

**THE DISCRETIONARY DILEMMA: AN EXAMINATION OF
DIVERSION IN THE KENYAN CHILDREN ACT (2022).**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
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Declaration.

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

Signed: 

Date:7/1/2025.....

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

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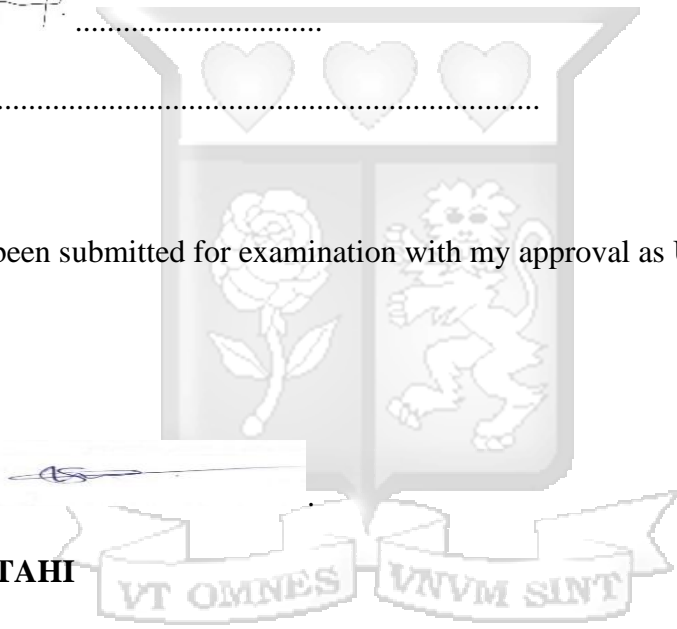
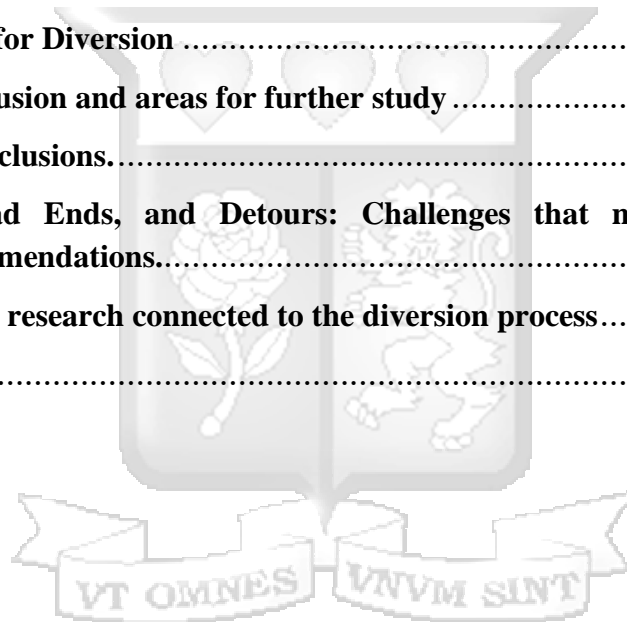


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Abstract.

This research explores the excessive discretion that is accorded to judicial officers in choosing the appropriate diversion program for a youthful offender pursuant to the Children Act. It impacts fairness and brings about a lack of consistency in the application of the law. The study recommends for reforms in the law to take a form like that of South Africa's Child Justice Act which clearly stipulates the appropriate form of program for a particular offence to ensure that there is consistency and uniformity in applying the law.



List of abbreviations

ODPP

Office of the Director of Public Prosecutions

CJA

Child Justice Act



List of Cases.

S v CKM, The High Court Of South Africa, (2013)

S V White, Eastern Cape High Court of South Africa, (2013),



List of Legal Instruments.

Constitution of Kenya, 2010.

Constitution of South Africa,1996

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

Children Act (*No 29 of 2022*).

Office of the Director of Public Prosecutions (ODPP), *Diversion Guidelines*.

United Nations, Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UN Doc A/RES/45/112.

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



CHAPTER 1: INTRODUCTION

1.1 Background and Introduction.

Kenya's crime rate is reported to have risen by up to 19 percent in 2024.¹ This is attributed to the tough economic times being faced in the country.² Youngsters of 15-24 years in Kenya, who make up 7.8 percent of the total adolescents and young people and are a total of 445,621 are not in education, employment or training.³ This gives room for the children to be idle and engage in crime.

As a result of the children committing crimes, most of the times children are arrested and undergo the criminal justice system.⁴ Afterwards, if found guilty of their crimes, they are then sentenced to serve their jail terms. This would result in them being committed in rehabilitation schools in order to reform.⁵ However, it has been reported that children who are sentenced to these institutions most likely end up being subject to harassment, being abused and assaulted and even being radicalized which instead makes them more violent than they were.⁶ As a result, in a bid to protect children from institutionalization and grant them a better alternative to custodial care, the diversion program was established.⁷ This mirrors the Charter of Human Rights and Responsibilities which recommends that any criminal procedure a child is subjected to should consider their age and the desire to promote the child's rehabilitation and reforming.⁸ Pursuant to Section 2 of the Children Act 2022, diversion relates to the programs which divert

¹Otuki N, 'Kenya crime rate rises by 19pc in a tough economy' *The East African*, 7 October 2024 > <https://www.theeastafrican.co.ke/tea/business/kenya-crime-rate-rises-by19pc-in-a-tough-economy-4629904> > on 29 September 2024

² Otuki, 'Kenya crime rate rises by 19pc in a tough economy.',16

³National Council for Population and Development (NCPD), *Situation Analysis of Kenyan Adolescents Report*, August 2024.

⁴National Council for Population and Development (NCPD), *Situation Analysis of Kenyan Adolescents Report*, August 2024 <<https://ncpd.go.ke/wp-content/uploads/2024/08/Situation-Analysis-of-Kenyan-Adolescent-Report.pdf>> on 6 October 2024

⁵Onyango J, 'Effectiveness of rehabilitation programmes on juvenile delinquents in Kenya' Unpublished MSc Thesis, *University of Nairobi*, Nairobi, 2013, 34.

⁶ Njiru S, 'Alarm as underage girls in crime marginally rise as boys lead in juvenile offences' *The Star*, 23 May 2024 <<https://www.the-star.co.ke/counties/nairobi/2024-05-23-alarm-as-underage-girls-in-crime-marginally-rises-as-boys-lead-in-juvenile-offences>< on 1 October 2024

⁷ Swedish International Development Cooperation Agency (Sida), *The Diversion Program in Kenya*, March 2018, 10. ><https://cdn.sida.se/publications/files/sida52515en-the-diversion-program-in-kenya.pdf>. <

⁸ Article 8, *Charter of Human Rights and Responsibilities Act*, 2006

children from the criminal justice system in order to reduce stigmatization of children who are in conflict with the law.⁹ The Act goes on to state the eligibility criteria for a child to undergo diversion.¹⁰ These considerations include: where there is compelling evidence that the child committed the offence; where the child freely and voluntarily admits responsibility; in instances where the offence is not a capital offence; where the parent or guardian has consented to the child going through diversion and where the child is a first or second offender.

