

Strathmore
UNIVERSITY

**IMPROVING CHILD JUSTICE IN KENYA: AN ANALYSIS OF THE PROTECTION OF CHILD
OFFENDERS' RIGHTS**

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

By

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January 2024

Word count: 12392

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ACKNOWLEDGEMENT

First and foremost, I want to express my gratitude to the Almighty God for his favour, grace, and good health during this time. Secondly, I express my gratitude to Dr. Josephat Kilonzo, my supervisor, for his invaluable direction and suggestions during the composition of this work.

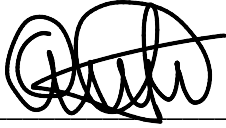
Thirdly, I want to express my gratitude to my family for their continuous encouragement and support during the writing process. I was able to put my all into writing this paper because of their support and capacity to stick by me.

Finally, I would like to say thank you to all of my friends and anyone else who has supported and helped me in any way. I truly appreciate your help and assistance.



DECLARATION

I, OSORO ALLAN DAN, 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 part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

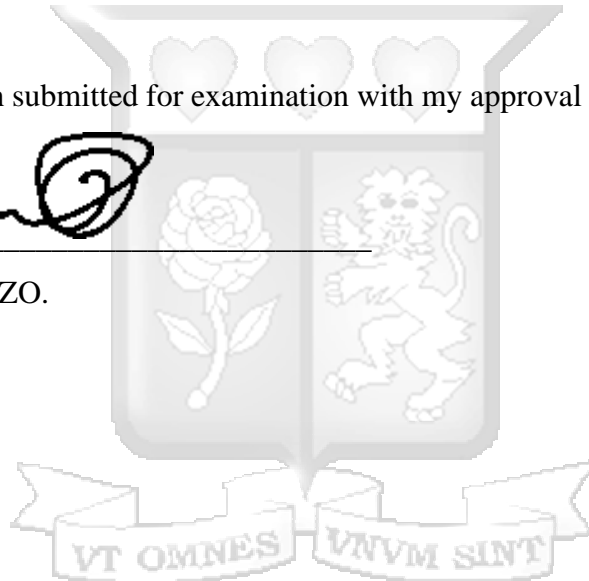
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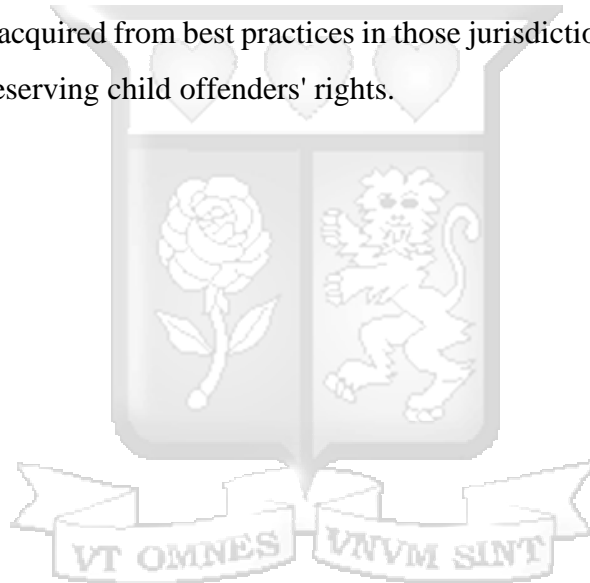
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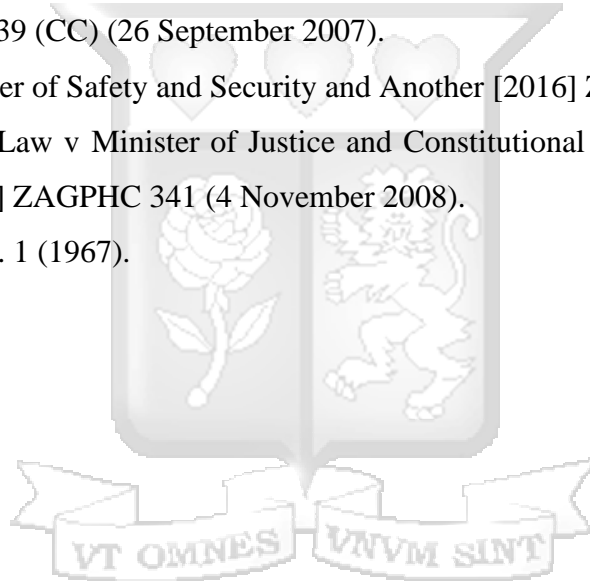
ABSTRACT

Every year, many children are involved with the criminal judicial system. A considerable number of these children are subjected to the criminal justice system and suffer physical, psychological, and/or sexual abuse. This is evident even though both domestic and international law establish safeguards to ensure that children who are in conflict with the law have their rights protected during the legal process. The involvement of courts is particularly noteworthy, in the context of safeguarding the legal rights of minors involved in legal disputes. The purpose of this research is to look into the structure of the trial process for children in legal conflict, the role of courts and other child justice system actors in defending those children's rights, and the challenges that occur in doing so. In addition, outstanding methods from other jurisdictions, such as South Africa, will be explored, and insights acquired from best practices in those jurisdictions will be applied to offer future possibilities for preserving child offenders' rights.



LIST OF CASES

1. Erick Githua Kiarie v Attorney General & 2 others (2016) eKLR.
2. POO (A Minor) v Director of Public Prosecutions & Senior Resident Magistrate Mbita Law Courts (Constitutional Petition 1 of 2017) [2017] KEHC 8341 (KLR) (17 August 2017) (Judgement).
3. M W K & Another v Attorney General & 3 others [2017] eKLR.
4. DMO & Another JB v Republic [2013] eKLR.
5. Antony Murithi v O.C.S Meru Police Station & 2 others [2012] eKLR.
6. Republic V Dorine Aoko Mbogo & another [2010] eKLR.
7. S v M (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) (26 September 2007).
8. Raduvha v Minister of Safety and Security and Another [2016] ZACC 24.
9. Centre for Child Law v Minister of Justice and Constitutional Development and Others (11214/08) [2008] ZAGPHC 341 (4 November 2008).
10. Re Gault 387 U.S. 1 (1967).



List of Abbreviations

UNICEF	The United Nations International Children’s Emergency Fund
UNCRC	The United Nations Convention on the Rights of the Child
ACRWC	The African Charter on the Rights and Welfare of the Child
NCAJ	The National Council on the Administration of Justice
ICCPR	The International Covenant on Civil and Political Right



CHAPTER ONE: INTRODUCTION

1.1 Background to the Problem

Child justice is the safeguarding and advancement of the rights and well-being of children who come into contact with the justice system – as victims, witnesses, offenders, or in need of care or protection.¹ Child justice encompasses the aversion of child involvement in illicit activities, as well as the recuperation and reintegration of children who have run afoul with the law.² Child justice has historically taken a peripheral place within the criminal justice system in Kenya but crime among children has recently surged.³ The concept of child delinquency is driven by the unfavourable effects of social and economic development, especially economic crises, political unrest, and the deterioration of important institutions.⁴ Consequently, attention has shifted to the child justice system, as issues regarding its efficiency in ensuring that justice is served have been raised.⁵

In Kenya, the Persons Deprived of Liberty Act in Kenya authorises the detention of child offenders and provides that those denied their freedom may be housed in any facility or prison.⁶ Detention refers to the confinement of a child in conflict with the law in a police cell, place of safety, or rehabilitation school, among others.⁷ The Children Act of 2022, which supplements this, as per Section 2, allows for the confinement of child offenders in the aforementioned places.⁸ The Act further provides methods of dealing with children in conflict with law.⁹ Child detention refers to the short-term incarceration that is typically employed following an arrest of a minor but prior to the judge's decision about the minor's guilt or innocence.¹⁰

¹ UNICEF, Justice for Children, 31 January 2022 <https://www.unicef.org/protection/justice-for-children> in September 2023.

² UNICEF, Justice for Children, 31 January 2022 <https://www.unicef.org/protection/justice-for-children> in September 2023.

³ Kinyanjui S, *Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, Department of Children's Services, January 2021, 1.

⁴ World Youth Report, *Juvenile Delinquency*, 2003, 183.

⁵ Kinyanjui S, *Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya*, Department of Children's Services, January 2021, 1.

⁶ Section 12 (3) (g), *Persons Deprived of Liberty Act (Act No.23 of 2014)*.

⁷ Section 2, *Children Act (Act No. 29 of 2022)*.

⁸ Section 2, *Children Act (Act No. 29 of 2022)*.

⁹ Section 239, *Children Act (Act No. 29 of 2022)*.

¹⁰ The Annie. E Casey Foundation, *Juvenile Detention Explained*, March 26 2021 – < [Juvenile Detention Explained](#)> on 24 December 2022; Hodgkin R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children's Fund, 2002, 35-40.

In exercise of the powers conferred by Section 92 of the Children Act 2022, the National Council for Children's Services made regulations for remand homes and rehabilitation schools.¹¹ Detention of children is required to conform with Articles 29(f) and 51 of the Constitution of Kenya, 2010.¹² As of 2022, a new Children's Act was enacted which outlines the necessary standards and procedures for detention of children in conflict with the law.¹³ The Act provides that detention conditions should facilitate humane treatment and respect for privacy, legal capacity and inherent human dignity.¹⁴ In a similar vein, the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty applies to all forms of detention facilities.¹⁵ Furthermore, it is referenced in Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR), which states that anyone who has lost their freedom must be treated with respect for their inherent dignity.¹⁶ Furthermore, the United Nations Convention on the Rights of the Child (CRC), guarantees the right of any child deprived of their liberty to prompt access to an advocate and any other assistance required for their safety.¹⁷ The African Charter on the Rights and Welfare of the Child (ACRWC), supplements and complements the CRC by comprehensively addressing the specific socio-cultural and economic realities.¹⁸

In reference to the institutions provided for in Section 2 of the Children Act, the conditions in remand homes approved schools, and borstal institutions have been criticised for not meeting internationally recognized standards and for having harsh and perhaps fatal confinement circumstances in contrast to the desire for humane and respectable conditions.¹⁹ The institutions where children were housed had outdated amenities, poor water and sanitation facilities, shoddy and filthy bedding materials, and a high frequency of corporal punishment and it was revealed that

¹¹ The Children (Remand Homes and Rehabilitation Schools) Regulations, 2020.

¹² Section 26, *Children Act* (Act No. 29 of 2022).

¹³ Section 217 to Section 243, *Children Act* (Act No. 29 of 2022).

