



Strathmore University

Law School

BRIDGING THE INSTITUTIONAL GAP FOR JUVENILE COURT- ANNEXED MEDIATION IN KENYA

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

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January 2024

Word count: 12893

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ACKNOWLEDGEMENT

I would like to acknowledge the Almighty God for being there for me during the entire dissertation writing process and for giving me the perseverance to finish the work. I have to admit that working on this project has been a demanding but rewarding experience, and I am grateful that God has seen me through all of the ups and downs. In addition, I am more than grateful to my supervisor, Dr. Melissa Muindi, for all of her assistance and guidance. Her understanding and patience made it very easy to bounce ideas off of her regarding how to present this dissertation. I am also extremely thankful to Charles Odino, my friend and mentor, who encouraged me along the entire writing process and was always there for me. Finally, I pass my sincere gratitude to Strathmore Law School for imparting knowledge that has shaped the course of my education.



DECLARATION

I, AMIANI FEMINA SAGINA, 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.

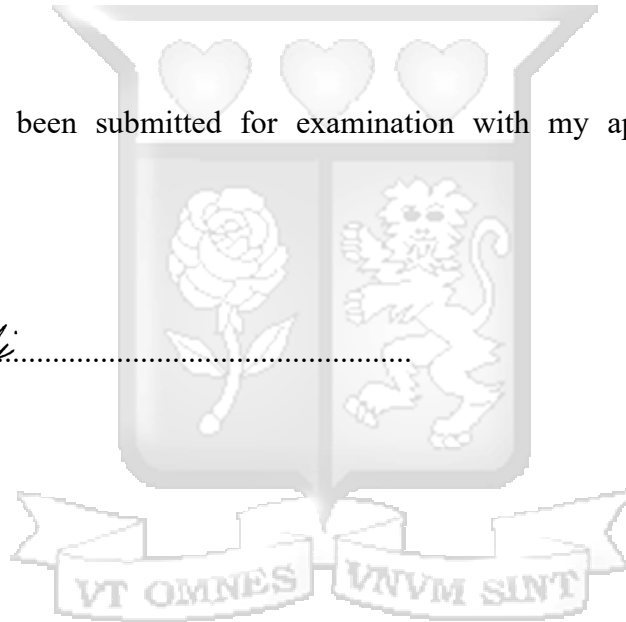
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ABSTRACT

Court-annexed mediation (CAM) is a method of resolving disputes restoratively and it has the potential to propel the juvenile justice system to be in line with the ‘best interests of the child’ principle. Its effects, however, are yet to be realised since the institutions to conduct this process seem to be nonexistent. This study discusses the institutional gap in Kenya and a case study of Kenya and Australia is conducted. The contrast in the institutional framework between the two countries is highlighted.

The study used a deductive approach to how restorative access to justice is practised in various legal systems and how such practices can be modified to fit the Kenyan context. This is also complemented by an institutional analysis to show how juvenile mediation programmes work in other legal systems in terms of structural procedure. Reference was made to primary sources in the form of books, articles, and reports, which discuss juvenile court-annexed mediation, as well as access to justice.

The study further discusses child-inclusive mediation and how this could play an important role in ensuring both the juvenile and the victim benefit from the mediation process in the juvenile justice sector.

It is recommended that child participation in the justice system be supported by way of sensitising communities to uphold ADR practices and allocating resources equitably in the justice sector.



LIST OF ABBREVIATIONS

ADR - Alternative Dispute Resolution
ACT - Australian Capital Territory
AJS - Alternative Justice System
CAM - Court-Annexed Mediation
CCAC - County Children Advisory Committees
CCUC - Children Court User Committee
CIArb - Chartered Institute of Arbitrators
CIM - Child-Inclusive Mediation
CUC - Court User Committee
CYPS - Child and Youth Protection Services
DPP - Director of Public Prosecutions
ECOSOC – United Nations Economic and Social Council
ICCPR - International Covenant on Civil and Political Rights
KAACR - Kenya Alliance for Advancement of Children
LSK - Law Society of Kenya
MAC - Mediation Accreditation Committee
NCAJ - National Council on the Administration of Justice
NCCS - National Council for Children’s Services
NGOs - Non-Governmental Organisations
NSW - New South Wales
NT - Northern Territory
ODPOP - Office of the Directorate of Planning and Organisation Performance
ODPP - Office of Director of Public Prosecutions
SCS - Secretary of Children Services
ScCCAC - Sub-county Children Advisory Committees
TSC - Teachers Service Commission
UNCRC - United Nations Convention on the Rights of the Child
VOMA - Victim-Offender Mediation Association
VORP - Victim/Offender Reconciliation Program/Project
YORET - Youth Outreach Re-Engagement Team

LIST OF CASES

Dry Associates Ltd v Capital Markets Authority & another (2012) eKLR.

Gillick v Norfolk and Wisbeck Area Health Authority (1986) AC 112.

JCM v Republic (2018).

Martin Kinyanjui Muindi v Republic (2004).

Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR.

Mary Mwihaki Kimani and 4 others v Ministry for Gender, Children & Social Development and another (2011).

Michael Munene Wanjiku v Republic (2020).

Republic v BC [2022] eKLR.



LIST OF LEGAL INSTRUMENTS

Kenya Legal Instruments

Borstal Institutions Act (1963)

Children Act, (2022).

Children (Children in Conflict with the Law) (Procedure and Practice) Rules (2023).

Civil Procedure Act.

Constitution of Kenya (2010).

Judicial Service Act (2011).

Law Society of Kenya Act (2014).

Mediation (Pilot Project) Rules, (2015).

Non-Governmental Organisations Co-ordination Act (1990).

Persons Deprived Liberty Act (2014).

Prevention of Torture Act (2017).

Foreign Legal Instruments

Children, Youth, and Families Act (2005).

Children and Young People Act (2008).

Crimes (Restorative Justice) Act (2004).

Youth Justice Act (1992).

Youth Justice Act (1997).

Youth Justice Act (2005).

Young Offenders Act (1993)

Young Offenders Act (1994).

Young Offenders Act (1997).

International Legal Instruments

International Covenant on Civil and Political Rights.

United Nations Convention on the Rights of the Child.

UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985).

CHAPTER ONE

Introduction

1.1 Background

In Kenya, the Children Act sets out provisions governing juvenile matters.¹ The term ‘children in conflict with the law’ refers to a child between the ages thirteen and seventeen that has undergone the justice system because of committing a crime or being accused thereof as defined under Part 1 of the Children Act.² Like any other Kenyan citizen, juveniles also have the right to access justice.³ However, the fruition of this right has been affected by the backlog of cases in children’s courts.⁴ Thus, there was the need to enhance access to justice by the use of alternative dispute resolution (ADR) mechanisms as provided for in the Constitution and the Office of the Director of Public Prosecutions Diversion Policy Guidelines.⁵

Since the court process is famously used in Kenya as a way of solving disputes, it explains why matters held in court have numerous laws providing for which procedure to follow. The same cannot be said when it comes to ADR mechanisms which seek to dispense justice through a restorative approach.⁶ The restorative approach of dispensing justice seeks to provide a more favourable outcome to both the victim and the offender.⁷ The Chief Justice of Kenya made efforts to come up with processes that would promote more favourable outcomes when it comes to criminal matters. This was by enacting Guidelines that guide the conduct of criminal cases in a manner that gives effect to ADR mechanisms.⁸

Court-annexed mediation (CAM) is one ADR mechanism that has been recently introduced in Kenya’s justice system to help facilitate restorative justice.⁹ This process is governed by

¹ *Children Act*, (2022).

² Section 2, *Children Act* (2022).

³ Article 48, *Constitution of Kenya* (2010).

⁴ Ojwang’ R, ‘Courts Unveil Campaign to Clear Children Cases Backlog’ Kenya News Agency, 2021.

⁵ Article 159(2)(c), *Constitution of Kenya* (2010); Office of the Director of Public Prosecutions Diversion Policy Guidelines and Explanatory Notes.

⁶ Article 159(2)(c), *Constitution of Kenya* (2010); Section 1A, *Civil Procedure Act*; Isabelle RG, ‘Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations’ 5 *Cardozo Journal of Conflict Resolution* 2, 2004, 87.

⁷ Crime Prevention and Criminal Justice’ E4J University Module Series <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html#/top>

⁸ National Council on the Administration of Justice, *Guidelines for Active Case Management of Criminal Cases in Magistrate Courts and High Courts of Kenya*, 2019.

⁹ Section 59B, *Civil Procedure Act*.

Mediation (Pilot Project) Rules, 2015 as it entails cases referred by courts, to mediation.¹⁰ The current framework of CAM is narrow and does not feature the practice of juvenile court-annexed mediation.¹¹ A gap is therefore realised that there is a need to expand the scope of CAM in Kenya to cater to matters regarding juveniles. Ultimately, it explains why child-victim offender mediation has not been exhaustively explored in the Kenyan context. This brings out the assumption that the successful facilitation of justice for juvenile offenders through CAM is being limited since insufficient programmes and institutions are factoring in juvenile mediation.

Due to this, a report by the National Council on the Administration of Justice (NCAJ) listed some of the pending work concerning children matters in the justice sector such as ‘the need to develop a system to regulate training for juvenile justice actors’ which will essentially catalyse the development of juvenile mediation institutions.¹² For this dissertation, this applies to mediators facilitating CAM in matters regarding children in conflict with the law.

Child victim-offender mediation draws its roots from the declaration by the Supreme Court of Ohio in 1991 which leaned into the restorative justice theory as a way of upholding the best interests of the victim and the offender.¹³ This declaration led to the upholding of Article 40 of the United Nations Convention on the Rights of the Child (UNCRC) which urges States to establish laws, procedures, authorities and institutions that are specifically applicable to juveniles.¹⁴ This is further backed by Article 14 of the International Covenant on Civil and Political Rights (ICCPR) which states that proceedings regarding juveniles should not be made public as that would prejudice the interests of justice.¹⁵ CAM thus provides the confidentiality aspect for juvenile cases and thus, the best interests of the child are attained.

1.2 Problem Statement

At the time of enacting the Mediation (Pilot Project) Rules 2015, the aim was to gauge how effective mediation would be in solving disputes extrajudicially. From that pilot project, it was envisioned that the scope of mediation could be widened over time to feature in more civil

¹⁰ Section 6(2), *Mediation (Pilot Project) Rules* (2015).

¹¹ Section 2, *Mediation (Pilot Project) Rules* (2015); Kariuki M, ‘Court Sanctioned Mediation in Kenya - An Appraisal’, 2015, 13.

¹² National Council on the Administration of Justice, *Administration of Justice in Kenya Annual Report 2021-2022*, 12 January 2023.

¹³ Supreme Court of Ohio Committee on Dispute Resolution, *Preliminary Report of the Committee to the Supreme Court of Ohio*, 1991.

¹⁴ Article 40(3), *United Nations Convention on the Rights of the Child*.

¹⁵ Article 14, *International Covenant on Civil and Political Rights*.

actions. However, till now, these Pilot Project Rules have not been amended to cater for more disputes and cases that are annexed to mediation. In Kenya, matters regarding juveniles are diverted from the Children’s Court as provided for under the Children Act, 2022. However, there are not enough programs to support ADR mechanisms that are aimed at improving access to justice for juveniles. For this dissertation, CAM, which is an alternative justice system (AJS) approach, has yet to be effectively explored to aid juveniles in accessing justice in a manner that is more appropriate and more effective.

This dissertation aims to study the following: whether section 2 of the Mediation (Pilot Project) Rules, 2015 should incorporate cases of children in conflict with the law to be handled under court-annexed mediation as an AJS; whether such measure will amplify already existing laws governing the diversion process; and consequently, whether such reform will help develop more juvenile mediation institutions.