Section 230 mandates that a magistrate may apply any diversion options in the three different levels.¹¹ These levels are titled the first, second and third levels in the Children Act. This therefore gives the magistrate the discretion to choose the option to be applied to the cases.

1.2 Problem Statement

While the Children Act 2022 sets out to improve access to justice, it falls short where it fails to narrow down the diversion options for specific offenses. This is contrasted with South Africa's Child Justice Act which has levels of diversion programs which are level 1 to 3 each relating to the seriousness of the offense.¹²

Level 1 diversion options are to extend to offenses which are schedule 1 and are considered to be less serious.¹³ Level 2 is in relation to offenses that are deemed to be serious and are listed in schedule 2.

Level 2 also includes diversion options for offenses listed in schedule 3 which are the most serious offenses of them all.

The diversion method should not be left in the hands of the public prosecutor and instead the process should be guided by law due to the type of offenses that have been committed. This would bring about a lack of uniformity in the type of program to be followed in different parts of the country. Additionally, by granting the prosecution the discretion to select the diversion option, prosecutors are likely to be biased in their decision and the prosecutors would most likely use their personal views to make these decisions.

⁹ Section 2, *Children Act (Act No 29 of 2022)*.

¹⁰ Section 227, *Children Act (Act No 29 of 2022)*.

¹¹ Section 230, *Children Act (Act No 29 of 2022)*.

¹² Section 53, *Child Justice Act, 2008 (South Africa)*

¹³ Section 53, *Child Justice Act, 2008 (South Africa)*

The discretion in the hands of Kenyan prosecutors would make them be biased with regards to other social factors of the child's life such as his background, his upbringing while setting the right diversion process for him and in instances where the child would need a more punitive way of diversion having committed a serious offense, and they were brought up in a tight knitted family environment, then they would be given a less serious diversion programme that does not reflect the gravity of the offense. However, if the child is observed to have been brought up in an opposite family system, then the prosecutor would choose a diversion process for tier 3 even if they committed a less serious offense. This is due to the prosecutor exercising their discretion as provided by the act, and there is therefore no uniform sequence to be followed.

Therefore, the Kenyan Law should take an approach like that of South Africa, which clearly groups offenses and the related option for diversion from the onset making it easier to narrow down on the best suitable program for a committed offense.

1.3 Research Objectives

This research seeks to attain the following objectives:

1. To analyze the legal framework in Kenya that governs the diversion program in Kenya, which is in the Children Act 2022.
2. To analyze the diversion program in children matters applied in South Africa and compare the process to the Kenya process.
3. To make recommendations to the Kenyan legal system on a better way to carry out the diversion program.

1.4 Research Questions

In order to achieve the aims and objectives stated above, this research seeks to answer the following questions:

1. What is the existing framework in Kenya that governs diversion?
2. What approach do judicial officers in South Africa take in matters of diversion?
3. What can be done to rectify the problem at hand in the Children Act?

1.5 Justification of the study.

This study seeks to compare the Kenyan diversion policy and that of South Africa, to illustrate that the laws should not allow much discretion in the hands of magistrates and prosecutors and

instead, prescribe options for diversion programs for particular offences. This would intern mean that the prosecutors and judicial officers ought to follow guidelines that guide them to choose the best option.

The findings of this research will be important to illustrate that the diversion laws and policy that is used in Kenya should mirror those of the Child Justice Act of South Africa, as it gives clear guidelines on which diversion program should be used when a certain offence has been used, instead of granting the prosecutor discretion to make this decision.

1.6 Hypothesis

The Children Act recommends that some cases should not go through the court process and instead, go through the diversion route. However, the Children Act fails to state which offenses should fall under the different levels of diversion options listed for the diversion process, leaving that task to the public prosecutors who may apply their bias in making the decisions.

1.7 Theoretical Framework

Restorative Justice is a theory by Howard Zehr which is an alternative form of criminal justice that sets its eyes on managing the needs of the injured party and those of the society that have been put forth together with the obligations of the offender.¹⁴ This theory first began in the 1970s and it began mainly to address crimes that were regarded as petty crimes such as burglary and property crimes. However, with time, it has expanded its horizons and is even used in serious offenses such as rape and murder. Restorative justice is also quite evidence reliant and is an exceedingly well-known interceding for juvenile delinquents.¹⁵

Restorative justice is keen to take children seriously, in order to create a safe space for them to be able to own up to their mistakes, take responsibility and involve them in making decisions with regards to matters in their lives. This theory has been utilized in the UN Principles of Restorative Practices (2002), the revised Council of Europe Recommendation on Restorative justice in Criminal matters (2018). Additionally, the Lima Declaration on Restorative Juvenile justice emphasizes that restorative justice ought to be an integral part of the juvenile process

¹⁴ Howard Zehr, *The Little Book of Restorative Justice*, Good Books, New York, 2002, 16.

¹⁵ Howard Zehr, *The Little Book of Restorative Justice*, Good Books, New York, 2002, 16.

and should be applied in each stage of the procedure. Additionally, it ought to be available to all people regardless of their age, gender and crime committed.¹⁶

Additionally, it is a set of principles and practices which has been used in different states in the world as a method of reforming the way a community deals with crimes.¹⁷ Restorative justice explains that crimes should not be considered as a violation of the laws but violations of people, relationships and communities.¹⁸ The diversion program does the same as it seeks to the relation between the injured party and the wrongdoer rather than criminalizing the offense committed.

1.7 Literature Review

Discretion is defined as the authority to act in certain conditions or situations in accordance with an official's own considered judgment or conscience.¹⁹ In the paper Prosecutorial Discretion: The Decision to charge, Randolph Teslik states that a prosecutor's decisions were influenced by certain characteristics of the criminal offender.²⁰ Such characteristics include occupation, the injured party's community status, the accused person's level of intelligence and the society's reaction of the crime.²¹

In the paper Prosecutorial Discretion- A re-evaluation of the prosecutor's unbridled discretion and its potential for abuse, the author, John Lundquist states that prosecutors are stopped only by their own judgment and conscience. Man is naturally observed to not be constantly rational, unbiased and ethical.²² Therefore in a society where human shortcomings are acknowledged and in order to protect society from the men themselves, society expresses its premise as a regime of law and not individuals, which is the guiding belief of the people. With no appropriate checks in place, there is a great possibility of abusive discretion to exist which

¹⁶United Nations, *Promoting Restorative Justice for Children*, 8, on 22 October 2024.

