottawa: Law Reform Commission of Canada, p.17.

⁵² Lemert, 1981, p.41.

internal factors such as workloads, working conditions, and organizational policies.⁵³ Instead of prioritizing the victim as recommended by the Commission, decisions may be driven by practical considerations like meeting deadlines, gaining recognition or promotion, fulfilling reporting requirements, or addressing manpower shortages. These operational pressures often outweigh the ideal objectives of diversion in the criminal justice system. Additionally, police discretion may be constrained by fear of public criticism if their decisions are perceived as being made on improper grounds.⁵⁴ Any decision to refer the child to another agency also contains the potential for coercion, this is because the family feel that they must express a willingness to accept and take more responsibility for action to implement the suggestion of the police. However, even in cases where the police do not use their authority to get the family to accept the referral, the family often gets the impression that if it does not accept the referral, the juvenile will be sent to court.⁵⁵

Lastly, as with many other forms of diversion, the child essentially is powerless to participate in the decision-making process, hence may see the final result as unjust and as a form of punishment; it is hardly surprising that he may quickly develop an attitude of disdain and disrespect for the judicial system. One of the principal goals of diversion programs is to avoid the stigma of involvement in the criminal justice system, but we have already labelled the child as ‘bad’, even though we prefer to call him one in need of help and guidance. Society also pays the price for these well-intentioned, but misguided actions since numerous studies indicate that the final result of this stigmatization will probably be more delinquent acts.⁵⁶

2.5 Diversion Programs and Policies

Diversion schemes offer community-based alternatives to imprisonment, diverting suspected or convicted offenders into noncustodial responses. The idea is that prolonged prison sentencing of certain types of offenders may be more destructive to society than beneficial. Some of the potential negative consequences include heightened rates of recidivism from released prisoners, exorbitantly

⁵³ Wilson, L., 1976. Diversion: The Impact of Juvenile Justice. *Canadian Journal of Criminology and Corrections*, 18(2), p.163.

⁵⁴ Law Reform Commission of Canada, 1975, p.11.

⁵⁵ Wilson, 1976, p.163.

⁵⁶ Wilson, 1976, p.165.

high expenses for prisons, and destabilization of families and communities, particularly in urban areas. Diversion programs aim to alleviate prison overcrowding, meet distinct needs within populations of offenders, and provide more effective cost–benefit outcomes than conventional criminal justice processes.⁵⁷

Originally developed to rehabilitate juvenile offenders without the negative effects of incarceration, diversion has evolved to address psychosocial causes of adult offending. Such causes include alcohol and drug use, mental disorder, unemployment, and combat-related traumatic exposure. Unlike re-entry or parole services reinforcing incarceration, diversion programs are alternatives to custodial sentencing. They identify offenders who will probably go to prison but whose risk of further offending might increase if their special needs or vulnerabilities are not met.⁵⁸

The concept of diversion in juvenile justice paralleled the establishment of juvenile courts in the late 19th century. Reformers sought to rectify the injustice and inefficacy of confining young offenders alongside adult offenders, having recognized adolescence as a distinct and malleable phase of development. To this end, juvenile justice was established to offer rehabilitation-based and service-oriented responses to youthful misconduct. While diversion attempted to steer young people away from the adult criminal justice system and penal institutions, intervention routinely entailed incarceration in specialized reformatories. These facilities provided clinical treatments, social services, and educational training, reflecting a preference for institutionalization as the desired method of rehabilitation.⁵⁹

Today diversion programs are implemented for men, women, and children of diverse backgrounds, charged or convicted with a variety of offenses, in order to steer them away from prison toward more innovative sanctions. The recent technological advances in treating substance abuse and mental health using evidence-based therapies, along with cognitive-behavioral techniques and the universality of applying case management styles in human services, have led diversion to be a useful, flexible sentence type. When well designed and well executed community-based

⁵⁷ Sung, Hung-En. “Diversion.” *The Encyclopedia of Theoretical Criminology*, Academia.edu, 2014, p 1.

⁵⁸ Sung, “Diversion,” p. 1.

⁵⁹ Feld, Barry. *Bad Kids: Race and the Transformation of the Juvenile Court*. New York: Oxford University Press, 1998.

interventions are targeted at the appropriate groups of offenders, they can significantly reduce recidivism, right wrongs, and encourage productive lives.⁶⁰

The growing focus on re-entry has also shed light on the benefits of diversion programs. By keeping defendants in their communities and avoiding the accumulation of serious criminal records, these programs reduce the barriers to reintegration that ex-offenders often face when they leave prison. This advantage not only helps the defendant but also his/her family and community. Diversion programs have expanded to address a wide range of offenses, from drug dealing to prostitution, and serve various populations of offenders with specific needs or risks, such as veterans of war or habitual felons. These programs are often applied in problem-solving courts that address the root causes of criminality. Yet extremely violent offenders continue to be systematically barred from diversion programs because of public fears of handling and treating them in the community.⁶¹

Following arrest, offenders may access diversion programs at various stages, either pre- or post-adjudication. Deferred prosecution and deferred sentencing are two predominant models of diversion. Under deferred prosecution, the indictment is postponed temporarily and not filed against the defendant. Failure to meet program requirements may activate the reinstatement of prosecution, leading to conviction and potential incarceration. Deferred sentencing, on the other hand, requires participants to plead guilty to a criminal offense at the start, with the plea agreement specifying a prison or jail sentence to be imposed if they fail at the program. Successful completion regularly leads to reduced or dismissed charges and, in some cases, sealing of the record.⁶²

Diversion programs are often sponsored by prosecutors or judges, using the threat of punishment to induce participation. Participation can be mandatory, where all eligible defendants are required to participate, or voluntary, where eligible individuals may opt to participate.⁶³ Prosecutors within the juvenile justice system have significant discretion at two junctures: determining the appropriate charges for a delinquency case and whether to prosecute following the filing of a petition. This authority is in line with both prosecutorial discretion and the *parens patriae* doctrine, which emphasizes the state's interest in protecting and caring for juveniles. Prosecutors may choose not

⁶⁰ Sung, "Diversion," p. 2.

⁶¹ Sung, "Diversion," p. 2.

⁶² Sung, "Diversion," p. 2.

