



**PROTECTION OF CHILDREN’S RIGHTS ONLINE: PARENTAL
RESPONSIBILITY IN RELATION TO THE SOCIAL MEDIA USE OF CHILDREN
IN KENYA.**

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DECLARATION

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

Signed:

Date:

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

Signed:.....

[Supervisor's Name]

ABSTRACT

The digital revolution has ushered in an era where technology profoundly shapes the lives of children from the earliest stages of their development. In the contemporary landscape, children grow up in an interconnected world where smartphones, tablets, and social media platforms are integral to their daily existence. This digital transformation has provided unprecedented opportunities for learning, socialisation, and creativity, but it has also introduced complex challenges related to privacy, security, and online exploitation. For instance, the digital transformation presents numerous legal and ethical challenges pertaining to the creation of social media profiles for children under 13 in Kenya by their parents.

Situated within the context of child protection, enshrined in the *Children Act, 2022*, the study proposes to investigate the risks of privacy and data protection infringement and exploitation facing minors being deliberately exposed online by their own parents. Such risks are likely to include online sexual exploitation, monetary exploitation, exposure to predatory organised crime, abuse, as well as child labour.

The methodology the research relies on is qualitative, and the primary sources include the *Constitution of Kenya (2010)* and statutes such as the *Children Act, 2022*, the *Employment Act, 2007*, the *Data Protection Act, 2019*, international statutes and judicial decisions. This research uses secondary sources, including journal articles and books. The theoretical frameworks the study shall use to analyse the problem are Erving Goffman's theory, Communication Privacy Management theory and the patriarchal theory of children as property. The three chosen theoretical frameworks offer complementary perspectives to help fully understand concerns around minors' online exposure by their parents. Erving Goffman's theory provides insights into the dramaturgical aspects of social interaction, shedding light on how individuals present themselves online and the potential implications for minors whose digital identities are curated by their parents. Communication Privacy Management theory helps in the comprehension the complexities of privacy dynamics within the family unit and how they are expressed in the digital world by investigating how individuals manage private information in interpersonal relationships. The patriarchal theory of children as property provides a critical perspective through which to investigate power dynamics within familial interactions, specifically how parental authority and control influence minors' digital exposure. The conclusion of this research is likely to be that the creation of social media accounts for children by their parents from a young age is ethically and legally hazardous for

it infringes on the child's rights and protection such as children's right to privacy and data protection, and protection from monetary and sexual exploitation. This dissertation also suggests a proactive strategy involving education, awareness, and regulation to navigate the complexities of the digital landscape for minors in Kenya.

LIST OF ABBREVIATIONS

United Nations Convention on the Rights of the Child	UNCRC
Fair Labour Standards Act	FLSA
Communication Privacy Management	CPM
African Union	AU
Committee on the Rights of the Child	CRC
African Charter on the Rights and Welfare of the Child	ACRWC
Children's Online Privacy Protection Act	COPPA
Federal Trade Commission	FTC
General Data Protection Regulation	GDPR
Parental Responsibility Agreement	PRA
Generation Z	Gen Z

TERMINOLOGIES AND DEFINITIONS

Gen Z - The generation of people born between 1997 and 2012.

Kidfluencer - Persons under the age of 18 who have been posted online on numerous social media platforms producing high numbers of viewers and followers, usually in the context of supporting or advertising goods, services, or a way of life decisions and often earning money for sponsored content.

LIST OF LEGAL INSTRUMENTS

List of National Instruments

1. Constitution of Kenya [2010]
2. Children Act [Act No 29 of 2022]
3. Data Protection Act [Act No 24 of 2019]
4. Employment Act [2012].

List of Foreign Instruments

1. Children's Online Privacy Protection Act [21 April 2000]
2. Financial Advisory and Intermediary Services Act [2002] [South Africa].

LIST OF CASES

1. *Gillick v West Norfolk*, House of Lords Judgement on 6 of December 1986.
2. *Centre for Child Law and Others v Media 24 Limited and Others* (2019),
Constitutional Court of South Africa.
3. *Nubian Rights Forum and 2 others v Attorney General and 6 others* (2020) eKLR.
4. *MAK v. RMAA & 4 others* (2022)
5. *Charles Muturi Macharia & 6 others v. Standard Group & 4 others* (2022)

CHAPTER ONE: INTRODUCTION

1.1 Background

Social media first emerged in the 1970s and 1980s with early internet platforms like Usenet and Bulletin Board Systems (BBS)¹ The users of these platforms were primarily composed of computer hobbyists, technological enthusiasts, and individuals seeking specialised information or community engagement. Users of social media have evolved alongside the development of platforms. It wasn't until the early 2000s, with the introduction of platforms such as Friendster, MySpace, and Facebook, that social media took off.² These platforms enabled users to build profiles, communicate with friends and family, and exchange information such as images and status updates. This broadened social media users to cater to diverse demographics and interests. These included adults who were especially born during or after the millennial era making up the majority of social media users and younger generations such as the 'Gen Z'. As social media grew in popularity, it continued to evolve and spread, with new platforms such as Twitter, Instagram, and TikTok emerging to satisfy users' evolving demands and preferences.³

Simultaneously, the growth of influencer culture and the increasing relevance of social media in moulding public opinion and consumer behaviour has resulted in a greater emphasis on amassing a vast number of followers and creating viral content.⁴ The individuals behind the pages amassed enormous followings on social media sites like YouTube, Instagram, and TikTok, giving them a new kind of celebrity status known as Internet stardom. Influencers are a new phenomenon that emerged from social media as technology and the Internet advanced. An influencer is a person who modifies or affects the behaviour of others.⁵

In light of this, parents began constructing social media profiles for their young children to exhibit their children's attractiveness or talent and build a following that may be monetised

¹ Boyd, D M, Ellison N B, 'Social network sites: Definition, history, and scholarship' 13 *Journal of Computer-Mediated Communication* 1, 2007, 4.

² Andreas M, Michael H, 'Users of the world, unite! The challenges and opportunities of social media' 53 *Business Horizons* 1, 2010, 62.

³ Salem A, Mengyan M, 'A tale of four platforms: motivations and uses of Facebook, Twitter, Instagram and Snapchat among college students?' 3 *Sage Journals* 1, 2017, 3.

⁴ Cate S, Caroline L, Susan H, Sonja M, Monique C, 'What's the worry with social anxiety? Comparing cognitive processes in children with generalized anxiety disorder and social anxiety disorder' 48 *Child Psychiatry and Human Development* 5, 2017, 786-795.

⁵ Cambridge Dictionary, 4 ed.

through sponsorships and endorsements.⁶ The practice of parents creating and maintaining social media identities for their young children, who are not yet of legal age to do so, is becoming more and more common. More than 1,000 parents with children under the age of two participated in a Gerber.com survey conducted in the United States, and almost forty percent of mothers between the ages of eighteen years and thirty-four years had set up social media accounts for their children before the first birthday, and another 7% did the same before the second.⁷ To be precise, in 2010 ninety-two percent of youngsters had an online presence by 2 years old.⁸ This has brought about a practice of ‘baby influencers’ and ‘kidfluencers’, in which parents manage and monetise their children's social media identities, which has received much attention.

Noteworthy is the fact that within the framework of this dissertation, child influencers who are 13 years of age or younger are referred to as ‘kidfluencers.’ Due to the fact that many social media networks, like Facebook⁹, Instagram¹⁰, and TikTok¹¹, forbid users from opening accounts without parental agreement, this age limit is important. Put another way, as it is illegal for minors under the age of 13 to use these platforms alone, any ‘kidfluencers’ on these platforms must have their parents' or guardians' consent and active participation.

Samia Ali, the daughter of Adam and LaToya Ali, was one of the first cases of American ‘kidfluencers’.¹² Influencers Adam and LaToya Ali on YouTube and Instagram started posting about Samia's upcoming birth in 2014 when Ms. Ali found out she was expecting. "Samia's birth video is on YouTube, so she pretty much was born into social media," Mr. Ali said.¹³ Other popular figures have been using their children since the rise in popularity of social media.

⁶ Deagracias, Danah B, ‘It’s complicated: the social lives of network teens’ 44 *Journal Youth Adolescence* 7, 2015, 117 -1174.

⁷ UNICEF Innocenti Research Brief, Estimates of internet access for children in Ethiopia, Kenya, Namibia, Uganda and the United Republic of Tanzania, November 2022, 3.

⁸ [digitalbirthsglobaldraft2 \(typepad.com\)](https://digitalbirthsglobaldraft2(typepad.com)) on 6 October 2010.

⁹ https://www.facebook.com/help/570785306433644/?helpref=search&query=managing%20your%20account&search_session_id=e90c4cca7a80c556b05f6c4404096922&sr=13

¹⁰ [https://help.instagram.com/155940534568753`](https://help.instagram.com/155940534568753)

¹¹ <https://www.tiktok.com/legal/page/global/childrens-privacy-policy/en> on 1 January 2023.

Eekelaar ‘Parental Responsibility’ (1991) JSW & FL 37.

¹² Sapna Maheshwari, 'Online and earnings thousands, at age 4: meet the kidfluencers' The New York Times, 1 March 2019

<https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> on 1 March 2019.

¹³ Sapna Maheshwari, 'Online and earnings thousands, at age 4: meet the kidfluencers' The New York Times, 1 March 2019

<https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> on 1 March 2019.

In Kenya, social media influencer culture has recently taken the masses by storm and laid its foundation on people's minds. Moreover, as the influencer culture trickles down into the new norm, so does the 'kidfluencing' practice. Milly Chebby Mwangi, a prominent influencer mom in Kenya, is an example of a parent publicly exposing their child's intimate life. She released a video of her child showering in a basin just after undergoing major surgery.¹⁴ There was an uproar on her page, which later led to the video being deleted. That was enough to raise the question; "to what extent should children's private lives be shared online?"

In an article by Nation Africa in 2020, the various reasons why parents create a social media account are discussed.¹⁵ Still, the common factor across almost all stories is the desire to share pictures and videos for memories. While the intention is harmless, what is shared is done under the assumption that it is 'right' which may not be the case in the end. In an article by Kenyabuzz, examples of popular Kenya 'kidfluencers' are mentioned and most of them have an account already created from birth or just shortly after being born.¹⁶

Parents creating social media profiles for their children at such a young age are motivated by a number of factors including a desire to document their child's life, share precious moments with friends and family, and even explore opportunities for financial gain through sponsored content and brand partnerships.¹⁷ While these goals may appear well-meaning, they expose numerous children to various dangers in the digital world. With this, parental responsibility must be re-analysed in order to protect their children's safety.

Parental responsibility is enshrined in Article 53(1)(e) of the *Constitution of Kenya* (2010), providing that every child has the right to parental care and protection.¹⁸ Moreover, Section 31 of the *Children Act*, 2022 defines parental responsibility as "all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child."¹⁹ The

¹⁴ Anita Murage, 'Why we're parenting under the social media limelight' Nation Media Group, 30 September 2020 <https://nation.africa/kenya/life-and-style/dn2/why-we-re-parenting-under-social-media-limelight-2452890> on 30 September 2020.

¹⁵ Anita Murage, 'Why we're parenting under the social media limelight' Nation Media Group, 30 September 2020 <https://nation.africa/kenya/life-and-style/dn2/why-we-re-parenting-under-social-media-limelight-2452890> on 30 September 2020.