1.3 Research Objectives

1. To assess the current legal framework governing juvenile CAM in Kenya and whether progress has been made in developing restorative institutional structures to complement existing restorative laws.
2. To investigate the under-exploration of CAM in matters regarding juvenile cases in Kenya.
3. To propose the incorporation of juvenile mediation programmes in Kenya’s juvenile justice system.

1.4 Research Questions

1. What are the current institutional structures at play that promote access to justice through CAM in the juvenile justice system?
2. How has CAM been under-explored, and how is this incompliant with the principle of rehabilitation?
3. How can Kenya incorporate juvenile mediation programmes in its juvenile justice system in a manner that is proportionate to its aims?

1.5 Hypothesis

If there are not enough juvenile mediation programmes in Kenya, then the diversion process will seem pointless as there will be a backlog of cases when juvenile matters are annexed. As such, if Kenya's restorative approach to justice, specifically CAM as endorsed in Section 2 of the Mediation (Pilot Projects) Rules, 2015 is explored more broadly, then juveniles will enjoy their right to access justice extrajudicially. This will thus enhance social policy and the development needs of the juveniles in Kenya.

1.6 Justification of the study

Cases regarding juveniles have been escalating and this resulted into backlog of cases in the Children's Court.¹⁶ To remedy this, diversion was embraced in the Children Act, 2022 to help solve disputes regarding juveniles through AJS.¹⁷ However, this restorative approach has been obstructed by the fact that there are inadequate institutions and programmes which would help facilitate justice for juveniles through juvenile mediation.

This study is thus important from a juvenile's rights perspective in that it will enable them to have more access to restorative justice. The laws in Kenya regarding children in conflict with the law have focused more on legal representation and the importance of diversion processes.¹⁸

Thus, this study will be unique in that it will go beyond this scope to assess whether passing or enacting legislation on ADR in a limited way contributes to gaps in other legal fields. When certain legal fields are left unattended, it results in the underrepresentation of those fields due to a lack of institutions to handle cases from those fields.¹⁹

It will also be useful to policymakers when it comes to drafting laws as they will see the importance of drafting legislation in a broader approach. Bodies such as the NCAJ, CRADLE, will also benefit as they exercise the duties vested in them to protect and be mindful of the needs of juveniles in Kenya.²⁰ Lastly, this study will provide insight into how such bodies can formulate an institutional framework to govern juvenile mediation.

¹⁶ National Council on the Administration of Justice, *Status Report on Children in the Justice System in Kenya*, 20 November 2019.

¹⁷ Section 226, *Children Act* (2022).

¹⁸ Part XV, *Children Act* (2022).

¹⁹ Buscaglia E, 'The Comparative Advantage of Mediation in Ecuador' unpublished, Washington DC USA, 1998; Buscaglia E and Ratliff W, *Law and Economics in Developing Countries*, Hoover Institution Press, Stanford, 2000; Nadja A, *International and Comparative Mediation: Legal Perspectives*, Singapore, 2009.

²⁰ The CRADLE-The Children's Foundation, <https://thecradle.ke/about-the-cradle/> ; National Council on the Administration of Justice, <https://www.ncaj.go.ke/>

1.7 Theoretical Framework: Institutional Theory

This study will be premised on the ‘institutional theory’. Simply put, the theory is concerned with the legitimacy of organisations and States. It has its origin in economics literature in an attempt to explain the processes by which institutions are formed and how they attain legitimacy.²¹ Rowan and Meyer argue the importance of legitimacy in the institutional environment as it helps ensure organisational survival.²² The adoption and acceptance of new standards or practices more often than not leads to their acceptance in the environment. It does seem backward and irrational when they are not implemented or adopted into the system. From a broad eye-view, institutions are seen as the working rules of society since they determine either formal or informal procedures, order, and standards in the organisational structure, and how they become established as authoritative guidelines for social behaviour. Often it is used to explain the adoption of formal organisational structures.²³ This theory uses a specific mechanism known as the ‘Mimetic process’ which generally has an impact when there is a suspense of uncertainty within an industry. This process occurs when an organisation borrows practices of another organisation that is regarded as successful in solving problems with unclear solutions. This theory, therefore, works where there is uncertainty and where there is a need for imitation of policies and strategies.²⁴

It is, therefore, key in analysing how juvenile mediation programmes can be developed in Kenya and why they should be formed. First off, the use of ADR has been constitutionalised in Kenya and awareness of the same has been encompassed in higher learning institutions as well as various occupations and sectors of the country.²⁵ This shows that the use of ADR has gradually become legitimised in Kenya. There is, therefore, the need to encompass this information on ADR into relevant institutions and to come up with specific infrastructure and programmes to handle ADR in various contexts, including juvenile mediation. This supports the notion of institutional theory by allowing for the effective exploration of rules of diversion, such as CAM, through the implementation of juvenile justice programmes. Furthermore, this

²¹ Gordon J, ‘What is Institutional Theory?’ The Business Professor, May 16 2022 https://thebusinessprofessor.com/en_US/management-leadership-organizational-behavior/institutional-theory-explained

²² Meyer JW, Rowan B, ‘Institutional organisations: formal structure as myth and ceremony’ *American Journal of Sociology*, 1977, 340-363 https://faculty.babson.edu/krollag/org_site/org_theory/Scott_articles/meyer_rowan.html

²³ Robert JD, Pamela ST, Johnny B, ‘Institutional Theory in Organisational Studies’, 23 December 2019 <https://oxfordre.com/business/display/10.1093/acrefore/9780190224851.001.0001/acrefore-9780190224851-e-158;jsessionid=B4C8A5F4842B4B291A9CF7594B4BA861#acrefore-9780190224851-e-158-bibItem-0115>

²⁴ Scott WR, *Institutions and Organisations*, 4th ed, Stanford University, USA, 2013.

²⁵ Article 159(2), *Constitution of Kenya* (2010).

theory helps address the uncertainty that exists when cases involving children in conflict with the law are annexed.

Institutional theory has been utilised in this study to emphasise the need to develop juvenile mediation programmes in Kenya by borrowing insights from Australia as will be further discussed in Chapter Three.

1.8 Literature Review

Existing literature focuses on general mediation practice in Kenya and why there is a need for more ADR institutions to be put in place to enhance access to justice.²⁶ Kariuki Muigua and Fitzpatrick add to this discussion by addressing the need for reinforcing the administrative infrastructure to ensure it keeps up with the trends affecting the mediation process.²⁷ Their work highlights how bureaucracy is getting in the way of juveniles accessing justice through CAM due to the fact that there are not enough juvenile mediation programmes in Kenya.²⁸ Consequently, this beats the purpose for diversion which aims to reduce the backlog of cases in Children's Courts as the ratio of annexed cases to institutions and programmes dealing with the same is disproportionate.

This problem was similarly spotted by the Victim/Offender Reconciliation Project (VORP); a program that creates a platform for mediation between juvenile offenders and victims.²⁹ From the programme's data, the problem that was highlighted was the imbalance between the number of juvenile cases being referred to mediation and the availability of programmes that accommodate court-annexed juvenile mediation.³⁰ This brought out the need to promote

²⁶ Kariuki M, 'Legitimising ADR in Kenya: Towards a Policy and Legal Framework', 2017, 2; Rhode DL, 'Access to Justice' 69 *Fordham Law Review*, 2001, 1785-1819; Carmona SM and Donald K, 'Access to justice for persons living in poverty: a human rights approach,' Ministry for Foreign Affairs, Finland, 8-9

https://www.academia.edu/6907000/Access_to_justice_for_persons_living_in_poverty_a_human_rights_approach

²⁷ Kariuki M, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation', 2020, 16-17; Fitzpatrick D, 'Dispute Resolution; Mediating Land Conflict in East Timor' 2 AusAID's *Making Land Work; Case Studies on Customary Land and Development in the Pacific*, 2008, Case Study No. 9, 175; Clarke GR and Davies IT, 'ADR — Argument For and Against Use of the Mediation Process Particularly In Family and Neighbourhood Disputes' *University Of Technology Law Journal*, 81-96; Katz LV, 'Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin,' 1993 *Journal of Dispute Resolution* 1, 1993.

²⁸ Ater S, 'Strides in Court-Annexed Mediation in Kenya', May 23 2019 <https://mediate.com/strides-in-court-annexed-mediation-in-kenya/>; Ojwang JB, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,' 19 *Kenya Law Review Journal* 1, 2007; Kariuki M, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation,' 2020.

²⁹ Fifth Judicial District <http://fifthdcs.com/FifthPolicy/index.cfm?policy=VORP>

³⁰ Ater S, 'Strides in Court Annexed Mediation in Kenya' Mediate.com, 23 May 2019 <https://mediate.com/strides-in-court-annexed-mediation-in-kenya/>; Report to the California Legislature, *A Summary of the Evaluations of Six California Victim Offender Reconciliation Programs*, May 2000, 101.

juvenile mediation programmes. Mark Bradshaw and Mark Umbreit also support the promotion of these juvenile mediation programs through their discussion on the advantages brought by victim-juvenile mediation in promoting restorative justice to both the victims and the juvenile offenders.³¹

1.8.1 Applicability of court-annexed mediation in juvenile cases in Kenya

CAM process of juvenile cases lacks a proper structure in that it is very random and is highly under the discretion of magistrates in different courts.³² This, therefore, proves that the application of juvenile annexed cases is still at its infant stage in the Kenyan context. Furthermore, the application of CAM has faced several criticisms in Kenya. Some argue that legislating and institutionalising ADR processes goes contrary to their very nature of being regarded as an ‘alternative’.³³ This is because that would turn the ADR mechanisms into other forms of judicial processes since the element of voluntariness is defeated. A different line of argument is that victim-offender reconciliation programmes are religion-led in that what is mostly being advocated for is the forgiveness of offenders rather than complete reconciliation. This approach may create complexity in Kenya’s justice system since Kenya encompasses different religions, and some of its citizens do not conform to any religion.³⁴

1.8.2 Application of juvenile court-annexed mediation in international legal systems

Various jurisdictions have shifted their laws to camouflage with the restorative approach model.³⁵ The purpose of this was to enhance speedy justice for juveniles and to reduce the rate

³¹ Bradshaw W, Umbreit MS, ‘Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialogue’, 22-23.

³² Njagi CM, ‘Court-Annexed Mediation as a Tool for Access to Justice: A Case Study of Milimani Children’s Court’, 2021, 80.

³³ Wazir B, Swaleh M, ‘An Analysis of Mandatory Mediation’; Kariuki M, ‘Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation’ 2020, 20; Spencer D, ‘Court given power to order ADR in civil actions’, 38 *Law Society Journal* 9, 2009, 71-72; National Alternative Dispute Resolution Advisory Council, ‘Where did the ‘alternative’ go? Why Mediation should not be a Mandatory Step in the Litigation Process, DR Bulletin, 12(3), 2010; National Alternative Dispute Resolution Advisory Council, ‘Legislating Alternative Dispute Resolution: A guide for government policymakers and legal drafters,’ 2006, Commonwealth Australia.

³⁴ Young MA, ‘Restorative Community Justice: A Call to Action’, 1995; Van ND and Heetderks, ‘Restoring Justice’, 1997; Kerner HJ, Marks E, Schreckling J, ‘Implementation and acceptance of victim-offender mediation programs in the Federal Republic of Germany: A survey of criminal justice institutions’, 1992; Messmer H and Otto HU, *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation—International Research Perspectives*, Kluwer Academic Publishers, Netherlands, 29-54.