⁶³ Sung, "Diversion," p. 2.

to file formal charges when the interests of justice and those of the juvenile intersect and instead pursue alternative sanctions like victim-offender mediation, counseling, or less stigmatizing alternatives. Prosecutors make such decisions based on information received from a wide range of sources, including teachers, social workers, police officers, and local political factors.⁶⁴

Eligibility for diversion programs in the juvenile justice system is hard to ascertain due to the variation in decision points and the lack of uniform criteria across jurisdictions. Opportunities for diversion are highly variable, with some communities offering a single option for diversion and others allowing several entries into diversion programs. Eligibility criteria may also vary considerably; one country may restrict diversion to first-time offenders for any offense, while another may exclude juveniles charged with violent or sex offenses. Ideally, eligibility standards should be inclusive rather than narrowly exclusionary and consider such elements as the seriousness of the current offense, the offender's delinquency history, family support, and the eagerness to enroll and complete the program, as well as the victim's acceptance of diversion. These criteria serve as a beginning for unofficial risk assessment, and a needs assessment, to determine whether the youth is suitable for the diversion program's services, is completed by the diversion program to make case-specific decisions and improve rehabilitative outcomes.⁶⁵

The success of diversion programs and policies is usually measured in five ways.⁶⁶

1. Did diversion reduce the jail or prison population?
2. Did the diversion respond to the underlying causes of criminal offending through therapeutic and behavioral interventions?
3. Did the diversion maintain an acceptably low reoffending rate among its participants while they were fulfilling their sentence requirements in the community?
4. Did the diversion decrease the recidivism rate among its participants after the completion of their sentence requirements?
5. Did the diversion save taxpayers', has it proven to be more economically efficient than the traditional incarceration approach it replaced?

⁶⁴ Patenaude, Allan L., and Marc A. Patenaude. "Diversion and Diversion Programs." In *The Encyclopedia of Criminology*, 2005.p 7

⁶⁵ Patenaude and Patenaude, "Diversion and Diversion Programs," p. 6

⁶⁶ Sung, "Diversion," p. 3.

As noted by UNICEF, there are many diversion measures and programs available for use with children in conflict with the law. The most frequently used ones include the following.:

1. *Police Cautions.*

This strategy enables law enforcement to issue warnings to juveniles involved in minor offenses, like petty theft, aiming to discourage future misconduct. It is typically applied in cases involving first-time or low-level offenses. An example of its effective use is found in Australia, where the "warning on the run" initiative was launched in 1984 to steer minor offenders away from formal court proceedings. This approach helped courts prioritize more serious cases, as police were given the authority to handle such incidents immediately upon apprehending the youth.⁶⁷

2. *Victim-Offender Mediation.*

Mediation involves an unbiased third party who assists those in conflict to reach a mutually acceptable resolution. However, it is only effective when both parties are open to resolving the issue collaboratively. The process requires the offender to acknowledge responsibility for their actions, and the victim must also agree to participate. For mediation to be truly effective, it should be facilitated by someone with proper training, experience, and developed skills in conflict resolution.⁶⁸

Victim-offender mediation is highly valued for helping parties rebuild relationships and achieve mutually beneficial solutions. It can be initiated at any stage after the offender is apprehended. In Austria, it was formalized as a diversion measure under the 1988 Juvenile Court Act, primarily addressing property-related offenses such as damage, theft, or burglary committed by children.⁶⁹

Victim-offender programs also offer advantages to the broader community. Both crime and delinquent behavior impact individuals directly and indirectly. Even minor offenses can trigger a chain reaction, heightening fear and a sense of insecurity among community members.⁷⁰

⁶⁷ Save the Children, *Juvenile Justice. Modern Concepts in Working with Children in Conflict with the Law*, 56

⁶⁸ Save the Children, *Juvenile Justice*, 57.

⁶⁹ Save the Children, *Juvenile Justice*, 57.

⁷⁰ <https://www.ovc.gov/publications/infores/probparole/chap4.htm>

3. *Family Group Conferencing.*

This approach brings together the offender, their family, the victim and their family, along with other key individuals such as police officers and support advocates, in a meeting led by a facilitator. The primary aim is to reach a shared agreement, with the offender's family playing a central role in shaping the outcome. During the meeting, the child's actions are thoroughly discussed, and a collaborative solution is developed. In New Zealand, family group conferences are widely regarded as an effective form of diversion, particularly for moderately serious offenses, though they are not used in cases involving crimes such as murder or manslaughter.⁷¹ The Children, Young Person's & their Families Act, 1989 of New Zealand supports the diversion of all juvenile cases, except those involving serious offenses like murder, primarily through the use of family group conferences.⁷² In family group conferences, the police primarily describe the nature of the offense and explain how it affected the victim. They are also permitted to express any concerns they may have regarding the outcomes decided during the conference.⁷³

While the diversion model and its programs have been successful, they have also faced various criticisms. Some of these concerns relate to the early stages of the movement, while others continue to be relevant today.

Firstly, since most diversionary programs resolve cases without full adjudication, they may conflict with the principles of due process and fundamental fairness. This concern is particularly significant in pre-adjudicative diversion programs, such as deferred prosecution, where defendants must accept a community-based sentence without pleading guilty or being found guilty of a crime. In these cases, the adversarial nature of the criminal justice process is replaced by an administrative approach that suspends the presumption of innocence. Defendants face the real threat of incarceration even without admitting guilt. While these programs are often labeled as voluntary, the looming certainty of incarceration for failing to participate or complete program requirements

⁷¹ Y.H.NG, *et al* (2012). An alternative to prosecution: *A comparative study between restorative service provision in Queensland and Hong Kong*. SS student e-journal. Vol. 1pg 267-313.

⁷² Save the Children, *Juvenile Justice*, 61

⁷³ Save the Children, *Juvenile Justice*, 61

makes them effectively coercive. As a result, this implicit plea of guilt is viewed by many scholars as inconsistent with the highest standards of procedural justice.⁷⁴

Net-widening continues to be a significant issue for those designing and managing diversion programs. This occurs when programs meant to prevent incarceration end up imposing overly restrictive or intrusive community-based sanctions on individuals who were not at risk of being imprisoned in the first place.⁷⁵ Rather than reducing the scope of social control, these programs expand it, subjecting more people to punitive measures.⁷⁶ Early diversion programs were often criticized for utilizing alternative sanctions in cases that prosecutors or judges considered weak and unlikely to result in a conviction. Focusing on first-time or minor offenders can undermine the intended purpose of diversion. For these programs to be effective and fair, they must focus on individuals who are genuinely at risk of incarceration, avoiding the net-widening effect. When implemented properly, targeting offenders likely to be imprisoned, diversion programs can lead to reduced recidivism, decreased prison populations, and cost savings.⁷⁷

⁷⁴ Bullington, B., Sprowls, J., Katkin, D., and Phillips, M. "Critique of Diversionary Juvenile Justice." In *Juvenile Delinquency: A Justice Perspective*, edited by R. A. Weisheit and R. G. Culbertson, 95–108. Prospect Heights, IL: Waveland Press, 1985.