¹⁷ Zehr H, *Restorative Justice : From Theory to Practice*, 2005 >[https://in.ewu.edu/titleix/wp-content/uploads/sites/119/2020/10/RESTORATIVE JUSTICE FROM THEORY TO PRACTICE.pdf](https://in.ewu.edu/titleix/wp-content/uploads/sites/119/2020/10/RESTORATIVE%20JUSTICE%20FROM%20THEORY%20TO%20PRACTICE.pdf).< on 25 September 2024.

¹⁸ Zehr H, *Restorative Justice : From Theory to Practice*, 10,2005

¹⁹ John A Lundquist, *Prosecutorial Discretion- A re-evaluation of the prosecutor's unbridled discretion and its potential for abuse*,< https://via.library.depaul.edu/cgi/viewcontent.cgi?params=/context/law-review/article/2908/&path_info=34_21DePaulLRev485_281971_1972_29.pdf 10.

²⁰ Teslik R, *Prosecutorial Discretion: The Decision to Charge*, 10.

²¹ Teslik R, *Prosecutorial Discretion: The Decision to Charge*, 12.

²² John A Lundquist, *Prosecutorial Discretion- A re-evaluation of the prosecutor's unbridled discretion and its potential for abuse*, 12

can be in order to stigmatize a criminal offender or even create the basis for extortion.²³ Discretion which ultimately leads to its continuous abuse is observed as something that results in general contempt of the law and creates an ambience for arbitrary, oppressive, unequal and oppressive application of the law. It also creates a fertile bed for corruption to thrive in a state.

Sabol J in his paper *Imprisonment, fines, diverting offenders from custody-*, he states that unless discretionary powers, which are vested upon the judicial officers, are confined by statute, there is no reason to assume that sentencing practices will adhere to the laws set out. ²⁴They are likely to use the policies to allow them to reach their objectives, instead of using the policies to achieve the child's overall benefit.

Skelton A, in his paper *Diversion and Due process* advances that a prosecutor is necessarily not the individual to decide who should undergo diversion. He highlights importantly that prosecutors work for the nation and therefore are likely not unbiased impartial officials.²⁵ Their main aim is to bring accused people to trial as they represent the complainant's rights. Therefore they may be inclined to consider few cases to undergo diversion. In instances where diversion decision making is left to an individual there is a lack of proper accountability structures which are to make sure that the judgments are constant.²⁶ The consequence of that in two similar theoretical instances would mean that the children in the two cases would experience two different experiences in the judicial system since each individual prosecutor can be able to make a decision regarding a particular case however they want.²⁷

The diversion program is a concept that is extracted from the Convention on the Rights of Children in Article 40 (3) (b) that highlights strategies that do not result to the offender going through the court system.²⁸ Section 2 of the Children Act defines diversion as interventional programs which are put in place to redirect minors from the penal system in order to reduce stigmatization of juvenile offenders.²⁹ Diversion is also believed to promote

²³ John A Lundquist, *Prosecutorial Discretion- A re-evaluation of the prosecutor's unbridled discretion and its potential for abuse*, 9.

²⁴ Sabol J, *Imprisonment, Fines, Diverting Offenders from Custody: Implications of Sentencing Discretion for Penal Policy*, 4

²⁵ Skelton A, *Diversion and due process* in Muntingh L (ed), *Perspectives on Diversion*, NICRO Research Series, Nr 2, NICRO, Cape Town, 1995, 2

²⁶ Skelton, *Diversion and due process*,6

²⁷ Skelton, *Diversion and due process*,8

²⁸ UNICEF, *Diversion Programmes in East and Southern Africa*, 2023, 15. <https://www.unicef.org/esa/media/13321/file/UNICEF-Diversion-Programmes-ESAR-2023.pdf>.

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

more humanitarian ways to deal with young offenders rather than subjecting them to punitive sentences.³⁰ Diversion therefore makes use of unconventional methods of holding minors accountable for their illegal actions, promote rehabilitation of the youthful offender and to also foster the minor's reconciliation with the society.³¹ Additionally, diversion provides an opportunity to the victims of the actions of the youthful offender, to be able to express themselves regarding the offender's actions.³² It also encourages restitution as some diversion options include the offender compensating the victim for the harm, they have cause them. Lastly, diversion is set out to put an end to the stigmatization a child in conflict undergoes in public when they are often put through the criminal justice system and are sentenced to serve time in the borstal institutions.³³

In *S v CKM*, the South African High Court held that the traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behavior transgressing the law by assessing their behavior, and correcting their actions by using diversion, and lastly the reintegration of the minor into the society.³⁴ The court highlighted that by understanding the behavior of minors conflicting with the law, then the authorities are able to get to the root of what causes the minor to take part in crime.³⁵

The court also affirmed that using means that are not punitive in nature to correct the child's misdeed is a more effective method of curbing criminal acts by these minors.³⁶ Lastly, the court emphasized the need of the authorities taking steps to ensure that the minor is able to rejoin their community after the commission of the crime. Therefore there ought to be steps to ensure that the minor is not hindered from joining society and the child should not be stigmatized or punished further for their past action.³⁷

The Children Act also provides for a criterion for a child to be eligible for diversion. The criteria includes the following, if there is persuasive and strong evidence that the minor did

³⁰ Parker S, *Combating the Effects of War on Children*, 2010, 12. ><https://www.files.ethz.ch/isn/112130/79.pdf>.<
on 27th October 2024

³¹ Section 226, *Children Act (Act No 29 of 2022)*.

³² Section 226, *Children Act (Act No 29 of 2022)*.

³³ Section 226, *Children Act (Act No 29 of 2022)*.

³⁴ *S v CKM* (2013), The High Court of South Africa

³⁵ *S v CKM* (2013), The High Court of South Africa

³⁶ *S v CKM* (2013), The High Court of South Africa

³⁷ *S v CKM* (2013), The High Court of South Africa

indeed commit the offense, the child voluntarily admits responsibility and there was no pressure for the child to admit, that the offence is not a capital offence, that their child's parent, guardian or a person who is their parental figure has consented to diversion, the concerns of the victim were contemplated upon, and that the minor is a first time offender or repeat offender.³⁸

The Children Act also mandates that a magistrate apply any of the diversion options listed in section 230. This is after the responsible public prosecutor decides that the case should be diverted.³⁹ As a result of the offenses not being linked to the appropriate diversion method, it gives room for discretion to be used. This gives room for inconsistencies in the application of diversion programs. Additionally, there is a lack of uniformity that may be experienced.