¹⁴ Section 26 (6), *Children Act* (Act No.29 of 2022).

¹⁵ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990 [United Nations Rules for the Protection of Juveniles Deprived of their Liberty](#) on 24 December 2022.

¹⁶ Article 10(1), International Covenant on Civil and Political Rights, 16 December 1966, *Treaty Series* 999 (December).

¹⁷ Article 37, United Nations Convention on the Rights of the Child.

¹⁸ Olowu D, *Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child*, *The International Journal of Children's Rights*, 2002, 127-136.

¹⁹ UNICEF, Rights at Risk: Issues of Concern for Kenyan Children, April 19 2001 [Rights at Risk: Issues of Concern for Kenyan Children](#) on 24 December 2022.

children who needed care and protection and child offenders were housed together in the same facility. It is reported that these conditions still exist in most of the institutions.²⁰

According to a survey performed by the National Council on Administration of Justice in 2016, in excess of fifty per cent of respondents reported witnessing child offenders being physically, psychologically, or sexually victimized. Of those, the majority reported having experienced physical, psychological, or sexual abuse.²¹ The investigation also confirmed that 12,000 or so children encounter the criminal court system annually. During their time in custody, these children were required to share cells with adults.²² The institutions' working conditions do not uphold the right to humane and respectful treatment, which has a cascading effect on other human rights abuses.

In this context, the study will look at Kenya's child justice system, namely how well state agencies²³ and other participants are defending children's best interests as required by Kenyan law.²⁴

1.2 Statement of Problem

There are many shortcomings in the violation of rights at the point of arrest, custody, trial and even the post-trial stage, despite the existence of well-defined legal and policy criteria that direct governmental organs with obligations to protect the rights of minor offenders. Taking into consideration the inhumane and undignified detention conditions and human rights violations. Not to mention the treatment of child delinquents and street children as criminals despite their detention being of a child nature.²⁵

1.3 Research Objectives

The research intends to:

1. To examine the current legal and institutional framework that safeguards the rights of child offenders in Kenya.

²⁰ Kenya Vision 2030 Second Medium Term Plan (2013-2017), 90.

²¹ Ottolini D, 'Violence Does Not Fall on One Roof Alone: A baseline survey on violence against children in the Kenya Juvenile System', Kolbe Press, 2016.

²² Ottolini D, 'Violence Does Not Fall on One Roof Alone: A baseline survey on violence against children in the Kenya Juvenile System'.

²³ Article 20 (1) (4), *Constitution of Kenya* (2010).

²⁴ Article 20 (1), *Constitution of Kenya* (2010).

²⁵ Kenya Vision 2030 Second Medium Term Plan (2013-2017), 90.

2. To explore the key challenges facing the protection of the rights of child offenders in Kenya and analyze their causes and consequences.
3. To compare the legal systems of South Africa with Kenya in terms of the protection of rights of child offenders and draw lessons and recommendations for Kenya.

1.4 Research Questions

The paper primarily focuses on the subsequent questions:

1. What is the current legal and institutional framework that safeguards the rights of child offenders in Kenya?
2. What are the key challenges facing the protection of the rights of child offenders in Kenya?
3. What lessons can Kenya learn from South Africa on the protection of the rights of child offenders?

1.5 Hypothesis

This dissertation hypothesizes that state authorities and other stakeholders are not efficacious in enforcing the rights of child offenders.

1.6 Justification of the study

The primary contributions of this study are to call attention to the suffering of child offenders and to make recommendations for enhancing the child justice system. The study contributes to the corpus of information presently accessible on the vital subject of the rights of child offenders. To accomplish this purpose, the research attempts to spark an informed discourse on the subject and suggest novel solutions to the issue of child offenders' rights violations.

1.7 Conceptual Framework

To achieve the objectives of this paper, this study is based on four principles governing Kenya's children's rights: non-discrimination, survival and development, the child's viewpoints, and the best interests of the child.

In layman's words, Yvonne Dausab elaborated on the principle of best interest as it is in the child's best interest to involve them before making decisions that will have an impact on their life.²⁶ She impels the pertinent institutions, to put things into perspective, and to take into account the

²⁶ Dausab Y, 'The Best Interest of the Child' in Ndaambe Haimbili (ed), *Children's Rights in Namibia*, Macmillan Education Namibia, Namibia, 2009, 145.

following when they are construing a matter involving a child: the child's wishes, whether they are objective or subjective, the scope of the interest, the type of interest at stake, and the criteria used to determine it.²⁷ Article 53(2) of the Kenyan Constitution and Section 4 of the Children Act both recognize the principle and so do Kenyan Courts as they deem the principle crucial in every case involving child offenders. For some time now, judges and even academics have struggled with the complexities involved in applying the best interest principle in actual instances. Yvette McGee noticed that state supreme courts frequently take on the most challenging criminal justice cases involving minors. Adoption of a useful framework has thus been created to facilitate the use of the best interest principle.²⁸

The principle of non-discrimination is enshrined in both international and domestic legislation.²⁹ It protects children from discrimination³⁰ and ensures equality of opportunity for children from diverse backgrounds.³¹ The African Charter on the Rights and Welfare of the Child includes provisions designed to safeguard the welfare interests of children.³² The responsibility of ensuring the fulfilment of these rights lies with the state, as demonstrated by the *Erick Githua Kiarie v Attorney General & 2 others* case, in which the High Court had to order the state to give basic education to minors confined in a borstal facility.³³

The principle on the child views emphasizes the importance of children's voices being heard and their opinions being given the weight they deserve in matters that impact them. This concept requires that a kid be given the opportunity to express themselves and have an advocate appointed at the state's expense.³⁴ The court case *POO (A Minor) v. Director of Public Prosecutions*³⁵ highlights the importance of the principles where legal aid is crucial for children, especially those who are less knowledgeable about the legal system.³⁶

²⁷ Dausab, 'The Best Interest of the Child,' 145.

²⁸ McGee Y and Jolson K.A, Chief Justice O'Connor's Juvenile Justice Jurisprudence: A Consistent Approach to Inconsistent Interests, 48 *Akron Law Review* 1, April 2015, 56-77.

²⁹ Article 2, United Nations Convention on the Rights of the Child.

³⁰ Article 27 (5), *Constitution of Kenya* (2010).

³¹ Olowu D, *Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child*, *The International Journal of Children's Rights*, 2002, 127-136.

³² Articles 11- 16, *African Charter on the Rights and Welfare of the Child*, July 1990, 36804.

³³ *Erick Githua Kiarie v Attorney General & 2 others* (2016) eKLR.

³⁴ Berkheiser M.E, 'The Fiction of Juvenile Right to Counsel: Waiver in Juvenile Courts', *Scholarly Works*, 2002 - < <https://scholars.law.unlv.edu/facpub/378> on 31 October 2023.

³⁵ *POO (A Minor) v Director of Public Prosecutions & Senior Resident Magistrate Mbita Law Courts* (Constitutional Petition 1 of 2017) [2017] KEHC 8341 (KLR) (17 August 2017) (Judgement).

³⁶ Berkheiser M.E, 'The Fiction of Juvenile Right to Counsel: Waiver in Juvenile Courts'.

The principle of survival and development of the child is crucial for child offenders, as it ensures they can live normal lives, meeting their fundamental necessities.³⁷ Some have contended that the definition of development should encompass not only physical well-being but also mental, emotional, cognitive, social, and cultural development.³⁸ The fact that capital punishment is not applied to minors, allowing them to complete their punishment quickly, reintegrate into the community, and contribute positively is one step taken to acknowledge the principle.³⁹ This forbids the death sentence, safeguarding a child's right to life.⁴⁰ The principle also emphasizes the significance of survival and development, which includes mental, emotional, cognitive, social, and cultural development.⁴¹

Together, these tenets provide a sophisticated framework for analyzing the children incarceration rate in Kenya, pointing the way toward understanding systemic disparities, developmental consequences, participatory methods, and the necessity of child-centered interventions in the criminal justice system.

1.8 Literature Review

This section discusses the theoretical literature pertinent to the issue under investigation and how it relates to the study's goals and questions. It also examines the studies conducted by other researchers, their techniques, and any gaps in their studies that may be present. The chapter also evaluates recent writing pertinent to the study.

The definition of children's delinquency must be developed to comprehend the core of this study. According to, Clement Okech in his paper defines delinquency is a deviant phenomenon that may manifest before maturity and may extend into adulthood. He goes on further to state that physical and mental challenges or pressures may cause a child to engage in antisocial behavior, including criminality, at a disproportionately high rate.⁴² The concept of child delinquency is driven by the unfavourable effects of social and economic development, especially economic crises, political

³⁷ Hodgson D, 'The Child's Right to Life, Survival and Development', *2 International Journal of Children Rights* 4, 1994, 385 – 386.

³⁸ Olowu D, 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare off the Child', 127-136.

³⁹ Article 37 (a), United Nations Convention on the Rights of the Child.

⁴⁰ Hodgson D, 'The Child's Right to Life, Survival and Development', 385 – 386.

⁴¹ Olowu D, 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare off the Child', 127-136.

⁴² Okech C, 'The Juvenile Justice in Kenya: Growth, System and Structures', *Resource Material Series No. 101*, UNAFEL.

unrest, and the deterioration of important institutions.⁴³ There is no one path to delinquency, and multiple risk factors often raise a young person's likelihood of breaking the law. Factors such as aggression, low verbal IQ, delayed language development, and school problems can lead to delinquency as proposed by Tremblay and Le Marquand.⁴⁴

Janet E. Ainsworth provided a critical analysis, linking the child justice system to the doctrine of *parens patriae*, which subordinates parental authority to government authority through state intervention to protect the welfare of children who were not provided with adequate parental care and consequently became involved in criminal activities.⁴⁵ Emphasis on the doctrine of *parens patriae* was laid on the notion of the court's determination of the moral and social state of the offender and determining the most effective way to reform his behaviour – rather than the hearing centering on whether the child has violated the law. The Supreme Court's ruling in *re Gault* case had a significant effect on the child justice system because it mandated several reforms, such as the application of the rules of evidence in delinquency hearings and the necessity that all delinquency proceedings be adversarial with children represented by counsel.⁴⁶

According to David J. Smith, the child justice system is a result of a collision between two opposing ideologies: children are seen as a force of nature rather than as autonomous moral agents, while mature adults are recognized as moral beings capable of making decisions and being held accountable for their choices.⁴⁷ Despite the progressive reforms pertaining to child participation, parents and guardians still make decisions on behalf of their children, providing justification and explanation for their decisions in the child's best interest. The text recognizes that there is a tension between these two concepts in child justice. It's unclear if children in conflict with the law should be treated like children who need support and supervision or as responsible adults who need to be penalised.⁴⁸ According to Smith, each child justice system offers a unique way to resolve this conflict, hence it is inevitable that opinions will differ on how successful the system is in balancing conflicting ideals.