³⁵ Bazemore, Umbreit, 1995. Office of Juvenile Justice and Delinquency Prevention, 1998; Tim D, The New Domestic Relations Judge Will Help to Handle Busy Docket, Preisse Will Target Cause of Increase in Juvenile Crime, The Columbus Dispatch, October 13 1996; Angela T, ‘Miami Voters Ponder Issues: Candidates List Their Concerns’ Dayton Daily News, 30 October 1996.

of recidivism amongst juveniles.³⁶ Administrative measures were taken to avail accessibility to restorative approaches to justice and to develop victim-offender mediation programmes.³⁷ However, the application of such novel ideas is not always smooth sailing. This is because change in laws does not automatically shift change in practice. The concept of restorative justice is generally not put into practice, and this explains why diversionary programmes are not as fruitful.³⁸ Some argue that juvenile justice structures differ among States and that there is still uncertainty on whether complex matters can be handled in mediation programmes hence its implementation is still on rocky grounds.³⁹

Contribution

While previous studies in Kenya have focused on training mediators, and regulating of ADR practice through formulating a policy framework, this study will contribute to the need for more development of juvenile mediation programmes and institutions in Kenya.⁴⁰

1.9 Methodology

This study, in general, uses a deductive approach as to how restorative access to justice is practised in various legal systems and how such practices can be modified to fit the Kenyan context. This is to examine how the legal framework governing CAM in Kenya can be reformed to provide for more institutions regarding the same. This is also complemented by an institutional analysis to show how juvenile mediation programmes work in other legal systems in terms of structural procedure. The legal system used for this study is Australia as will be proven in Chapter Three.

³⁶ The Supreme Court of Ohio, Ohio Courts Summary 1996; Marianne M, 'Mediation – An Alternative Approach for the New Jersey Justice System?', 20; Monrad GP, Children's Court: Gateway or Last Result? The Problems of Juvenile Courts and The Rights of Children, 1975, 107-108; Umbreit MS, Victim Meets Offender: The Impact of Restorative Justice and Mediation 2, 1994.

³⁷ Supreme Court of Ohio Committee on Dispute Resolution, Preliminary Report of the Committee to the Supreme Court of Ohio 1, 1991, 11.

³⁸ Imran AS, 'Juvenile Justice Policy: Gaps Identification and Role of Key Stakeholders in Pakistan' 1 *Pakistan Journal of Criminology*, 2009, 124.

³⁹ Umbreit MS, 'Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment' 1(1) *Western Criminology Review*, 1998.

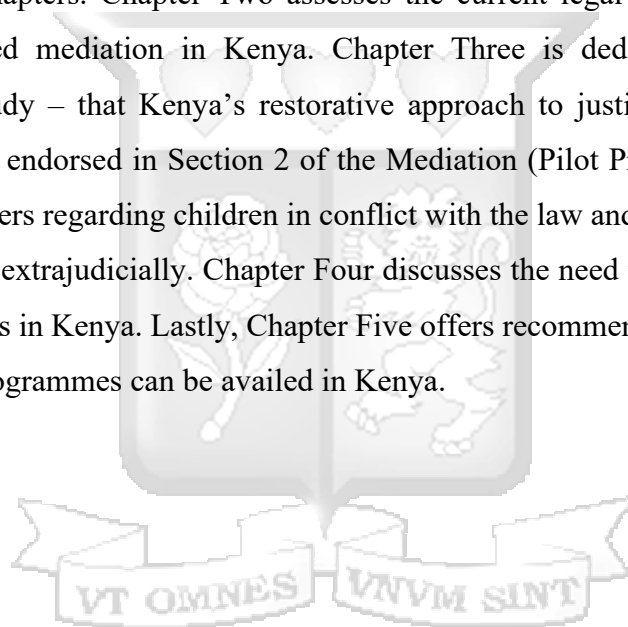
⁴⁰ Kariuki M, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation, 2020, 17; Fitzpatrick D, 'Dispute Resolution; Mediating Land Conflict in East Timor', 196; Kariuki M, Regulating ADR Practice in Kenya: Looking into the Future, 1-6; Robert JM, 'Florida's Experience with Dispute Resolution Regulation: Too much of a Good Thing?' *Florida Conflict Resolution Consortium*, <http://consensus.fsu.edu/ADR/PDFS/FloridaADR.pdf>; Zack AM, 'The Regulation of ADR : A Silent Presence at the Collective Bargaining Table,' 4, *Seventh Annual Conference of the ABA Dispute Resolution Section Los Angeles, California, April 15, 2005*, <http://www.law.harvard.edu/programs/lwp/people/staffPapers/zack/The%20Regulation%20of%20ADR-ABA%207th%20conference.pdf>

The first part of the study is qualitative and reference is made to primary sources in the form of books, articles, and reports, which discuss juvenile court-annexed mediation, as well as access to justice.

After developing policies that result in the creation of institutions that care for children in conflict with the law, the study critically analyses how to investigate and navigate the applicability of laws about children in conflict with the law in the Kenyan setting.

1.10 Chapter Breakdown

Chapter One forms the first chapter of this study. It details, among others, the research objectives, theoretical framework, and justification of the study and thus sets the foundation for the subsequent chapters. Chapter Two assesses the current legal framework governing juvenile court-annexed mediation in Kenya. Chapter Three is dedicated to proving the hypothesis of this study – that Kenya’s restorative approach to justice, specifically court-annexed mediation as endorsed in Section 2 of the Mediation (Pilot Projects) Rules, 2015 is underexplored in matters regarding children in conflict with the law and this denies them their right to access justice extrajudicially. Chapter Four discusses the need to incorporate juvenile mediation programmes in Kenya. Lastly, Chapter Five offers recommendations as to how best juvenile mediation programmes can be availed in Kenya.



CHAPTER TWO

The Current Legal Framework Governing Court-Annexed Mediation In Kenya

2.1 Introduction

This chapter sets out to assess Kenya's progress in developing restorative institutional structures for juvenile offenders that complement already existing laws. According to the Administration of Justice in Kenya Annual Report of 2021-2022, the Criminal Justice System of Kenya was tasked with the mandate to safeguard the rights of children already in contact with the criminal justice system.⁴¹ To achieve this, a child rights-based approach was pursued to ensure the best interests of the child have been taken into consideration.⁴² This entailed that children in conflict of the law would not only have the right to access justice, but that they would also be provided for institutions that complement with their development needs as they navigate through the justice system.⁴³ This is in line with the provisions under Article 21(3) of the Constitution of Kenya which provides that State organs have to address the needs of vulnerable groups within the society, and this includes children.⁴⁴ However, this section of the dissertation aims to show how provisions of law outweigh the institutions made available when it comes to juvenile court-annexed mediation in Kenya.

2.2 The Statutory Regime

The laws aimed at promoting the restorative justice approach that have been drafted to enhance the use of ADR mechanisms are discussed as follows:

2.2.1 Constitution of Kenya, 2010

Article 159(2)(c) of the Constitution provides that mediation is one of the means of obtaining justice.⁴⁵ This is consistent with the Civil Procedure Act's section 59B, which also mentions mediation.⁴⁶ Children who are in legal trouble therefore have the right to use CAM to obtain

⁴¹ National Council on the Administration of Justice, *Administration of Justice in Kenya Annual Report 2021-2022*, 42.

⁴² Article 3, *United Nations Conventions on the Rights of the Child*.

⁴³ Article 3, *United Nations Conventions on the Rights of a Child*; Article 53(2), *Constitution of Kenya* (2010).

⁴⁴ Article 21(3), *Constitution of Kenya* (2010).

⁴⁵ Article 159(2)(c), *Constitution of Kenya* (2010).

⁴⁶ Section 59B, *Civil Procedure Act*.

justice.⁴⁷ When mediation is acknowledged as a dispute resolution process, it is implied that its wider applicability should be investigated. In the case of *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another*, it was decided that restorative justice and reconciliation, which are firmly established and supported by the Kenyan Constitution of 2010, are two approaches to administering justice and ADR.⁴⁸ Juvenile CAM ought to be investigated more thoroughly in light of this.

2.2.2 Children's Act 2022

Section 8 of the Children's Act 2022 puts emphasis on the importance of prioritising actions that are in line with the best interests of a child.⁴⁹ This is seen when the Children's Court opts to make restorative justice orders when dealing with diverted cases.⁵⁰ Restorative justice is achieved when programmes and institutions are provided for in order to reduce the rate at which juveniles interact with the criminal and civil justice system. Consequently, this reduces the stigma faced by children in conflict with the law.⁵¹ Juvenile mediation programmes, thus, have to be provided for in order to cater for the court-annexed juvenile cases as this will enable juveniles to enjoy their right to access justice alongside protecting their well-being. This Act repealed the Children Act 2001 which did not provide for concepts such as diversion and restorative justice system.⁵² The same sentiment applies to the repealed Children and Young Persons Act (Cap 141) which had no provisions for ADR mechanisms.⁵³ Furthermore, the 2001 Act had no procedural rules to ensure expeditious trial takes place and there were insufficient trained personnel to deal with children matters, nor was there State-sponsored legal representation for children.⁵⁴ The lack of awareness of children's rights and the principles of juvenile justice prompted the enactment of the Children Act 2022.

⁴⁷ Article 48, *Constitution of Kenya* (2010).

⁴⁸ *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another* [2016] eKLR.

⁴⁹ Section 8, *Children Act* (2022).

⁵⁰ Section 239(1)(l), *Children Act* (2022).

⁵¹ Section 2(k), *Children Act* (2022).

⁵² Section 191, *Children Act* (2001).

⁵³ Section 191, *Children and Young Persons Act* (1969).

⁵⁴ Rajab M, Juvenile Justice System in Contemporary Child Care and Protection: Emerging Issues, Challenges and Opportunities, February 18 2020 <https://www.linkedin.com/pulse/juvenile-justice-system-contemporary-child-care-emerging-mwachia/>

2.2.3 International Statutes

Article 40(3) of the UNCRC advocates for procedures and institutions that ensure children in conflict with the law are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.⁵⁵ Provisions under the Beijing Rules makes reference to the need to have institutions and bodies that administer juvenile justice in a manner that is designed to meet their varying needs while still protecting their basic rights.⁵⁶ All this is aimed at safeguarding both the victim and the offender.⁵⁷

2.2.4 Office of Director of Public Prosecutions' Diversion Policy

The General Prosecution Guidelines provides that children should not be prosecuted where a diversion programme exists to handle cases deemed as less serious in nature.⁵⁸ It is further stated in *Republic v BC* that the major role of the Directorate of Children Services is to rescue, rehabilitate and reintegrate.⁵⁹ When juvenile matters are annexed, there is an assumption that there are programmes available that will deal with those specific matters. However, there aren't sufficient mediation programmes available to hear juvenile-related disputes. The diversion option that provides for a restorative justice meeting with the victim is, thus, limited in this regard.⁶⁰ Efforts should clearly be made to ensure eligible juveniles receive diversion.⁶¹ For the context of this dissertation, efforts should be made to avail more juvenile mediation programmes lest the purpose of CAM be rendered irrelevant.⁶²

2.2.5 Judiciary's Policy Guidelines on Alternative Justice Systems

A child-friendly Judiciary aims at establishing institutions that are effective and promote access to justice through the restorative model.⁶³ This seeks to ensure children in conflict with the law have an equal footing in the justice system since they are now included in the decision-making

⁵⁵ Article 40(3), *United Nations Convention on the Rights of a Child* (1989).

⁵⁶ Rule 2.3, *UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* (1985).

⁵⁷ Rule 5, *UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* (1985).

⁵⁸ Clause 18(i), *General Prosecution Policy*.