⁷⁵Sung, Hung-En, and Steven Belenko. "From Diversion Experiment to Policy Movement: A Case Study of Prosecutorial Innovation in the United States." *Journal of Contemporary Criminal Justice* 22, no. 3 (2006): 220–240.

⁷⁶Blomberg, Thomas G. "Widening the Net: An Anomaly in the Evaluation of Diversion Programs." In *Handbook of Criminal Justice Evaluation*, edited by M. W. Klein and K. S. Teilmann, 572–592. Beverly Hills, CA: Sage, 1980.

⁷⁷ Sung, "Diversion," p. 3.

2.6 Conclusion

This chapter addressed the question of what is the role of diversion in the juvenile justice system for children in conflict with the law? The findings indicate that diversion serves as a crucial mechanism for promoting the best interests of children, steering them away from the potentially harmful effects of formal criminal proceedings. The chapter highlighted the theoretical underpinnings of dignified justice and restorative justice, emphasizing the importance of rehabilitation and reintegration over punitive measures. Furthermore, this chapter highlighted the criteria for diversion and what is considered as a successful diversion program. It also covered the challenges of a diversion program.

CHAPTER 3:

THE LEGAL AND INSTITUTIONAL FRAMEWORKS FOR DIVERSION IN KENYA

3.1 Introduction

This chapter tackles the legal and institutional frameworks for diversion in Kenya, and their effectiveness in addressing juvenile justice. This chapter provides a detailed analysis of the existing legal and institutional frameworks governing diversion in Kenya. It also delves into the relevant provisions of the Children Act No. 29 of 2022, the Diversion Policy of 2019, and the ODDP Diversion Guidelines & Explanatory Notes of 2019, examining how these instruments define and regulate diversion processes. Additionally, the chapter outlines the roles and responsibilities of various stakeholders involved in diversion, such as the judiciary, public prosecutors, probation officers, child welfare agencies, and community-based organizations. A critical assessment of the effectiveness of these frameworks in achieving the aims of diversion will be conducted, paying particular attention to the challenges identified in the problem statement regarding the exclusion of petty and felony offenses. The chapter also explores how the discretionary nature of the current policy impacts its implementation and overall success in promoting restorative justice for juvenile offenders, and whether its application is consistent with Section 227 (2)(c) of the Children Act 2022.

3.2 Domestic Legal Framework of Diversion

Before the enactment of the Children Act, 2001.⁷⁸ Juvenile rights were governed and enforced by various pieces of legislation, although the Children and Young Persons Act remained the primary law regulating juvenile offenders. .⁷⁹ The significance of this diverse approach lies in the fact that the Penal Code defined criminal offenses and their corresponding punishments, while the Criminal Procedure Code outlined the probation process. Additionally, the Probation of Offenders Act played a key role in social inquiry reports and overseeing probation orders. However, with regard

⁷⁸ Swaka GO, 'The Implementation of Juvenile Offenders' Rights in the Criminal Justice System in Kenya,' Unpublished LLB Project, Mount Kenya University, Parklands Campus, 2021,26.

⁷⁹ Swaka, *The Implementation of Juvenile Offenders' Rights*, 2021,27.

to Juvenile Justice, this framework was deemed unsustainable and flawed, as it conflicted with the fundamental principles of international legal standards.⁸⁰

3.2.1 The Constitution of Kenya, 2010.

The Constitution of Kenya, 2010 (COK), enacted on August 27, 2010, outlines the rights of juveniles.⁸¹ Additionally, under Article 2(6), the Constitution incorporates international treaties ratified by Kenya into domestic law.⁸² Article 21(3) mandates that public officers and state institutions address the needs of vulnerable groups in society, including children.⁸³ It also outlines a comprehensive bill of rights, ensuring a wide range of economic, social, and cultural rights for all citizens.⁸⁴ The COK also guarantees the rights and freedoms of the elderly, persons with disabilities, youth, minorities, and juveniles .⁸⁵

The COK guarantees that children will not be detained except when absolutely required, and if detention occurs, it will be for the shortest time possible.⁸⁶ Furthermore, children in detention must be kept separate from adults and placed in environments that take into account their age and gender. The principle of the best interests of the child is also enshrined in the COK, ensuring that the child's welfare remains the primary concern in all matters related to them.⁸⁷ The COK also provides for alternative forms of dispute resolution aside from the court system,⁸⁸ as long as it does not contravene the Bill of rights and is not repugnant to justice and inconsistent with the COK.⁸⁹

While the COK grants rights to children, these rights are not absolute and may be restricted under Article 24. Any limitations imposed under this article must be reasonable and justifiable in a democratic society that values human dignity, equality, and freedom.⁹⁰ COK standards for diversion from the provisions highlighted denotes that it's the best interest for the child not to be subjected to the criminal system as seen above that children in conflict with the law should not be

⁸⁰Swaka, *The Implementation of Juvenile Offenders' Rights*, 2021,27.

⁸¹ Article 53, *Constitution of Kenya* (2010)

⁸² Article 2 (6), *Constitution of Kenya* (2010).

⁸³ Article 21(3), *Constitution of Kenya* (2010).

⁸⁴ Article 19, *Constitution of Kenya* (2010)

⁸⁵ Article 53, 54,55 ,56 and 57, *Constitution of Kenya* (2010)

⁸⁶ Article 53(f), *Constitution of Kenya* (2010).

⁸⁷ Article 53(2), *Constitution of Kenya* (2010).

⁸⁸ Article 159(2)(c), *Constitution of Kenya* (2010).

⁸⁹ Article 159(3), *Constitution of Kenya* (2010).

⁹⁰ Article 24, *Constitution of Kenya* (2010).

detained unless it is absolutely necessary. The COK is in line with the international standards that were discussed in the previous section and hence it's up to the state organs and public officers in charge with handling children in conflict with the law to ensure that they address the needs of these children and ensure that the programs set in place by them are up to standard when it comes to diversion.