⁴³ Nanjala S.L, 'Analysis of the Factors Leading to Juvenile Delinquency: The Case of Murang'a Children's Remand Home', September 2008.

⁴⁴ Tremblay R.E., and LeMarquand D, *Individual Risk and Protective Factors (From Child Delinquents: Development, Intervention, and Service Needs*, Sage Publications, NCJ 207781, 2001, 1377-164.

⁴⁵ Ainsworth J.E., The Court's Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases, 6 *The Future of Children* 3, 1996, 64-74.

⁴⁶ *Re Gault* 387 U.S. 1 (1967).

⁴⁷ Smith D.J, 'The Effectiveness of the Juvenile Justice System,' Sage Publications, 5(2), 2005, 181-195.

⁴⁸ Smith D.J, 'The Effectiveness of the Juvenile Justice System,' 181-195.

In order to hone and fortify Africa's ability to advance promising solutions and best practices, Julia Sloth-Nielsen and Benyam D. Mezmur conducted research to identify themes and topics that are pertinent to the promotion of children's rights in the African setting.⁴⁹ According to the text, children are not just bound by the laws of their nation of origin.⁵⁰ Children are entitled to a position on the global stage because of their vulnerability and their need for care, security, and justice.⁵¹ According to the article, the African understanding of human rights is demonstrated by the recognition that children are important members of society and as such, they need extra protection because of their unique, vulnerable, and precarious circumstances.⁵² Vulnerability refers to the condition of high exposure to specific hazards paired with a diminished capacity to protect or defend oneself against those risks and cope with their negative repercussions.⁵³ Diego Ottolini depicts what transpires when children come into contact with the child justice system. Most of these children suffer from physical, mental, and/or sexual abuse, with females particularly vulnerable to gender-based violence.⁵⁴

After the review of the literature, it can be duly asserted that child offenders' rights are still largely infringed, even with diverse legal protections. Thus, this dissertation contributes to scholarship on the protection of the rights of child offenders in Kenya.

1.9 Methodology

In line with the objectives of this paper, desk-based research is to be undertaken. Research in this paper is based on data obtained from primary and secondary sources of law. Primary sources of law include the Constitution of Kenya, legislation case law as well as international law. Secondary sources of law include scholarly articles and textbooks. The study equally adopted a comparative approach to the implementation of South African laws, institutions, and procedures to those in Kenya.

⁴⁹ Sloth-Nielsen J and Mezmur B.D., "Surveying the research landscape to promote children's legal rights in an African context," 7 *African Human Rights Journal* 2, 2007.

⁵⁰ Sloth-Nielsen J and Mezmur B.D., "Surveying the research landscape to promote children's legal rights in an African context,".

⁵¹ Sloth-Nielsen J and Mezmur B.D., "Surveying the research landscape to promote children's legal rights in an African context,".

⁵² Sloth-Nielsen J and Mezmur B.D., "Surveying the research landscape to promote children's legal rights in an African context,".

⁵³ Mendola D, Parroco A.M and Li Donni P, "Accounting for interdependent risks in vulnerability assessment of refugees," *Book of Short Papers SIS 2020*, November 2020, 3.

⁵⁴ Ottolini D, 'Violence Does Not Fall on One Roof Alone: A baseline survey on violence against children in the Kenya Juvenile System'.

1.10 Scope and limitations of the study

The study's geographic scope is restricted to Kenya, where child offenders' rights are being implemented. This study evaluates pertinent judicial decisions along with domestic and international legal mechanisms that are peculiar to Kenya. In addition to relying on international and Kenyan law, reliance was placed on South African law as it has one of the world's best child justice systems of law, which are inventive and forward-thinking and reflect a noteworthy creative approach for comparative purposes.⁵⁵

1.11 Chapter Breakdown

Chapter One: It provides a succinct summary of the study report. The chapter contains the background to the study, the statement of the problem, the research questions and objectives, the hypothesis, a justification for the study, the conceptual framework, the literature review and the scope and limitations of the study.

Chapter Two: The chapter seeks to analyze the current legal and institutional framework that protects the rights of child offenders in Kenya.

Chapter Three: This chapter delves into an evaluation of the challenges the so-called framework faces in protecting the rights of children in conflict with the law.

Chapter Four: This chapter discusses the implementation of South African laws, institutions, and procedures to those in Kenya. It then addresses the lessons Kenya can learn from South Africa with the hopes of remedying its provisions in terms of the rights of child offenders.

Chapter Five: This chapter concludes the research. Proceeds to make proposals that are intended to help Kenya's child justice system better implement the rights of child offenders.

⁵⁵ Du Plessis J.E, "South Africa", *Elgar Encyclopaedia of Comparative Law*, 2nd ed, 2012, 814.

CHAPTER TWO: THE LEGAL AND INSTITUTIONAL FRAMEWORK THAT PROTECTS THE RIGHTS OF CHILD OFFENDERS IN KENYA

2.1 Introduction

Child protection is a multidisciplinary and multisectoral issue that is covered by several international legal systems.⁵⁶ This is significant given that people under the age of eighteen (18) make up about half of Kenya's overall population.⁵⁷ Alongside that, children also experience many forms of vulnerability in their daily lives.⁵⁸ But no consideration is given to the fact that their survival behaviour and the hard reality of their existence frequently clash with the law.⁵⁹ As a result, when children in need of care and protection encounter the legal system, they become embroiled in the adult criminal justice system.⁶⁰ Which is in no way in their best interest.

A fundamental principle of the Constitution, the Children Act, and other international and regional treaties is that a child's best interests should always come first in all matters pertaining to them. The rights of children who are in conflict with the law are not sufficiently protected by Kenya's legal system, notwithstanding advancements in children's rights. Notwithstanding the progress made in the field of children's rights, the most marginalized, disregarded, and undesired topic is the reform of laws pertaining to child offenders.⁶¹

This chapter seeks to analyse the current framework – legal, policy and administrative – for children in conflict with the law. Furthermore, the chapter, based on legal arguments, highlights the gaps that exist in the legal framework protecting of rights of child offenders in Kenya.

2.2 An Analysis of the Legal Framework in Kenya

The key elements of the child protection system consist of laws and policies protecting children from abuse and exploitation, a central government coordination mechanism, a centralized management information system, sufficient resources, viable regulation, a committed workforce,

⁵⁶ The National Council for Children's Services, 'The Framework for The National Child Protection System for Kenya', November 2011, <https://resourcecentre.savethechildren.net/document/framework-national-child-protection-system-kenya/> on 6 December 2023.

⁵⁷ Kenya National Bureau of Statistics, Highlights of the Socio-Economic Atlas of Kenya, 2019.

⁵⁸ The National Council for Children's Services, The Framework for The National Child Protection System for Kenya.

⁵⁹ Nikhil R and Wong M., 'Juvenile Justice-Modern Concepts of Working with Children in Conflict with the Law', Save the Children UK, 2012, <https://resourcecentre.savethechildren.net/document/juvenile-justice-modern-concepts-working-children-conflict-law/> on 26 December 2023.

⁶⁰ Nikhil R and Wong M., 'Juvenile Justice-Modern Concepts of Working with Children in Conflict with the Law'.

⁶¹ Muncie J., 'The United Nations, children's rights and juvenile justice' in Wayne T. et al (eds), *Youth Justice Handbook: Theory, Policy, and practice*, Cullompton Willan, 2009, 20-21.

and opportunities for children to voice their views and participate. It guarantees the children's safety and that infractions are dealt with in their best interests. The interdependence in a child protection system is both horizontal and vertical.

As per the vulnerability reasons mentioned in the case of *M W K & Another v Attorney General & 3 others*,⁶² the Constitution enforces the overarching principle of the best interests of the child to be considered in all matters concerning the child.⁶³ So said matters concerning the children in conflict with the law include their arrest, search and detention, arraignment in court, the trial process, and their disposition. There are many discrepancies in the violation of rights at the aforementioned stages, despite the existence of well-defined legal and policy criteria that direct governmental organs with obligations to protect the rights of child offenders.

2.2.1 Arrest, Search, and Detention

The initial interaction between the criminal justice system and a child suspected of being in conflict with the law occurs during the arrest process.⁶⁴ A child's rights to privacy and human dignity are to be safeguarded according to the law. Therefore, in accordance with our developing human rights culture, a police officer must consider less intrusive techniques that must be utilized to arraign the suspect in court and to gather evidence before carrying out any arrest, search, or detention of a minor.

The law mandates that children's rights are safeguarded against cruel treatment and punishment, harmful cultural norms, violence of any kind, abuse, neglect, and hazardous or exploitative labour.⁶⁵ A child should only be detained as the final resort and for the least amount of time feasible. During detention, children should be separated from adults and people of the opposing gender.⁶⁶ The phrase "a measure of last resort" describes a rule that must be followed when deciding whether or not to place a child in detention and assumes that detention should only take place after all other avenues have been exhausted.⁶⁷

⁶² *M W K & Another v Attorney General & 3 others* [2017] eKLR.

⁶³ Article 53 (2), *Constitution of Kenya* (2010).

⁶⁴ Section 59, *National Police Service Act* (No. 11A of 2011); Fifth Schedule, *National Police Service Act* (11A of 2011).

⁶⁵ Article 53 (1)(d), *Constitution of Kenya* (2010).

⁶⁶ Article 53 (1)(f), *Constitution of Kenya* (2010); Rule 13.3, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 1985.

⁶⁷ Article 53 (1)(f), *Constitution of Kenya* (2010).