⁵⁹ *Republic v BC [2022] eKLR*.

⁶⁰ Guideline 67(t), *Diversion Policy Guidelines and Explanatory Notes*.

⁶¹ Clause 2.14, *Diversion Policy Guidelines and Explanatory Notes*.

⁶² Rule 11.4, *Beijing Rules (1985)*; 45, *UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (1990)*; 57, *UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (1990)*; Recommendation 2, *Council of Europe Social Reaction to Juvenile Delinquency, 1987 o (CER (87)20)*; *IV, A, 24, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*

⁶³ 'Vision, Principles and Strategic Outcomes', *Social Transformation Through Access to Justice: Child Justice Strategy 2023-2030*, 18.

process.⁶⁴ The Judiciary has sought to develop rules on child-focused and child-inclusive mediation, and what follows therefore, is the need to avail juvenile mediation programmes which will handle annexed matters.⁶⁵ This aligns with the Child Justice Strategy facilitated by the Office of the Directorate of Planning and Organisation Performance (ODPOP).⁶⁶ This body deals with monitoring and evaluating Judiciary programmes to ensure it conforms with national strategies. The strategy at hand is reformulating the justice system towards the restorative justice approach. The ODPOP envisions an accessible diversionary framework that is inclusive of all forms of AJS.⁶⁷ The CAM framework thus must include juvenile-mediation programmes.

2.3 The Institutional Regime

Kenya has various institutions which aim to promote the shift from retributive justice to restorative justice. This part of the dissertation aims to assess the role they play in ensuring justice is accessed extrajudicially. The institutions are discussed as follows:

2.3.1 The Law Society of Kenya (LSK)

LSK is a statutory body that has membership from all advocates in Kenya.⁶⁸ The Law Society of Kenya Act 2014 highlights that the LSK should assist the Judiciary with administering justice by ensuring its members are trained in their technical areas of practice.⁶⁹ This is contrary to the repealed Law Society of Kenya Act 1962 which did not place much emphasis on equipping legal practitioners to ensure they are on par with legal trends through facilitating adequate training programmes.⁷⁰

For advocates who are mediation practitioners, the training sessions are important as they help foster the restorative approach to justice. In line with this, LSK further encourages its members to participate in Court User Committee (CUC) meetings. CUCs are platforms that bring together various actors in the justice sector who consult each other on how best justice could

⁶⁴ 'Vision, Principles and Strategic Outcomes', Social Transformation Through Access to Justice: Child Justice Strategy 2023-2030, 19.

⁶⁵ 'The Strategy Elaborated', Social Transformation Through Access to Justice: Child Justice Strategy 2023-2030, 30.

⁶⁶ Kenya Judiciary, Directorate of Planning and Organisation Performance <https://judiciary.go.ke/elementor-3384/>; Social Transformation Through Access to Justice: Child Justice Strategy 2023-2030, 'Implementation Framework', 32.

⁶⁷ 'Implementation Framework', Social Transformation Through Access to Justice: Child Justice Strategy 2023-2030, 32.

⁶⁸ Section 7, *Law Society of Kenya Act* (2014).

⁶⁹ Section 4, *Law Society of Kenya Act* (2014).

⁷⁰ Section 4, *Law Society of Kenya Act* (1962).

be administered.⁷¹ They also discuss ways of availing infrastructure aimed at delivering justice. Since CUCs look at the administration of justice from a broader context, the Children CUCs (CCUCs) were introduced to solely focus on children's matters. CCUCs are innovations that were introduced to improve the state of the juvenile justice system by spearheading restorative justice for children in conflict with the law. CCUCs WhatsApp groups, for example, provided a platform where the members could raise concerns regarding the issues juveniles face when they try to access justice, and this was practically shown in the case of *Republic v BC*.⁷² It proved effective since the juvenile was sent to a rehabilitation institution suitable to her needs and circumstances, and was placed under the care of a qualified counsellor or psychologist instead of being subjected to detention.

ADR forms part of this restorative justice agenda. It can be thus alluded that LSK members have to discuss ways of availing infrastructure aimed at promoting juvenile CAM through these CCUCs.

2.3.2 The State Law Office

The State Law Office is also known as the Office of the Attorney General and Department of Justice. It aims to promote human rights and provide policy on the administration of justice.⁷³ According to Executive Order No.2 of 2013, the Attorney General's duties and responsibilities involve overseeing, coordinating, and setting policies for several legal sector organisations.⁷⁴ Under the Department of Justice, one of the mandates entails coordinating the victim reparation framework in Kenya.⁷⁵ This complements the aim of this dissertation which is to coordinate steps that will improve victim-juvenile offender mediation in the Kenyan system.

⁷¹ Section 35, *Judicial Service Act* (2011).

⁷² *Republic v BC* (2022) eKLR.

⁷³ Article 156, *Constitution of Kenya* (2010); Section 4, *Office of the Attorney General Act* (2012); Office of the Attorney General and Department of Justice <https://www.statelaw.go.ke/about-us/who-we-are/#:~:text=MISSION,upholding%20of%20ethics%20and%20integrity>

⁷⁴ Executive Order No.2 of 2013, 23-24. <https://www.theelephant.info/documents/executive-order-no-2-of-2013-organization-of-the-government-of-kenya/>; Muindi A, Office of the Attorney-General in Kenya: Functions, powers and duties, 13 January 2023 <https://vellum.co.ke/office-of-the-attorney-general-in-kenya-functions-powers-and-duties/>

⁷⁵ Office of the Attorney General and Department of Justice, <https://www.statelaw.go.ke/departments/department-of-justice/>

2.3.3 Office of Director of Public Prosecutions (ODPP)

The ODPP is established under Article 157 of the Constitution of Kenya.⁷⁶ The Director of Public Prosecutions (DPP) holds this office and while exercising the powers vested on him, he is mandated to have regard to the interests of the administration of justice.⁷⁷ For this context, this entails promoting the use of ADR. The Diversion Policy was developed to enable prosecutors to divert cases from the court process.⁷⁸ Diversion is encouraged especially when it comes to children in conflict with the law since this restorative approach better suits the interests of a child. The DPP is tasked to develop a structural framework for the implementation of the diversion process, and to reduce barriers that hinder access to justice when cases are diverted.⁷⁹ The ODPP is therefore tasked to avail more programmes for juvenile CAM by ensuring effective linkages exist between the DPP and service providers responsible for diversion programmes.⁸⁰ This is because the juvenile offender cannot be granted diversion if these services are unavailable.⁸¹

2.3.4 National Council on the Administration of Justice (NCAJ)

The NCAJ is established under the Judicial Service Act to coordinate the administration of justice effectively.⁸² NCAJ is composed of the Attorney-General, DPP, and Chairperson of the LSK discussed above.⁸³ This essentially shows that NCAJ creates linkages amongst various justice actors in Kenya, hence making it easier to identify the gaps in child-friendly infrastructure.⁸⁴ For this context, the gap is the juvenile mediation programmes. The gaps are identified by the Standing Committee on Administration of Justice for Children which keeps track of the dispensation of juvenile justice.⁸⁵

The NCAJ is further tasked to form Court User Committees (CUCs) at county levels so as to best coordinate the administration of child justice as was briefly discussed above. For matters relating to juveniles, Children Court User Committees (CCUCs) are established under the

⁷⁶ Article 157(1), *Constitution of Kenya* (2010).

⁷⁷ Article 157(11), *Constitution of Kenya* (2010).

⁷⁸ Article 157, *Constitution of Kenya* (2010).

⁷⁹ Section 13, *Diversion Policy*.

⁸⁰ Section 66, *Diversion Policy*.

⁸¹ Section 52, *Diversion Policy*.

⁸² Section 34, *Judicial Service Act* (2011); Section 35(1), *Judicial Service Act* (2011).

⁸³ Section 34(2), *Judicial Service Act* (2011).

⁸⁴ National Council on the Administration of Justice, *Administration of Justice in Kenya Annual Report 2021-2022*, 74.

⁸⁵ National Council on the Administration of Justice, *Administration of Justice in Kenya Annual Report 2021-2022*, 74.

CUCs to facilitate the realisation of children's rights and equal access to justice.⁸⁶ This entails weighing the circumstances before it to decide which juvenile cases are fit for diversion.

Aware of the unique barriers that hinder children from accessing justice, ADR mechanisms were set in place within the juvenile justice system to ensure responsiveness to children's matters.⁸⁷ To ensure that children are included in the justice system, NCAJ partnered up with *Mtoto News*, a children's magazine that aims to amplify children's comprehension of the juvenile justice system.⁸⁸ This essentially helps the children to better advocate for their rights. The theoretical foundation of restorative justice is thus set in this regard.

However, on the practical aspect of ADR mechanisms, the disconnect between the theory and practice of such procedures has been revealed in multiple findings of NCAJ. It thus developed an action plan aimed at prioritising institutional reforms to improve access to justice.⁸⁹ This notion thus backs up the argument on the need to avail juvenile mediation programmes that enhance access to justice for juveniles.

2.4 Conclusion

Although there are sufficient laws and processes governing CAM, there aren't nearly enough mediation programmes in Kenya. This research attempts to address this by analysing how juvenile mediation initiatives might be created in Kenya by utilising the institutional theory. It is important to keep in mind that justice delayed is justice denied. When juveniles' cases are adjudicated for mediation, the lack of juvenile mediation programmes implies that they are denied access to justice since there are not enough institutions, which causes delays. The path of Kenya's juvenile justice system - from its historical foundation to the present legal framework - has been covered in great detail in this chapter. The next chapter builds on this Chapter's discussion by providing an overview of how CAM is under-explored in Kenya's juvenile justice system and how, then, Kenya can borrow from Australia's system to avail juvenile mediation programmes in its society.

⁸⁶ Section 35(2)(c), *Judicial Service Act* (2011); *Court User Committee Guidelines (Revised) 2019*.

⁸⁷ National Council on the Administration of Justice, *Administration of Justice in Kenya Annual Report 2021-2022*, 49.

⁸⁸ Legal Resources Foundation, *Mtoto News, 2021 Impact Report* [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mtotonews.com/wp-content/uploads/2021/12/2021-Mtoto-News-Impact-Report-1.pdf](https://www.mtotonews.com/wp-content/uploads/2021/12/2021-Mtoto-News-Impact-Report-1.pdf)

⁸⁹ The Kenya Gazette, *Annual Administration of Justice Report 2021/2022*, Authority of the Republic of Kenya.

CHAPTER THREE

The under-exploration of court-annexed mediation in matters regarding children in conflict with the law in Kenya

3.1 Introduction

This chapter demonstrates how Kenya's juvenile justice system fails to adequately protect juveniles seeking extrajudicial justice. To do so, the current juvenile institutional structure will be thoroughly discussed; examining both the advancements made in Kenya's juvenile justice system and the areas that are still in need of improvement. Additionally, a comparative study between Kenya and Australia is conducted to capture the under-utilisation of juvenile CAM. Australia, being a Commonwealth country that ascribes to the common law system, is suitable for this study.⁹⁰ The comparative study aims to elaborate on how Kenya can create juvenile institutional structures that will guarantee the rehabilitation principle.

3.2 Juvenile Justice System in Kenya

Kenya's juvenile justice system has both adversarial and inquisitorial components. The adversarial system requires both the accused and the accuser to present their arguments in court, and have their matters decided by a third party, normally a judge or magistrate.⁹¹ However, in the inquisitorial system, the judge simultaneously has the role of discovering the facts of the case and that of representing the State's interests in a trial. This is usually applied in countries with a civil law system.⁹² Inquisitorial elements have, however, been spotted in Kenya's justice system, most notably through the language used in judicial judgements.⁹³ Under the code of judicial conduct, judges are thus required to use broad language that protects the judiciary's reputation. By abiding by this code, it ensures that no impression of misconduct or partiality is implied to the members of the public.