3.2.2 The Children Act, 2022.

The Children's Act, 2001, replaced the Children and Young Persons Act, the Adoption Act, and the Guardianship Act, marking a significant milestone for Kenya in fulfilling its commitments under international laws such as the ACRWC and CR.⁹¹ However, the Children Act of 2001 was replaced by the Children Act of 2022, which was a watershed moment in Kenyan legislation, reflecting the country's commitment to children's welfare and protection by incorporating new provisions and reforms to address contemporary challenges facing Kenyan children. The Act is consistent with international standards, particularly the United Nations Convention on the Rights of the Child, which Kenya adopted.⁹²

The act stipulates that in all matters involving children, whether handled by social welfare institutions, courts, administrative authorities, or legislative bodies, the child's best interests must be the primary consideration. These interests are defined broadly and include, but are not limited to, the factors outlined in the First Schedule.⁹³ The detention of a child under the Act prescribes that it shall be a matter of last resort and is in conformity with Article 53 (f) of the COK.⁹⁴ For children in conflict with the law, the Act provides for an alternative from the formal criminal justice system which is diversion⁹⁵.

The purpose of diversion is to use alternative approaches to hold children accountable for their harmful actions while promoting their rehabilitation and reintegration into their family and community. It allows affected individuals to express their views, encourages the child to make symbolic restitution, fosters reconciliation between the child and those harmed, minimizes

⁹¹ Swaka, *The Implementation of Juvenile Offenders' Rights*, 2021,28.

⁹² <https://www.amgadvocates.com/post/the-children-s-act-2022-in-kenya-key-changes> -on 15th April 2024

⁹³ Section 8 (1), *Children Act 2022* (Act No 29 of 2022)

⁹⁴ Section 26(7), *Children Act 2022* (Act No 29 of 2022)

⁹⁵ Section 224 (a), *Children Act 2022*(Act No 29 of 2022)

stigmatization, and prevents negative impacts from the child's involvement in the criminal justice system.⁹⁶ A child qualifies for diversion if the offense they are suspected or charged with is not a capital offense.⁹⁷ The new Children Act affords every child in conflict with the law the avenue of diversion . From the act, the standard of diversion is that as long as it's not a capital offence then any child is mandated to be diverted as long as the party's consent. This provision is inclusive as it allows more children in conflict with the law to benefit from diversion and it encompasses the best interest of a child as it's in their interest not to be subjected to the cruel and harsh conditions of the criminal justice system that had been discussed in the second chapter.

3.2.3 The Diversion Policy 2019

The diversion policy was established by the Office of the Director of Public Prosecutions. It is a key means of operationalizing Article 159 of the Kenyan constitution.⁹⁸ In 2019, the Office of the Director of Public Prosecutions implemented a Diversion Policy and Diversion Guidelines to streamline the diversion process. These texts represent the embrace of diversion and provide a framework for diversion choices. The ODPP Diversion Policy and Guidelines, in particular, emphasize diversion as a viable option for youth in legal trouble.⁹⁹

Although a step forward in realizing the best interest of a child, the scope of children in conflict with the law who will have the benefit of diversion is limited. Discretion powers are given to the public prosecutor,¹⁰⁰ however the discretion is guided as the guidelines have provided factors to which diversion can be granted or denied.¹⁰¹ Some of the factors a Public Prosecutor may take into account when deciding on diversion includes the child's age, apparent maturity level, and mental capacity. They may also consider the availability of alternatives to prosecution, the ability and willingness of the parents or guardians to exercise effective control over the child, and the child's history, including any prior record and the circumstances surrounding it.¹⁰² Providing this type of discretion to a prosecutor might be beyond their scope because first and foremost , prosecutors are not qualified to diagnose one's mental capacity as prosecutors are normally lawyers and not

⁹⁶ Section 226, *Children Act 2022*(Act No 29 of 2022)

⁹⁷ Section 227 (2)(c), *Children Act 2022*(Act No 29 of 2022)

⁹⁸ ODPP, *Diversion Policy 2019*, Office of the Director of Public Prosecutions, Nairobi, 2019.

⁹⁹ ODPP *Diversion Policy ; ODPP Diversion Guidelines and Explanatory Notes*, clause 35

¹⁰⁰ *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.1,

¹⁰¹ *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.10, No 56 and 57.

¹⁰² *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.8, No 40.

psychiatrists and the qualifications are prescribed under section 34 of *Office of the Director of Public Prosecutions Act 2022* (Act No 6B of 2022). That to qualify for appointment as a prosecution counsel, a person must be an Advocate of the High Court of Kenya or possess legal qualifications that permit them to practice law in Kenya. Additionally, they must be deemed a fit and proper individual, demonstrating experience, conscientiousness, and integrity suitable for the responsibilities of the office. From this we can see that prosecutors typically lack the specialized training and expertise in psychology or psychiatry necessary for accurate mental capacity assessments. Hence a prosecutor is not best suited to do it since the misdiagnosis of the child in conflict with the law poses the risk of excluding the child from benefitting from diversion.

This discretion given to the prosecutors also allows them to decide whether to afford diversion when it comes to petty offences.¹⁰³ And in regard to felony offences the guidelines dictate that they will carry out an exceptional circumstance test.¹⁰⁴ Exceptional circumstances test is a test that provides for factors such as the circumstances of the offense should be assessed, including cases where the offense may be serious but the facts or the offender's level of participation reduce its severity. The offender's personal circumstances are also important, particularly if the impact of a conviction would be disproportionate to the seriousness of the offense. Additionally, the views of the victim and the investigating officer should be taken into account, especially when they consent to diversion being applied.¹⁰⁵ The study has discussed that the rights of children are not absolute but can be limited so long as they are reasonable and just. However, the limitation applied by the diversion policy that every case including those of petty offences shall be left on the discretion of the prosecutor goes against the principle of best interest of a child as it is provided in the COK. If the policy is applied in the manner in which the unfettered discretion afforded to prosecutors is applied in a limited way in petty and felony cases then this limited approach of diversion may lead to the exclusion of more children in conflict with the law from benefitting from diversion yet the underlying objective of the criminal justice system especially in regard to diversion is to ensure that more children upholding the best interests of a child benefit from diversion. Hence by the COK standards this policy falls short.