This fundamental principle is intended to protect the right to freedom and make it difficult to restrict it unless there are legitimate grounds to do so. Second, children who are already vulnerable may be more severely affected by the traumatic, brutalizing, dehumanizing, and demeaning consequences of confinement, which can also have an adverse effect on their physical and mental health.⁶⁸

The Children Act forbids torturing or punishing children in any way, including inhumane treatment. By explicitly forbidding the unlawful detention and deprivation of children's liberty, it raises the standard. It places a strong emphasis on separating children from adults while they are in custody and mandates that children get access to their families and legal counsel while they are in custody.⁶⁹

For minors on trial, the Children Act provides guidelines. It requires that the child's parent or legal guardian be notified to be present during interrogation, and it requires that the child be arraigned within twenty-four hours after the arrest. The children's officer ought to be present if they cannot be traced.⁷⁰ According to Judge Mumbi's opinion in *DMO & Another JB v Republic*, the law is unambiguous regarding the questioning of minors.⁷¹ When a minor provides evidence without the presence of his parents, guardian, or lawyer, the trial court may rule that the testimony is not admissible.⁷²

2.2.2 The Trial Process

Per the provisions of the Constitution, every accused person is entitled to a fair trial that commences and concludes without undue delay.⁷³ The Children Act constituted the Children's Court, which has the authority to consider any case involving a minor, with the exception of those in alleged murder cases or those in tandem with an adult.⁷⁴ Cases must be gazetted by the Chief Justice for a magistrate to preside over so said cases in such courts.⁷⁵ The Children's Court takes into account various factors during hearings concerning children being vulnerable persons.⁷⁶ The

⁶⁸ M W K v another v Attorney General & 3 others [2017] eKLR para 76.

⁶⁹ Section 18, *Children Act* (Act No. 29 of 2022).

⁷⁰ Fifth Schedule, *Children Act* (Act No. 29 of 2022).

⁷¹ *DMO & Another JB v Republic* [2013] eKLR.

⁷² *Antony Murithi v O.C.S Meru Police Station & 2 others* [2012] eKLR.

⁷³ Article 50 (2)(e), *Constitution of Kenya* (2010).

⁷⁴ Section 91, *Children Act* (Act No. 29 of 2022).

⁷⁵ Section 93(1), *Children Act* (Act No. 29 of 2022).

⁷⁶ Section 93(3), *Children Act* (Act No. 29 of 2022).

law places limitations on who is permitted to attend court proceedings⁷⁷ and gives the court the authority to eject anyone who is not permitted to be present during procedures involving a minor.⁷⁸ Accordingly, every child on trial is entitled to an advocate appointed by the state and funded by the state, according to the Constitution.⁷⁹ The Children's Act accentuates the significance of providing legal representation for unrepresented children in court proceedings, with expenses covered by parliament-allocated funds as substantial injustices have been acknowledged to occur.⁸⁰

2.2.3 Disposition

The Children Act primarily governs disposition proceedings, with additional parliamentary acts serving as a complement. Different concepts are at work while dealing with child offenders. In addition to being protected from the death penalty by law,⁸¹ children should not be placed in imprisoned⁸² or exposed to corporal punishment.⁸³ The Children Act also specifies how punishments should be administered.⁸⁴

2.3 Children Institutions

2.3.1 Borstal Institutions

According to the statute, youthful offenders are those who have been found guilty of a crime carrying a jail sentence and who, at the time of the conviction, the court judged to have reached the age of fifteen but to be under the age of eighteen. These individuals are sent to borstal institutions.⁸⁵ For a maximum of three years, individuals enrolled in borstal institutions are required to receive educational, industrial, and agricultural training.⁸⁶ In contrast, children serve for a year and a half before being eligible for release under license.⁸⁷ This is done in an effort to

⁷⁷ Section 93(4), *Children Act* (Act No. 29 of 2022).

⁷⁸ Section 93(5), *Children Act* (Act No. 29 of 2022).

⁷⁹ Article 50 (2)(h), *Constitution of Kenya* (2010).

⁸⁰ Section 96, *Children Act* (Act No. 29 of 2022).

⁸¹ Section 6, *Children Act* (Act No. 29 of 2022).

⁸² Section 238(1), *Children Act* (Act No. 29 of 2022).

⁸³ Section 25(3), *Children Act* (Act No. 29 of 2022).

⁸⁴ Section 239, *Children Act* (Act No. 29 of 2022).

⁸⁵ Section 2, *Borstal Institutions* (Act No. 10 of 1983).

⁸⁶ Section 4(b), *Borstal Institutions* (Act No. 10 of 1983).

⁸⁷ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," Department of Children's Services, January 2021, 26.

rehabilitate the children, provide them with the skills they need to stop committing crimes and empower them.⁸⁸

2.3.2 Children Remand Homes

Children remand homes are intended to accommodate, care for, and safeguard children in conflict with the law and their placement is as a last resort for their care and safety during trial before verdict or placement.⁸⁹

In *Republic v Dorine Aoko Mbogo and Another*⁹⁰ the court noted that, in accordance with the Child Offender Rules, a child may be placed on remand for a maximum of six months before being granted release as a matter of right, unless Article 49(1)(h) provides sufficient reasons for denying bail.⁹¹

2.3.3 Rehabilitation Schools

In accordance with the Children Act, the government has founded many rehabilitation facilities across the nation to help rehabilitate child offenders and ease their reintegration into society. Rehabilitation schools' primary objectives are to help child offenders who have been found guilty by a court of law grow psychologically, physically, and mentally.⁹²

Rehabilitation centres have an obligation to guarantee the children's safety and well-being. They must strictly comply with the legal and regulatory frameworks that regulate them to achieve their goals. According to the UN Human Rights Council, nations must create legal and policy frameworks that respect international law and consider the needs of children. The difficulties that rehabilitation institutes face should likewise be covered by those policies.⁹³

Additionally, they also serve to provide spiritual education, academic training, and vocational skills to make them economically independent. Subsequently, they see to it that the child is

⁸⁸ Kariuki W.R., Njoka J.N. and Ndegwa L.W., Challenges Facing Juvenile Delinquent Centers in Kenya: A Case Study of Othaya Rehabilitation Centre, Nyeri, *Kenya African Journal of Education Science and Technology*, Vol 5 No. 2 (2019), 164-172.

⁸⁹ Section 77, *Children Act* (Act No. 29 of 2022).

⁹⁰ Republic V Dorine Aoko Mbogo & another [2010] eKLR.

⁹¹ Article 49(1)(h), *Constitution of Kenya* (2010).

⁹² Kariuki W Rosalind et al, *Challenges Facing Juvenile Delinquent Centers in Kenya: A Case Study of Othaya Rehabilitation Centre, Nyeri*, 164-172.

⁹³ Kariuki W Rosalind et al, *Challenges Facing Juvenile Delinquent Centers in Kenya: A Case Study of Othaya Rehabilitation Centre, Nyeri*, 164-172.

admitted to a regular school whenever the rehabilitation term concludes.⁹⁴ As per the Children Act, a child can only be qualified for a rehabilitation school if they fall between the age range of twelve to fifteen.⁹⁵ A child may be furnished to a rehabilitation school for an aggregate of three years, or till they reach the age of eighteen.⁹⁶

2.3.4 Youth Corrective Training Centre

The purpose of the Youth Corrective Training Centre was to house disruptive and disorderly youth who needed to be withdrawn from their families and placed in a disincentive and rehabilitative environment.⁹⁷ The Centre was established under the Prisons Act,⁹⁸ and the sole boy establishment was at Kamiti. Admitted youth have to be between the ages of 17 - 21 and shall be retained for a maximum of four months.⁹⁹ Their admission could only be granted by the court on the recommendation of the probation office.¹⁰⁰

2.3.5 Fit Persons and Charitable Institutions

As per the Children Act, a child who is determined to be in conflict with the law might be entrusted to an eligible person for care. According to the Children Act, a fit person possesses strong moral character and integrity, can appropriately care for and be a guardian for a kid, and has proven to the satisfaction of the Court.¹⁰¹

Children who are taken by an authorized authority on the grounds that they need care and protection or are in compliance with a care order are permitted to be placed in charitable institutions.¹⁰² Legal requirements mandate that charitable institutions give dedicated children proper care and security during their stay.¹⁰³ For the duration of the child's commitment to a charitable centre, the Secretary of Children Services is obligated to provide supervision over the child. Under the Act, any charitable organization providing care and protection for children may

⁹⁴ Kariuki W Rosalind et al, *Challenges Facing Juvenile Delinquent Centers in Kenya: A Case Study of Othaya Rehabilitation Centre*, Nyeri, 164-172.

⁹⁵ Section 239(1)(f), *Children Act (Act No. 29 of 2022)*.

⁹⁶ Section 82(3), *Children Act (Act No. 29 of 2022)*.

⁹⁷ Okech C, *The Juvenile Justice in Kenya: Growth, System and Structures, Resource Material Series*, No. 101, UNAFEI.

⁹⁸ Preamble, *The Prisons Act (2009)*.

⁹⁹ Section 67, *The Prisons Act (2009)*.

¹⁰⁰ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," 14.

¹⁰¹ Section 135 (1)(g), *Children Act (Act No. 29 of 2022)*.

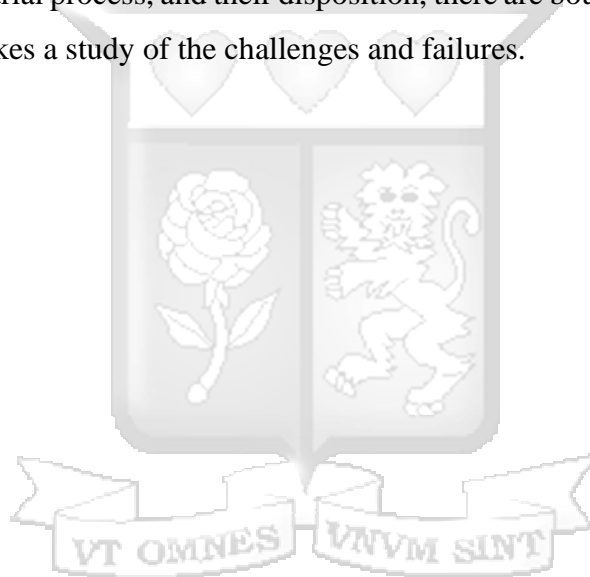
¹⁰² Section 71 (1), *Children Act (Act No. 29 of 2022)*.

¹⁰³ Section 67 (1), *Children Act (Act No. 29 of 2022)*.

be inspected by an officer designated by the director of children's services.¹⁰⁴ An official designated as such has the authority to enter the premises, examine the records kept by the organization, and even speak with the children residing there.¹⁰⁵ Obstructing an authorised officer to access and inspect a nonprofit organization or interfering with the officer's duties is illegal.¹⁰⁶

2.4 Conclusion

Kenya has made substantial advances in adopting laws that safeguard the liberties of child offenders as established by international conventions, standards, and norms. As this chapter has addressed, it is understood that courts and other children's institutions have a huge responsibility to preserve children's rights. Due to the intricacies of their apprehension, search and custody, arraignment in court, the trial process, and their disposition, there are bound to be various setbacks. The next chapter undertakes a study of the challenges and failures.