¹⁶ Maureen Kasuku, 'Insta famous kids in Kenya' Kenyabuzz, 21 June 2022 <https://kenyabuzz.com/lifestyle/insta-famous-kids-in-kenya> on 21 June 2022.

¹⁷ Rae Smith, 'Parent-Managed Social Media Profiles for Children' 61 *Old Dominion University* 1, 2019, 1.

¹⁸ Article 53(1)(e), *Constitution of Kenya* (2010).

¹⁹ Section 31, *Children Act* (Act No 29 of 2022).

parents' responsibilities have been divided into the ability to make critical decisions concerning a child. Article 53(1)(e) of the *Constitution of Kenya (2010)* and section 31 of the *Children Act, 2022* both state that parental duty shall never be relinquished.

Two ideas have been represented by parental responsibility. The first is that parents must be dutiful to their children, and the second is that the duty for child care belongs to parents, not to the state.²⁰ Lord Mackay LC summed up the first idea by stating that the overwhelming aim of parental responsibility is caring for and raising the child to be a physically and ethically developed adult.²¹ This recalls the historic decision in *Gillick vs West Norfolk and Wisbech Area Health Authority*²², whereby Lords Fraser and Scarman stressed that parental power to manage a child existed for the benefit of the child, not the parent. However, now parents expose their children's private lives to their followers in the hope of amassing more followers and gaining brand promotions or advertising deals.

Children in Kenya, as in many other parts of the world, are growing up in an interconnected world where access to information and digital platforms is an essential part of their everyday lives.²³ Although this can be seen as an opportunity for children's growth and development in today's digital world, technology is a double-edged sword whereby, along with the digital transition, comes a host of challenging new issues, particularly in the area of child protection. Furthermore, present child labour rules do not adequately safeguard 'kidfluencers', leaving them open to potential exploitation.²⁴

²⁰ Gloriam L, 'Parental Responsibility towards a Child in Kenya'.

²¹ Eekelaar J, 'Parental responsibility: state of nature or nature of the state?' 13 *Journal of Social Welfare and Family Law* 1, 2008, 13.

²² *Gillick v West Norfolk*, House of Lords Judgement on 6 of December 1986.

²³ UNICEF Innocenti Research Brief, Estimates of internet access for children in Ethiopia, Kenya, Namibia, Uganda and the United Republic of Tanzania, November 2022, 3.

²⁴ Munirat Suleiman, 'Is Kidfluencing Child Labor? : How the Youngest Influencers Remain Legally Unprotected', *Culawreview*, 2022, 3 - [Is Kidfluencing Child Labor?: How the Youngest Influencers Remain Legally Unprotected — Columbia Undergraduate Law Review \(culawreview.org\)](https://culawreview.org) on 16 June 2022.

1.2 Statement of the Problem

The practice of ‘kidfluencing’ in Kenya has raised significant concerns about child safety, privacy, and well-being. Parents frequently create social media identities for their children, often from birth, which has led to questions about the protection of children's rights, the commodification of childhood, and the significance of parental responsibility. This practice exposes children to potential internet threats such as predatory behaviour and economic exploitation through brand deals while also raising legal issues of the violation of children’s rights of privacy, data protection, and protection against exploitation. Furthermore, the present Kenyan law does not answer the question of parental liability when parents expose their children to these threats and violations and also does not provide specific legal protection for these ‘kidfluencers’. As the digital world becomes increasingly interconnected, this dissertation explores the challenge of balancing parental rights and obligations with the legal requirement of protecting children's rights and interests.

1.3 Aim

The purpose of this dissertation is to provide a thorough and logical examination of the legal and ethical difficulties raised by the practice of parents creating social media profiles for children under the age of 13 in Kenya, with an emphasis on the legal consequences. The research will analyse the legal issues involved and assess different perspectives on exploitation by critically investigating the commodification of childhood and sexual exploitation within the framework of ‘kidfluencing’. The study also aims to evaluate the risks to children's privacy, security, and well-being in the digital age, as well as potential violations of their rights and protection as outlined in the *United Nations Convention on the Rights of the Child*, 20 November 1989 (UNCRC), the *Children Act*, 2022 and the *Constitution of Kenya* (2010) in relation to the role of the best interest of the child in ‘kidfluencing’ practices. This dissertation makes the case that eliminating ‘kidfluencing’ or at the very least controlling it is essential to upholding children's rights and advancing their best interests.

Furthermore, the research intends to suggest recommendations and regulatory actions to safeguard children's safety and well-being in a growing digital ecosystem, building on current legal and ethical frameworks as well as international best practices.

1.4 Statement of Objectives

The following are the research objectives:

- To analyse the protection of children's rights, from the point of view of the legal framework on parental responsibility and children's use on social media in Kenya as well as internationally.

- To examine court jurisprudence in matters of children's rights protection in the digital space.

- To present the findings and make recommendations on the best mechanism that Kenya can adopt to protect the rights of children within the digital space and balance parental rights and obligations with children's rights and protection.

1.5 Research Questions

- From the perspective of the protection of children's rights, to what extent do parents contribute to the infringement of these rights by creating and managing social media profiles for them?

- What jurisprudential standards have been set in the determination of cases regarding the balance of parental responsibility and children's rights and protections in Kenya?

1.6 Hypothesis

In Kenya, parents' development of social media profiles for children under the age of 13 endangers children's privacy, security, and well-being while violating their rights and protection as contained in the *Children Act, 2022* and the *Constitution of Kenya (2010)*. As a result, there is an urgent need to reconsider the ethical and legal consequences of this activity and adopt regulatory measures to protect the rights of children in the digital age.

1.7 Justification of the Study

The study on parents creating social media identities for children under the age of 13 in Kenya is critical. The digital revolution has drastically changed children's lives, with technology becoming a vital part of their daily lives. Children are growing up in an interconnected environment in which smartphones, tablets, and social media networks are significant. Their safety and well-being in the digital era are called into question by this.

The dangers of parents creating and managing social media profiles for their young children are varied. These dangers include invasion of privacy, security problems, and the possibility of exploitation. The necessity to evaluate the degree of parental responsibility while completely appreciating the significance of these activities in the context of modern child safety is what motivates this research.

Child protection is not just a moral obligation in Kenya, but it is also mandated by legislation. The *Children Act, 2022* and the *Constitution of Kenya (2010)* both establish children's rights and protections. However, the extent to which these legal frameworks apply to the digital sphere, as well as the ethical implications of this conduct, must be thoroughly examined.

Furthermore, this is not a Kenyan problem; it is a global phenomenon. As a result, the findings of this study have broader worldwide implications. This research can help to advance the worldwide conversation about child safety and digital ethics by providing useful insights into the issues children experience in the digital era and the solutions required to protect their interests.

One practical result of this research might be the creation of policies, guidelines, and recommendations. It can provide vital help for the creation of successful policies aimed at safeguarding children in the digital era by identifying difficulties and potential solutions.

Furthermore, this research contributes to the academic knowledge of a current issue at the nexus of child safety, law, ethics, and technology. It thoroughly examines the practices and difficulties confronting children and parents in an era marked by widespread digital devices.

The findings of this study can be used to educate parents, educators, legislators, and the general public on the possible hazards of early social media exposure for children. Education and awareness are essential for promoting appropriate digital parenting practices and ensuring children's safety and well-being in the digital realm.

Finally, the urgent necessity to address the multifaceted concerns surrounding parents developing social media profiles for their young children in Kenya justifies this study. It has the ability to influence policy, improve child safety, and contribute to scholarly understanding of this new digital phenomenon.

1.8 Theoretical Framework

The patriarchal theory of children as property, the communication privacy management theory, and Erving Goffman's theory provide the theoretical framework that evaluates the research objectives.

1.8.1 Erving Goffman's Theory

Erving Goffman, an acclaimed sociologist, pioneered the dramaturgical perspective, which holds that people engage in social interactions as if they were performers on a stage, intentionally manipulating the images they give others.²⁵ Goffman's theory will be applied in the context of parents creating social media accounts for their children to investigate the symbolic interactions between parents, children, and the online audience. By examining the performative aspects of parental actions on social media, we can uncover the underlying motivations, societal expectations, and the impact of these digital performances on familial relationships.²⁶

²⁵ Erving G, *The presentation of self in everyday life*, 2 ed, University of Edinburgh Social Sciences Research Centre, 39 George Square Edinburgh, 1956, 152-160.

²⁶ Livingstone S, Blum-Ross A and Olafsson K, 'In the best interest of the child? Informational rights and responsibilities of parents, children and state in the digital age', 13 *Journal of Children and Media* 1, 2019, 1-5.

1.8.2 Communication Privacy Management Theory

Sandra Petronio's Communication Privacy Management Theory focuses on how individuals navigate privacy limits in communication.²⁷ This theory will be employed to explore the complexities of information sharing inside the family unit in the context of children's social media accounts created by parents. The framework will shed light on the problems and ramifications of parental decisions to publicly expose portions of their children's lives on social media by analysing the negotiation of privacy boundaries between parents and children in the digital sphere. The application of this theory to investigate the intricacies of information sharing within the family unit in the context of children's social media accounts created by parents has been addressed in several studies. For example, Miltgen and Peyrat-Guillard used this theory to analyze the disclosure of children's personal information on Facebook by parents.²⁸

1.8.3 Patriarchal Theory of Children as Property

The Patriarchal Theory of Children as Property is a concept developed by feminist scholars to analyze the historical and societal frameworks that position children, particularly daughters, as property owned and controlled by their parents.²⁹ This theory will be applied in the context of social media use to investigate whether parents, knowingly or unconsciously, maintain patriarchal norms by exerting control over their children's online presence. The investigation will look into power dynamics within the family and the implications of treating children as digital property.

1.9 Literature review

The purpose of this summary of previous research is to help set the scene for what has been said and done on the topic in the past by providing an overview of the key arguments,

²⁷ Sandra P and Irwin A, *Boundaries of privacy*, State of New York Press, New York, 2002, 56-70.

²⁸ Miltgen C and Guillard D, 'Cultural and generational influences on privacy concerns: A qualitative study in seven European countries', *67 Journal of Business Research* 1, 2014, 15-20.

²⁹ Cosslett R, 'We all want better for our children than we had - but Britain's housing crisis is crushing that dream' *The Guardian*, 21 July 2023
<https://www.theguardian.com/commentisfree/2023/jul/21/children-britain-housing-crisis-market-renting> on 21 July 2023.

findings, and conclusions.. Existing work on the regulation of child influencers, or "kidfluencers," in the context of social media has primarily focused on legal issues, family autonomy, and the potential exploitation of children online. However, there is a gap in the Kenyan legal context.

1.9.1 Marina Masterson: Navigating the Legal Landscape of Child Influencers

From an American standpoint, Marina Masterson talks about how "kidfluencers" on social media should be included in the child actor legislation. There have previously been unsuccessful attempts. Families might be compensated through commercials, gifts, and sponsorships, which also makes compensation regulations difficult.³⁰

Masterson discusses the relationship between child labour laws and family law. Though there are some constraints, parents generally have the freedom to raise their children in their homes any way they deem proper. Masterson points out that although parents may consider the things they do to their children to be "play," it is actually work. When parents post their children on the Internet, they obtain both money and celebrity. As a result, children may be exploited at the price of their well-being and education. A compromise must be struck between family liberty and child protection.³¹

The federal Fair Labour Standards Act (FLSA), which was accepted and regulates child labour across America, only applies to coercive labour, meaning child performers are not included because performing is seen as an opportunity for children. Acting is now done at the state level, with some governments offering strong protection and others offering none at all.³² According to Masterson, laws pertaining to child influencers would apply to them all since their work would not be seen as oppressive because it benefits children rather than harming them.