¹⁰³ *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.8, No 37.

¹⁰⁴ *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.8, No 38.

¹⁰⁵ *ODPP Diversion Guidelines and Explanatory Notes*, Clause 2.8, No 50.

Secondly, The Diversion Policy also falls short of the standards made by the Children Act 2022. This is because unlike the policy, the act with the best interest of a child in mind provide that diversion is provided for all other offences except capital offence.¹⁰⁶ This provision allows more children in conflict with the law to benefit from diversion as it's inclusive nature allows both petty offences and children with felony cases to be diverted away from the criminal justice system. This allows children offenders to be treated with dignified justice as. The diversion policy should benchmark from this Act and make changes in order to achieve the aims of diversion

3.3 International Legal Framework of Diversion.

Several international legal instruments support diversion, either explicitly or through guiding principles. These include national guidelines for juvenile offenders, the African Charter on the Rights and Welfare of the Child (ACRWC), and the United Nations Convention on the Rights of the Child (CRC). Together, they establish a comprehensive framework for protecting juveniles in conflict with the law, though some of these instruments are non-binding.¹⁰⁷

3.3.1 United Nations Convention on the Rights of the Child

The CRC was adopted by the UN General Assembly in 1989 and came into effect in 1990. As a binding instrument, it holds legal weight due to its status as a convention signed by 191 countries and ratified by the juvenile justice system. The convention underscores that the primary goal of diversion is to promote the well-being and best interests of the child.¹⁰⁸ The convention requires state parties to treat arrest, detention, or imprisonment of a child as a last resort and advocates for alternative measures in circumstances where the child's liberty may be restricted.¹⁰⁹ Alternative measures to arrest, detention, or imprisonment include care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care.¹¹⁰ The convention also requires state parties to implement measures, other than judicial proceedings, to address cases involving children under 18 years of age in conflict with the law.¹¹¹ The purpose of this convention is to ensure member states have the

¹⁰⁶ Section 227 (2)(c), *Children Act 2022*(Act No 29 of 2022)

¹⁰⁷ Besler, E. M., Hanson, K., & Hirt, A. (2009). In *Sourcebook on international children's rights*.

¹⁰⁸ Article 3 and 40(4), *UN Convention on the Rights of the Child*.

¹⁰⁹ Article 37 (b), *UN Convention on the Rights of the Child*.

¹¹⁰ Article 40(4), *UN Convention on the Rights of the Child*.

¹¹¹ Article 40(3b), *UN Convention on the Rights of the Child*.

best interest of a child heart when they come to dealing with children in conflict with the law , hence limiting diversion goes against this convention as the well-being of the children being left out of the diversion stands to be affected as they may not benefit from it.

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

The Beijing rules promote well-being of the juvenile and proportional punishment of the juveniles and take into consideration of not only circumstances of offense but also circumstances of juvenile.¹¹²It also provides that diversion shall be implemented at the discretion of the police or prosecutors and with the consent of the juveniles and parent/guardians.¹¹³ However this discretion is a danger to diversion as giving discretion to judicial officers could lead to the risk of limiting diversion since its on their discretion and hence this discretion will lead to denial of diversion to a group of children who are in conflict with the law . The convention also provides alternatives to pre-trial detention, including close supervision, intensive care, or placement with a family or in an educational or home setting.¹¹⁴ Moreover, it provides various non-custodial disposition¹¹⁵ and also discourages disposition that involves institutionalization of juvenile.¹¹⁶

3.3.3 United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)

It deals with non-custodial measures of convicted people, including adults and juveniles. It promotes not only alternatives to imprisonment but also alternatives to pre-trial detention with consideration of the rights of victims and rights of offenders.¹¹⁷At pre-trial stage, the police and prosecutor have the powers to discharge the case or impose non-custodial measures as an alternative to pre-trial detention if the they consider that the case is not necessary to proceed and for the protection of society, crime prevention, or the promotion of respect for the law and the rights of victims.¹¹⁸ Some examples of non-custodial measures that are alternatives to

¹¹² Rule 1.1 and 5.1, *The United Nations Standard Minimum Rules for the Administration of Juveni/e Justice (the Beijing Rules)*

¹¹³ Rule 11, *The United Nations Standard Minimum Rules for the Administration of Juveni/e Justice (the Beijing Rules)*

¹¹⁴ Rule 13, *The United Nations Standard Minimum Rules for the Administration of Juveni/e Justice (the Beijing Rules)*

¹¹⁵ Rule 18, *The United Nations Standard Minimum Rules for the Administration of Juveni/e Justice (the Beijing Rules)*

¹¹⁶ Rule 19, *The United Nations Standard Minimum Rules for the Administration of Juveni/e Justice (the Beijing Rules)*

¹¹⁷ Rule 1 and 2, *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*.

¹¹⁸ Rule 5 and 6, *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*.

imprisonment are reprimand, warning, custodial discharge, restitution to victims, suspended sentence, probation and judicial supervision, community service order.¹¹⁹ The Tokyo Rules seek to increase community participation in the management of criminal justice, particularly in the treatment of offenders, while encouraging offenders to develop a sense of responsibility toward society.¹²⁰

3.3.4 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs)

Guidelines are very instructive when criminal justice authorizes to decide that it is most appropriate that juvenile is to be deprived of liberty either detention pending trial or imprisonment.

¹²¹Those means of deprivation of liberty should of course be for the shortest period if possible and attempts should be made to promote sense of responsibility among juvenile offenders and impart skills and attitude that help them to reintegrate back into society.¹²²To achieve these two aims the guidelines set out various rules regarding placement of juvenile them being ; separation from adult and the classification of juvenile offenders; physical environment and accommodation; education, vocational training, and work; recreation; medical care; return to community; etc.¹²³

3.3.5 United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)

Principally it aims at prevention of juvenile crimes through the efforts of the entire society including family, community, and media.¹²⁴ The guidelines indeed confirm that juveniles should be diverted from the criminal justice system.¹²⁵ The Kenyan laws align with these guidelines as will be discussed in the domestic frameworks.

¹¹⁹ Rule 8, *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*.

¹²⁰ Rule 1.2, *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*.

¹²¹ Rule 11, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs Rules)*

¹²² Rule 12, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs Rules)*

¹²³ Section IV, C-N, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs Rules)*

¹²⁴ Guideline 1, *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*.