¹⁰⁴ Section 72, *Children Act (Act No. 29 of 2022)*.

¹⁰⁵ Section 73, *Children Act (Act No. 29 of 2022)*.

¹⁰⁶ Section 73 (3), *Children Act (Act No. 29 of 2022)*.

CHAPTER THREE: THE KEY CHALLENGES FACING THE PROTECTION OF RIGHTS OF CHILD OFFENDERS IN KENYA

3.1 Introduction

Protecting and promoting the well-being of children is a community obligation that requires both state and non-state actors to collaborate to overcome the issues that children face in the child justice system. Kenya's legal structure has not adequately protected minors in contact with and in conflict with the law, despite the country ratifying international laws and adopting some of the most compelling legislation. As far as access to justice is concerned, children's rights have been somewhat disregarded. Because of this, children get treated in some of the most inhumane ways in, police stations, courts, and children's institutions.

3.2 Public Perception

Changing the public's unfavourable perception of children in conflict with the law is one of the biggest obstacles facing the children's justice movement.¹⁰⁷ It is rarely understood on its whole that these children are frequently the victims of social injustice and violence themselves and that they need our compassion and support.¹⁰⁸ It is imperative that we protect children's rights, even if they have been accused of a crime or are in violation of the law. To guarantee a child lives to the fullest extent feasible, adherence to the CRC's concept of child development and survival is essential. Consequently, any interference with the child's life must be warranted; thus, the child justice system ought to endeavour to curb such interference by implementing human rights principles.¹⁰⁹

According to the CRC, all children—including those in conflict with the law—have the right to an education, humane treatment, and the right to a fair trial as well as rehabilitation and reintegration. However, it is challenging to accomplish child justice reform and, consequently, respect for these rights due to a lack of sympathetic understanding and public support. For starters, the lack of public

¹⁰⁷ UNICEF, 'Rights at Risk: Issues of Concern for Kenyan Children'.

¹⁰⁸ Nikhil R and Wong M., 'Juvenile Justice-Modern Concepts of Working with Children in Conflict with the Law', Save the Children UK, 2012 <https://resourcecentre.savethechildren.net/document/juvenile-justice-modern-concepts-working-children-conflict-law/> on 26 December 2023.

¹⁰⁹ Wouters J, Ninio A, Doherty T and Cisse H, Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability. Law, Justice, and Development, *The World Bank Legal Review*, Volume 6, 2015.

interest means that funding for the appropriate management of child justice is not supported politically.

Olufemi contends that the treatment of child offenders by society at large, coupled with the reality that minors are still in a developmental period and need special attention, has a significant influence on recidivism rates.¹¹⁰ To guarantee that children's rights are respected, numerous national, regional, and international legislative instruments were passed in recognition of this crucial factor.

3.3 Systemic Flaws

3.3.1 Arrest, Search and Detention

The United Nations Body of Principles for the Protection of All Persons under any Form of Detention stipulates that no human rights may be violated during the arrest, search, or detention process and that these actions must be executed by competent officials in strict accordance with the law.¹¹¹ As in the case of *Raduvha v Minister of Safety and Security and Another* where it was mandated that the arrest and detention of a child should be in accordance with a child's rights.¹¹²

According to an assessment done in 2021 by the Ministry of Labour and Social Protection Department of Children's Services, many of the children who were interviewed admitted that when they were being questioned by police, none of the designated people – parents, guardians, or children's officers – were present.¹¹³ Furthermore, the study found that several of the children who were interviewed said they had been apprehended for longer than twenty-four hours before being presented before a court.¹¹⁴

Additionally, the detention of minors in ordinary police cells is concerning. First, a great deal of children who were interviewed said they were in detention with adult offenders.¹¹⁵ They disclosed that they had been bullied by adults in a variety of ways. This included beatings, denying them

¹¹⁰ Olufemi M, A Sociological Review on Issues of Juvenile Delinquency, 5 *The Journal of International Social Research* 21, 2012, 468.

¹¹¹ Principle 2, United Nations Body of Principles for the Protection of All Persons under any Form of Detention, or Imprisonment.

¹¹² *Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24.

¹¹³ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," 13.

¹¹⁴ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," 14.

¹¹⁵ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," 14.

food or blankets, and forcing them to empty buckets of human waste. The exposure of adult offenders to criminal conduct is equally concerning as it hinders efforts at rehabilitation. Interviews with children in legal trouble revealed that the adult criminals' glorification of illegal behaviour had a detrimental effect on them.¹¹⁶

The second issue with holding child defendants in regular police cells is that the conditions there jeopardize attempts at rehabilitation. Even in police stations where children were housed in separate cells, the cells were part of the same block as adult cells, meaning that they were subject to the same conditions as adult offenders.¹¹⁷ Regaining one's self-worth and dignity is essential to rehabilitation. A feeling of indignity and low self-worth is sustained by inhumane surroundings. The police cells' conditions are still deplorable and fall short of what is needed.¹¹⁸

3.3.2 The Trial Process

During the trial of child offenders, the four principles stated in the first chapter apply to all cases involving children. Per the provisions of the Constitution, every accused person is entitled to a fair trial that commences and concludes without undue delay.¹¹⁹ The CRC delves extensively into the subject of children who incur afoul of the law by offering guidelines for handling child justice cases. It mandates that a child who has been accused of any crime be handled with decency, taking into mind both the child's age and the goal of reintegrating them into the community.¹²⁰

Similarly, member states are prohibited from setting the age of criminal culpability too low by the 'The Beijing Rules', which demand that they take into account children's emotional, mental, and intellectual capability.¹²¹ It is best to approach children in a way that invites engagement rather than forcing them to participate. A child should not be allowed to participate in the proceedings if doing so could negatively impact their mental, emotional, or psychological development.

¹¹⁶ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," Department of Children's Services, January 2021.

¹¹⁷ Kariuki W Rosalind et al, *Challenges Facing Juvenile Delinquent Centers in Kenya: A Case Study of Othaya Rehabilitation Centre, Nyeri*, 164-172.

¹¹⁸ National Council on the Administration of Justice, *Criminal Justice System in Kenya: An Audit* (NCAJ, LRF and RODI 2016) 64; Principle 6, United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Part d, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules); Rule 4(1) and Rules 9 – 14, United Nations Standard Minimum Rules for the Treatment of Prisoners.

¹¹⁹ Article 50 (2)(e), *Constitution of Kenya* (2010).

¹²⁰ Article 40, United Nations Convention on the Rights of the Child.

¹²¹ Rule 4, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

Examining the child should be done in a way that is acceptable and not invasive or aggressive.¹²² According to the assessment, many of them were unable to fully participate in the trial process because they regarded the setup of the courtroom to be intimidating.¹²³

The Rules acknowledge that child offenders have certain rights, including the right to counsel, the right to have their parents or guardians present during the proceedings, the right to cross-examine and question witnesses, the right to be informed of the charges against them, and the right to appeal.¹²⁴ According to the assessment done by the Ministry of Labour and Social Protection Department of Children's Services, the majority of the children who were interviewed acknowledged that they were ignorant of the judicial system and that they lacked legal counsel.¹²⁵ Some children were worried about not getting to talk to their lawyers about their cases when the state assigned them attorneys.¹²⁶ Others stated that they felt cut off from the court by the appointment of attorneys. Some said they were asked to speak with their attorneys and were turned away when they tried to address the court.¹²⁷ The Committee on the Rights of the Child made it abundantly clear that children have the right to direct hearings in addition to the right to have their voices heard by legal representation.¹²⁸

The member states are committed to safeguarding the privacy rights of child offenders by limiting the dissemination of case details in the media and retaining personal information of these offenders.¹²⁹ Unless there are very specific circumstances or it is in the child's best interests for it to be held in public, it is the responsibility of all professionals working in the criminal court system to guarantee that all proceedings take place behind closed doors.¹³⁰

¹²² Office of the Director of Public Prosecutions, *A Prosecutor's Guide to Children in the Criminal Justice System*, 2020.

¹²³ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," Department of Children's Services, January 2021, 19.

¹²⁴ Rule 7, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

¹²⁵ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," Department of Children's Services, January 2021, 19.

¹²⁶ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," Department of Children's Services, January 2021, 19.

¹²⁷ Kinyanjui S, "Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya," Department of Children's Services, January 2021, 19.

¹²⁸ Committee on the Rights of the Child, General Comment No. 10, para 44, 2007 <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf> on 6 March 2024.

¹²⁹ Rule 8, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

¹³⁰ Office of the Director of Public Prosecutions, *A Prosecutor's Guide to Children in the Criminal Justice System*, 2020.

3.3.3 Children Institutions

The ACRWC, a regional human rights instrument that addresses issues of special concern and relevance to African children, pertains to several articles that are consistent with the CRC. Reminiscent of the Convention, the Charter is predicated on four pontiff principles. These being the principle of non-discrimination,¹³¹ the best interests of the child,¹³² rights to life, survival and development,¹³³ and the views of the child.¹³⁴ The articles of the Charter on the Administration of Child Justice serve to protect the rights and welfare of children who are in conflict with the law.¹³⁵ It mandates that all minors who are either found guilty or suspected of committing an offence have the right to special treatment that respects their age and dignity.

Similarly, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules), compels child justice systems to protect the safety and rights of children offenders while also advancing their physical and mental well.¹³⁶ The Rules offer a productive framework for managing child detention institutions. According to the Rules, minors who are incarcerated must have access to services and facilities that uphold their human dignity and fulfil all health standards. To reduce dangers, the facilities should be designed safely.¹³⁷ They ought to be provided with respectable sleeping quarters that honour their age.¹³⁸ Additionally, they must have access to hygienic facilities that meet standards.¹³⁹

In reference to the institutions provided for in Section 2 of the Children Act, the conditions in remand homes approved schools, and borstal institutions have been criticised for not meeting internationally recognized standards and for having harsh and perhaps fatal confinement circumstances in contrast to the desire for humane and respectable conditions.¹⁴⁰

At a policy level, the rehabilitative programmes are not planned for and consequently, there is inadequate funding for remand homes to deliver rehabilitative services.¹⁴¹ As a result, the

¹³¹ Article 3, African Charter on the Rights and Welfare of the Child (1999).

¹³² Article 4, African Charter on the Rights and Welfare of the Child (1999).

¹³³ Article 5, African Charter on the Rights and Welfare of the Child (1999).

¹³⁴ Article 4(2), African Charter on the Rights and Welfare of the Child (1999).