Conversely, Masterson suggests that federal regulations would be more appropriate for providing protection for social media output, just as they would be for providing protection

³⁰ Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 169 *University of Pennsylvania Law Review* 2, 2021, 581-582.

³¹ Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 580-582.

³² Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 585-586.

for online advertising and entertainment.³³ Masterson talks about the Coogan regulation, which was implemented for child actors in California after a young actor discovered that his parents had embezzled his money. According to this regulation, parents must invest 15% of the earnings of their child in a trust until the child turns eighteen years old. According to Masterson, other reasons, including financial ones, can hurt child actors - lengthy hours, hazardous workplace conditions, and negative effects on a child's mental and physical well-being. As a result, California has imposed daily work hours limitations on children that differ according to age groups.³⁴ Similar issues concern 'kidfluencers', and California's definition of the "entertainment industry" is broad enough to cover social media creations. Still, it would be preferable to have distinct regulations for this topic.³⁵

Unlike child acting, the majority of social media content is produced at home and under Masterson indicates that although though the children are mentioned in several posts and the sponsors' agreements expressly state that the children must be present, parents regularly assert that they are the ones who should be doing the work. Because of this, the children's parents and the organisation that sponsors them may take advantage of them. It is harder for governments to enforce regulations on social media goods when family autonomy and self-expression are present. What kinds of social media work qualify as labour needs to be established.³⁶ Masterson adds in her statement that unpaid social media products should not be subject to labour law because they are a form of self-expression. When creating content for money, however, personal expression and actual work must be separated.³⁷

1.9.2 Neyza L. Guzman: Child Labour Laws and the Online Entertainment Industry

Neyza L. Guzman's "The Children of YouTube: How an Entertainment Industry Gets Around Child Labour Laws" begins with a discussion of historical employment of children and the variety of settings in which they are employed. Guzman claims that children are exposed to excessive hours and little pay because they lack the capacity to effectively fight for themselves. Child labour was especially prevalent in the United States throughout the

³³ Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 586.

³⁴ Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 587-588.

³⁵ Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 589.

³⁶ Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 593-594.

³⁷ Marina A, 'When play becomes work: Child labor laws in the era of "kidfluencers"', 595.

Industrial Revolution. The family would benefit from the child's earnings, and the company would often pay the parents directly. Guzman draws a comparison between this and the present situation, when YouTube pays the parents directly instead of the child.³⁸ Despite the fact that numerous federal and provincial laws have been passed to address different facets of child labour, they are out of step with the advancements in technology. As of yet, they neither provide youngsters aired on websites like YouTube with protection nor any type of financial or non-financial compensation. The comment explores these limitations as well as the ways in which current laws fail to acknowledge minors using the Internet as hired actors. Guzman also covers the background of child performers and the 1939 Coogan Law's effects on the regulations governing child actor work.³⁹

Guzman draws attention to the fact that child performers like as Shirley Temple have historically been recognised for giving love when it was most needed—during the Great Depression, for example. It was necessary to make decisions, but they also needed to be regulated because the government's position on child labour had changed. Should all forms of child labour be prohibited and regulated, or only those deemed to be oppressive? The audience would lose out on the child actors who brought them so much joy and happiness if they went with the first option. It was deemed non-oppressive due to the positive contributions made by young actors, and as a result, it was not included in the laws that were later drafted..⁴⁰

The commentary delves into the history and significance of YouTube, tracing the evolution of user-generated material on the site and its eventual development into a partner programme that enabled users to monetarily monetize their videos by adding movie trailers..⁴¹ Guzman claims that YouTube's focus, in this case, has been to avoid losing commercials and revenue rather than removing harmful information from the videos.⁴² YouTube has taken down and demonetized videos that include disturbing content about children, but it doesn't seem to be

³⁸ Kimberlianne P, 'Does Exploiting a Child Amount to Employing a Child - The FLSA's Child Labor Provisions and Children on Reality Television', *17 UCLA Entertainment Law Review* 1, 2010, 87.

³⁹ Kimberlianne P, 'Does Exploiting a Child Amount to Employing a Child - The FLSA's Child Labor Provisions and Children on Reality Television', 89.

⁴⁰ Kimberlianne P, 'Does Exploiting a Child Amount to Employing a Child - The FLSA's Child Labor Provisions and Children on Reality Television', 91.

⁴¹ Kimberlianne P, 'Does Exploiting a Child Amount to Employing a Child - The FLSA's Child Labor Provisions and Children on Reality Television', 93–94.

⁴² Kimberlianne P, 'Does Exploiting a Child Amount to Employing a Child - The FLSA's Child Labor Provisions and Children on Reality Television', 95.

doing anything about channels that don't follow the law regarding child labour and whether or not children get paid for their labour. YouTube channels are consequently disregarded..⁴³

1.9 Methodology

The research design of this study is a qualitative case study technique. This design is deemed appropriate because it allows for an in-depth analysis of the legal problems involved with parents creating social media identities for children under the age of 13 in Kenya. The case study design is consistent with the research questions and hypothesis since it allows for a comprehensive analysis of the multiple features of 'kidfluencing.' For example parents' motivation to introduce their children into the 'kidfluencing' culture and the laws surrounding it. This method enables an in-depth examination of specific situations, resulting in rich, culturally embedded insights into the phenomenon. The approach also corresponds to the study's ultimate goal, which is to give a complete analysis of the legal issues of the violation of children's rights and protections and the parental responsibility related to this practice.

The design of the case study is suitable for the time and resource restrictions. It enables a focused exploration of a small number of instances, ensuring a thorough analysis while addressing the practical constraints inherent in a qualitative research project. The case study design excels at providing a deep, context-specific understanding of the research problem. It is especially useful for investigating complicated social issues when environmental elements are important.⁴⁴ However, drawbacks include the possibility of difficulties generalizing findings to larger groups and the subjective nature of qualitative data interpretation.⁴⁵

The case study will include specific instances of Kenyan parents creating social media identities for their children. To guarantee a comprehensive analysis of the moral and legal ramifications of 'kidfluencing,' a number of examples will be examined. The diversity of socioeconomic backgrounds, cultural contexts, and the sort of online content disseminated will all be factors in case selection. This guarantees that you have a thorough understanding of the phenomenon.

⁴³ Kimberlianne P, 'Does Exploiting a Child Amount to Employing a Child - The FLSA's Child Labor Provisions and Children on Reality Television', 96.

⁴⁴ Robert K, *Case Study Research and Application*, 6ed, Design and Methods, Thousand Oaks, 2018, 15.

⁴⁵ Stake R, *The art of case study research*, Sage Publications, Thousand Oaks, 1995, 49-68.

1.10 Limitations

The predicted drawback of the study is the inability to employ quantitative data due to the semester's short time frame for writing the dissertation. Due to the impossibility of collecting field data, the research will be mostly based on qualitative data.

1.11 Chapter Breakdown

- Chapter one is the introduction to the research. The study starts with the background, which describes the history of parents in Kenya setting up and maintaining social media accounts for their kids. It then goes on to state the problem, the goals and research questions, the theoretical framework, the literature review, the methodology, and the rationale behind the research.
- Chapter two discusses the theoretical framework used to analyse the problem stated.
- Chapter three examines the legal framework that governs children's rights and parental responsibility in Kenya.
- Chapter four analyses the jurisprudence of the courts in Kenya in the determination of matters regarding parental responsibility and the protection of children's digital rights.
- Chapter five covers the research findings, subsequent recommendations, and the conclusion of the research.

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1 Introduction

Chapter one created the basis by deconstructing the dynamics of 'sharenting' and 'kidfluencing,' laying the groundwork for a deeper investigation into the reasons and repercussions of parents sharing their children's lives on social media. In this chapter, we will be guided by three key theories: Erving Goffman's social theory, the Communication Privacy Management (CPM) theory, and the patriarchal theory of children as property which will provide insights into the underlying motivations, the delicate balance of privacy and parental authority and control in the arena of 'sharenting.'

2.1 Erving Goffman's Theory

Erving Goffman's Dramaturgical Theory, which views social interactions as theatrical performances, proves particularly pertinent for analysing the topic of parents having social media profiles for their children. The essence of the idea is represented by the metaphor of social life as a staged drama, in which individuals strategically exhibit themselves, much like performers on a stage.⁴⁶ This theory is appropriate for the analysis since it emphasises symbolic interactions, impression management, and the distinction between the front stage (public persona) and back stage (private self).⁴⁷ Goffman's paradigm offers a conceptual lens through which to investigate the symbolic features of content creation, the deliberate constructing of online personas, and the dynamic interplay between parents and their children in the digital arena.

In order to investigate the motivation of parents sharing pictures and videos of their children on social media to the extent of even opening profiles and managing them on their behalf, let's first look at Erving Goffman's social theory, which is founded on symbolic

⁴⁶ Erving G, *The presentation of self in everyday life*, 2 ed, University of Edinburgh Social Sciences Research Centre, 39 George Square Edinburgh, 1956, 152-160.

⁴⁷ Marwick A and Boyd D, 'To See and Be Seen: Celebrity Practice on Twitter' 17 *Convergence: The International Journal of Research into New Media Technologies* 2, 2011, 139-158.

interactionism.⁴⁸ The theoretical framework of Erving Goffman facilitates an investigation of the self-representation motive that underlies the sharenting propensity of parents.⁴⁹ When parents use their children to exhibit themselves, they are typically demonstrating their resolve to overcome parent-related challenges. Seeing as it enhances the parents' self-representation when they are showcasing their talents, portraying their ideal selves, or capturing genuine parenting moments, the inclusion of children is, therefore, intentional rather than coincidental.⁵⁰

In "Sharenting and the Extended Self: Self-representation in Parents: Instagram Presentation of their Children," Steven Holiday and colleagues did research. Following the collection of 125 Instagram posts at random, the researchers conducted a comparative analysis of 25 captions related to the posts.⁵¹ In order to counteract the researcher's biases, the posts were gathered via "hashtag sampling" and Instagram's "Explore Posts" section.⁵² Following an evaluation of the pictures' explicit and implicit meanings, the researchers identified recurrent and overlapping themes, which were then ranked in order of frequency.⁵³ The researchers came to the conclusion that 'sharenting' fell into three main categories: intimate, promotional, and polished.⁵⁴

First of all, well-crafted postings had a nice visual appeal, and the information was used to project the ideal version of themselves.⁵⁵ Even in cases when the child was included in these publications, their role was merely that of a vehicle for communicating their parents' flawlessness.⁵⁶ Second is the promotional posts. The promotional posts were purposefully designed to showcase the parent's skills and abilities, even though they were frequently

⁴⁸ Shahad H, 'Examining the Phenomenon of Sharenting', 14 *Canadian Journal of Family and Youth* 2, 2022, 266-271.