¹²⁵ Guideline 58, *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*.

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

The treaty was adopted by the Organization of African Unity (OAU), now the African Union (AU), in July 1990 and came into effect in 1999. The preamble of the ACRWC acknowledges that, due to a child's physical and mental development, they should be legally safeguarded in environments that ensure freedom, dignity, and security.¹²⁶ The Charter also emphasizes that the best interests of the child must be a primary consideration in all matters affecting the child.¹²⁷ The Charter also stipulates that, in cases where a child is accused of violating the law, the primary goal should be their rehabilitation and reintegration into their family and society.¹²⁸ This charter shows that it encourages the practice of diversion across member states.

3.4 Conclusion

This Chapter focused on the question of what are the legal and institutional frameworks for diversion in Kenya, and how effective are they in addressing juvenile justice? The analysis of the Children Act No. 29 of 2022, the Diversion Policy of 2019, and the ODDP Diversion Guidelines & Explanatory Notes of 2019 revealed a framework that, while progressive in its intent, faces challenges in its implementation. The discretionary power afforded to prosecutors although unfettered, especially regarding petty and felony offenses, limits the reach of diversion and potentially excludes children who could benefit from restorative justice. The chapter concluded that the existing frameworks, while providing a foundation for diversion, require further refinement and a more consistent application to fully realize their potential in promoting the best interests of children in conflict with the law, while upholding Section 227 (2)(c) of the Children Act 2022.

¹²⁶ Preamble, *African Charter on the Rights and Welfare of the Child*.

¹²⁷ Article 4, *African Charter on the Rights and Welfare of the Child*.

¹²⁸ Article 17(3), *African Charter on the Rights and Welfare of the Child*

CHAPTER 4:

WHAT LESSONS CAN KENYA LEARN FROM NEW ZEALAND TO BENCHMARK THE BEST PRACTICES OF DIVERSION

4.1 Introduction

This chapter presents a comparative analysis with New Zealand to draw insights applicable to Kenya's context. Like Kenya, New Zealand has ratified the United Nations Convention on the Rights of the Child,¹²⁹ The ratification document establishes a system that is widely recognized for its mandated diversion, which supports restorative justice practices.¹³⁰ Like Kenya, New Zealand is a member of the Commonwealth and adheres to English common law.¹³¹ Given their shared colonial history, there is potential for implementing restorative justice in Kenya, at least at the normative level, as both countries' formal institutions have similar foundations. Additionally, New Zealand has robust legislation supporting the use of restorative justice, complemented by various laws and policies.¹³²

This chapter presents a comparative analysis of New Zealand's approach to diversion, focusing on the Children, Young Persons, and Their Families Act (CYPFA). It examines the key features of New Zealand's system, including its legal basis, implementation mechanisms, and outcomes, while highlighting the differences between the New Zealand context and the Kenyan context. The chapter then identifies key lessons that can be applied to enhance Kenya's approach to diversion. Finally, the study discusses how these lessons can inform policy recommendations for reforming the Diversion Policy of 2019 to better align with the best interests of children in conflict with the law, ensuring that diversion is accessible to a broader range of offenders, including those who have committed petty and felony offenses, in accordance with restorative justice principles.

¹²⁹ New Zealand ratified on 6 April 1993. See <https://search.yahoo.com/search/?p=New%20Zealand%20ratified%20on%206%20April%201993.%20See-https%3A%2F%2Fwww.just> on 2 January 2021.

¹³⁰ Schmid DJ, 'Restorative justice: A new paradigm for criminal justice policy', 91.

¹³¹ Driscoll S, 'Youth justice in New Zealand: A restorative justice approach to reduce youth offending', 136th international training course visiting experts' papers, Resource Material Series Number 75, 2008, 64- https://unafei.or.jp/publications/pdf/RS_No75/No75_10VE_O'Driscoll.pdf on 23 July 2020. Schmid DJ, 'Restorative justice: A new paradigm for criminal justice policy', 55.

¹³² Children, Young Persons, and Their Families Act (New Zealand). Some of these other laws are the Sentencing Act of 2002, Victims' Rights Act of 2002, Parole Act of 2002, the Corrections Act of 2004, the 2004 Ministry of Justice Principles of Best Practice, and the May 2002 Guidelines for Restorative Justice Processes in Prisons.

4.2 Diversion practices in New Zealand

New Zealand has made several legal reforms to reduce the formal court system's control over juvenile offenders. In 1989, the Children, Young Persons, and Families Act (CYPFA) was enacted to formalize and enhance the use of restorative justice for young offenders.¹³³ Sections 5 and 13 outline the key principles guiding the application of the CYPFA. For instance, the Act mandates the involvement of the child's family and community in all decisions impacting the child. Additionally, it prioritizes the best interests of the child.¹³⁴ The families of both the offender and the victim play a crucial role in guiding the process, addressing the offense, and creating and overseeing rehabilitation plans. Once this stage is reached, only these parties are allowed to meet and determine the outcome for the offender, with all other participants being excluded.¹³⁵

The diversion policy enables the use of alternative methods at any stage, either during or prior to entering the criminal justice system.¹³⁶ Mandatory diversion is a key feature of the juvenile justice system in New Zealand, applied in nearly all cases involving young offenders.¹³⁷ In New Zealand, state officials are not given the discretion to decide whether to divert cases. Instead, they are required to refer cases to a Family Group Conference (FGC) when the offender either pleads guilty or is found guilty by a competent authority.¹³⁸ This is different with how the Kenyan context work as the diversion policy gives unfettered powers of discretion to public prosecutors.¹³⁹

The FGC is an informal gathering including the police officer in charge of a case, family members, and friends of the young offender.¹⁴⁰ The juvenile offender, the victim, social workers, youth, a Care and Protection Coordinator, and any other person with a valid purpose to attend.¹⁴¹ Whatever the families decide is given legal effect and binds everyone, except to the extent that contravenes any of the general guiding principles.¹⁴² Although Diversion can be made mandatory , the

¹³³ *The Children, Young Persons, and Their Families Act* (New Zealand). Carruthers D, 'Restorative justice: Lessons from the past, pointers for the future', 3 -5.

¹³⁴ Section 5(d), *The Children, Young Persons, and Their Families Act* (New Zealand).

¹³⁵ Section 251(4) and 22(2), *The Children, Young Persons, and Their Families Act* (New Zealand).