¹³⁵ Article 17, African Charter on the Rights and Welfare of the Child (1999).

¹³⁶ Rule 1, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules).

¹³⁷ Rule 32, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules).

¹³⁸ Rule 33, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules).

¹³⁹ Rule 34, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules).

¹⁴⁰ UNICEF, 'Rights at Risk: Issues of Concern for Kenyan Children'.

¹⁴¹ Ministry of East African Community(EAC), Labour and Social Protection, '*Performance Audit Report on Rehabilitation and Re-integration of Child Offenders and Children in Need of Care and Protection*', 2017

insufficient programs and activities conducted in remand homes primarily rely on the initiative of the management and largely rely on partners for both human and financial resources.¹⁴² Given that a sizable portion of the children in the remand homes have criminal histories, the absence of appropriate and well-designed rehabilitation programs in these facilities is especially alarming. Due to the lengthy stays in remand facilities, it is necessary to have a well-defined plan and to have programs in place that will guarantee the rehabilitation of minors who have broken the law.¹⁴³

The study also showed that detention facilities are ill-equipped to handle the rehabilitation needs of children involved in drug- and terrorism-related offences. It was also observed that the rehabilitation programs were not gendered because of their poor design. As a result, they do not take a gendered approach to rehabilitation.¹⁴⁴ There is an increased risk of being exposed to criminal activity due to the inadequate quality, quantity, and consistency of the rehabilitation programs offered in remand houses.

Insufficient teacher numbers limit the academic offerings in all schools. Some classrooms go unattended while the few available teachers move between them. The government's education capitation program helps the schools, but there are always gaps in funding, therefore the schools turn to their partners to fill the gaps.¹⁴⁵

According to a survey conducted by the National Council on Administration of Justice, over half of the respondents reported witnessing minor offenders being victimized physically, psychologically, or sexually.¹⁴⁶ The investigation also confirmed that 12,000 or so children encounter the criminal court system annually. During their time in custody, these children were required to share cells with adults.¹⁴⁷ The institutions' working conditions do not uphold the right to humane and respectful treatment, which has a cascading effect on other human rights abuses.

[Rehabilitation-and-Re-Integration-of-Child-Offenders-and-Children-in-Need-of-Care-and-Protection-2017.pdf \(oagkenya.go.ke\)](#) on 12 February 2024.

¹⁴² Ministry of East African Community (EAC), Labour and Social Protection, *'Performance Audit Report on Rehabilitation and Re-integration of Child Offenders and Children in Need of Care and Protection'*, 24.

¹⁴³ Kinyanjui S, *'Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya.'* 14.

¹⁴⁴ Behan C., *'Learning to Escape: Prison Education, Rehabilitation and the Potential for Transformation'*, 1 *Journal of Prison Education and Re-entry* 1, 2020, 21.

¹⁴⁵ The Judiciary of Kenya, *'Child Justice Strategy 2023-2030'*, [Child-justice-Strategy.pdf \(judiciary.go.ke\)](#), 12 February 2024.

¹⁴⁶ Ottolini D, *'Violence Does Not Fall on One Roof Alone: A baseline survey on violence against children in the Kenya Juvenile System'*.

¹⁴⁷ Ottolini D, *'Violence Does Not Fall on One Roof Alone: A baseline survey on violence against children in the Kenya Juvenile System'*.

3.4 Conclusion

As this chapter explains, the problem facing the implementation of the legal framework as it falls short of providing adequate protection for the rights of children who are in conflict with the law. This deficiency is exacerbated by the fact that existing laws do not fully implement the rights of these children, even though they cover topics like detention as a last resort, prompt proceedings, participation, right to legal representation, right to dignity, and right to development.



CHAPTER FOUR: A COMPARATIVE ANALYSIS OF THE SOUTH AFRICAN CHILD JUSTICE FRAMEWORK

4.1 Introduction

The South African constitution's provision upholding children's rights is profoundly informed by international legal frameworks. The ACRWC and CRC, which South Africa ratified, are of the utmost significance.¹⁴⁸ When the constitution was enacted, South Africa had not yet complied with the demands made on its signatories by the ACRWC and CRC. Consequently, a commission was established to investigate South Africa's child justice system.¹⁴⁹ The investigations culminated in the Child Justice Act (herein referred to as 'the Act') which established a distinct criminal justice system for children.¹⁵⁰

Starting with its preamble and working its way through its provisions, the Act serves as the primary component of legislation that protects children who are in conflict with the law. Although the Act garnered praise for keeping up with international developments in protecting child offenders' rights, it has fallen short of being silent on the disposition of cases of child offenders.¹⁵¹

4.2 Provisions of the Child Justice Act

Three guiding concepts serve as the foundation for the South African Child Justice Act. These are the diversion principle, the child's best interests, and the notion that children should not be treated worse than adults.

4.2.1 The Best Interests of the Child

The child's interest should have precedence in all decisions pertaining to a child, according to Article 28(2) of the 1996 South African Constitution.¹⁵² Legal analysts contend that the term "paramount" was purposefully used to elevate the child's interests above all other factors, making them the most significant factor. However, in the South African case of *Child Law v Minister of Justice and Constitutional Development*, the Constitutional Court refuted this idea, ruling that

¹⁴⁸ African Committee of Experts on the Rights and Welfare of the Child, Ratifications Table, <https://www.acerwc.africa/en/member-states/ratifications> on 12 December 2023.

¹⁴⁹ Maguire J, *Children of the Abyss: Permutations of Childhood in South Africa's Child Justice Act*, New Criminal Law Review, 2012, 68-121.

¹⁵⁰ Child Justice Act (No. 75 of 2008).

¹⁵¹ Gallinetti J, Muntingh L and Skelton A, 'Child Justice Concepts' in Sloth-Nielsen J and Gallinetti J (eds) *Child Justice in Africa: A guide to Good Practice*, Community Law Centre, University of the Western Cape, Bellville, 2004.

¹⁵² Article 28 (2), *The Constitution of the Republic South Africa* (1996).

while the child's best interest was significant, it did not imply that everything else was insignificant.¹⁵³ The court went on to say that there is a limit to what is in the best interests of the child. That it needed to be weighed against other rights, which, when needed, also needed to be taken into consideration.¹⁵⁴

On the other hand, the South African Court in *S v M* highlighted the significance of the best interests of the child principle; hence, the scope of Section 28 (2) requirements is very broad.¹⁵⁵ The article's language highlights the need to be child-sensitive when implementing the law. It also highlights the importance of interpreting and evolving the legislation in a way that prioritizes safeguarding and advancing children's interests. In their day-to-day operations, the courts are expected to consistently protect and respect the rights of children.

This disparity demonstrates the broad discretionary authority South African courts possess in interpreting and applying the best interest of the child.¹⁵⁶ They must take into account a plethora of considerations to provide a decision that aligns with the "best interest of the child principle." As a result, every case needs to be evaluated on its own merits while considering the particular circumstances surrounding it.

The Act's preamble admits that the statute legislation of the time did not provide many of its offspring.¹⁵⁷

The difference in the interpretation of the best interests of the child principle by South African and Kenyan courts can be attributed to the varying degrees of case law development. South Africa's more established legal system has a wider collection of case law and jurisprudence on children's rights, whereas Kenya's legal system acknowledges the importance of a child's best interests, but court rulings may lack clarity.¹⁵⁸

¹⁵³ Centre for Child Law v Minister of Justice and Constitutional Development and Others (11214/08) [2008] ZAGPHC 341 (4 November 2008).

¹⁵⁴ Centre for Child Law v Minister of Justice and Constitutional Development and Others (11214/08) [2008] ZAGPHC 341 (4 November 2008).

¹⁵⁵ *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) (26 September 2007).

¹⁵⁶ Junger-Tas J, 'Trends in International Juvenile Justice: What conclusions can be drawn?' in Junger-Tas J and Decker S.H. (eds), *International Handbook of Juvenile Justice*, Springer, 2006, 505-532.

¹⁵⁷ Preamble, *Child Justice Act* (No. 75 of 2008).

¹⁵⁸ Parliament of the Republic of South Africa, 'Promoting Children's Rights in South Africa: Fast Facts - United Nations Convention on the Rights of the Child (UNCRC)', 2019 [Parliament of South Africa](#) on 6 March 2024.

4.2.2 The Principle of Diversion

A core concept of South African child justice legislation is the diversion principle.¹⁵⁹ According to this notion, child offenders ought to be kept out of the formal criminal justice system if feasible.¹⁶⁰ In its manifestation, child offenders circumvent a trial, a conviction, or a criminal record by going through an alternate process that runs concurrently with the official criminal justice system.¹⁶¹ The principle endorses alternative forms of sanction instead of sentencing child offenders.

Diversion is justified by the fact that child offenders who are removed from the formal criminal justice system have a higher chance of reintegrating into society more seamlessly. It is becoming increasingly apparent that a child offender's likelihood of becoming an adult criminal increases with their level of involvement in the criminal justice system.

Whilst Kenya and South Africa have comparable approaches to child justice and diversion, each nation's legal system, resources, and cultural background may have different implementation strategies. As the paper notes, the competency of pertinent institutions, the availability of resources, and the dedication of stakeholders – including social services and law enforcement – all affect how effective diversion programs are.

4.3 Arrest and Detention

When feasible, The Act detests the subjugation of children to the conventional criminal justice system. Regarding this, the Act supports methods other than arrest and detention to obtain a first appearance in court.¹⁶² The child ought to obtain a written notice or summons in the presence of their parents or legal guardian.¹⁶³ The written notice or summons must be sent to a probation officer within twenty-four hours. The police officer must notify the child who receives a written notice or summons, of their rights, the nature of the offence, the procedures that follow, and the repercussions of disobeying the written notice or summons.¹⁶⁴

¹⁵⁹ Chapter 8, *Child Justice Act* (No. 75 of 2008).

¹⁶⁰ Section 2(b) and Chapter 8, *Child Justice Act* (No. 75 of 2008).

¹⁶¹ Gallinetti J, Muntingh L and Skelton A, 'Child Justice Concepts' in Sloth-Nielsen J and Gallinetti J (eds) *Child Justice in Africa: A guide to Good Practice*, Community Law Centre, University of the Western Cape, Bellville, 2004.

¹⁶² Section 17, *Child Justice Act* (No. 75 of 2008).

¹⁶³ Section 17, 18 and 19, *Child Justice Act* (No. 75 of 2008).

¹⁶⁴ Section 18 and 19, *Child Justice Act* (No. 74 of 2008).