⁹⁰ Australian National University Library, The Australian Legal System <https://libguides.anu.edu.au/c.php?g=634887&p=4547083>

⁹¹ Drury M, Adversarial system of justice, Overview, Benefits and Downsides <https://study.com/academy/lesson/adversarial-system-of-justice-definition-advantages.html>

⁹² "Inquisitorial System ." West's Encyclopedia of American Law. . Retrieved December 11, 2023 from Encyclopedia.com: <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/inquisitorial-system>

⁹³ Quincy K, The Language of Judicial Judgements, 8 September 2022. <https://tta.co.ke/the-language-of-judicial-judgments/>

Kenya's juvenile justice system is a hybrid model that incorporates elements of the welfare and justice models. This hybrid model is based on the principle of the best interests of the child, and it combines the welfare approach and the justice model.

Kenya adopted the modified justice model into its institutional and legal framework which has widely endorsed detention facilities, rehabilitation centres, and remand homes to address juvenile offenders restoratively.⁹⁴ The current juvenile justice system in Kenya is made up of the police, the prosecution, the court, correctional institutions, and probation processes.⁹⁵ The police and the Children Officers are involved in the arrest of juveniles and it is at this point that the juvenile may or may not be granted bail or bond. Arraignment and adducing of evidence are done by the prosecution; while bail information reports, bond, or remand custody are handled by the court. The correctional institutions train and rehabilitate juveniles while probation involves post-release supervision and aftercare. Whereas Children Officers mostly handle cases of child protection including custody and care in remand and rehabilitation schools, Probation Officers' role is to assist the court in making decisions concerning juveniles and their supervision and rehabilitation in the community.⁹⁶ These decisions relate to either bail, procedures related to disposition after trial and judgment, institutional confinement, committal to correctional institutions, or supervision in the community.

The Probation of Offenders Act dictates that the Children's Court has the authority to impose a probation order on the juvenile offender.⁹⁷ Furthermore, juveniles are handled differently according to their ages in that those between the ages of twelve and fifteen are placed in a rehabilitation facility that is appropriate for their needs and situation while those who have attained the age of sixteen are dealt with as per the provisions laid out in the Borstal Institutions Act.⁹⁸

According to the *parens patriae* doctrine, the State has the responsibility to ensure sanctions and punishment do not constitute corrective measures as it will be contrary to the juvenile's well-being if allowed.⁹⁹

⁹⁴ Section 38(b), *Children Act (2022)*.

⁹⁵ Okech C, Juvenile justice in Kenya and the management of children Involved in violent crimes; A public lecture held at the Ministry of Justice, Headquarters, Japan-Tokyo- 27th January 2023, 6.

⁹⁶ Visiting Experts' Papers, Okech C, The Juvenile Justice in Kenya: Growth, System and Structures, 9.

⁹⁷ Section 239(1)(c), *Children Act (2022)*.

⁹⁸ Section 239(1)(g), *Children Act (2022)*; Section 239(1)(e), *Children Act (2022)*.

⁹⁹ Sloan M, Parens Patriae Doctrine in Juvenile Justice, <https://study.com/learn/lesson/parens-patriae-juvenile-justice.html>

3.2.1 Borstal institutions

The rehabilitation of juvenile offenders in borstal institutions, as well as their reintegration into society after release, are provided for in the Persons Deprived Liberty Act.¹⁰⁰ These Institutions are established at the discretion of the Minister and the current existing ones are Shikusa (Kakamega), Shimo La Tewa (Shanzu), Kamiti Youth Corrective Centre, and Kamae Girls Borstal.¹⁰¹ The case of *Michael Munene Wanjiku v Republic* sheds light on how the court considers the youthful offender's previous conduct and circumstances of the offence, and whether the period of training in a borstal institution aligns with the juvenile's reformation.¹⁰² This practice by the courts also shows how borstal institutions adhere to international, constitutional, and human rights legislations that protect children's rights. Compliance to this degree is a key indicator of how well borstal institution are doing their rehabilitative mission.¹⁰³

3.2.2 Remand Homes

Children's remand homes were established to accommodate, care for, and protect juveniles.¹⁰⁴ A "children's remand home" is a secure facility that juveniles may be sent to by court order while their cases are being handled.¹⁰⁵ This usually occurs when the Children's Court denies to grant the juvenile bail or bond.¹⁰⁶ It is therefore not a correctional facility. Remand homes are meant to be used as a last resort for the care and protection of juveniles during trial, pending a decision or placement.¹⁰⁷ Before an order of placement is made, the case of *Martin Kinyanjui Muindi v Republic* provides that the age assessment of the juveniles is conducted and a report by the probation officer ascertaining the eligibility of the minor to be placed in Kabete Juvenile Remand Home, is produced.¹⁰⁸ The list of remand homes in Kenya are Kisumu Remand Centre, Manga Remand Centre, Nyeri Remand Centre, Malindi Remand Centre, and Nairobi Remand

¹⁰⁰ Section 26, *Persons Deprived Liberty Act* (2014).

¹⁰¹ Section 3, *Borstal Institutions Act (1963)*; Chacha H, 'Treatment and Social Reintegration of Offenders: Case Study of Shikusa Borstal Institution', 1; Steve M, Rotary Club of Nairobi Central, "Elimu Magerezani": Unlocking Potential <https://sub.rotaractnairobi-central.co.ke/elimu-magerezani-unlocking-potential/#:~:text=Today%20we%20have%20four%20borstal,with%20adults%20in%20regular%20prisons.>

¹⁰² *Michael Munene Wanjiku v Republic* (2020).

¹⁰³ Okutoyi AM, 'Rehabilitation of children in conflict with the law: A case of Shikusa Borstal Institution, Kakamega, Kenya' Published Master of Arts in Human Rights, University of Nairobi, Nairobi, 2015, 3 <http://erepository.uonbi.ac.ke/bitstream/handle/11295/93947/Okutoyi%20Anne%20M%20Rehabilitation%20of%20children%20in%20conflict%20with%20the%20law%20%20a%20case%20of%20Shikusa%20borstal%20institution%20Kakamega%20Kenya.pdf?sequence=3&isAllowed=y>

¹⁰⁴ Section 77, *Children Act* (2022).

¹⁰⁵ Section 2, *Children Act* (2022).

¹⁰⁶ Section 16, *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹⁰⁷ Section 77(2), *Children Act* (2022).

¹⁰⁸ *Martin Kinyanjui Muindi v Republic* (2004).

Centre. Other remand homes in the country are found in Murang'a, Kakamega, Kericho, Eldoret, Likoni and Nakuru counties.¹⁰⁹

3.2.3 Rehabilitation Schools

Juvenile rehabilitation schools are classified according to the age and sex of the child offenders so that their needs to adequately met.¹¹⁰ These schools are established, administered, and maintained by the Office of the Secretary of Children Services.¹¹¹ Examples of rehabilitation schools include: Wamumu Boys, Kericho Boys, Dagoretti Girls. Other juvenile rehabilitation schools in the country are Kirigiti Girls, Kakamega Boys, Othaya Boys, Getathuru Boys, Thika Boys, Likoni Boys, and Machakos Boys rehabilitation facilities.¹¹² Rehabilitation schools ensure juveniles still receive education, and they also offer programmes that help juveniles obtain vocational skills as may be approved by the Cabinet Secretary.¹¹³ This can be seen in *JCM v Republic* where it was suggested that the appellant be placed at Getathuru Rehabilitation Centre for three years to ensure he continues with his primary school education and at the same time, receive behavioural rehabilitation.¹¹⁴

3.2.4 National Council for Children Services

The National Council for Children Services formulates, approves, assesses, oversees, and makes reports regarding the implementation of children programmes in Kenya to ensure the obligations align with international and regional standards.¹¹⁵ To effectively do so, the National Council for Children Services formed the County and Sub-County Children Advisory Committees to carry out its mandate.¹¹⁶ These Committees advise the Council on any issue related to child welfare programmes.¹¹⁷ In *Mary Mwihaki Kimani and 4 others v Ministry for Gender, Children & Social Development and another*, the respondents closed down Naivasha Orphans Rescue and Rehabilitation Centre following an inspection report from the Area Council that listed out the following issues: (i) the children's records were not kept up to date;

¹⁰⁹ Francis M, Juvenile Remand Homes in Kenya, 4 October 2021 <https://wikitionary254.com/juvenile-remand-homes-in-kenya/>

¹¹⁰ Section 79, *Children Act* (2022).

¹¹¹ Section 38(a) and (q), *Children Act* (2022).

¹¹² Francis M, Juvenile Remand Homes in Kenya, 4 October 2021 <https://wikitionary254.com/juvenile-remand-homes-in-kenya/>

¹¹³ Section 78(3), *Children Act* (2022).

¹¹⁴ *JCM v Republic* (2018).

¹¹⁵ Section 42, *Children Act* (2022).

¹¹⁶ Section 54 and 55, *Children Act* (2022).

¹¹⁷ Section 55(4), *Children Act* (2022).

(ii) unqualified staff personnel were hired; (iii) poor diet and inadequate facilities for food preparation, water, and storage; (iv) the gym and fitness premises were uncondusive; (v) lack of adequate medical and health facilities; (vi) inadequate recreational facilities; (vii) poor sanitary conditions; (viii) some children could not attend school; and (ix) poor delivery of guidance and counseling sessions.¹¹⁸

3.2.5 Factors to be considered before diverting juvenile cases

When making judicial decisions, the Magistrate considers the degree of harm resulting from the offence, the degree of responsibility the child has for causing or risking that harm, the society's safety, the victim's perception to the offence, and any prior record that shows that the child was unable to respond to alternatives to detention or institutionalisation.¹¹⁹

A preliminary inquiry is held upon the child's arrest or when they are presented to court prior plea taking as long as the child is above twelve years and the matter has not been diverted.¹²⁰ Eligible matters can, however, be diverted at this stage before the plea-making process. Preliminary inquiries are important since they ensure availability of relevant information concerning the child such as their circumstances and the offences committed, in order to decide on diversion and placement of the child.¹²¹ The agencies involved in this process are the children officer, probation officer, investigation officer and the DPP.¹²² Diversion is one of the outcomes of a preliminary inquiry.¹²³ This occurs especially when the Children's Court adjourns the proceedings and instead makes arrangements in respect of a suitable diversion option.¹²⁴ The magistrate can then choose to make an order as to the placement of the child to a suitable institution or alternative care.¹²⁵

Only when a child acknowledges responsibility for the alleged offence can diversion be ordered.¹²⁶ Section 230 of the Act further provides for the types and levels of diversion options which help determine whether the child offender is eligible for diversion.¹²⁷ To determine the

¹¹⁸ *Mary Mwihaki Kimani & 4 others v Ministry for Gender, Children & Social Development and another* (2011) eKLR.

¹¹⁹ Matundura T, Kenyan Children in Conflict with the Law: A Comprehensive Overview of the Proposed Procedure and Practice Rules 2023, 12 September 2023. <https://medium.com/@matundura/kenyan-children-in-conflict-with-the-law-a-comprehensive-overview-of-the-proposed-procedure-and-ac9b0a3bf9e8>

¹²⁰ Section 228, *Children Act* (2022); Section 5, *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹²¹ Section 228(3), *Children Act* (2022).