¹³⁶ Van Ness D and Strong K, *Restoring justice: An introduction to restorative justice*, Routledge, 2014, 70 - 75.

¹³⁷ Carruthers D, 'Restorative justice: Lessons from the past, pointers for the future', 5 and 7.

¹³⁸ 'How restorative justice works <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works?> process on 26th January 2025.

¹³⁹ This has been discussed in Chapter 3 of this study.

¹⁴⁰ Luna E, 'Reason and emotion in justice' New Zealand Institute for Dispute Resolution, Victoria University of Wellington, Faculty of Law, Lecture Transcript, 5 July 2000 <https://www.scoop.co.nz/stories/GE0007/S00014.htm>

¹⁴¹ Section 22 and 251, *The Children, Young Persons, and Their Families Act* (New Zealand)

¹⁴² Section 250 (c), 267 and 268, *The Children, Young Persons, and Their Families Act* (New Zealand).

procedure is voluntary, and any involved person may choose not to participate. For example, the victim may choose to miss sessions. However, after considering the necessity of the victim's involvement and whether the focus is primarily on the offender rather than the victim, the process can continue.¹⁴³ The general procedure for the FGC is sealed under section 26 and 256 that allow the FGCs to regulate themselves within the confines of the general principles.¹⁴⁴ Strict time limits are set to ensure that justice is administered promptly. For instance, the Youth Justice Coordinator must arrange a Family Group Conference (FGC) within 21 days of receiving a case report.¹⁴⁵

A police officer is present to ensure order is maintained, such as preventing further victimization of the victim and addressing any potential instances of mob justice that could arise against the offender during the process.¹⁴⁶ They also have the chance to develop crime prevention and detection strategies, as the community's attention is directed toward addressing the root cause of a particular offense.¹⁴⁷ The Kenyan Diversion Policy also envisions the police playing a central role in the diversion process, with their responsibility being to request diversion for children in conflict with the law.¹⁴⁸ The involvement of the police in this process also strengthens public trust in them. The positive environment fostered by the procedure helps shift people's perceptions of the police from negative to positive.¹⁴⁹ Overall, the police develop a greater sense of involvement in the Family Group Conference (FGC), as the formal court system tends to restrict their participation due to procedural formalities.¹⁵⁰ The primary role of advocates is to attend the proceedings and ensure that the process adheres to legal requirements.¹⁵¹ They achieve this by ensuring that the juvenile offender's rights are fully upheld.¹⁵²

¹⁴³ Van Ness D and Nolan P, 'Legislating for restorative justice', 80.

¹⁴⁴ Section 26 and 256, *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁴⁵ Section 249(1), *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁴⁶ O' Driscoll S, 'Youth justice in New Zealand', 66; Schmid DJ, 'Restorative justice: A new paradigm for criminal justice policy', 132; *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁴⁷ Schmid DJ, 'Restorative justice: A new paradigm for criminal justice policy', 92.

¹⁴⁸ Ministry of Labour and Social Protection, Department of Children's Services, *Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, January 2021.7.

¹⁴⁹ Schmid DJ, 'Restorative justice: A new paradigm for criminal justice policy', 127.

¹⁵⁰ Nicholl C, 'Community policing, community justice, and restorative justice: Exploring the links for the delivery of a balanced approach to public safety', U.S. Department of Justice, Office of Community Oriented Policing Services, Washington DC, 1999, 149 - 152.

¹⁵¹ Schmid DJ, 'Restorative justice: A new paradigm for criminal justice policy', 132- 133

¹⁵² O' Driscoll S, 'Youth justice in New Zealand', 68 - 69.

However, not all cases in New Zealand are diverted. There are four situations where diversion does not occur. The first is when the offender admits the crime and opts to be tried in court, as diversion is a voluntary process.¹⁵³ Secondly, the Family Group Conference (FGC) is bypassed if the coordinator, family, and community members determine that holding an FGC will not yield positive outcomes.¹⁵⁴ This is most likely influenced by the offender's overall personality, as well as prior or subsequent offenses.¹⁵⁵ The CYPFA ensures impartiality by outlining key factors that determine the potential success of an FGC. Before deciding on diversion, the coordinator and community members must assess the offender's reaction, the nature of the offense, and the offender's involvement.¹⁵⁶

Third, when a juvenile offender is directly brought to court in cases involving murder or manslaughter.¹⁵⁷ This provision exists because murder and manslaughter cases are particularly emotional and serious, and since the victim is unable to participate in the FGC, it undermines the purpose of diversion. For this reason, a preliminary hearing should be held in court.¹⁵⁸ The fourth situation arises when it is deemed in the public's interest to address the matter through the formal system, with the CYPFA outlining specific criteria to assess what constitutes public interest.¹⁵⁹

In the context of diversion, the court serves a secondary role. While the FGC may be bypassed in certain cases, the CYPFA prevents the court from issuing orders unless an FGC has been conducted.¹⁶⁰ This means that, even in cases involving the most serious offenses, the court is required to instruct the coordinator to organize an FGC after the preliminary hearing. Additionally, if the court disagrees with any FGC proposal due to a violation of the guiding principles, it cannot impose its own recommendation but must instead order the FGC to reconvene.¹⁶¹

¹⁵³ Section 276, *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁵⁴ Section 248(1)(b), *The Children, Young Persons, and Their Families Act* (New Zealand)

¹⁵⁵ Section 248(2) and (3), *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁵⁶ Section 248(4) and (5), *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁵⁷ Section 246 and 272, *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁵⁸ Section 272(4), *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁵⁹ Section 281A, *The Children, Young Persons, and Their Families Act* (New Zealand)

¹⁶⁰ Section 281(1), *The Children, Young Persons, and Their Families Act* (New Zealand).

¹⁶¹ Section 281(2), *The Children, Young Persons, and Their Families Act* (New Zealand).

4.3 Informing Policy: Lessons from New Zealand’s Diversion System for Juvenile Justice Reform in Kenya

The legal system established by the CYPFA in New Zealand is comprehensive in defining and safeguarding the child's best interests through diversionary devices such as FGC, as previously mentioned. The types of cases that will be automatically diverted, as well as how, when, and where they will be diverted, are specified in legislation and, commendably, implemented in practice. Restorative justice is well-integrated into New Zealand's official juvenile justice system.¹⁶² The New Zealand approach is more consistent with international norms since it considers the best interests of the child, which is one of the goals of diversion. This is in contrast to Kenya, where the legislation provides prosecutors broad discretion in applying diversion in the country.