Summons and written notices are reserved for minor infractions covered by Schedule 1 of the Act. A minor who commits a serious offence may be placed under arrest.¹⁶⁵ The child must be informed by the police officer during the arrest about the nature of the offence, the reason for the arrest in a language they can understand, and the next steps that will happen after the arrest. It is also necessary to advise the child offender of their rights. Within 24 hours after the child's arrest, the arresting police officer is required to inform the offender's parents or guardians that the child has been taken into custody. The probation officer in charge of the arrested child must get a similar notification.¹⁶⁶ The Act expressly forbids arresting a child younger than ten years.¹⁶⁷

The process for obtaining a court appearance in Kenya may differ from that of other countries. It's worth noting that children in Kenya may not necessarily receive written notices or summonses in the presence of their parents or legal guardians. Instead, the authorities may opt to take the child into custody and provide an explanation of the charges, their rights, and the next steps in a language that they can understand.¹⁶⁸

A written notice or summons may be used by the police officer to set bail prior to arraignment. Only authorized adults or parents or guardians may take custody of the child.¹⁶⁹ Unless there are extremely valid reasons not to, the child must in any event be arraigned before a magistrate's court within 48 hours of the arrest.¹⁷⁰ The least restrictive kind of detainment is advised if the child must stay in police custody for any of the Act's approved reasons.¹⁷¹ According to the Act, the child should be placed in a child and youth care centre.¹⁷²

Any child accused of committing an offence must be evaluated by a probation officer.¹⁷³ After being informed by the police of the child's arrest, summons, or written notice, the probation officer has to assess the child before permitting them to attend a preliminary inquiry. The assessment determines the child's age, determines whether the child needs care and protection, gathers information about prior convictions, formulates recommendations for the proper course of action, takes into account diversion when practical, and determines whether the child was coerced by an

¹⁶⁵ Section 20, *Child Justice Act* (No. 75 of 2008).

¹⁶⁶ Section 20, *Child Justice Act* (No. 75 of 2008).

¹⁶⁷ Section 9(1), *Child Justice Act* (No. 75 of 2008).

¹⁶⁸ Fambasayi R and Moyo A, 'How South Africa, Kenya and Zimbabwe measure up on child offenders,' 2020 [How South Africa, Kenya and Zimbabwe measure up on child offenders \(theconversation.com\)](https://theconversation.com/how-south-africa-kenya-and-zimbabwe-measure-up-on-child-offenders) on 6 March 2024.

¹⁶⁹ Section 21, 22 and 23, *Child Justice Act* (No. 75 of 2008).

¹⁷⁰ Section 22(2), *Child Justice Act* (No. 75 of 2008).

¹⁷¹ Section 26(1), *Child Justice Act* (No. 75 of 2008).

¹⁷² Section 29, *Child Justice Act* (No. 75 of 2008).

¹⁷³ Section 34(1), *Child Justice Act* (No. 75 of 2008).

adult to commit the offence.¹⁷⁴ Subsequently, the probation officer will gather his findings and prepare a report that the magistrate will study during the preliminary inquiry. The probation officer maintains the confidentiality of all the information gathered.

4.4 Preliminary Inquiry

Following their apprehension, children are brought before a magistrate for a preliminary inquiry, an informal pre-trial process aimed at gathering factual information.¹⁷⁵ The preliminary inquiry can take place in a courtroom, or any other location deemed appropriate for the purpose. The prosecutor conducting the case, the probation officer and the offender's parents or guardians must be in attendance.¹⁷⁶

The magistrate compiles all pertinent information about the child during the inquiry and takes into consideration the probation officer's evaluation report. After that, the magistrate has the authority to determine if the case qualifies for diversion. All information disclosed during the preliminary hearing is kept private.¹⁷⁷ If individuals who are required to attend the preliminary inquiry do not show up, the magistrate may issue an arrest order against the absentee.¹⁷⁸ During the preliminary hearing, the magistrate has the authority to issue an order for diversion or to refer the matter to court.¹⁷⁹ A magistrate has a variety of diversionary measures at their disposal as provided in the Act.¹⁸⁰

Whilst selecting the measure, the magistrate must consider the child's culture, religion, age, language background, education, and background in both domestic and environmental settings. Additionally, the recommended option's proportionality must be considered, along with the nature of the offence, societal interests, and the child's developmental needs.¹⁸¹ The magistrate overseeing the preliminary investigation appoints a probation officer to oversee compliance with diversion orders.

If a magistrate establishes that the minor will be brought to trial, the child will be brought before the child Justice Courts to be tried.

¹⁷⁴ Section 35, *Child Justice Act* (No. 75 of 2008).

¹⁷⁵ Section 43, *Child Justice Act* (No.75 of 2008).

¹⁷⁶ Section 44(1), *Child Justice Act* (No.75 of 2008).

¹⁷⁷ Section 45, *Child Justice Act* (No.75 of 2008).

¹⁷⁸ Section 46 as read with 24 (7), *Child Justice Act* (No.75 of 2008).

¹⁷⁹ Section 49, *Child Justice Act* (No.75 of 2008).

¹⁸⁰ Section 53, *Child Justice Act* (No.75 of 2008).

¹⁸¹ Section 54, *Child Justice Act* (No.75 of 2008).

4.5 Plea-Taking and Trial Process

In South Africa, similar to Kenya, every child has the right to legal representation. There are situations where the state may pay for the child to have an advocate. In some situations, the court must submit a minor who has been arraigned without legal representation to Legal Aid South Africa for review.¹⁸² Plea cannot be taken until a child is given reasonable time to employ a legal representative.¹⁸³ However, unlike South Africa, where the state may pay for destitute children's legal representation, Kenya lacks a comparable provision. Although pro bono attorneys or groups like Legal Aid may offer legal assistance to children in Kenya, the state does not always give children legal representation.

Just as in the official criminal justice system, a child must enter a plea in court. If an adult and a child are charged together, the Criminal Procedure Act will apply to the adult and the Act's requirements will be followed during the trial.¹⁸⁴ Before entering a plea, the child must be informed about the charges against them, their rights, and the next stages in the legal procedure by the judicial official overseeing the case.¹⁸⁵

In line with section 25 of the Act, the minor can apply for bail pending trial following the taking of a plea.¹⁸⁶ As per the Act, the judicial officer must establish suitable conditions that do not involve monetary compensation if the bail terms are excessively high for the parent of the child to afford.

The hearing must be conducted by the court in a way that advances the child's best interests. To guarantee that the proceedings are child-friendly and understandable, the court has the authority to look for any further information from any other parties concerned, based on the child's age.¹⁸⁷ Furthermore, unless the court has granted permission or the attendance is required, no one may attend the proceedings.¹⁸⁸ The Act permits the parents to support their child throughout the legal process. Nevertheless, the Act is silent on the scope of this aid.

A cap on postponements by courts hearing situations pertaining to minors is also imposed under the Act. The court may only postpone for a maximum of 14 days if the child is being held in prison

¹⁸² Section 82(1), *Child Justice Act* (No. 75 of 2008).

¹⁸³ Section 82(2), *Child Justice Act* (No. 75 of 2008).

¹⁸⁴ Section 63(2), *Child Justice Act* (No. 75 of 2008).

¹⁸⁵ Section 63 (3), *Child Justice Act* (No. 75 of 2008).

¹⁸⁶ Section 25, *Child Justice Act* (No. 75 of 2008).

¹⁸⁷ Section 63 (4), *Child Justice Act* (No.75 of 2008).

¹⁸⁸ Section 63 (5), *Child Justice Act* (No. 75 of 2008).

prior to the matter's trial begins. The trial may only be rescheduled for a maximum of sixty days in cases when the child is not in detention.¹⁸⁹ Before the trial is over, the Court may still decide to consider diverting the case.

4.6 Disposition

In cases where a minor is found guilty following a trial or by their plea, the court will render a decision in accordance with Section 68 of the Act.¹⁹⁰ Probation officers' pre-sentence reports must serve as guidance for courts in cases involving serious offences.¹⁹¹ The court may impose a range of sanctions on the child, most of which are non-custodial. Prison sentences should only be used as a last resort and in extreme cases.

Community-based sentencing, which permits a child to stay in the community, is one of the various choices for disposition. To resolve disputes between victims and offenders outside of the formal system, the court may also issue restorative justice sentencing.¹⁹²

Other penalties include fines, mandatory residence requirements, and correctional monitoring orders. The Court may mandate mandatory residence in a child and youth centre for up to five years, or until the minor reaches the age of 21.¹⁹³

The Act forbids the detention of children under the age of 14.¹⁹⁴ In the case of older children, incarceration should only be used as a last resort and for the least amount of time feasible.¹⁹⁵ Repeat offenders and significant offences such as treason, sedition, murder, kidnapping, rape, and sexual assault face imprisonment.¹⁹⁶ The maximum prison sentence for a child between 14 and 17 years is 25 years.¹⁹⁷ Throughout their term, South African children incarcerated may be eligible for early release.¹⁹⁸

Similarly, the Children Act No. 29 of 2022 places a strong emphasis on the rehabilitation and reintegration of child offenders into society. However, it seems that Kenya's court system has more stringent rules when it comes to holding child offenders. Due to the distinct socio-legal

¹⁸⁹ Section 66, *Child Justice Act* (No. 75 of 2008).

¹⁹⁰ Section 68, *Child Justice Act* (No. 75 of 2008).

¹⁹¹ Section 71, *Child Justice Act* (No. 75 of 2008).

¹⁹² Section 73, *Child Justice Act* (No. 75 of 2008).

¹⁹³ Section 76, *Child Justice Act* (No. 75 of 2008).

¹⁹⁴ Section 77(1)(a), *Child Justice Act* (No. 75 of 2008).

¹⁹⁵ Section 77(1)(b), *Child Justice Act* (No. 75 of 2008).

¹⁹⁶ Section 77(3) read with Schedule 3, *Child Justice Act* (No. 75 of 2008).