As illustrated above, discretionary power accorded to the prosecutors to make the decision on the best diversion method to use pursuant to the Children Act, leads to a plethora of numerous shortcomings such as biasness, and corruption among others.

1.8 Research Methodology

In this research, I shall be undertaking a doctrinal study. The research shall rely on primary and secondary sources of law. The primary sources include the Constitution of Kenya Children Act 2022, other statutes, and case law while the secondary sources include book chapters, reports, journals and articles. The research shall also analyze the Child Justice Act of 2008 of South Africa and the Constitution of South Africa. Additionally, South Africa is a commonwealth Country just like Kenya and likely has a similar legal system.

1.9 Limitations.

This research may be limited by time constraints. The time frame to carry out this study was inadequate and therefore as a result, the researcher failed to have an opportunity to interview public prosecutors or the child offenders who have undergone the diversion program in Kenya.

1.2 Chapter Breakdown

This study will be completed in five chapters.

³⁸ Section 227, *Children Act (Act No 29 of 2022)*.

³⁹ Office of the Director of Public Prosecutions (ODPP), *Diversion Guidelines*, August 2024, 5. ><https://odpp.go.ke/wp-content/uploads/2024/08/DIVERSION-GUIDELINES.pdf> on 27th October 2024

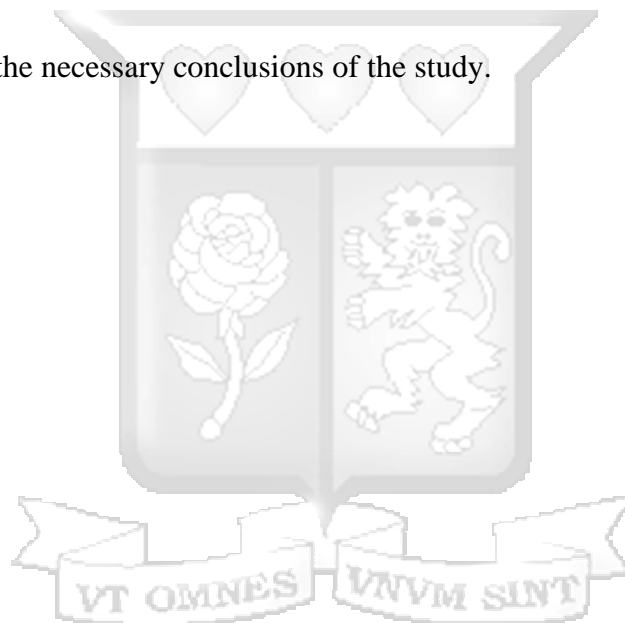
Chapter 1 covers the introduction. This chapter introduces the study and contains the introduction and background of the study, statement of the problem, the research objectives, the research questions, the hypothesis and the justification of the study. Additionally, it also enunciates the literature review, the theoretical framework, the research methodology and the chapter breakdown.

Chapter 2 seeks to analyze the Kenyan law in relation to diversion of children cases.

Chapter 3 seeks to evaluate the South African Law and cases decided in South Africa which relate to diversion of children cases in Kenya.

Chapter 4 seeks to make recommendations on the best way forwards for the court in dealing with such cases.

Chapter 5 shall make the necessary conclusions of the study.



CHAPTER 2: THE KENYAN LEGAL FRAMEWORK.

2.1 Introduction.

As discussed in chapter 1, pursuant to the Kenyan Children Act, diversion programs have been incorporated into the judicial system. This chapter focuses on Kenya's laws and guidelines in relation to diversion, Kenya's international obligations with regards to diversion and lastly the legal gaps in the law, challenges and the criticisms available.

2.2 Background to diversion.

Diversion has been defined as a set of measures that are used in correcting the criminal nature of offenses, without the children having to go through the formal criminal proceedings.⁴⁰

2.2.1 Kenya's obligations under the International Instruments

Under the Constitution of Kenya, international law forms part of the law of Kenya. The following international laws are applicable in Kenya with regards to diversion and place and obligation on Kenya to align its laws with the international laws.

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

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) were adopted on 29th November 1985 and have been monumental in deciding matters that pertain to the enforcement of justice in issues that concern children in conflict with the law.

With reference to rule 11 of the Beijing Rules, where appropriate, consideration shall be given in instances such as dealing with minors without turning to the criminal trial by the authorities.

⁴¹ Additionally, the officials that deal with such cases have the authority to resolve them without any formal hearings, and according to the criteria laid down in the particular legal

⁴⁰ Skelton A, Diversion and due process in Muntingh L (ed), *Perspectives on Diversion*, NICRO Research Series, Nr 2, NICRO, Cape Town, 1995, 2

⁴¹ Rule 11, United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, UN Doc A/RES/40/33, 29 November 1985

system. In order to facilitate diversion, efforts have to be made to provide for community programs and compensation of victims

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

The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) was ratified by Kenya on 25th July 2002. Pursuant to guideline 5, it highlights the requirement for and importance of policies to avoid treating a child as a criminal and penalizing a child for behavior that would not cause severe consequences to the growth of the minor.⁴²

2.3 The legal framework governing diversion in Kenya.

2.3.1 Constitution of Kenya

Article 53 of the Constitution of Kenya is relevant to the diversion program in Kenya. Article 53 provides that every minor has the right not to be detained, except as a final measure.⁴³

2.3.2 Children Act.

The Children Act has been revolutionary as it has introduced diversion as a process which a youthful offender may undergo.⁴⁴ This is contrary to the previous version of the Act, where a child offender was only bound to court proceedings.⁴⁵ In the Children Act 2022, The alternative of the diversion mechanisms would be the judicial process which is done pursuant to the Criminal Procedure Code.⁴⁶

The Act affirms that the aims of diversion are to make use of other methods of holding minors liable for the crimes they have committed which are detrimental to other people, to promote rehabilitation of a youthful offender and to ensure their integration into the family and community.³⁹ It also promotes reconciliation between the child and the person who was affected by the actions of the child's actions or harmful conduct and to minimize the

⁴² United Nations, *Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, UN Doc A/RES/45/112, 14 December 1990.

⁴³ Article 53, *Constitution of Kenya* (2010)

⁴⁴ Section 227, *Children Act (Act No 29 of 2022)*.

⁴⁵ Section 227, *Children Act (Act No 29 of 2022)*.