⁴⁹ Shahad H, 'Examining the Phenomenon of Sharenting', 266-271.

⁵⁰ Shahad H, 'Examining the Phenomenon of Sharenting', 266-271.

⁵¹ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 20 *Popular Communication* 1, 2022, 1-15.

⁵² Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁵³ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁵⁴ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁵⁵ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁵⁶ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

visually appealing.⁵⁷ These images featured children even when the emphasised abilities had nothing to do with being a parent.⁵⁸ The posts only emphasised the children's personal lives. The self-representation motive is supported by the parents who engaged in this type of 'sharenting', who appeared to use their children as promotional instruments.⁵⁹ If the parents' ability to share was a means of promoting themselves, then their children would be seen as mirror images of themselves that allow the parents to express who they are.⁶⁰

The last type of sharenting was a way to capture a memorable moment of parenthood in an authentic way and turn it into a photograph.⁶¹ Since the parents are the ones taking the photos, they are not included in the content of these postings, which feature the children more frequently.⁶² The parents' attempts to let the audience into their flawed backstage persona in exchange for maintaining the moment's closeness nonetheless feature themes of self-representation.⁶³ When parents use their children to exhibit themselves, they are typically demonstrating their resolve to overcome parent-related challenges.⁶⁴ Because it enhances the parents' self-representation when they are showcasing their talents, portraying their ideal selves, or capturing genuine parenting moments, the inclusion of children is therefore intentional rather than coincidental.⁶⁵

2.2 The Communication Privacy Management Theory

Sandra Petronio's Communication Privacy Management Theory (CPM) proposes that individuals traverse the boundaries of privacy in communication by deciding what

⁵⁷ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁵⁸ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁵⁹ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁶⁰ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁶¹ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁶² Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁶³ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁶⁴ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

⁶⁵ Steven H, Mary S and Rebecca L, 'Sharenting and the extended self: self-representation in parents' Instagram presentations of their children', 1-15.

information to disclose and what to keep private.⁶⁶ CPM is based on the concept of privacy rules, which users design to govern the flow of private information. These guidelines govern disclosure decisions, such as when, how, and with whom information is released.⁶⁷ Because it examines the delicate dynamics of information sharing inside the family unit, CPM is particularly suited to analysing the issue of parents creating social media profiles for their children. The emphasis on privacy rules and boundary management in the theory allows for an exploration of how parents negotiate and enact decisions regarding their children's online presence, shedding light on the complex interplay between family autonomy, social media sharing, and preserving children's privacy in the digital age.

“The opportunities social media offer to parents to share messages related to one’s children highlight the need to find common ground between parents and children concerning the boundaries of this digital disclosure of personal information. How individuals negotiate these boundaries is enlightened by the Communication Privacy Management Theory (CPM) developed by Petronio (2002).”⁶⁸

Three overarching concepts—“privacy ownership,” “privacy rules,” and “privacy turbulence”—are recognised by CPM in order to shed light on the decisions people make regarding their privacy when controlling the spread of information and to highlight the issues that might occur when people's private boundaries are violated.⁶⁹ People believe they are the owners of their own information and should consequently be able to govern it, which is a core tenet of CPM known as “privacy ownership.”⁷⁰ However, when someone grants permission for others to access their personal data, they become co-owners (authorised) and create a reciprocal privacy boundary around the shared data.⁷¹

⁶⁶ Sandra P and Irwin A, *Boundaries of privacy*, State of New York Press, New York, 2002, 56-70.

⁶⁷ Petronio S, ‘Communication privacy management theory: What do we know about family privacy regulation?’, 2 *Journal of Family Theory and Review* 3, 2010, 175-196.

⁶⁸ Michel W, Karen V, Gaëlle O, Luna S, Lara H and Kris H, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory’, 7 *Frontiers in Education* 1, 2022, 2-6.

⁶⁹ Petronio S and Child J, ‘Conceptualization and operationalization: utility of communication privacy management theory.’ 31 *Current Opinion in Psychology* 1, 2020, 76–82.

⁷⁰ Petronio S, (2013) ‘Brief status report on communication privacy management theory’, 13 *Journal of Family Communication* 1, 2013, 6–14.

⁷¹ Michel W, Karen V, Gaëlle O, Luna S, Lara H and Kris H, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory’, 2-6.

CPM recognises that people make decisions about their privacy management based on a dialectic tension between their desires for access and privacy.⁷² The paper “The Limits of Sharenting: Exploring the Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory” examines the reasons behind parents' "sharing" activity and how teenagers interpret it so as to better understand the concept of "privacy ownership" and private limits as provided by CPM theory. It then poses the following queries: What drives parents' "sharing" behaviour? What impression does the "sharenting" of parents have on adolescents?

Sometimes people weigh the advantages of maintaining or sharing personal information against any potential concerns. We refer to this as a risk-benefit trade-off.⁷³ In particular, parents' willingness to provide information about their children can conflict with their child's right to safety and privacy.⁷⁴ When a parent shares a picture of a child with others, that child's original owner and caretaker is also involved. A communal privacy boundary is formed around these new confidants.⁷⁵ The new receivers may choose to share the image even further.

Ten Belgian families participated in thirty semi-structured interviews with families with teenagers that were done in Dutch in April and May of 2019.⁷⁶ According to the findings of these interviews, every adolescent expressed a growing desire to govern their own privacy as they became older. According to seven adolescents, parents ought to get their consent before sharing anything on social media and give their children a say over the content that parents

⁷²Child J, and Petronio S, *Unpacking the paradoxes of privacy in CMC relationships: the challenges of blogging and relational communication on the internet*, Computer-Mediated Communication in Personal Relationships, New York, 2011, 21-40.

⁷³ Michel W, Karen V, Gaelle O, Luna S, Lara H and Kris H, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory’, 2-6.

⁷⁴ Romero-Rodríguez J, Aznar-Díaz I, Kopecky K and Sotkowski R, ‘The phenomenon of sharenting and its risks in the online environment, Experiences from Czech Republic and Spain’ 110 *Children and Youth Services Review* 1, 2020, 26-40.

⁷⁵ Griffin, E., Ledbetter, A., and Sparks, *Communication Privacy Management Theory. A First Look at Communication Theory*, 8 ed, McGraw-Hill, New York, 151–163.

⁷⁶ Michel W, Karen V, Gaelle O, Luna S, Lara H and Kris H, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory’, 2-10.

upload.⁷⁷ When eight teenagers saw the pictures of them posted on the internet, they occasionally requested that the information be removed or that the post be erased.⁷⁸

“I would appreciate it if they would ask for my permission” (Daughter, family 8).⁷⁹

Kenya's Data Protection Act, 2019 mandates that processing of children's personal data must have consent from the child's parent or guardian and must be carried out in a manner that respects, protects, and advances the child's best interests.⁸⁰ However, should we leave parents' consent as the final determinant? Is that in the best interest of the child?

Some parents have discovered that their child may be at risk for privacy if they merely publish a picture online. A mother named Paris posted a picture of her daughter on Facebook.⁸¹ She was unaware of the identity of the user who liked her post.⁸² “The stranger had made the toddler's image her homepage photo and was presenting Paris' son as her own child.”⁸³ Paris is not the only one; Ashley, another mother, also went through a comparable “digital kidnapping.”⁸⁴ Ashley found out that upon the release of a photo of her two daughters

⁷⁷ Michel W, Karen V, Gaelle O, Luna S, Lara H and Kris H, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory’, 2-10.

⁷⁸ Michel W, Karen V, Gaelle O, Luna S, Lara H and Kris H, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory’, 2-10.

⁷⁹ Michel W, Karen V, Gaelle O, Luna S, Lara H and Kris H, ‘The Limits of Sharenting: Exploring Parents’ and Adolescents’ Sharenting Boundaries Through the Lens of Communication Privacy Management Theory’, 2-10,

⁸⁰ Section 33, *Data Protection Act*, (Act No 24 of 2019).

⁸¹ Jennifer O’Neill, ‘The Disturbing Facebook Trend of Stolen Kid Photos’, Yahoo! News, 3 March 2015 - https://www.yahoo.com/news/parenting/mom-my-son-was-digitally-kidnapped-what-112545291567.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFJCewYjLddHKvhgRjkYzSFsIGJbUW-DfHe8ew-mOzmAK3XMxPyTEQwmpVfgnvYng0ON2u0jCSPPH5sKGvSw3R-qKdPFtU0I9gauWl23w2Q_hdZTl4d07VZ0SD2T_MUo7LySe9uDkoP4uNXVJhyU91NSXzdfkeTnyrDGw114-RI5 on 3 March 2015.

⁸² Jennifer O’Neill, ‘The Disturbing Facebook Trend of Stolen Kid Photos’, Yahoo! News, 3 March 2015 - https://www.yahoo.com/news/parenting/mom-my-son-was-digitally-kidnapped-what-112545291567.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFJCewYjLddHKvhgRjkYzSFsIGJbUW-DfHe8ew-mOzmAK3XMxPyTEQwmpVfgnvYng0ON2u0jCSPPH5sKGvSw3R-qKdPFtU0I9gauWl23w2Q_hdZTl4d07VZ0SD2T_MUo7LySe9uDkoP4uNXVJhyU91NSXzdfkeTnyrDGw114-RI5 on 3 March 2015.

⁸³ Jennifer O’Neill, ‘The Disturbing Facebook Trend of Stolen Kid Photos’, Yahoo! News, 3 March 2015 - https://www.yahoo.com/news/parenting/mom-my-son-was-digitally-kidnapped-what-112545291567.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFJCewYjLddHKvhgRjkYzSFsIGJbUW-DfHe8ew-mOzmAK3XMxPyTEQwmpVfgnvYng0ON2u0jCSPPH5sKGvSw3R-qKdPFtU0I9gauWl23w2Q_hdZTl4d07VZ0SD2T_MUo7LySe9uDkoP4uNXVJhyU91NSXzdfkeTnyrDGw114-RI5 on 3 March 2015.

⁸⁴ Jennifer O’Neill, ‘The Disturbing Facebook Trend of Stolen Kid Photos’, Yahoo! News, 3 March 2015 - https://www.yahoo.com/news/parenting/mom-my-son-was-digitally-kidnapped-what-112545291567.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFJCewYjLddHKvhgRjkYzSFsIGJbUW-DfHe8ew-mOzmAK3XMxPyTEQwmpVfgnvYng0ON2u0jCSPPH5sKGvSw3R-qKdPFtU0I9gauWl23w2Q_hdZTl4d07VZ0SD2T_MUo7LySe9uDkoP4uNXVJhyU91NSXzdfkeTnyrDGw114-RI5 on 3 March 2015.

on Facebook, another page that seemed to circulate a lot of pictures of young girls had shared it.⁸⁵ Upon closer inspection of the link to her children on the page, Ashley discovered that anyone In addition to viewing the picture of her kids, her thousands of followers may click the link to visit her own Facebook page and learn more about her girls, including where they live.⁸⁶

The above-discussed parental experiences are entwined with the private lives of their young children and serve as the foundation for sharing disclosures.⁸⁷ Even though many parents share these details online with the best of intentions, the children—who are typically the focus of the disclosures—rarely have a say in how the tale is presented or how decisions are made.⁸⁸

2.3 The Patriarchal Theory of Children as Property

The fundamental issue in this study is between the rights of parents to protect their children and the rights of children to participate. It stems from patriarchal thinking, which sees children as their parents' property.⁸⁹ The history of this philosophy is dissected by Barbara Bennett Woodhouse, who also discusses the two stances it adopted: the absolute stance and the particular parental obligations stance.⁹⁰ As the head of the home, fathers had the final say over their families and considered their offspring to be their property since they were their

⁸⁵ Jennifer O'Neill, 'The Disturbing Facebook Trend of Stolen Kid Photos', Yahoo! News, 3 March 2015 - https://www.yahoo.com/news/parenting/mom-my-son-was-digitally-kidnapped-what-112545291567.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFJCewYjLddHKvhgRjkYzSFsIGJbUW-DfHe8ew-mOzmAK3XMxPyTEQwmpVfgnvYng0QN2u0jCSPPH5sKGvSw3R-qKdPFtU019gauWl23w2O_hdZTl4d07VZ0SD2T_MUo7LySe9uDkoP4uNXVJhyU91NSXzdfkeTnyrDGw1l4-RI5 on 3 March 2015.