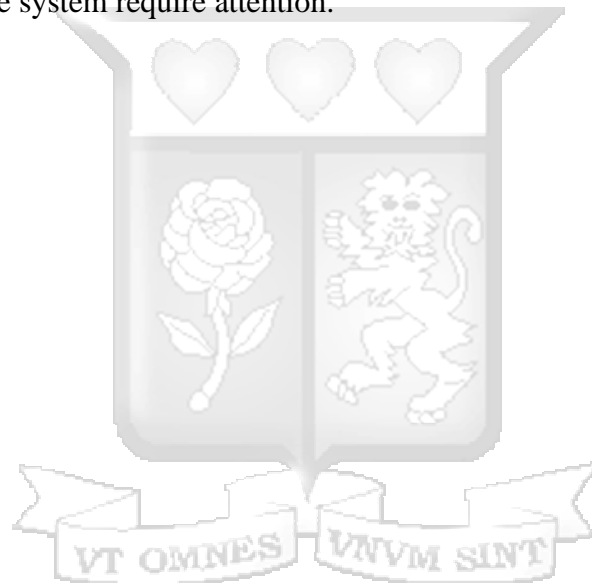
¹⁹⁷ Section 77 (4), *Child Justice Act* (No. 75 of 2008).

¹⁹⁸ Section 77 (6), *Child Justice Act* (No. 75 of 2008).

circumstances of every nation, there are variations in the particular dispositional alternatives and the detention strategy. Kenya's Children Act seems to place a higher focus on diversion and community-based solutions, whereas South Africa's Child Justice Act allows for a larger range of dispositional choices with specific clauses regarding the use of incarceration as a last resort.

4.7 Conclusion

This chapter's objective was to contrast Kenya's legal and framework safeguards for child offenders with those implemented by other legal systems. The chapter has highlighted particular practices that could be replicated locally after examining the innovative provisions found in South Africa's legal and institutional framework. It follows from the earlier studies that particular issues with Kenya's child justice system require attention.



CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The study's purview was on the rights of children in conflict with the law. The objective of this research was to determine whether the legal system adequately protects the rights of children who are in legal trouble as well as to pinpoint any legal framework gaps that may exist. There has been progress in the acknowledgement and promotion of children's rights. Kenya has made progressive provisions for children's rights in its Constitution and Children Act, and it has ratified and domesticated both the CRC and the ACRWC. The CRC crystallized child rights, which have been heralded in the socio-economic, cultural, religious, political, and administration of justice sectors. To determine the optimum framework for children in conflict with the law, an examination of international treaties, norms, and standards for children in conflict with the law was conducted. The study evaluated how well Kenya's legal system protected the rights of child offenders by comparing it to the ideal framework. The Kenyan legal framework examined comprised the Constitution, the Children Act, the Penal Code, the Criminal Procedure Code, and the Sexual Offences Act. The South African Child Justice Act was examined for the study of best practices in this area.

5.2 Conclusion

The research paper set to establish whether state authorities and other stakeholders are not efficacious in enforcing the rights of child offenders. The first chapter served as an introduction to the research problem, outlining the research questions to be addressed as well as the hypothesis that would serve as the foundation for the investigation. The second chapter delved into discussing the legal and institutional framework that protects the rights of child offenders in Kenya. Chapter three highlighted the key problems to protecting the rights of young offenders in Kenya. The fourth chapter conducted a comparative analysis of the child justice framework in South Africa. Through this investigation, it was determined that while the theoretical and philosophical foundations of children's rights in that jurisdiction are similar to those in Kenya, there are significant systemic and practical differences. The study concludes that, notwithstanding new legislative safeguards, minor offenders' rights are nevertheless substantially violated.

This chapter concludes this research by expounding on the conclusions arrived at during the study and offering recommendations that may help remedy the problem.

5.3 Recommendations

5.3.1 Empowerment and Training of Stakeholders to Handle Children's Matters

The law is sufficiently prescriptive to protect the rights of child offenders. The issue occurs when those involved fail to adhere to the legal rights that these children enjoy. Following their arrest, minors cross the Kenyan child justice system's revolving doors and undergo a series of steps that include being held in police custody, arraigned in court, and then placed in remand centres. They repeat this process for months or years until their cases are resolved.¹⁹⁹

Despite the law, all these infractions take place. This suggests that the stakeholders are ill-equipped to protect the rights of child offenders, as the study rightly notes. The best method to increase the ability of different stakeholders to offer services to children in their care is through training. As of January 2022, South Africa has made recognized the importance and has made significant efforts to provide training to stakeholders involved in the child justice system i.e., the South African Police Services (SAPS) training focuses on understanding child rights, age-appropriate communication, and ensuring fair treatment during arrests and investigations, the Department of Social Development (DSD) training emphasizes on child welfare, diversion programs, and rehabilitation, the National Prosecuting Authority (NPA) training focuses on balancing justice with the best interests of the child, the Department of Correctional Services (DCS) training covers child-friendly environments, rehabilitation, and reintegration, and many more stakeholders undergo training.²⁰⁰

5.3.2 Consider Pre-trial Diversion of Child Offenders

When it comes to saving children from dire circumstances that call for quick action, institutionalization should be the very last resort. The government's policy on the care and protection of vulnerable children places a high priority on interventions meant to assist children in reintegrating into their families and communities. It should be the same for child offenders.

¹⁹⁹ UNICEF, 'Rights at Risk: Issues of Concern for Kenyan Children'.

²⁰⁰ The Department of Justice and Constitutional Development; 'Child Justice Act 2008; National Policy Framework on Child Justice, 2018, [National-Policy-Framework-on-Child-Justice2c-2018- Child-Justice-Act-75-of-2008.pdf \(dcs.gov.za\)](#) on 8 April 2024.

Despite the constitution's requirement that child offenders be catered for, these institutions do not meet needed standards. Frequently they are noted to have inadequate funding, which prevents them from providing an atmosphere that would support children's rights. For example, many Borstal facilities are situated near adult prisons. Even though they are kept apart from adults, children and adults frequently interact when working together on daily tasks. The schools do not provide high-quality instruction. Upon release from custody, an inmate must pick up where they left off with their studies prior to being committed.

Given the situation, it would be appropriate to try to divert child offenders from the legal system prior to their arraignment. Since using this strategy in 1997, South Africa has successfully kept over 80% of child offenders out of the harsh legal system.²⁰¹ These child offenders' can eventually be reintegrated into society and carry on with their lives just like any other young person.

Children are a country's backbone. The appropriate growth of a country's progeny is essential to that nation's progress. When young children are detained, they fail to fit in with society's expectations and grow to be prejudiced against these norms. Ultimately, they take to criminality. The likelihood of a child surviving and developing is greatly increased when they are removed from the criminal justice system. In the long run, it is also conceivable that it will raise a nation's economic productivity.

5.3.3 Enhancement of litigants' awareness of the judicial process

It is essential that litigants understand how the legal system operates. Relevant research articles published throughout the study stated that, in addition to the lack of (or necessity for) legal assistance, litigants frequently lack awareness of the court's surroundings and procedures.

In South Africa, various steps have been taken to enhance litigants' awareness of the judicial process. The use of witness tools mentioned under Criminal Procedure Act prescribes the use of witness tools in criminal cases involving child offenders who choose an active defense. This pushes forward the notion of Recognizing that child offenders are often victims themselves, these tools aim to ensure a fair trial by considering each child's unique characteristics and experiences.²⁰²

The Informal Preliminary Inquiry established under the Child Justice Act establishes an informal inquisitorial, pre-trial procedure called a preliminary inquiry. During this inquiry, child offenders,

²⁰¹ Wood C, *Diversion in South Africa: A Review of Policy and Practice, 1990 to 2003*, Institute for Security Studies, October 2003.

²⁰² Section 170A, *Criminal Procedure Act* (No.51 of 1977).

their parents or guardians, legal representatives, probation officers, prosecutors, and inquiry magistrates engage in discussions related to the case.²⁰³ Intermediaries for Effective Participation facilitates communication and understanding, ensuring that child offenders comprehend their rights and can actively engage in the legal process.²⁰⁴ And many more various steps.

In Kenya, despite the Hon. Chief Justice's establishment of children Pro-Bono lawyers' programs, one of the biggest obstacles facing Kenyan children is access to legal representation, a crucial component of justice.²⁰⁵ This result supports the NCAJ Justice for Children approach and envisions using a variety of channels to guarantee that litigants, including children and their families, have access to information and legal counsel.

5.3.4 Strengthened inter-agency collaboration, communication, and coordination.

It is indisputable that cooperation between the legal and social service sectors, such as the police, ODPP, probation officers, children's officers, advocates, local government, and volunteer community social workers, is necessary to improve children's access to justice.

Notably in South Africa, intersectoral coordination between various committees facilitate collaboration among stakeholders with sufficient training on coordination and information sharing ensures effective implementation of children's right.²⁰⁶

The child justice organizations in Kenya comprise the Children Court User Committee (CCUC), the newest entity created under the NCAJ. Though it is more focused on child issues, the CCUC is similar to the Court User Committee (CUC) in terms of membership and functions.²⁰⁷ The establishment of responsibility among the parties involved in the child justice system is greatly aided by the Children Court User Committees.²⁰⁸ The CCUC meets at least once every quarter to discuss the status of the minors involved in the legal system.²⁰⁹ It is composed of representatives from the offices of all relevant parties.²¹⁰ They also keep each other accountable and exchange suggestions on how to improve the system. Therefore, the best way to achieve interagency

²⁰³ Madinginye K, 'How minors are charged, tried and sentenced in the South African legal system', [How minors are charged, tried and sentenced in the South African legal system – Lindsay Keller Attorneys](#) on 8 April 2024.

²⁰⁴ Bekink M, *The Right of Child Offenders to Intermediary Assistance in the Criminal Justice System: A South African Perspective*, PER/PELJ, 2021.

²⁰⁵ The Judiciary of Kenya, 'Child Justice Strategy 2023-2030.'

²⁰⁶ The Department of Justice and Constitutional Development; 'Child Justice Act 2008; National Policy Framework on Child Justice, 2018.

²⁰⁷ The Judiciary of Kenya, 'Child Justice Strategy 2023-2030.'

²⁰⁸ The National Council of Administration of Justice (NCAJ), Court Users Committee Guidelines, 2019, 1.

²⁰⁹ The National Council of Administration of Justice (NCAJ), Court Users Committee Guidelines, 2019, 6.

²¹⁰ The National Council of Administration of Justice (NCAJ), Court Users Committee Guidelines, 2019, 4.

collaboration, communication, and coordination is to fortify the committees that the NCAJ and the judiciary established.

5.3.5 Remove correctional facilities from the Prison Service's management.

The Kenya Prisons Service oversees and manages the Borstal facilities. Adult prison administration falls under the purview of the Prisons Services. It makes sense that the Department of Children's Services would oversee it as it is an organization that deals with matters pertaining to children. It should make sense that, just as adults and children should be kept apart when it comes to topics pertaining to children, the same should hold when it comes to institutions. In any event, Kenya's executive branch handling child-related issues is the Department of Children's Services.



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