⁴⁶ Section 227, *Children Act (Act No 29 of 2022)*.

stigmatization of the child and to prevent hostile consequences which may arise from them being subjected to the criminal justice system.⁴⁰

Section 227 (1) of the act further states that when a judicial officer is handling a matter where a child is charged or suspected of having committed an offense then if the child is eligible for diversion, the judicial officer should consider it in the first instance. The Children Act goes a step further and outlines the criteria to be met for a child to be eligible for diversion.⁴⁷

The factors in the eligibility criteria include that there ought to be compelling evidence that the child had indeed committed the alleged offense, that the child voluntarily admits responsibility of taking part in the offense and that the admission is free from intimidation or pressure, that the offense is not a capital offense, that the parent or guardian has consented to them taking part in diversion, that the concerns of the victim or their victim's next of kin have been considered and lastly that the child is a first or second offender.⁴⁸

The Children Act goes on to further give the options which are available to a magistrate who may want to apply diversion.⁴⁹The Act categories the diversion programs available into three levels: level 1, level 2 and level 3. Level 1 entails diversion options which include an oral apology or a written apology to a specific person or persons, a formal caution which is in a prescribed manner with certain conditions tied to it, a placement under a supervision and guidance order, placement under a reporting order, placement under a family time order, placement under a good behavior order which lasts for not more than 3 months, issuing of an order prohibiting the child from visiting or appearing at a specified place or places, referral to counseling or psychotherapy for a period not exceeding three months.⁵⁰

The second tier encompasses all of the above options in tier 1 but for a longer period of not exceeding 6 months. It also includes performance of community service in accordance with Community Service Orders, compensation of up to a maximum of five thousand shillings to a specified person, referral to appear at a family group conference or a combination of any two or more options specified in level two.⁵¹ It also includes retribution of a specified sum of money

⁴⁷ Section 227 (1), *Children Act (Act No 29 of 2022)*.

⁴⁸ Section 227 (1), *Children Act (Act No 29 of 2022)*.

⁴⁹ Section 230, *Children Act (Act No 29 of 2022)*.

⁵⁰ Section 230, *Children Act (Act No 29 of 2022)*.

⁵¹ Section 230, *Children Act (Act No 29 of 2022)*.

that is paid to the victims of the crime. Level 2 diversion also includes a combination of any of the two diversion options that are stated under Section 230 (2) (b).

The third tier includes all the options presented in tier two and goes on to list more diversion programs which include: a referral program not exceeding six months and the offender is to stay in a residential institution for a period that does not exceed thirty five days in total or twenty one consecutive days as the program is in operation, community service with no remuneration pursuant to the Community Service Act, and a compulsory attendance at a vocational center for not more than six months.⁵²

The court may also identify a children's officer, a probation officer or any officer they may deem fit in order to observe the minor's adherence with the diversion option assigned to them.⁵³

While the Children Act is a fairly new law that has factored in relevant laws that are needed to make sure that cases by child offenders are dealt with in ways that do not make them lose their dignity, or make them face harsh punishments whilst they still have a long life ahead of them, therefore giving them the opportunity to reform, it brings about certain uncertainty.

The Children Act does not exactly pinpoint in which instances level 1 and level 2 diversion options may be utilized. While it does state that level 1 options may be utilized when the crime is less serious while level 2 options are to be utilized in more serious, it does not give examples of the less serious crimes, nor does it elaborate on what these more serious crimes may be. Stealing can be a less serious crime if it involves an item of an amount of 10 Kenya Shillings, while stealing 10 million is a more serious offense. Therefore, there ought to be a clear distinction between the two. This would ensure that it is not under the discretion of a prosecutor to conclude what a serious crime is or what a crime less serious crime is.

However, the Child Act fails to give a distinction between these two categories. This may lead to grave consequences especially in communities where even the slightest form of criminal behavior is shunned upon. In areas where communities are quite religious, stealing even 300 Kenya Shillings is observed as such a big illegality, and therefore, the child may be handed an option in level 2 while their conduct does not necessarily call for such an option.

⁵² Section 230, *Children Act (Act No 29 of 2022)*.

⁵³ Section 231, *Children Act (Act No 29 of 2022)*.

2.3.3 Diversion Policy Guidelines and Explanatory Notes (ODPP Guidelines)

The ODPP guidelines is a document that contains guidelines and explanatory notes on the Diversion Policy officer, to be utilized by the Public Prosecutors. These guidelines are intended to aid in the interpretation of laws which are in relation to diversion. The diversion guidelines state that diversion is offered by the public prosecutor who exercises their discretionary powers decides also to state the persons who can make a request for a minor's case to be diverted.⁵⁴ These interested people include: A child offender through their representative, a children's officer, a judicial officer, the victim or the victim's representative or the police.⁵⁵ Diversion can be considered as a substitute to the court proceedings from the moment the youthful offender has been arrested to the close of the prosecution's case.⁵⁶ Diversion is therefore not available when the prosecution has closed its case.

A prosecutor can only consider an offender for diversion if there is sufficient evidence to support the charge against him, if there exist public policy reasons to initiate the prosecution process and if the offender has made clear and reliable admission that they committed the offense that they are being charged with.⁵⁷

It is worth mentioning that the public prosecutor is the one who makes a decision on the diversion. They are led by the six factors which fall under two criteria: Offender focused criteria and offense focused criteria.⁵⁸ The offender focused criteria include: The current conditions of the minor and whether the consequences of the offender being convicted would be excessive and unbalanced as compared to the offense committed.⁵⁹ Offense focused criteria on the other hand entails: The seriousness of the crime , the circumstances that lead to the offender carrying out the offense, the offender's current view on diversion and the options that are offered and the investigating officer's perspective on diversion and the diversion options.⁶⁰

The diversion guidelines affirm that the public prosecutor is the one who has the discretion to make a choice of the option or options that is to be selected, and in doing so they may consult with programs providers.⁶¹ The options chosen must be reasonable, proportionate and ones that

⁵⁴ ODPP, *Diversion Guidelines*, 1

⁵⁵ ODPP, *Diversion Guidelines*, 1

⁵⁶ ODPP, *Diversion Guidelines*, 1

⁵⁷ ODPP, *Diversion Guidelines*, 2

⁵⁸ ODPP, *Diversion Guidelines*, 7

⁵⁹ ODPP, *Diversion Guidelines*, 7

⁶⁰ ODPP, *Diversion Guidelines*, 7

⁶¹ ODPP, *Diversion Guidelines*, 9

are able to be achieved within the stipulated time frame.⁶² In making the decision, the prosecutor has to take the following into account: the nature of the charge, the individual conditions of the offender, the views of the injured party and their family and the views of the investigating officer.⁶³