⁸⁶ Jennifer O'Neill, 'The Disturbing Facebook Trend of Stolen Kid Photos', Yahoo! News, 3 March 2015 - https://www.yahoo.com/news/parenting/mom-my-son-was-digitally-kidnapped-what-112545291567.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFJCewYjLddHKvhgRjkYzSFsIGJbUW-DfHe8ew-mOzmAK3XMxPyTEQwmpVfgnvYng0QN2u0jCSPPH5sKGvSw3R-qKdPFtU019gauWl23w2O_hdZTl4d07VZ0SD2T_MUo7LySe9uDkoP4uNXVJhyU91NSXzdfkeTnyrDGw1l4-RI5 on 3 March 2015.

⁸⁷ Maeve D, Amanda L, Cliff L and Nicole B, 'Concerns About Children, Social Media and Technology Use', Pew Research Center, 2015, 1-10 - <https://www.pewresearch.org/internet/2015/07/16/concerns-about-children-social-media-and-technology-use/> on 16 July 2015.

⁸⁸ Stacey B, 'Sharenting: Children's privacy in the age of social media' 66 *UF Law Faculty Publications* 1, 2017, 16-41.

⁸⁹ Sorensen S, 'Protecting children's rights to privacy in the digital age: Parents as trustees of children's rights', 36 *Children's Legal Rights Journal* 3, 2016, 167.

⁹⁰ Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property' 33 *William and Mary Law Review* 4, 1992, 1037.

children and needed their care and survival. This was known as the absolute view of children as property.⁹¹

As a result, fathers had complete control over their offspring's person, liberties, and freedoms, and they had to adhere to this power.⁹²In an attempt to move away from the absolute view, the particular parental duties approach—which sprang from the patriarchal property model—argued that parents' rights over their children originated from their duty to raise, care for, educate, and protect them.⁹³ Nonetheless, children remained under their parents' influence.

Both the needs-based approach to children's rights and the parental view of children as property lay a heavy focus on the role and responsibility of caregiving, as well as the child's survival dependent on its parent. This gives rise to the idea that parental rights always come first and that a parent's choice is always better for their child. Despite the fact that parental actions are often in their children's best interests, parental rights cannot override, replace, or be synonymous with children's rights.⁹⁴

According to relationship-based theory experts, rather than evaluating a child's rights and well-being from the perspective of parental rights against children's rights, it is necessary to consider the interactions in which they participate and have an impact on them.⁹⁵ Thus, by demonstrating that the State's action was required to ensure the child's protection by assisting the family in situations where the parent was unable to fulfil their obligations and enforce their rights, the relationship-based approach can be used to support the State's intervention in contentious cases that call for it.

Therefore, as opposed to the rigid "parent-knows-best" approach to children's digital rights put forth by patriarchal theory, the relationship-based theory can be used to determine whether a parent or guardian who forbids their child from using the internet is violating the child's right to education, right to access information and other rights. If so, the State should

⁹¹ Grossberg M, *Governing the hearth: Law and the family in nineteenth-century America*, 1 ed, The University of North Carolina Press, Chapel Hill, 1985, 235.

⁹² Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property', 1037.

⁹³ Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property', 1037-1038.

⁹⁴ Brighthouse H and Swift A, 'Parents' rights and responsibilities', University of Warwick Institute for Advanced Teaching and Learning, 2017, 1 – [We're sorry, but the page you requested could not be found \(warwick.ac.uk\)](https://www.warwick.ac.uk/institute/iatl/parents-rights-responsibilities) on 9 February 2021.

⁹⁵ Pamela L, 'The relational rights of children' 48 Connecticut Law Review 3, 2016, 780-781.

use its relational powers in a way that balances the parental right to protect their child from harm and the child's right to participate in online activities.

CHAPTER THREE: LEGAL FRAMEWORK THAT GOVERNS CHILDREN'S ONLINE PROTECTION IN KENYA.

3.1 Introduction

In keeping with the overarching theme of "Parental Responsibility and Children's Social Media Use," this chapter deconstructs the legal factors that govern the intersection of parental responsibility, children under the age of thirteen with social media accounts, and child safety within the Kenyan legal framework.

As part of the African Union's (AU) Agenda for Children 2040, member states have an obligation to guarantee that children have access to moderately priced information and technology devices, connection, and content. The objective of the agenda is to advance an Africa that supports children's rights.⁹⁶ As the number of children using the internet rises, it is imperative to make sure that every child has safe and secure access to the digital world. The Committee on the Rights of the Child (CRC Committee) of the United Nations declared in its most recent General Comment 25 that "children's rights shall be respected, protected, and fulfilled in the digital environment."⁹⁷

Aside from YouTube, which is currently more popular among children than television⁹⁸, a substantial proportion of children and teenagers spend time on Instagram. A 2021 report published by the child protection charity Thorn found that out of 750 respondents, around 40% of children under the age of 13 have used Instagram.⁹⁹ This is despite the fact that the platform is restricted to persons aged 13 and up.¹⁰⁰

⁹⁶ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

⁹⁷ *CRC General Comment No 25, Children's rights in relation to the digital environment*, 2 March 2021, 8.

⁹⁸ George W, 'New data shows Youtube dominates video landscape for kids', Tvtech, 19 August 2021 <https://www.tvtechnology.com/news/new-data-shows-youtube-dominates-video-landscape-for-kids#> on 19 August 2021.

⁹⁹ Thorn, *Responding to online threats: Minors' perspective on disclosing, reporting and blocking*, May 2021, 6-10.

¹⁰⁰ <https://help.instagram.com/517920941588885> .

Even if children are a gift from God, they nonetheless need care and work to be useful, beautiful, or productive.¹⁰¹ The *Children Act*, 2022 has undoubtedly advanced Kenya's efforts to meet the obligations imposed by the *African Charter on the Rights and Welfare of the Child*, 11 July 1990 (ACRWC), and the *Convention on the Rights of the Child*, 20 November (CRC), on all responsible bearers, including the government, parents, and civil society, to respect, protect, and fulfil the rights of children, subject to the recommendations of the CRC document.¹⁰²

In spite of its progressive nature, the Act does not entirely adhere to international norms for children's rights in a number of areas.. This chapter contends that parental responsibility is a critical right enshrined in Section 31 of the *Children Act*, 2022¹⁰³, however, it is not properly implemented within Kenyan jurisdiction. Article 53(1)(e) of the *Constitution of Kenya* (2010)¹⁰⁴ and Section 31 of the *Children Act*, 2022¹⁰⁵ both state that parental duty shall never be relinquished.

3.2 Who is a child under Kenyan law?

The Kenyan Constitution of 2010 and the *Children Act*, 2022 define a child as any human being under the age of eighteen.¹⁰⁶¹⁰⁷ These rules protect children from all types of maltreatment, including psychological harm and exploitation. Children who use the internet are vulnerable to several types of abuse and exploitation.

However, there is no definition of a child under the Data Protection Act, and the rights of the child in connection to data obtained during the minority and majority phases are also not specified, particularly in light of their changing capacities and best interests. Furthermore, despite the fact that the National Integrated Identity Management System is applicable to

¹⁰¹ Amondi G, 'Parental Responsibility towards a Child in Kenya', - https://www.academia.edu/33195731/Parental_Responsibility_towards_a_Child_in_Kenya on 15 February 2019.

¹⁰² Amondi G, 'Parental Responsibility towards a Child in Kenya', - https://www.academia.edu/33195731/Parental_Responsibility_towards_a_Child_in_Kenya on 15 February 2019.

¹⁰³ Section 31, *Children Act* (Act No 29 of 2022).

¹⁰⁴ Article 53(1), *Constitution of Kenya* (2010).

¹⁰⁵ Section 31, *Children Act* (Act No 29 of 2022).

¹⁰⁶ Article 290, *Constitution of Kenya* (2010).

¹⁰⁷ Section 2, *Children Act* (Act No 29 of 2022).

children, no additional requirements or regulations control how data relating to children is to be gathered, processed, and maintained in the National Integrated Identity Management System.¹⁰⁸

3.3 Why focus on children under the age of thirteen?

In the United States, the *Children's Online Privacy Protection Act*, (COPPA) governs the age limit of thirteen for joining social networking platforms and creating personal profiles.¹⁰⁹ The federal legislation known as COPPA imposes obligations on persons who willfully gather personal data from children under the age of thirteen as well as operators of websites or online services targeted at children under that age. The fundamental legal basis for the age limit is COPPA, which was passed in 1998 and is enforced in the United States by the *Federal Trade Commission* (FTC).¹¹⁰

COPPA requires social media service providers to get verifiable parental consent prior to collecting personal information from children under the age of thirteen. However, there are no laws that specifically forbid parents from setting up social media accounts for their children who are younger than thirteen.

In Kenya, there is no specific law that governs the age limit for joining social networking platforms and creating personal profiles. However, the *Kenya Data Protection Act*, 2019, which is the main law governing data protection in Kenya, mandates that before collecting an individual's personal information, data controllers and processors must get that person's express consent. This means that social networking platforms or websites that collect personal information from individuals in Kenya are required to obtain consent from individuals, regardless of their age.

However, social networking platforms, most of which follow COPPA's age limit of 13 years, each have their own age restrictions or guidelines that users are expected to adhere to worldwide

¹⁰⁸ *Nubian Rights Forum and 2 others v Attorney General and 6 others* (2020) eKLR.

¹⁰⁹ Rule 312.2, Children's Online Privacy Protection Act, 21 April 2000.

¹¹⁰ <https://www.exterro.com/data-privacy-alert-library/what-is-coppa-and-why-does-it-matter-so-much-today> on 19 December 2023.

3.4 The dilemma of monetary exploitation, sexual exploitation, privacy and data protection.

3.4.1 Monetary Exploitation of Children

To dissect monetary exploitation of childhood in Kenya, we must understand a few definitions under Kenyan law. These include child labour, economic exploitation, and employment of a child. Section 2 of the *Children Act, 2022* defines child labour as ‘work done by a child which is exploitative, hazardous or otherwise inappropriate for a person of that age and places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development.’¹¹¹ We shall focus on ‘work which is exploitative’ in this subsection.