¹²² Section 5(3), *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹²³ Section 6(5), *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹²⁴ Section 8(1)(a), *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹²⁵ Section 9, *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹²⁶ Section 12, *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹²⁷ Section 230, *Children Act* (2022).

appropriate level of diversion, the Magistrate takes into account several factors, including the juvenile's age and maturity, social class, educational background, special needs, the type of relationship the juvenile has with the victim, previous records of offences committed, escape risk, public interest, and the gravity of the offence.¹²⁸ Upon ordering diversion, the magistrate may appoint persons such as the probation or children's officer, to monitor whether the juvenile complies with the identified diversion option.¹²⁹

3.2.6 Family Group Conferences

The preliminary inquiry conducted by the magistrate as per section 228 may apply level-two diversion option which entails the juvenile being referred to undergo a family group conference.¹³⁰ When the matter has been referred, the conference is convened by the children officer within fourteen days and twenty-one days after such referral. The convening process entails planning the time, the venue and notifying the parties to the conference details of the same.¹³¹ The parties may include the juvenile and their victim, the child's parents or guardians, the DPP, the children's officer, the probation officer, and relevant persons to the case.¹³² This process seeks to help juveniles understand the magnitude of the crime they committed and to guide and support them as they reform their behaviour.¹³³ The outcome of the family group conference is recorded by the children officer and the copy of the record is handed out to the parties.

3.3 Juvenile CAM in Australia

Contrary to Kenya's situation, Australia has a relatively well-established juvenile justice system that promotes restorative justice. Australia is composed of six States and two territories.¹³⁴ The six States are New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania; while the two territories are the Australian Capital Territory (ACT) and Northern Territory. It follows that State and territory laws in Australia regulate the

¹²⁸ Section 12(3), *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023); Matundura T, 'Kenyan Children in Conflict with the Law: A Comprehensive Overview of the Proposed Procedure and Practice Rules 2023' Medium, 2023

¹²⁹ Section 13, *Children (Children in Conflict with the Law) (Procedure and Practice) Rules* (2023).

¹³⁰ Section 230, *Children Act* (2022).

¹³¹ Section 232(1), *Children Act* (2022).

¹³² Section 232(2) and (3), *Children Act* (2022).

¹³³ Section 232(5), *Children Act* (2022).

¹³⁴ Australian States, Territories and Capital Cities <https://www.australia.com/en/facts-and-planning/about-australia/cities-states-and-territories.html#:~:text=The%20country%20is%20divided%20into,of%20environments%2C%20cultures%20and%20rhythms.>

juvenile justice system.¹³⁵ To make sure restorative justice is implemented, a study will be conducted for each of these regions to examine the various juvenile justice programmes already in use.

3.3.1 The Victorian Juvenile Justice System

The 2005 Children, Youth and Families Act reflects the strong diversionary strategy Victoria has when handling juveniles.¹³⁶ The "best interests of the child" principle underpins Division 3A of the Act, emphasising that the response to a child's offence should maintain and promote the child's development; the action taken should be appropriate to the circumstances; and the response should give due consideration to the interests of any victim of that offence.¹³⁷

To correspond with the statutory provision, the Victorian Children's Court aims at attaining the best practice model which involves eliminating adversarial practices at the Court.¹³⁸ The Children's Court Youth Diversion Service (CCYD) further steps in to ensure juveniles do not progress further into the justice system by having their matters diverted and this only takes place when the courts and the offender consent to the diversion process.¹³⁹ Group conferencing is the term used to describe the current diversion procedure.¹⁴⁰

The Act further provides for group conferences which facilitates meetings between the child or persons important to the child, and the victim or the victim's representatives.¹⁴¹ The objectives of such meetings are to assist the child in taking responsibility for harm caused to the victim and the community, to reduce the likelihood of recidivism, and to draft an outcome plan.¹⁴² An outcome plan is a strategy intended to ensure that the juvenile does not face double jeopardy by helping them make up for their actions.¹⁴³

¹³⁵ Child Family Community Australia, Australian Child Protection Legislation, August 2022 <https://aifs.gov.au/resources/resource-sheets/australian-child-protection-legislation>

¹³⁶ Division 3A, *Children, Youth and Families Act* (2005).

¹³⁷ Section 356C, *Children, Youth and Families Act* (2005).

¹³⁸ The Children's Court of Victoria, Response to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Agreements, April 2010, 10.

¹³⁹ Section 356E, 356F, *Children Youth and Families Act* (2005).

¹⁴⁰ Children's Court of Victoria, Group Conferencing <https://www.childrencourt.vic.gov.au/criminal-division/groupconferencing#:~:text=The%20program%20aims%20to%20divert,amends%20for%20the%20harm%20done> ; Section 415, *Children Youth and Families Act* (2005).

¹⁴¹ Section 415, *Children Youth and Families Act* (2005).

¹⁴² Section 415(4), *Children Youth and Families Act* (2005).

¹⁴³ Section 415(5), *Children Youth and Families Act* (2005).

Victoria's Department of Justice and Community has justice service centres across the region to enable the execution of group conferencing.¹⁴⁴ They are: Bairndale Justice Service Centre, Ballarat Regional Office, Bendigo Justice Service Centre, and Box Hill Justice Service Centre.

3.3.2 Western Australia

Western Australia is guided by the Young Offenders Act 1994 on how to handle juveniles in a manner that fosters restorative justice.¹⁴⁵ One way of achieving this is through juvenile justice teams.¹⁴⁶ Juvenile justice teams are an alternative way of handling children who have committed crimes. The teams ask the juveniles to take responsibility for their actions and encourage them to face their problems and then divert them from the children's courts.¹⁴⁷ The team is made up of a Coordinator, a member of the Police Force, and any other person as the Coordinator appoints.¹⁴⁸ The following Metropolitan Juvenile Justice Teams are available in various regions in Western Australia: Central Metro Youth Justice Services, South-West Metro Youth Justice Services Cockburn, South-West Metro Youth Justice Services Rockingham, South-East Metro Youth Justice Services, and North Metro Youth Justice Services.¹⁴⁹

3.3.3 New South Wales (NSW) Juvenile Justice System

New South Wales has various legislation that govern matters concerning children in conflict with the law. The Young Offenders Act 1997 is the pertinent statute for this study.¹⁵⁰ In order to address juvenile offenders and their victims in a way that is mutually beneficial, the Young Offenders Act 1997 establishes programmes that use youth justice conferences as an alternative to court procedures.¹⁵¹

Youth justice conferences are meetings between a child offender, the victim, and persons aware of the offence.¹⁵² These meetings are intended to assist mend the damage that the young

¹⁴⁴ Victoria State Government, Justice and Community Safety Service Locations, <https://www.justice.vic.gov.au/service-locations>

¹⁴⁵ Part 2, *Young Offenders Act* (1994).

¹⁴⁶ Part 5 Division 2, *Young Offenders Act* (1994).

¹⁴⁷ Government of Western Australia, Department of Corrective Services 2010 Factsheet, 1. <https://www.correctiveservices.wa.gov.au/files/youth-justice/jjt-fact-sheet.pdf>

¹⁴⁸ Part 5 Division 3 Section 37, *Young Offenders Act* (1994).

¹⁴⁹ Western Australia Police Force, Juvenile Justice, 7 December 2022, <https://www.police.wa.gov.au/Crime/Juvenile-justice>

¹⁵⁰ *Young Offenders Act* (1997).

¹⁵¹ Section 3, *Young Offenders Act* (1997).

¹⁵² Section 47, *Young Offenders Act* (1997); NSW Government, What is a Youth Justice Conference?, <https://www.nsw.gov.au/legal-and-justice/youth-justice/conferencing/what-is-youth-justice-conference#:~:text=A%20Youth%20Justice%20Conference%20is,the%20family%20and%20broader%20comm>

offender made in order to help rebuild the relationship that was previously there with the larger community. Conferencing assists in keeping young people out of the legal system, hence promoting the restorative justice model. The conference is organised by the conference convener who guides the participants through it by facilitating discussion, posing questions, and adhering to the predetermined agenda structure.¹⁵³ The inference that follows from this succinct explanation is that the format, the setting, and the environment of youth justice conferences are identical to those of mediation.

The following are some of the seventeen youth justice conferencing offices in NSW: Sydney, Armidale, Lismore, Blacktown, Newcastle, Broken Hill, Orange, Campbelltown, Penrith, Coffs Harbour, Petersham, Dubbo, Fairfield, Queanbeyan, Glen Innes, Wagga Wagga, Gosford, and Wollongong.¹⁵⁴ These offices were dispersed across the region to ensure juveniles obtain justice in their localities. Matters eligible for conferencing are those considered minor in nature; juveniles who have never had conferencing; and juveniles who confess to committing an offence and consent to attend the conference.¹⁵⁵

3.3.4 Queensland Juvenile Justice System

In Queensland, the restorative justice procedure is conducted through conferences.¹⁵⁶ A child who commits an offence and other concerned persons can address the offence in a way that is advantageous to all parties by using the convening conference procedure outlined in the Youth Justice Act 1992.¹⁵⁷ Initiating the conference is the convenor's responsibility, and he or she must be impartial to the circumstances of the offence.¹⁵⁸ Moreover, Queensland also includes provision for alternative diversion programs.¹⁵⁹ The chief executive and the child approve of these programs which entail the child taking part in remedial actions to address the child's

[unity.](https://www.nsw.gov.au/legal-and-justice/youth-justice/resources-and-policies/glossary#C); Youth Justice Glossary, Glossary of terms used by Youth Justice <https://www.nsw.gov.au/legal-and-justice/youth-justice/resources-and-policies/glossary#C>

¹⁵³ Youth Justice Glossary, Glossary of terms used by Youth Justice <https://www.nsw.gov.au/legal-and-justice/youth-justice/resources-and-policies/glossary#C>

¹⁵⁴ Go To Court, Youth Justice Conferences (NSW) <https://www.gotocourt.com.au/criminal-law/nsw/youth-justice-conferences/#:~:text=In%20New%20South%20Wales%2C%20there,Wagga%20Wagga%2C%20Gosford%20and%20Wollongong.>

¹⁵⁵ Go To Court, Youth Justice Conferences (NSW) <https://www.gotocourt.com.au/criminal-law/nsw/youth-justice-conferences/#:~:text=In%20New%20South%20Wales%2C%20there,Wagga%20Wagga%2C%20Gosford%20and%20Wollongong.>

¹⁵⁶ Part 3 Division 1 Section 31, *Youth Justice Act* (1992).

¹⁵⁷ Part 3 Division 2, *Youth Justice Act* (1992).

¹⁵⁸ Part 3 Division 2 Section 35, *Youth Justice Act* (1992).

¹⁵⁹ Part 3 Division 1 Section 38, *Youth Justice Act* (1992).

behaviour.¹⁶⁰ To execute this, The Community Youth Diversionary Response Program offers a culturally sensitive substitute for police prosecuting, or remanding juvenile offenders. This program delivers a range of services in Townsville, Cairns, and Ipswich.¹⁶¹

3.3.5 South Australia's Juvenile Justice System

The Parliament of South Australia enacted the Young Offenders Act 1993 which lists out family conferencing as a mode of dealing with offences committed by a juvenile extrajudicially.¹⁶² These conferences is assembled by a Youth Coordinator who assigns time and venue for the family conference, issues a notice requiring the juvenile and any other person the Youth Justice Coordinator invites to attend.¹⁶³ Family conferencing occurs when consent is given by all those invited and it has a State-wide coverage from its base, Adelaide.¹⁶⁴

3.3.6 Tasmanian Juvenile Justice System

Tasmania's Youth Justice Act 1997 provides for ordinary community conferences and court-ordered community conferences, which divert juveniles from the court system and sentencing.¹⁶⁵ A community conference consists of the facilitator who convenes it, the juvenile and the victim, the police, and other persons invited by the facilitator.¹⁶⁶ Community conferencing serves as a restorative justice procedure as well as a rehabilitation tool used to integrate young people into a community-based structure that promotes learning and development from illegal activity.¹⁶⁷ This process requires the juvenile to accept responsibility and make amends to the victim of the offence.