The prosecutor may only pick the diversion option from the list of diversion options available in the children Act. Prosecutors are also required to justify the decisions and choices they make with regards to diversion.⁶⁴ If the prosecutor realizes that there are no suitable diversion programs for the offender, this means that the offender is not able to undergo diversion as it would not be suitable.⁶⁵ However, to reach such a conclusion, the prosecutor has to consider all the diversion options separately and in combination with other diversion programs before they make the choice of declining the process.⁶⁶

The guidelines also outline the different roles and responsibilities assigned to the stakeholders. Stakeholders in this case would include the investigative agencies such as the Commission on the Administration of Justice and The Director of Public Prosecution. Other stakeholders are the judiciary, the probation services, Kenya Police service, Law enforcement agencies, Victims representatives, Medical and health practitioners, an offender and their representatives, Diversion service providers in the following (which comprises religious organizations, probation, community) among other numerous stakeholders.⁶⁷

In order for diversion to be implemented successfully, all the stakeholders must play a part. Stakeholders such as the Investigative agencies have the mandate of conducting investigations and collecting evidence, the ODPP has the mandate of deciding to divert a case, providing input into the particular decision of diversion, tendering for diversion service providers and keeping a record of diversion candidates.⁶⁸ The Diversion services providers, who are regarded as interested parties, are authorized to supervise the diversion conditions, providing diversion

⁶² ODPP, *Diversion Guidelines*, 12

⁶³ ODPP, *Diversion Guidelines*, 6

⁶⁴ ODPP, *Diversion Guidelines*, 10

⁶⁵ ODPP, *Diversion Guidelines*, 11

⁶⁶ ODPP, *Diversion Guidelines*, 11

⁶⁷ ODPP, *Diversion Guidelines*, 11

⁶⁸ ODPP, *Diversion Guidelines*, 11

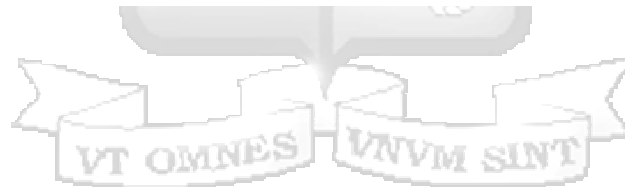
programs such as conciliation, mentorship, and counseling.⁶⁹ Additionally, they also report, evaluate and monitor the diversion process.⁷⁰

Additionally, a diversion agreement is to be kept confidential, and it remains in the prosecution, court and police files for official use only.⁷¹ This is in accordance with the offender's right to privacy that is protected in Article 31 of the Constitution.⁷² This decision that is made with regards to diversion is one that is always susceptible to judicial review and as such the records of the decision must be kept.⁷³

The Diversion guidelines fail to illustrate that there is a thorough mechanism put in place to ensure that the prosecutor identifies a diversion option that is proportionate to the offense committed. It has also failed to illustrate that the diversion program is a program that is open to review and can be used by other prosecutors or judicial officers to make decisions in other similar matters. Therefore there have been no officials that are able to evaluate the decision making process during diversion.

2.4 Gaps, Challenges and criticisms of the legal framework.

As illustrated in the above chapter, Kenya has a robust legal framework which it has put in place to ensure that juvenile justice is observed. However, this legal framework has multiple shortcomings that have been previously highlighted.



⁶⁹ ODPP, *Diversion Guidelines*, 12

⁷⁰ ODPP, *Diversion Guidelines*, 12

⁷¹ ODPP, *Diversion Guidelines*, 12

⁷² Article 31, *Constitution of Kenya*, (2010)

⁷³ ODPP, *Diversion Guidelines*, 12

3.0 An analysis of The South African Legal framework in relation to Diversion mechanisms.

3.2 Introduction.

The concentration of this chapter is on Kenya's laws and guidelines in relation to diversion and diversion programs have been included in the South African judicial system.

3.2 The Constitution Of South Africa.

Article 28 of South Africa's Constitution stipulates that the child's welfare is of great importance. Article 28 (1) of South Africa's Constitution further states that each minor has a right not to be detained in custody except if it is an extreme case.⁷⁴ Additionally, where a minor is held , it should be only for a short period of duration as stipulated in Article 28 (1) (g).⁷⁵

The South African Constitution sets out two important principles that are applicable when dealing with cases of child justice. These principles are the principles of last resort, and the shortest period of time principle. Resultantly, the Constitution was key in the establishment of a law that would have elaborate and well thought out procedures on how to deal with juvenile delinquents.

3.3 The Child Justice Act 75 of 2008.

The Child Justice Act of South Africa is an admirable piece of legislation in the Continent It lays out clear guidelines on how to deal with youthful offenders. The preamble of the Act states that its main aim is to put in place a penal system for juvenile delinquents and upholding the morals encapsulated in South Africa's Constitution while observing its international commitments under its mandate.⁷⁶

Section 51 of the CJA affirms several diversion objectives. These objectives are : how to deal with a minor outside the formal penal system in a manner that is appropriate for the related cases, how to motivate the minor to take full accountability of the destruction that they caused, how to promote reconciliation between the youthful offender and the society , how to reduce the potential of the child repeating the offense they might have committed, to prevent stigmatization of the child and promote them being reintegrated back into their society.⁷⁷

⁷⁴ Article 28, *Constitution of South Africa*, (2008)

⁷⁵ Article 28 (1) (g) , *Constitution of South Africa*, (2008)

⁷⁶ The Preamble, *Child Justice Act*,2008 (South Africa)

⁷⁷ Section 51, *Child Justice Act*, 2008 (South Africa)

Additionally, diversion also promotes the dignity and wellbeing of the minor and the development of the minor's dignity and their capacity to contribute to society.⁷⁸

In order for the child to be able to be considered for diversion, then they have to meet the following metrics ; The child has to acknowledge that they are responsible for the offense, that in acknowledging this responsibility, they were under no influence to do so, that there is a strong case that exists against the youthful offender and that the juvenile and the parent consents to the diversion, and that the prosecutor states they have chosen diversion.⁷⁹ In the event that the child fails to acknowledge that they indeed committed the crime, then they are deemed having not been ready to have their case diverted .