The *Children Act, 2022* goes on to define economic exploitation as ‘unfairly taking advantage of another person because of their vulnerability, by grossly underpaying them for their work in comparison to average market rates payable for similar work’.¹¹² Moreover, section 18 of the *Children Act, 2022* emphasises that ‘no person shall subject a child to child labour, domestic servitude, economic exploitation or any work or employment which is hazardous, interferes with the child’s education or is likely to be harmful to the child’s health or physical, mental, moral or social development’.¹¹³

Lastly, section 53 of the *Employment Act, 2012* defines employment as employment of a child ‘in a situation where: (a) the child provides labour as an assistant to another person and his labour is deemed to be the labour of that other person for the purposes of payment; (b) the child’s labour is used for gain by any person or institution whether or not the child benefits directly or indirectly; and (c) there is in existence a contract for service where the party providing the service is a child whether the person using the services does so directly or by

¹¹¹ Section 2, *Children Act* (No 29 of 2022).

¹¹² Section 2, *Children Act* (No 29 of 2022).

¹¹³ Section 2, *Children Act* (No 29 of 2022).

agent.¹¹⁴ Section 56 of the *Employment Act*, 2012 clearly forbids the employment of a child under the age of thirteen in any capacity, whether for profit or not. This is a crucial point to emphasise.¹¹⁵

Childhood has become a big business in today's consumer-driven world, as children are seen as customers and the target of advertising campaigns.¹¹⁶ From an early age, children are exposed to commercial culture, which includes products and marketing tailored to their interests. Childhood is a generative cultural site that develops bodies and meanings, hence there is a market specifically for items, venues, and media aimed at children. This market is a magnificent accomplishment of capitalism in the 20th century, not merely an extension of other markets..¹¹⁷

In a 2019 interview with Forbes, Eyal Baumel, CEO of Yoola, a management organisation that also manages digital child stars, claimed that YouTube is "the most popular babysitter in the world."¹¹⁸ Children's product lines are major business. It was projected that the global toy market would grow from roughly US\$141 billion in 2021 to \$230.6 billion by 2028.¹¹⁹

Toy "reviews" on YouTube are now being used by YouTube kidfluencers to push items to other children. Still, these videos aren't the same as conventional product reviews. They are mash-ups that combine the three main categories of entertainment, branded content, and reviews..¹²⁰

A structural approach is necessary to comprehend the legal repercussions of "kidfluencing" strategies and the commercialization of childhood. This approach sees children as being abused and invaded by adult institutions such as businesses and advertising..¹²¹ The 1930s

¹¹⁴ Section 53, *Employment Act* (2012).

¹¹⁵ Section 56, *Employment Act* (2012).

¹¹⁶ Anna L, 'Kant Stop the Kidfluencers: Moral consideration in using children as social media influencers', Published Degree of Master Thesis, University College Stockholm, Stockholm, 2023, 30.

¹¹⁷ Anna L, 'Kant Stop the Kidfluencers: Moral consideration in using children as social media influencers', Published Degree of Master Thesis, University College Stockholm, Stockholm, 2023, 30.

¹¹⁸ <https://www.uts.edu.au/news/business-law/does-kidfluencer-culture-need-better-regulation> on 2 May 2023.

¹¹⁹ <https://www.uts.edu.au/news/business-law/does-kidfluencer-culture-need-better-regulation> on 2 May 2023.

¹²⁰ Maarit J, 'From venacularized commercialism to kidbait: toy review videos on YouTube and the problematics of the mash-up genre' 14 *Journal of Child and Media* 2, 2020, 237-254.

¹²¹ Anna Lenander, 'Kant Stop the Kidfluencers: Moral Considerations in Using Children as Social Media Influencers, University college Stockholm, Stockholm, 2023, 30.

revolution in clothing departments signalled a change in viewpoint from seeing the world through the eyes of a mother to starting to see it through the eyes of a child.¹²²

The media and entertainment industries' increasing influence on children, the advent of new technologies and digital media, children's increasing purchasing power and capacity to influence household expenditures, and other factors are pushing the commodification of childhood. As a result, there is now more direct marketing of products and services to children, along with the employment of convincing but frequently deceptive advertising strategies designed to appeal to their needs and preferences. Furthermore, it leads to children selling these goods to themselves or to other people without even having a bank account..¹²³

Josh Golin is the executive director of the Campaign for a Commercial-Free Childhood. He claims that companies choose children as their influencers because it is obvious what their goal is: other children.¹²⁴ This is common on websites such as YouTube, where a "don't tell, don't ask" policy is utilized, according to Golin—websites benefit greatly by providing content that is specifically tailored to appeal to children.¹²⁵

The term "childhood commercialization" is the practice of approaching and treating children like consumers in order to generate revenue for businesses. This strategy involves producing and promoting goods and services, especially for kids rather than focusing on adults. It also involves using marketing strategies like advertising to get children interested in buying these products.¹²⁶¹²⁷

The relationship between consumer culture and childhood can be better understood from a structural viewpoint, which sees businesses, advertising, and other adult institutions as entering childhood and exploiting children through promotions, advertising, and media. This

¹²² Cook D, *The commodification of childhood: the children's clothing industry and the rise of the child consumer*, Duke University Press, Durham, 2004, 3.

¹²³ Sapna Maheshwari, 'Online and earnings thousands, at age 4: meet the kidfluencers' *The New York Times*, 1 March 2019.
<https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> on 1 March 2001.

¹²⁴ Sapna Maheshwari, 'Online and earnings thousands, at age 4: meet the kidfluencers' *The New York Times*, 1 March 2019.
<https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> on 1 March 2001.

¹²⁵ [Kid influencers: Few rules, big money | Full Documentary \(youtube.com\)](https://www.youtube.com/watch?v=...) on 23 August 2019.

¹²⁶ Cook D, *The commodification of childhood: the children's clothing industry and the rise of the child consumer*, 2.

¹²⁷ Cook D, *The commodification of childhood: the children's clothing industry and the rise of the child consumer*, 6.

is considered as empowering since it highlights children's freedom and their active involvement in consumer culture. Youngsters have a creative way of appropriating media and consumer items, and they give toys new purposes that their adult creators did not intend.¹²⁸

Parents are left in the middle as the news media often exposes child trafficking and marketers regularly emphasise the empowerment of children. On the other hand, the universe of products, advertising, and media has its historical and structural roots in adult businesses, organisations, and financial arrangements that exist before and beyond any one child or specific childhood expression. The situation is not as straightforward as a simple exploitation vs. empowerment binary, and parents are usually stuck in the midst.¹²⁹

Parents, educators, and child advocates have expressed worry and discussion over childhood commercialization, claiming that it can negatively affect the growth and well-being of children. Some contend that rather than fostering meaningful connections and experiences, it may encourage materialism and consumerism.¹³⁰

In addition to the commercialization of childhood through product marketing, there is a concerning trend in which children are viewed as commodities unto themselves. Parents hold their children up to the camera so they may share and get money from the images online. A sponsored post can bring in up to \$10,000 for users who have one million or more followers.¹³¹ Children who have gained social media influence are frequently exploited to pitch things to their friends and follow them as 'kidfluencers'.

This raises severe legal concerns regarding the marketing of children and how much emphasis is placed on their interests and well-being. Additionally, it upholds the idea that children are just commodities to be used for financial gain rather than sentient beings with free will and agency.

¹²⁸ Cook D, *The commodification of childhood: the children's clothing industry and the rise of the child consumer*, 4.

¹²⁹ Cook D, *The commodification of childhood: the children's clothing industry and the rise of the child consumer*, 5.

¹³⁰ Livingstone S and Rahali M, *Written evidence on influencer culture and children*, Department of Media and Communications, London School of Economics and Political Science, 2021, 1.

¹³¹ [Kid influencers: Few rules, big money | Full Documentary \(youtube.com\)](#) on 23 August 2019.

Children's value as influencers is frequently based on how well they can generate revenue for the companies they support. They may receive training on how to produce engaging content, gain followers, and optimise revenue via partnerships and sponsorships. Talent agencies also represent some 'kidfluencers', highlighting the commoditization of their persona and image.¹³² A 'kidfluencer' making money and sharing content online is asked what an "influencer" is at the start of a CBS documentary. They have no idea, yet it is their "job."¹³³

3.4.2 Sexual exploitation

Paedophiles have been known to physically exploit young children in recent years. With the proliferation of high-speed internet, the scenario has significantly changed; they now do it from the comfort of their own homes.¹³⁴ According to Terres De Hommes, the use of a virtual ten-year-old Philippine girl by the proxy name Sweetie, was identified by researchers that adults from 65 countries are involved in the sexual exploitation of innocent young children.¹³⁵

Child trafficking for sexual exploitation has reached alarming proportions not only in Southeast Asia but also in Africa.¹³⁶ The collaboration of various parties with UN agencies has resulted in a significant increase in internet governance, but most African nations still lack laws or rules governing the online safety of minors. The preceding decade's experience demonstrated that some categories of youngsters, such as girls and child domestic workers, are at risk.¹³⁷

According to media sources in Kenya, an extradition case involving a Kenyan wanted in the United States of America for conducting an Internet-based child pornography syndicate has

¹³² Sapna Maheshwari, 'Online and earnings thousands, at age 4: meet the kidfluencers' The New York Times, 1 March 2019

<https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> on 1 March 2021.

¹³³ [Kid influencers: Few rules, big money | Full Documentary \(youtube.com\)](#) on 23 August 2019.

¹³⁴ Ong'ong'a Oloo, 'Approaches to safeguard children online in Kenya. Case of children aged 12-14' SSRN Electronic Journal, 2020,5 [Approaches to safeguard children online in Kenya. Case of Children aged 12-14 years by Oloo Ong'ong'a :: SSRN](#) on 2 November 2023.

¹³⁵ Ong'ong'a Oloo, 'Approaches to safeguard children online in Kenya. Case of children aged 12-14' SSRN Electronic Journal, 2020,5 [Approaches to safeguard children online in Kenya. Case of Children aged 12-14 years by Oloo Ong'ong'a :: SSRN](#) on 2 November 2023.

¹³⁶ Annan J, Hargreaves and Tachiiri K, 'On the observational assessment of climate model performance' 38 Geophysical Research Letters 24, 2011, 26.

¹³⁷ Section 1(h), *Financial Advisory and Intermediary Services Act* (2002) (South Africa).

been emphasized. There are currently no laws in Kenya that apply to internet abuse. The constitution, however, prohibits sexual contact with an underage person, but there are no rules regarding individuals who have communication with minor people through online platforms. The public needs to be more aware of the threats posed by the internet, particularly to young children who use online digital communication technology.¹³⁸

As a result, the internet's nature has made committing crime easier and opened up new channels for committing crimes with impunity.¹³⁹

In addition to sharing information child sex offenders can distribute and preserve materials about child sexual abuse online by file sharing, websites, live streaming, cloud technologies etc.¹⁴⁰ The advancement of technology gives offenders the ability to obtain child abuse materials and transact financially while remaining anonymous or using fictitious identities.¹⁴¹

3.4.3 Privacy and Data Protection

According to Article 16 of the *UN Convention on the Rights of the Child*, children are shielded from unlawful attacks on their honour and reputation as well as from arbitrary or illegal interference with their right to privacy, family, home, or correspondence.¹⁴² This provision foreshadowed the threats to children's safety that came with connectivity and digitisation in numerous ways. The right to privacy was more closely associated with physical space and well-being than with digital space when the UNCRC was created. Digital rights for the internet and digital services were not as widespread as they are today. A useful online resource for privacy and data protection is the General Data Protection Regulation (GDPR), which stipulates that children need specific protection because they might not be as

¹³⁸ Section 1(h), *Financial Advisory and Intermediary Services Act* (2002) (South Africa).