The wellbeing of juveniles was further invested in in the Youth Justice Blueprint 2022-2032 that was drafted to set a direction for youth justice in Tasmania for the next ten years.¹⁶⁸ The Blueprint seeks to lessen criminal activity, enhance community safety, and address the root causes of criminal conduct. This was brought about by the Tasmanian Liberal Government's

¹⁶⁰ Part 3 Division 1 Section 38(1), *Youth Justice Act* (1992).

¹⁶¹ Queensland Government, Youth Justice Initiatives, Community youth response and diversion, <https://desbt.qld.gov.au/youth-justice/partnerships/initiatives>

¹⁶² Part 2 Division 3 Section 10(1), *Young Offenders Act* (1993).

¹⁶³ Part 2 Division 3 Section 10(2), *Young Offenders Act* (1993).

¹⁶⁴ Part 2 Division 3 Section 11, *Young Offenders Act* (1993); Courts Administration Authority of South Australia, Family Conferences <https://www.courts.sa.gov.au/going-to-court/court-locations/youth-court/family-conferences/>

¹⁶⁵ Part 2 Division 3, *Young Offenders Act* (1997); Part 4 Division 4, *Young Offenders Act* (1997).

¹⁶⁶ Part 2 Division 3 Section 15, *Young Offenders Act* (1997); Part 2 Division 3 Section 14, *Young Offenders Act* (1997).

¹⁶⁷ Hobart Community Legal Service Inc, Criminal Offences, Penalties and Sentences, Tasmanian Legal Handbook.

¹⁶⁸ Youth Justice Blueprint 2022, What is the Youth Justice System?, para 2, 5.

intention to restructure the juvenile justice system by establishing new facilities that use a therapeutic approach in place of Ashley Youth Detention Centre.¹⁶⁹

3.3.7 Australian Capital Territory (ACT) Juvenile Justice System

The process of rehabilitation and reintegration of juveniles is guided by the information provided by the director general.¹⁷⁰ The Children and Young People Act 2008 also lists guidelines for how juveniles should be supported during these processes.¹⁷¹ One way the ACT juvenile justice system ensures juveniles are cared for, counselled, and supported is by setting up restorative justice conferences.¹⁷² A convenor facilitates the conference and assists the parties reach an agreement.¹⁷³ The parties therein include the juvenile and their victim, or persons acting on behalf of either the juvenile or the victim.¹⁷⁴ Such diversionary services are offered and supported by the Child and Youth Protection Services (CYPS), a statutory child protection organisation that is regionally focused in the ACT's North and South regions.¹⁷⁵

3.3.8 Northern Territory (NT) Juvenile Justice System

In NT, a child between the ages of 10 and 17 may be eligible to participate in a youth diversion programme rather than appear in court.¹⁷⁶ These programmes are referred to as youth justice conferences as provided for under the Youth Justice Act 2005.¹⁷⁷ Juveniles are limited to participate twice in such conferences and it involves parties affected by the juvenile's conduct.¹⁷⁸ Some of the NGOs in NT that carry out this programme are; Tiwi Islands Regional Council, East Arnhem Regional Council, Warlpiri Youth Development Aboriginal

¹⁶⁹ Jaensch R, Therapeutic approach to youth justice reforms, 22 November 2022 https://www.premier.tas.gov.au/site_resources_2015/additional_releases/therapeutic-approach-to-youth-justice-reforms

¹⁷⁰ Part 2.1, Section 22(1)(h), *Children and Young People Act* (2008).

¹⁷¹ Part 1.2, Section 7(f), *Children and Young People Act* (2008).

¹⁷² Part 2 Section 6, *Crimes (Restorative Justice) Act* (2004); Part 8, *Crimes (Restorative Justice) Act* (2004)..

¹⁷³ Part 8 Division 8.2 Section 41(1), *Crimes (Restorative Justice) Act* (2004); Part 8 Division 8.4, *Crimes (Restorative Justice) Act* (2004).

¹⁷⁴ Part 8 Division 8.3 Section 42, *Crimes (Restorative Justice) Act* (2004).

¹⁷⁵ ACT Government, Community Services, Children and Youth Protection Services

<https://www.communityservices.act.gov.au/children-and-families/child-and-youth-protection/child-and-youth-protection-services#:~:text=CYPES%20is%20the%20statutory%20child,be%20at%20risk%20of%20harm>.

¹⁷⁶ Northern Territory Government, Youth Diversion Program <https://nt.gov.au/law/young-people/getting-arrested-and-pre-court-sentencing/youth-diversion-programs>

¹⁷⁷ Part 3 Section 39(2)(c), *Youth Justice Act* (2005).

¹⁷⁸ Go To Court, The Youth Justice Act (NT), <https://www.gotocourt.com.au/criminal-law/nt/youth-justice-act/#:~:text=In%20the%20Northern%20Territory%2C%20the,ages%20of%2012%20and%2018;> Northern Territory Government, Youth Diversion Program <https://nt.gov.au/law/young-people/getting-arrested-and-pre-court-sentencing/youth-diversion-programs>

Corporation, Youth Outreach Re-Engagement Team (YORET), Jesuit Social Services, and Relationships Australia NT.¹⁷⁹

3.4 Conclusion

It is clear from the comparison above that Kenya made institutional investments in juvenile detention and remand, but not as much in the establishment of ADR centres that handle juvenile cases. The next chapter discusses the role that children currently play in different mediation arrangements, and how child participation can also be enhanced in juvenile CAM.



¹⁷⁹ No. 699 Legislative Assembly of the Northern Territory, 2. https://parliament.nt.gov.au/_data/assets/pdf_file/0003/747264/Aqst-699-Finocchiaro-Youth-Diversion.pdf

CHAPTER FOUR

Incorporating Juvenile Mediation Programmes in Kenya

4.1 Introduction

This chapter seeks to demonstrate how mediation has gained acceptance in Kenya. Despite this recognition, efforts regarding the practice of mediation have mainly been made towards settling civil disputes in the Commercial and Family Divisions of the High Court.¹⁸⁰ The same cannot be said regarding juvenile cases that have been annexed to undergo mediation as not much effort has been placed in the juvenile justice system. This chapter discusses why juveniles should also be given a chance to be active participants in the AJS by highlighting other areas where children are involved in the mediation process.

4.2 Child-inclusive Mediation (CIM) in Kenya

This part seeks to discuss the current roles children play in different mediation settings in Kenya such as follows:

4.2.1 Custody Mediation

In family law proceedings, parents are guided by the principle of the ‘best interests of the child’ when undergoing divorce or separation. In moments like this, it is only natural for a parent to be concerned about how the outcome of the separation or divorce will affect their children. To ensure the rights and concerns of the child are safeguarded, children undergo a therapeutic mediation process that seeks to increase parents’ capacity to collaborate and think more critically about their child’s best interests.¹⁸¹ Child inclusion is a respectful expansion of the UNCRC, granting children the ability to voice their wishes in family law proceedings and to have their parents and the involved dispute resolution practitioners take those wishes into careful consideration.¹⁸² CIM therefore gives children a voice and a chance to express their worries and concerns without feeling pressured to take sides or feel responsible for making

¹⁸⁰ Article 159(2)(c), *Constitution of Kenya* (2010); Section 2, *Mediation (Pilot Projects) Rules*, (2015).

¹⁸¹ Child Beyond Dispute.com, Child Inclusive Mediation and Counselling (CIMC) <https://childrenbeyonddispute.com/child-inclusive-mediation/>

¹⁸² Article 12, *United Nations Convention on the Rights of the Child*.

decisions.¹⁸³ Jerameel Kevins opines that although the results have guaranteed that children have a voice in the entire process without having their will violated at any cost, child-inclusive mediation is still a grey area in Kenya that needs to be investigated.¹⁸⁴

4.2.2 CIM in the Kenyan educational system

Storm Thiaka lists examples of problems faced by children in Kenyan schools such as drug abuse, bullying, sexual activity, abuse, and harassment, among others.¹⁸⁵ In his paper, he discusses how some disciplinary measures such as corporal punishment are still at play despite being prohibited by the 2010 Constitution of Kenya and how they are treated as a mode of handling such issues.¹⁸⁶ Storm also highlights the evident gap in the laws and regulations pertaining to the school system based on the previously mentioned concerns but not remand centres and charitable children's institutions.¹⁸⁷ It therefore follows why there's a need for an organisational culture in the school system that permits students' basic involvement in matters that impact them.¹⁸⁸ He makes the case that mediation is the organised system most suited to resolve these problems.

That way, children in primary will be able to assess their actions or chances for resolution and, to some extent, comprehend their position in a dispute as a result.¹⁸⁹ This would imply that they are able to gather data, assess it against what they already know, and then decide whether to accept the phenomenon as true or alter their minds in favour of a better course of action.¹⁹⁰ It should be noted that this does not imply that children are able to comprehend the majority of life's complexities, but it does demonstrate that they are more than just neutral vessels. Research has demonstrated that kids are fully capable of providing their consent for decisions that impact them, including those pertaining to their health.¹⁹¹

¹⁸³ Jennifer M, Caroline L, and Lawrie M, 'Child-Focused and Child-Inclusive Mediation: A Comparative Study of Outcomes' 10 *Journal of Family Studies* 1, 2004.

¹⁸⁴ Jerameel KOO, 'Towards Ballyhoo of Child Inclusive Mediation as an Instrument for realising Best Interest of a Child Principle in Kenya', 9.

¹⁸⁵ Storm T, 'Resolving Conflicts through Mediation in Kenyan Schools' 11 *Alternative Dispute Resolution* 4, 2023.

¹⁸⁶ Articles 29(e), 29(f), and 25(a), *Constitution of Kenya* (2010); Section 7, *Prevention of Torture Act* (2017).

¹⁸⁷ Storm T, 'Resolving Conflicts through Mediation in Kenyan Schools' 11 *Alternative Dispute Resolution* 4, 2023, 253.

¹⁸⁸ Svein AV and Sturla F, 'Organisational Factors and Child Participation in Decision-Making: Differences between Two Child Welfare Organisations' 20 *Child & Family Social Work* 3, 2015, 277.

¹⁸⁹ Amelia C, Angie M and Caroline C, 'Supporting Children to Resolve Disputes' (2018) 16 *Journal of Early Childhood Research* 1, 92-93.

¹⁹⁰ Ala S, 'Children's Judgments in Theory Choice Tasks: Scientific Rationality in Childhood' 45 *ScienceDirect* 1, 1992.

¹⁹¹ *Gillick v Norfolk and Wisbeck Area Health Authority* (1986) AC 112 (House of Lords).