According to Section 53, the diversion options available to a child are set out in two levels, levels one for offenses set out in the first schedule and level 2 which applies to all offenses that are referred to in the second schedule and the third schedule. The options for level one diversion include: an verbal or written apology to a specific person, being placed under a reporting order , or a prohibitory order which prohibits a minor from going visiting a particular venue.⁸⁰

Other options include referral to counseling, a compulsory order to go to a specific center, supervised community service at a particular organization, restitution to a specific person,⁸¹ These options are specifically for the offenses which are stated in schedule 1, and in the event where a minor takes part in a crime, and is eligible for diversion, then a diversion option can be implemented.⁸²

These offences include: theft which can be under common law and this also includes receiving stolen property with the knowledge that it has been stolen or theft by false pretenses, where the value of the items doesn't exceed R1 500, Fraud extortion, forgery and uttering or an offence included in the Prevention and Combating of Corrupt Activities Act , 2004, where the amount was R1 500, Causing malicious injury to property, where the amount of the items or property does not exceed R1 500, Common assault where grievous bodily harm has not been inflicted, perjury, contempt of court, blasphemy, compounding, *crimen iniuria*, public indecency,

⁷⁸ Section 51, *Child Justice Act*, 2008 (South Africa)

⁷⁹ Section 52, *Child Justice Act*, 2008 (South Africa)

⁸⁰ Section 53, *Child Justice Act*, 2008 (South Africa)

⁸¹ Section 53, *Child Justice Act*, 2008 (South Africa)

⁸² Section 53 (2) (a), *Child Justice Act*, 2008 (South Africa)

bestiality as is referred to Section 13 of the Criminal Law (Sexual Offences and Related Matter) Amendment Act, 2007.⁸³

For level two, the CJA lists the following as the diversion options: the options included in the level one, compulsory attendance of a specific center which can be for a vocational or therapeutic purpose, referral to intensive therapy to treat problems that have been identified as a cause of the child committing the crime which may be residency for a certain amount of and being placed under the supervision of a probation officer with restrictions which may include restrictions of the minor's movement outside the magisterial district.⁸⁴

These options are available to youthful offenders who take part in offenses that are listed in the second and third schedule. Offenses in the second schedule includes: stealing, receiving property that has been stolen while knowing it is stolen and the amount of the items exceeds R2 500, swindling or fraudulently acquiring money, blackmail or forcefully demanding money with menaces, malicious injury to property which exceeds R1 500, assault which results in grievous bodily harm, homicide, arson, abduction, and offense relating to gang activities, among other listed offenses.⁸⁵

Additionally, these options also extend to individuals who have taken part in offenses listed in schedule 3. These offences include: Treason, sedition, murder, extortion, kidnapping, robbery which includes aggravating circumstances and robbery of a car, rape referred to in section 4 of the Criminal Law Act, crimes against to humanity and war crimes that are referred to in the implementation of the Rome Statute of the International Criminal Court Act (Act 27 of 2002), offences relating to dealing in or smuggling of weapons and the possession of weapons and sexual exploitation of persons who are mentally disabled.⁸⁶

Section 54 elaborates on the factors that have to be contemplated while a diversion option is being selected. These factors include: the diversion option should be at the suitable levels in terms of section 52, the child background, the child's educational level, the proportionality of the option recommended to the circumstances of the child, the offense and the society's interest and lastly the child's age and needs during development.⁸⁷ Additionally, where

⁸³ Schedule 1, *Child Justice Act*, 2008 (South Africa)

⁸⁴ Section 53 (4), *Child Justice Act*, 2008 (South Africa)

⁸⁵ Schedule 2, *Child Justice Act*, 2008 (South Africa)

⁸⁶ Schedule 3, *Child Justice Act*, 2008 (South Africa)

⁸⁷ Section 54, *Child Justice Act*, 2008 (South Africa)

appropriate , a prosecutor may develop an individual diversion plan that is more suitable to the child's situation , while meeting the aims of the process in section 51 and the baseline requirements established in section 55.⁸⁸

The CJA further mandates that if the offense committed is an offense indicated in schedule 1, then level 1 options set forth in section 52 are relevant and such options can be used together in combination.⁸⁹ It also mandates that level 2 diversion options which are set forth in section 53 (4) have to be appropriate for the offenses set out in schedule 2 and 3.

By setting the standard factors in law to be followed in diverting cases, then it restricts the prosecutors choosing the diversion process while not conforming to the law. Unless discretionary powers of decision makers are not confined by statute, no assumption should be made that the decision makers conform to the law or policy that guides them in decision making. Therefore, by listing the options a prosecutor has in deciding when a case goes through diversion for a particular type of crime, then there is already a list of predetermined options that they ought to choose from, therefore resulting in certainty in the decision making with regards to diversion. This therefore prevents the arbitrary use of discretion that is accorded to both the prosecutors, magistrates and judges.

3.4 Institutional Framework In South Africa with regards to the Diversion Process.

The Social Development department first accredits the organization that offers the diversion program or the program itself. This act of accreditation is to set performance expectations for service quality, to measure the caliber of the establishment and to keep this particular organization accountable to the public. The department of Social Development funds different institutions and individuals who in turn provide services to youthful offenders.⁹⁰

The department ensures that there is transparency and accountability at all levels. It ensures that the services that are delivered by individuals who intervene in the diversion process deliver high quality service and service that is also appropriate. Additionally, it ensures that these

⁸⁸ Section 54, *Child Justice Act*, 2008 (South Africa)

⁸⁹ Section 54 (2) (a), *Child Justice Act*, 2008 (South Africa)

⁹⁰Berg S, *Child Diversion Program: Minimum Standard Compliance In The Western Cape: An Explorative Study*, University of South Africa,2013, 66 .

programs are high quality programs that are efficient, effective, satisfactory and impactful to children.⁹¹

Before accreditation, the department ensures that the following criteria has been met: That there is a before intervention assessment and after intervention assessment in order to be able to gauge the changes in the minors behavior, that the programs is easily reachable to the minor, that the program is appropriate for the minor's physical and intellectual ability, that the program has clear and articulated objectives and outcomes, that the program is designed to have factors that reduce reoffending , that there is a system to monitor the quality of the program, that the program is managed and supervised by professionals.⁹²Having met the criteria, then the program is accredited. Afterwards, the program is added to the list of diversion options for minors who conflict with the law. These programs are available to all juvenile delinquents in the whole country as a whole. As a result, prosecutors are then free to pick these particular accredited programs.