¹³⁹ AlEroud, Alsmadi I, 'Identifying cyber-attacks on software defined networks: An inference-based intrusion detection approach' 80 *Journal of Network and Computer Applications*, 2017, 5.

¹⁴⁰ Every child protected against trafficking, *Offenders on the move: Global study on sexual exploitation of children in travel and tourism*, May 2016, 44- 46.

¹⁴¹ Every child protected against trafficking, *Offenders on the move: Global study on sexual exploitation of children in travel and tourism*, May 2016, 44- 46.

¹⁴² Article 16, *United Nations convention on the rights of the child*, 20 November 1989, 27531.

aware of the dangers, consequences, protections, and rights associated to the processing of their personal data.¹⁴³

Regionally, the *African Charter on the Rights and Welfare of the Child* (ACRWC) protects personal privacy under Article 10, which declares that “no child shall be subject to attacks on his honour or reputation, or to arbitrary or unlawful interference with his privacy, family home, or correspondence.”¹⁴⁴ In *Centre for Child Law and Others v. Media 24 Limited and Others* [2020],¹⁴⁵ the South African Constitutional Court ruled that because privacy is essential to a child’s developing self-identity, it is even more important when dealing with children. The court further underlined that upholding children's privacy fosters autonomy, integrity, and respect for human dignity.

Parents and legal guardians may also agree to the use of their children's data, in addition to their right to appropriately supervise their behaviour. All 31 African states have passed data protection legislation, however not all of them specifically protect minors. The Data Protection Act, 2012 in Ghana and the Protection of Personal Information Act, 2013 in South Africa, for instance, prohibit the processing of children's personal information without parental or guardian approval. The Kenyan Data Protection Act, 2019 is an additional example,¹⁴⁶ that defines sensitive personal data as revealing the names of a person’s child, bans the processing of a children’s personal data without the consent of the parent or legal guardian and only in a way that upholds and advances the best interest of the child.

3.2 Parental Responsibility and Criminal Liability

Section 22(3)(c) of the *Children Act, 2022* depicts the protection from abuse whereby any person who ‘through any electronic system, network, or other communication technology... in any other way, subjects a child to online abuse, harassment or exploitation, whether through social networks, playing online games or by use of mobile phones or other electronic devices, commits an offence and shall, on conviction, be liable to imprisonment for a term

¹⁴³ Recital 38, *General data and protection regulation*, 2016, 679.

¹⁴⁴ Article 10, *African charter on the rights and welfare of the child*, 1 July 1990.

¹⁴⁵ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

¹⁴⁶ Section 2, *Data Protection Act*, (2019).

not exceeding ten years or to a fine not exceeding two million shillings, or to both.’¹⁴⁷ However, in the case where it is the parents of the child who are subjecting their children to online abuse, harassment and exploitation by creating social media accounts for their children from as early as birth, there is no evidence of legal liability applying to them.

3.3 Conclusion

Lastly, while Kenya has made progress in aligning its legal framework with international standards to protect children online, notable gaps exist in enforcement and implementation. The *Children Act, 2022* recognizes parental responsibility but falls short in addressing the specific challenges posed by the creation of social media profiles for children under the age of 13. The absence of clear definitions and regulations in the *Data Protection Act, 2019* further complicates matters.

¹⁴⁷ Section 22(3), *Children Act* (Act No 29 of 2022).

CHAPTER 4: JURISPRUDENCIAL STANDARDS OF KENYAN COURTS ON PARENTAL LIABILITY AND CHILDREN ONLINE PROTECTION.

This chapter dives into the jurisprudential requirements established by Kenyan courts regarding parental responsibility and online child safety. This chapter attempts to provide insights into how Kenyan courts understand and apply current legislation surrounding parental responsibility in the digital era by analysing key legal cases and court judgements.

4.1 Cases within Kenyan Jurisdiction

This section covers two cases, *MAK v. RMAA & 4 others (2022)* and *Charles Muturi Macharia & 6 others v. Standard Group & 4 others (2022)*

4.1.1 *MAK v. RMAA & 4 others (2022)*

In this case, the appellant and the first respondent were married and had one son. The marriage broke down, and the appellant filed for dissolution on October 9, 2008. They signed a Parental Responsibility Agreement (PRA) before the dissolution. With the consent of the first respondent, the appellant relocated to the United Kingdom with the kid in order to pursue a degree. Disputes erupt between them, resulting in allegations and the intervention of social services. In the United Kingdom, the appellant requested a child arrangement order, whereas the first respondent requested that the child remain with him. Allegations and counter-allegations arose, involving the 1st respondent accusing the appellant of harming the child and the appellant claiming false accusations.¹⁴⁸

Legal actions unfolded in the United Kingdom and Kenya, including the appellant filing a suit in the High Court to adopt the PRA as a court order. Attempts to enforce this order in Tanzania were unsuccessful.¹⁴⁹ The first respondent was granted custody when the English Family Court designated the kid to be a ward. Sentimental about being wronged, the appellant challenged the decision in Kenyan courts, arguing that the child's constitutional rights and right to Kenyan nationality had been infringed. The High Court and the Court of

¹⁴⁸ *MAK v. RMAA & 4 others (2022) eKLR.*

¹⁴⁹ *MAK v. RMAA & 4 others (2022) eKLR.*

Appeal dismissed her claims..¹⁵⁰ The Supreme Court was approached, arguing that previous decisions were contrary to the best interest of the child and derogated from the existing PRA.

Key issues raised include whether parental access, custody, and parental rights after a child turns 18 warrant a Supreme Court appeal, understanding a Parental Responsibility Agreement, the proper application of United Kingdom Family Court decisions by Kenyan courts, guidelines for balancing the best interests of the child and parental rights, the binding nature of English Court decisions on Kenyan courts, the extinguishment of Kenyan High Court-issued rights by a foreign court, and whether Kenyan courts disregarded Kenyan law and a valid High Court order in favour of English Court decisions.¹⁵¹

The timely appeal addressed parental rights, the child's best interests, and the right to a fair trial. The ruling of the superior courts dealt with the protection of parental rights with reference to a child's rights. The English Court's conclusions served as a major foundation for decisions made by lower courts within the jurisdiction of the Supreme Court pursuant to Article 163(4)(a) of the Constitution. However, because foreign rulings were not taken into account while making decisions, the English Court ignored the significance of the Parental Responsibility Agreement (PRA) and its implications.¹⁵² The English Family Court's decision to reject the PRA was incorrectly upheld by the Court of Appeal, who failed to recognise that the PRA was legally binding and could only be revoked by the High Court. When procedures outlining the process for withdrawing a PRA were implemented as a High Court decision, they had greater legal force.¹⁵³

The upper courts erred when they upheld the English Court's decision and disregarded Kenyan law, the *Convention on the Rights of the Child* (CRC), and the *African Charter on the Rights and Welfare of the Child* (ACRWC). The appellant's hearing was unfairly denied because the English Court did not adequately address the important aspect of the child's best interest, and the superior courts did not thoroughly consider the facts.¹⁵⁴ The legal system for children's rights placed a strong emphasis on what was in the child's best interest, but by

¹⁵⁰ *MAK v. RMAA & 4 others* (2022) eKLR.

¹⁵¹ *MAK v. RMAA & 4 others* (2022) eKLR.

¹⁵² *MAK v. RMAA & 4 others* (2022) eKLR.

¹⁵³ *MAK v. RMAA & 4 others* (2022) eKLR.

¹⁵⁴ *MAK v. RMAA & 4 others* (2022) eKLR.

supporting actions that violated the child's rights—such as nationality and parental care—the courts disregarded this.

The rights of children were breached by the English Court's orders, which were upheld by higher courts, and the Supreme Court was unable to support such rulings. A PRA, prior parental performance, financial situation, mental health, and other considerations were taken into consideration while outlining guidelines for striking a balance between the best interest of a child and parental rights.¹⁵⁵ Protracted court battles, as observed in this case, were deemed against the child's best interest, leading to psychological harm. The appellant's lack of direct contact with the child since 2015, in violation of Kenya's legal regime, raised concerns, but the child reaching eighteen allowed for independent choices regarding residence and visitation.¹⁵⁶

Analysis

This case provides principles to take into account when weighing the best interests of a child against the upholding of parental rights and obligations.¹⁵⁷ Parental rights do not supersede a child's best interests.¹⁵⁸ However, parental rights should only be honoured where doing so serves the best interests of the kid. This is due to the fact that the idea of the best interest of the child aims to guarantee the complete and effective exercise of every child's legal rights. The goal of every law is to advance a child's complete development. As a result, courts are required to evaluate all conditions impacting the child before making a judgement that would affect the child.

The complex relationship between children's rights, parental responsibility, and global legal ramifications was addressed by Kenyan courts. The primary focus of the analysis is the enforcement of parental rights in regard to the best interests of the child.¹⁵⁹ The focal point of contention was the Parental Responsibility Agreement (PRA), a legal instrument that came under scrutiny in both Kenyan and English courts.

¹⁵⁵ *MAK v. RMAA & 4 others (2022) eKLR.*

¹⁵⁶ *MAK v. RMAA & 4 others (2022) eKLR.*

¹⁵⁷ *MAK v. RMAA & 4 others (2022) eKLR.*

¹⁵⁸ [Kenya Law - Are parental rights superior to the best... | Facebook](#) on 16 March 2023.

¹⁵⁹ *MAK v. RMAA & 4 others (2022) eKLR.*

The Supreme Court's scrutiny of the case revealed notable inadequacies in the lower courts' decision. The courts' heavy reliance on the English Court's findings, without due consideration for the binding nature of the PRA and the appellant's constitutional rights, underscored a gap in understanding the intricate legal dynamics at play. The court emphasized the paramount consideration of the child's best interest, a principle that appeared to be inadequately addressed in both the English Court and Kenyan superior courts.

A critical aspect of the court's analysis was the recognition that foreign judgments, in this case, the English Court's decisions, were not automatically applicable and required a meticulous examination of their compatibility with Kenyan laws, conventions like the CRC and ACRWC, and the existing High Court order. The court condemned the oversight of specific procedures for vacating the PRA and the failure to recognize its binding nature, highlighting the significance of a legal document that required High Court termination.

Furthermore, the court emphasized the detrimental impact of protracted court battles on the child's well-being, reflecting a keen understanding of the psychological and emotional toll such legal disputes can inflict. The appellant's lack of direct contact with the child since 2015, while reaching the age of eighteen, added another layer of complexity, prompting the court to consider the evolving rights and choices of the child.

The court's reasoning, in sum, demonstrated a careful assessment of the case's various facets, highlighting the importance of understanding parental rights in a nuanced manner, the binding nature of legal agreements, and—above all—the critical importance of the child's best interest. The case sets the standard for cases involving international law, parental rights, and the careful balancing judges must do between protecting children's rights and ensuring their welfare in the future.