The bodies that need to play a role to ensure this mechanism functions are: The Teachers Service Commission (TSC) the Chartered Institute of Arbitrators (CIArb), the Mediation Accreditation Committee (MAC), the Secretary of Children Services (SCS), the National Council for Children's Services (NCCS), the County and Sub-county Children Advisory Committees (CCAC, SeCCAC), and finally, Charitable Children's Institutions.¹⁹²

The establishment of TSC is provided for under Article 237 of the Kenyan Constitution, and its powers and functions are further listed under Article 252; an example relevant to this discussion being 'to conduct mediation' when disputes arise.¹⁹³ At all educational levels, conflict resolution and child psychology must be subjects that all teachers are knowledgeable in.¹⁹⁴ However, most of Kenya's education system teaches all the necessary pre-requisites for teaching including educational psychology, while only few universities offer courses on child psychology or conflict resolution.¹⁹⁵ To fill in this gap, teacher-mediator training programme is necessary. This programme would be overseen by the CIArb while the teacher-mediator's accreditation would be overseen by the MAC.¹⁹⁶ As per the 2012 Teacher Service Commission Act, the TSC's mandate is to collaborate with the CIArb in assigning teacher-mediators to various schools.¹⁹⁷

While the TSC would oversee the teacher-mediators' behaviour outside of the mediation process, the CIArb would be required to provide regulations for school mediation.¹⁹⁸ There would be a single mediator assigned to each school by the CIArb to handle particular case types.¹⁹⁹ The SCS creates a plan to carry out the implementation of this mechanism in educational institutions and is also required to recommend this programme to the NCCS, which

¹⁹² Storm T, Resolving Conflicts through Mediation in Kenyan Schools 2023 11(4) Alternative Dispute Resolution, 267.

¹⁹³ Article 237 and 252, *Constitution of Kenya* (2010).

¹⁹⁴ Kathryn LG, 'Preparing Teachers for Conflict Resolution in the Schools', ERIC Clearinghouse on Teaching and Teacher Education, Washington DC, 1995 <https://eric.ed.gov/?id=ED387456>

¹⁹⁵ 'Bachelor of education (arts) and bachelor of education (science)' (Kenyatta University School of Education) <http://education.ku.ac.ke/index.php/academicprograms/undergraduate/94-programmes/undergraduate/227-bachelor-of-education-arts-andbachelor-of-education-science> - accessed 3 January 2024; 'Bachelor of education (early childhood education)' (Kenyatta University School of Education) – <http://education.ku.ac.ke/index.php/academic-programs/undergraduate/94programmes/undergraduate/223-bachelor-of-education-early-childhood-education> on 3 January 2024; 'BACHELOR OF EDUCATION (ARTS) | Department Of Educational Studies' (University of Nairobi Department of Educational Studies) <https://edustudies.uonbi.ac.ke/bachelor-education-arts> accessed 3 January 2024.

¹⁹⁶ Mediation Accreditation Committee: Mediator Accreditation Standards.

¹⁹⁷ Understanding the Core Mandates of the Teachers Service Commission (TSC) in Kenya, <https://tscnewstoday.co.ke/the-core-mandates-of-tsc/#:~:text=The%20TSC%20aimed%20to%20provide,discipline%2C%20and%20payment%20of%20teachers.>

¹⁹⁸ Article 1, *CIArb Mediation Rules* (2018).

¹⁹⁹ Article 4, *CIArb Mediation Rules* (2018).

would ideally authorise, assess, and oversee its execution with support from the CCAC, the ScCCAC, and any appointed committees.²⁰⁰

4.3 Establishing CIM in the Juvenile Sector

There's need to make available physical legal infrastructure to ensure juvenile CAM actually takes place.²⁰¹ To do so, the following factors need to be considered: finances, staffing, and the philosophies that drive the mediation process; for instance, whether the concept of settlement, or that of relationships is what motivates them.²⁰² Relationship-driven mediations aim to mend broken relationships while settlement-driven mediations focus on a mutually agreeable plan outlining the process of reconciliation, restitution, or restoration. The victim-offender mediation programmes are created using the Victim-Offender Reconciliation Programme (VORP) model as a template.²⁰³ VORP was initiated in Fresno County in 1982 and it is the first programme of its kind to offer a restorative approach to the juvenile justice system.²⁰⁴ Simultaneously in the early 1980s, the Victim-Offender Mediation Association (VOMA), which was an unofficial organisation of practitioners, academics, restorative justice enthusiasts, and drivers of victim-offender mediation, was formed.²⁰⁵ VOMA aimed to offer technical support and assistance to communities and individuals that implemented restorative justice models.²⁰⁶ Since restorative justice is a field that is rapidly expanding and has an impact on justice systems, implementing it requires professional support and ongoing education.

In Kenya, the Kenya Alliance for Advancement of Children (KAACR) is the organisation that facilitates collaboration and sharing of child rights information among NGOs. More than 189 child-focused agencies are members of this organisation. KAACR is registered under the NGO Coordination Act of 1990 and was founded on the principles of the UNCRC.²⁰⁷ It is an NGO that has been granted Special Consultative Status by the United Nations Economic and Social Council (ECOSOC) and Equivalency Determination Certification.²⁰⁸ KAACR envisions a

²⁰⁰ Sections 42, 47, 54 and 55, *Children Act* (2022).

²⁰¹ *Dry Associates Ltd v Capital Markets Authority & another* (2012) eKLR.

²⁰² Audrey E and Robert C, 'What is a VORP?' in *A Summary of the Evaluations of Six California Victim-Offender Reconciliation Programs*, 2000, 5.

²⁰³ Ruth-Heffelbower D, VORP History, 6 June 2021 <http://vorp.org/history.shtml>

²⁰⁴ Victim-Offender Reconciliation Program <https://communityjusticecenter.com/vorp-1/>

²⁰⁵ Ruth-Heffelbower D, Victim-Offender Mediation Association http://www.voma.org/abt_voma.shtml

²⁰⁶ Resolution Systems Institute: Victim-Offender Mediation Association, <https://www.aboutrsi.org/library/victim-offender-mediation-association>

²⁰⁷ Part II, *Non-Governmental Organisations Co-ordination Act* (1990).

²⁰⁸ Kenya Alliance for Advancement of Children (KAACR) <https://www.kaacr.com/about-kaacr/>; United Nations Department of Economic and Social Affairs: NGO Branch, <https://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=1998>

society in which every child and adolescent has the right to exist, grow, and be involved in all decisions that affect them.²⁰⁹ Since its founding, KAAACR has taken up a leading position in the NGO community when it comes to advancing and fighting children's rights.²¹⁰ Child participation movement in Kenya was spearheaded by KAAACR, which started Child Rights Clubs in educational institutions.²¹¹ Setting up these clubs in educational institutions was meant to address violence against children. A Facilitators Manual was later published and several organisations were trained on how to establish and manage the Child Rights Clubs.²¹² This helped the clubs gain traction across the nation. Additionally, KAAACR supports child-led initiatives in the Coast and Western Provinces that aim to eliminate corporal punishment and create child-friendly environments in public primary and secondary schools.²¹³ It can then be argued that such organisations can also set up mediation programmes that are centred on meeting juveniles' development needs.

4.3.1 Why the VORP model will benefit Kenya

Juveniles who had taken part in VORP mediation were compared to those who had not (the comparison group).²¹⁴ Research from the United States, Canada, and England supports the idea that VORPs are a better option for making restitution to the victim than other, more conventional juvenile justice measures.²¹⁵ The main inquiry used to assess restitution was whether the restitution by VORP participants surpassed that of the comparison group by a significant amount, and this was answered in the affirmative.²¹⁶

For recidivism rates, the main inquiry was whether the reduction rate among VORP participants was much higher than that of the comparison group, and this too was answered in the affirmative.²¹⁷

²⁰⁹ Profile of Kenya Alliance for Advancement of Children (KAAACR) 2021 <https://www.kaacr.com/about-kaacr/>

²¹⁰ Profile of Kenya Alliance for Advancement of Children (KAAACR) 2021, 1.

²¹¹ Child Rights International Network, *Kenya Alliance for Advancement of Children (KAAACR): Background and History of the Alliance*, 2.

²¹² Kenya Alliance for Advancement of Children, *Profile of Kenya Alliance for Advancement of Children*, 2021.

²¹³ Kenya Alliance for Advancement of Children: Newsletter 47 (16 – 27 October 2006), Research Findings on Corporal Punishment Disseminated in Mombasa <https://archive.crin.org/en/library/publications/kenya-alliance-advancement-children-newsletter-47-16-27-october-2006.html>

²¹⁴ Audrey E and Robert CC, *Summary of the Evaluations of Six California Victim-Offender Reconciliation Programs*, United States of America, 2000, 21.

²¹⁵ Nugent WR, Umbreit MS, Wiinamaki L, and Paddock J, 'Participation in Victim-Offender Mediation and Reoffense: Successful Replications?' 11 *Research on Social Work Practice* 1, 2001, 5-23. <https://doi.org/10.1177/104973150101100101>

²¹⁶ Office of Justice Programs, *Summary of the Evaluations of Six California Victim-Offender Reconciliation Programs*, May 2000, 21-22.

²¹⁷ Office of Justice Programs, *Summary of the Evaluations of Six California Victim-Offender Reconciliation Programs*, May 2000, 22-23.

Victim and offender satisfaction is a crucial measure of VORPs' effectiveness. This is assessed by looking at the participants' willingness to refer the process to others, participant satisfaction with the mediation's outcomes, and the mediation services provided by staff and volunteers.²¹⁸

4.4 Conclusion

By using examples from other children's institutions that were created to meet the needs of children, this chapter emphasises the possibility of establishing juvenile mediation programmes. Juveniles will not be able to exercise their right to participate in the legal system until such programmes are established; ensuring that both their needs ,and the needs of their victims are met.



²¹⁸Office of Justice Programs, *Summary of the Evaluations of Six California Victim-Offender Reconciliation Programs*, May 2000, 26-27.

CHAPTER FIVE

Conclusion and Recommendations

5.1 Introduction

This chapter provides a summary of the study by stating the findings of each research question, and assessing whether the objectives of the study have been met.

5.2 Findings

Concerning the first research question, the study has found that the legal framework governing CAM in Kenya is well-advanced but the implementation of the same is rather slow due to inadequate institutions to handle annexed juvenile matters.

For the second research question, the study has found that the current institutional structure in Kenya's juvenile justice system is widely formal in that juveniles still interact with the court system and not much advancement has been made to settle juvenile cases extrajudicially. This is because borstal institutions, remand homes, and rehabilitation schools are more prominent compared to restorative approaches which better uphold the 'best interests of the child' principle by factoring in their development needs while still ensuring justice is served.

Lastly, for the third research question, the study found that it is indeed possible to ensure that child participation in the juvenile justice system takes place and consequently, that juvenile mediation programmes can be set up in Kenya.

5.3 Conclusion

Results drawn from the study conclude that juvenile mediation programmes can be established in the Kenyan setting to complement the existing laws set in place to ensure children in conflict with the law get to access justice restoratively. The hypothesis has thus been proven by demonstrating that juveniles will enjoy their right to access justice extrajudicially when the regime of CAM is explored more broadly.

5.4 Recommendations

The following recommendations provide practical solutions on how to improve the juvenile justice system and how much they will easily pave the way for setting up juvenile mediation programmes.

Allocating resources equitably in the justice sector

Since juvenile justice is part of Kenya's national development process of Kenya, it should equally receive sufficient resources to ensure the juvenile justice system aligns with international principles. This is backed by international law which provides that juvenile justice should not be looked down on, nor should it be placed at the bottom of the pile of resource allocation. Kenya is thus under an immediate legal duty to ensure that the civil rights of children in criminal justice proceedings are fully protected, and that can only be done if sufficient resources are allocated.

Sensitising communities to uphold ADR practices

Borrowing from the African proverb that 'raising a child takes the whole village', the community has a duty to raise a child in a manner that instils a sense of responsibility in the child. A positive environment that helps juveniles play positive roles in society at every stage, and one that supports their social integration must therefore be availed. International law also emphasises that regular interactions with other children and the community lower the chances of alienation and reoffending.

Increasing child participation in the justice sector

The right to freedom of expression is vested in children as well. When children give their views about criminal justice, their opinions should be given the weight that is appropriate to their age and maturity. Doing so enables children to actively take part in the justice system and consequently, the society gains from an efficient and accountable justice system.

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