One of the key lessons that Kenya can learn from New Zealand is to make its Diversion policy mandatory instead of discretionary this is because a diversion policy must secure the protection of offenders' and victims' rights while participating in restorative programs.¹⁶³ New Zealand mandates diversion to FGCs for most cases involving young offenders who plead guilty or are found guilty. This contrasts with Kenya's Diversion policy, where discretion lies with prosecutors. By establishing mandatory diversion policies, Kenya can ensure that young offenders are directed towards restorative processes rather than punitive measures. This shift would align with international best practices aimed at protecting children's rights and promoting rehabilitation over punishment. The limit on diversion can be placed on capital offences such as murder, manslaughter and robbery with violence.

4.4 Conclusion

This chapter addresses the final research question of what lessons can Kenya draw from New Zealand’s implementation of diversion in juvenile justice? this chapter's comparative analysis of New Zealand's diversion system, particularly the Children, Young Persons, and Their Families Act (CYPFA), highlighted the potential benefits of a more inclusive approach. The findings suggest that Kenya could learn from New Zealand's structured and less discretionary system, which ensures broader access to diversion for young offenders. However, the chapter also acknowledged

¹⁶² Pfander S, 'Evaluating New Zealand's restorative promise: The impact of legislative design on the practice of restorative justice' 15 (1) *New Zealand Journal of Social Sciences Online*, 2020, 171

¹⁶³ United Nations Office on Drugs and Crime, *Handbook on restorative justice programmes*, 53

the contextual differences between the two countries and emphasized the need for careful adaptation of New Zealand's model to the Kenyan legal and social landscape. Ultimately, the chapter concluded that incorporating elements of mandatory diversion into Kenya's Diversion Policy of 2019 could enhance its effectiveness in promoting restorative justice and safeguarding the rights and well-being of children in conflict with the law.

CHAPTER 5:

FINDINGS, CONCLUSION AND RECOMENDATIONS

5.1 Introduction

This study sought to inquire into the extent to which the exclusion of petty offenses and felony cases from the Diversion Policy 2019 in Kenya exposes more children to the negative aspects of the formal criminal justice system, hindering their rehabilitation and reintegration. The central research question guiding this inquiry was: How can Kenya's Diversion Policy be improved to better align with the principles of restorative justice and the best interests of the child, ensuring wider access to diversion programs for juvenile offenders? This study employed a mixed-methods approach, combining legal analysis of Kenyan legislation and international instruments with a comparative case study of New Zealand's diversion system, to identify potential reforms for the Kenyan context.

5.2 Summary of Findings

The study in Chapter two examined the aims and importance of diversion in promoting the best interests of children in conflict with the law. The findings revealed that while diversion is intended to rehabilitate and reintegrate juvenile offenders, the discretionary nature of the Diversion Policy 2019 limits its effectiveness. The analysis highlighted that the exclusion of petty and felony offenses from mandatory diversion undermines the policy's stated goals, potentially exposing vulnerable children to the detrimental effects of formal criminal proceedings.

In chapter three, the study analyzed the legal and institutional frameworks for diversion in Kenya. It assessed their effectiveness in ensuring that the aims of diversion are achieved. The findings indicated significant gaps in the implementation of diversion, with prosecutors' discretionary powers leading to inconsistencies and potential biases. It also showed that Kenya's legal framework, while progressive in some aspects, falls short of fully embracing the principles of restorative justice and child-centered approaches, hindering the widespread adoption of diversion as a primary response to juvenile offending.

In chapter four, the study explored New Zealand's use of diversion in juvenile justice, with the goal of identifying key lessons that can inform and enhance Kenya's approach to diversion. The research

found that New Zealand's system, characterized by its emphasis on restorative justice principles and community involvement, has achieved considerable success in reducing recidivism and promoting positive outcomes for young offenders. This chapter demonstrated that a shift towards a more broad-based diversion, coupled with adequate resources and community support, can lead to a more effective and equitable juvenile justice system in Kenya.

5.3 Recommendations

To enhance the effectiveness of diversion policies in Kenya's juvenile justice system, several recommendations can be made:

1. Amend Guideline on Diversion Policy Clause 2.8 – Diversion Categories: Category Two - Diversion for Children (i) Children and Petty Offenses- This guideline should be amended so that juveniles who are charged with minor offenses are entitled to diversion by default. This would reduce unjustified prosecutorial discretion, such that all juveniles who face minor offenses are protected from the formal justice system and provided with rehabilitative chances.
2. Amend Guideline on Diversion Policy Clause 2.8 – Diversion Categories: Category Two - Diversion for Children (ii) Children and Felony Offenses- This guideline should be amended to increase diversion eligibility for juveniles who commit non-capital felonies. Doing so would align the policy with restorative justice standards, prioritizing rehabilitation over punishment even for more serious crimes while maintaining public safety.
3. Reform the existing Diversion Policy 2019 to align with the Children Act 2022-This is by making amending section of the diversion guidelines and explanatory notes to read as all cases are viable for diversion with the exception of capital offences in order to be in line with section 227 (2)(c) of the Children Act 2022 .This would eliminate the discretionary power currently held by prosecutors, ensuring that a greater number of children benefit from diversion opportunities and reducing the risk of arbitrary exclusions based on narrow criteria. This move will expand the eligibility criteria for diversion to encompass a wider range of offenses, including petty and felony cases. This approach aligns with the principles of the Convention on the Rights of the Child (CRC) and emphasizes the best interests of children, allowing more young offenders to access rehabilitative support.

5.4 Conclusion

The hypothesis of this study stated that the reconstruction of the Diversion Policy 2019 to remove the discretion given to prosecutors and making diversion be applied more broadly in that it applies for all offenses in that it applies to all offenses committed by children in conflict with the law, with the exception of capital offenses, would lead to the inclusion of more children in conflict with the law and would lead to more children benefiting from the diversion policy. Based on the research findings, this study supports the hypothesis. The evidence presented indicates that the current discretionary nature of the Diversion Policy 2019 limits its effectiveness and that a shift towards a more broad-based diversion, coupled with the recommendations outlined above, would significantly improve the juvenile justice system in Kenya, ensuring wider access to diversion programs and promoting positive outcomes for young offenders.

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