4.1.2 Charles Muturi Macharia & 6 others v. Standard Group & 4 others (2022)

Seven teenagers were brought before the Murang'a magistrates' court on November 5, 2012, to answer to allegations relating to arson. The media outlets broadcast and/or published

pictures of the kids attending court, along with in-depth narratives about their purported involvement in the school's attempted burning.¹⁶⁰

The appellants demonstrated a breach of the minors' fundamental rights, and the lower courts erred in elevating the public interest above the children's protection and best interests.¹⁶¹ Even though the petitioner is not allowed to provide proof of the harm incurred, the courts must uphold the rights that have been violated. In addition to granting the appellants' request for summary judgment, the Court also establishes principles designed to help all child justice system agencies negotiate the complex terrain of advancing, defending, and upholding children's rights.¹⁶²

Analysis

The preservation and best interests of seven kids who were charged with arson and brought before the Murang'a magistrates' court are the main concerns. Legal procedures resulted from the media publishing and airing of these youngsters' photos coupled with in-depth reports of their purported involvement in the attempted school burning. The decision's high court to reject the appeal, citing the public interest in the story's publication and accompanying photos, raises serious concerns about putting the public interest ahead of the children's safety and best interests. This ruling raises the possibility that the kids' constitutional rights were overlooked because the courts did not sufficiently address the infringement of such rights even though there was no hard proof of loss or damage suffered.

It is possible that the lower courts made a mistake in their decision-making by placing insufficient emphasis on the children's protection and best interests, which ought to be top priorities given their vulnerable situation. The ruling highlights the significance of proving rights violations, especially in cases when the petitioners are unable to provide concrete proof of their losses. The appellants' move for summary judgment was granted by the Court,

¹⁶⁰ *Charles Muturi Macharia & 6 others v. Standard Group & 4 others (2022) eKLR.*

¹⁶¹ *Charles Muturi Macharia & 6 others v. Standard Group & 4 others (2022) eKLR.*

¹⁶² *Charles Muturi Macharia & 6 others v. Standard Group & 4 others (2022) eKLR.*

indicating that the violation of the children's fundamental rights had to be corrected. In addition, the release of guidelines intended to support all child justice system agencies signifies an understanding of how difficult it is to strike a balance between advancing, protecting, and upholding children's rights within the confines of the law.

4.2 Case within South African Jurisdiction

4.2.1 *Centre for Child Law and Others v. Media 24 Limited and Others [2020]*

Section 154(3) of the Criminal Procedure Act in South Africa, which protects the anonymity of minor victims, witnesses, and accused in criminal proceedings, was at issue in this case. The lawsuit also concerned the legality of the provision. KL, a child victim, went to the Centre for Child Law (CCL) for legal assistance after the media revealed her identity¹⁶³ in connection with a criminal case.

Section 154(3) was found to be partially unconstitutional by the Supreme Court of Appeal (SCA) because it did not safeguard the identity of child victims and did not grant child participants' anonymity protection once they turned 18.¹⁶⁴ The declaration of unconstitutionality was upheld by the Constitutional Court, and Parliament has been given a full year to remedy the shortfall.

According to the majority ruling, the exclusion of child victims went against the child's best interests, their right to privacy and dignity, and equality rights.¹⁶⁵ It also ruled that section 154(3) was unconstitutional because it did not offer continuing protection, highlighting the risk that young participants may face after they became adults.¹⁶⁶ The court suggested a

¹⁶³ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

¹⁶⁴ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

¹⁶⁵ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

¹⁶⁶ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

reading-in that allows individuals under section 154(3) protection to consent to identity disclosure after turning 18 or approach a court for permission.¹⁶⁷

While acknowledging the need for victim protection, the second ruling supported a default system in which anonymity ends at age 18 unless a court specifically extends it, emphasising the value of free speech and transparent justice.¹⁶⁸ The third ruling disagreed with the statement of unconstitutionality regarding the failure to protect child victims, but it agreed with the conclusion that the child's best interests, privacy, and dignity had been violated.¹⁶⁹

Analysis

The decision by the South African Constitutional Court emphasises how important privacy is to a child's formation of self-identity. Children's privacy protection is important because it helps foster respect for human dignity, integrity, and independence. This viewpoint is consistent with the understanding that children's privacy rights should be more closely guarded because they are still developing and are therefore vulnerable.

The court's emphasis on the value of privacy in a child's formation of a self-identity is a reflection of its awareness of the potentially devastating effects that exposure to or infringement upon a person's personal information can have on an individual's wellbeing. This acknowledgement emphasises privacy as a vital component of a child's personal development and sense of self, going beyond merely recognising it as a legal right.

The promotion of respect for dignity, personal integrity, and autonomy through privacy protection aligns with international human rights principles and conventions, emphasizing the unique vulnerabilities of children. Respecting a child's privacy is not just a legal requirement but a recognition of their inherent dignity and autonomy, contributing to their overall well-being and development.

¹⁶⁷ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

¹⁶⁸ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

¹⁶⁹ *Centre for Child Law and Others v Media 24 Limited and Others* (2019), Constitutional Court of South Africa.

4.3 Conclusion

Kenyan jurisprudence, as exemplified in cases like *MAK v. RMAA & 4 others (2022)* and *Charles Muturi Macharia & 6 others v. Standard Group & 4 others (2022)*, underscores the intricate balance between parental rights and the paramount consideration of children's best interests. The court's scrutiny of foreign judgments and the emphasis on legal agreements like the Parental Responsibility Agreement (PRA) highlight a commitment to defining and upholding parental responsibilities within the domestic legal framework.

In the digital era, where information dissemination is rapid and pervasive, protecting children's privacy rights becomes paramount. The MAK case, in particular, reflects the challenges presented by international legal dimensions and the need for meticulous consideration of the child's evolving rights. The court recognized that protracted legal battles, such as those observed in the case, can inflict psychological harm on the child, signalling a sensitivity to the unique vulnerabilities of children in the digital age.

The Charles Muturi Macharia case clarifies how children's digital privacy rights and media rights interact. The court's admission of a possible constitutional rights infringement in the face of public pressure highlights how important it is to put children's safety and best interests first. The directives provided to child justice agencies represent an aggressive strategy for striking the careful balance needed to advance, protect, and uphold children's rights in the rapidly changing digital environment.

In South Africa, the *Centre for Child Law and Others v. Media 24 Limited and Others [2020]* case provides insights into the importance of children's privacy rights in the digital age. The constitutional protection of a child's privacy underscores a recognition that safeguarding the dignity, personal integrity, and autonomy of children is crucial in the online realm.

As we navigate the complexities of the digital space, Kenyan jurisprudence sets a precedent for considering the binding nature of legal agreements and the paramount consideration of the child's best interest. It calls for a nuanced approach that recognizes the evolving rights of children, particularly in the face of rapid technological advancements. This involves not only upholding parental rights within legal agreements but also acknowledging the unique vulnerabilities of children in the digital space, where their privacy rights and best interests

must be safeguarded from potential infringements, including those arising from media activities.

CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSION

This conclusive chapter establishes a comprehensive review of the findings presented in the preceding chapters and makes recommendations based on the findings. It presents a conclusion and further demonstrates a basis for the hypothesis made initially.

5.1 Findings

In order to evaluate the legal framework of parental responsibility regarding the protection of children's rights, the study focused on parents who set up social media profiles for their children under the age of thirteen. In order to ascertain how current laws and regulations address the issues posed by children having social media accounts from birth, it approached the evaluation from the perspectives of both international law, such as the *UN Convention on the Rights of a Child*, the *African Charter on the Rights and Welfare of the Child* (ACRWC), and Kenyan law, such as the *Children Act, 2022*, *Employment Act, 2012*, and the *Constitution of Kenya* (2010). The focus was on assessing the effectiveness of legal provisions in safeguarding children in the digital age while exploring the evolving dynamics of parental responsibility in the context of online activities.

Examining how children's rights are safeguarded online in Kenya and around the world in light of the laws controlling parental accountability and kids' social media use was the main objective of the study. The study's analysis of the aim states that parents violate their children's rights to privacy, data protection, monetary exploitation, and sexual exploitation by creating and maintaining their children's social media platforms.

Firstly, Kenya's legal framework lacks explicit provisions specifically prohibiting parents from creating social media accounts for their children. It does not limit parental action in the digital space within the complexities of parental responsibility on children's engagement on social media.

The research's second objective was to examine court jurisprudence in matters of children's rights protection in the digital space. The study responded to the question of the jurisprudential standards that have been set in the determination of cases regarding the balance of parental responsibility and children's rights and protections in Kenya. Firstly, in the dilemma of balancing parental responsibilities and children's best interests, Kenyan courts

emphasized that the best interest of the child supersedes the freedom of parents in exercising their responsibilities and decisions upon their children. Therefore there should be a commitment to defining and upholding parental responsibilities that fully protect the child's best interest within the domestic legal framework. Secondly, the protection of children's privacy and data is crucial in matters concerning the media and especially social media. Lastly, a child's privacy underscores a recognition that safeguarding the dignity, personal integrity, and autonomy of children is crucial in the online realm.

5.2 Recommendations

A diverse method is crucial to solve the issues with minor children's privacy brought about by the digital era. As part of this, new laws governing 'sharenting'—the act of parents disclosing their children's personal information online—should be passed. A bill should be proposed to increase young people's social media literacy and provide them the tools they need to evaluate the possible consequences of their online presence and decide whether or not to allow their parents' exposure of them in the internet.

To protect children's interests in the digital sphere, creating a code of behaviour for influencer marketing is another crucial step. Strengthening the authority of regulatory agencies like the Competition and Markets Authority and the Advertising Standards Authority is crucial.

The Kenyan Department for Education should look into legislative options to improve labour protection for child influencers in light of the changing environment. This illustrates the requirement for legal frameworks that are flexible enough to meet the particular difficulties posed by the digital age.

A major common law analysis shows that parental consent forms alone are insufficient to safeguard children's digital privacy. Notice is also insufficient. The analysis emphasises proactive legal actions and promotes the implementation of positive law.

Considering the intricacy of children's rights, including multiple stakeholders is considered imperative. All of these parties—the government, non-state actors, regulators, educators,

civic society, parents, and children offer distinct viewpoints that, when taken together, can effectively advance children's right to privacy.

In order to put these recommendations into practice, it is advised that there must be adoption and application of legislation that takes into account children's needs and effectively safeguards their right to digital privacy, adoption of child-centred laws that prioritise privacy rights and are compliant with international law, especially the African Charter on the Rights and Welfare of the Child, creation of thorough regulations pertaining to children's rights in the digital era, with an emphasis on the right to privacy in Africa. These regulations ought to specify the obligations of the government, parents, and businesses. Finally, campaigns to sensitise communities, including children, parents, and educators about child safety and responsible use of information and communication technologies).

5.3 Conclusion

The study started with the hypothesis that, in Kenya, parents who create social media profiles for their younger children under thirteen years of age violate children's rights to privacy, security, and well-being as well as the Children Act, 2022, and the Kenyan Constitution (2010). The study supports the theory in a number of ways. The review of the literature revealed legislation is insufficient in the protection of child influencers. Research has proved that to date this is true, especially in Kenya. To protect children's data and privacy, also to protect them from sexual exploitation and monetary exploitation caused by the practice of their parents' creating and managing social media accounts for them from as early as birth, we must put more emphasis on parental responsibility and ensure it is used in the child's best interest.

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