Section 60 of the Child Justice act mandates that the director general of the Social Development department together with the director general of the Justice and Constitutional Development in conjunction with the National commissioner of the South African Police Service must put in place and ensure maintenance of a register of children who have a diversion order.⁹³ His register is to include the personal details of the minor , the particulars of the crime they committed, the diversion options selected and the details of the minor's compliance with the diversion option selected. This register ought to be accessed by relevant officials and other court officials when considering diversion for other youthful offenders. However, since the matter pertains to dealing with minors, then access to the register must be restricted and relevant people or organizations may be able to access it.⁹⁴

The essence of having such a register is to make research relating to diversion easier. This research may be research that seeks to investigate how effective diversion is.¹⁰⁴ Additionally, collecting different data on child justice promotes transparency and accountability by

⁹¹ Berg S, *Child Diversion Program: Minimum Standard Compliance In The Western Cape: An Explorative Study*,14

⁹² Berg S, *Child Diversion Program: Minimum Standard Compliance In The Western Cape: An Explorative Study*,14

⁹³ Section 60, *Child Justice Act*, 2008 (South Africa)

⁹⁴ Section 60, *Child Justice Act*, 2008 (South Africa)

illustrating what happens to minors whilst in conflict with the law and how they are treated in the criminal justice system. It also guides the development and review of policy.⁹⁵

3.5 Stakeholders who have different roles to play during the pretrial, trial and post-trial stages.

Pursuant to section 12 of the CJA, a police official dealing with a minor whose age is uncertain but has sufficient cause to believe that the child is under the age of 10, may act according to section 9.⁹⁶ This section prescribes the manner in which such a child should be treated. It includes the police officer handing the child over to the parent or guardian of the minor. If there are no parents or guardians, then the police officer may hand over the minor to a child and youth care center that is suitable and afterwards must inform a probation officer of the same.⁹⁷

Prior to a preliminary inquiry, a prosecutor can choose to divert offences that are in schedule 1 if the criteria in relation to section 52 (1) (a) have been complied with and this is done according to orders issued by the National Director of Public Prosecutions.⁹⁸

The Probation officers also have a hand in the exercise. They are tasked with carrying out the assessments of children, making the recommendations with regards to the prospects for diversion, recommending the program placement of the child during diversion and monitoring that the child is compliant with the diversion order put in place.⁹⁹ Additionally, if the diversion program is done within the community, they have the mandate to carry out supervision.

3.6 Judicial Decisions breathing life to the South African Law on Diversion

In the case *S v White*, the court held that Section 5 (2) of the CJA brings about diversion where it confers the Director of Public Prosecution the power to divert the minors case only if they committed it when they were minors.¹⁰⁰ However, this is only in connection to crimes committed that are under schedule 1.¹⁰¹ The accused person in this case committed the offences

⁹⁵ Berg S, *Child Diversion Program: Minimum Standard Compliance In The Western Cape: An Explorative Study*, 13

⁹⁶ Section 12, *Child Justice Act*, 2008 (South Africa)

⁹⁷ Section 60, *Child Justice Act*, 2008 (South Africa)

⁹⁸ Section 52 (1) (a) *Child Justice Act*, 2008 (South Africa)

⁹⁹ Berg S, *Child Diversion Program: Minimum Standard Compliance In The Western Cape: An Explorative Study*, 16

¹⁰⁰ *S v White*, Eastern Cape High Court, (2021)

¹⁰¹ *S v White*, Eastern Cape High Court, (2021)

of Attempted Rape which is in the third schedule of the Act and sexual assault which is under schedule 2 and as such he could not have a diversion option..¹⁰²According to section 52 (3) (a) of the Act, the DPP may have the jurisdiction to divert the case only if there are exceptional circumstances and if they write to the National Director of Public Prosecution stating that the matter should be diverted. Additionally, in this case since the offender was an adult, then they were not eligible to have the matter diverted.¹⁰³

The court interpreted the law in a strict sense, instead it prevented the use of discretionary powers held by the Director of Public Prosecution from averting justice without the matter being an exceptional case as is mandated by the law.



¹⁰² *S v White*, Eastern Cape High Court, (2021)

¹⁰³ Berg S, *Child Diversion Program: Minimum Standard Compliance In The Western Cape: An Explorative Study*,17

4.0 A Blueprint for the Future: Proposed Solutions for diversion in Kenya.

4.1 Introduction.

Based on the foregoing findings in the above 3 chapters, this study has proven the hypothesis that the Children Act has failed to state the type of offence that is committed and which particular level of diversion each offence falls under. It leaves a wide gap of discretion utilized by the judicial officers and the prosecutors to make the decision, therefore causing uncertainty while administering diversion procedures to the accused children.

4.2 A new Dawn for Diversion

Based on the findings, this study proposes the following recommendations:

Firstly, Kenya should update the laws on diversion that are found under the Children Act to comprise of: A clear definition of the levels of diversion options clearly stating that each level applies to specific offences. Kenya has three levels of diversion which have been expounded on in chapter 2. The options include remedies that are rather one that are not extremely harsh towards the youthful offender. As a result, the legal framework ought to state that level one options are for minor crimes, level two options are for mid-level offenses and level 3 diversion options are for serious offences. The legal framework should also define minor offences, mid-level offences and serious offences. Minor offences ought to be defined as violations of the lowest class and are the most common offences that a minor commits. Mid-level offences are to be defined as more serious offences as compared to the level 1 diversion options, while serious offences are offences that have significant and life threatening consequences to the victim.

The Children Act should also create three schedules, similar to the first two schedules of the CJA. In these schedules, the law should list the offences that fall under each category. Schedule 1 should include the offences that are minor offences, schedule 2 should list the offences that are mid-level offences and schedule 3 should outline the offences that are serious offences. The law should also include crimes such as theft that can be under the three schedules due to the value of the item that has been stolen. This therefore introduces theft as a crime that can be in the minor offences category, the mid-level category and in the serious offences category.

4.3 Institutional reforms.

This study notes that there are numerous pre-existing institutions and stakeholders in the diversion process. As such, there is currently no need for new institutions to be set up. Instead, the existing institutions have to be utilized to the fullest, by improving their state and how their processes are carried out.

Firstly, the ODPP should create a registry where the decisions with regards to diversion are able to be stored. While the diversion agreement is usually kept confidential to protect the child's privacy, having this agreement public would be quite helpful in terms of making sure that the decisions are not arbitrary, and additionally, the decisions would be available for other prosecutors to review. In a bid to ensure that their right to privacy is upheld, while reporting the cases, the names of the minors may be concealed and only written as initials, as is done in matters that relate to children in other court documents.

The ODPP together with other stakeholders ought to conduct assessments of the children who have been ordered to a diversion program before it commences and after the diversion program ends to have feedback on whether the program was successful and if there are any risks of the child offender committing the offence again. These stakeholders ought to conduct these assessments for all the minors and at the opportune time. These stakeholders include: public prosecutors, therapists, children officers, the child's parents, civil society organizations that cater to the child in Kenya, community leaders, representatives from religious institutions and a representative from the judiciary.

Lastly, the government through the ODPP ought to ensure that there is capacity building in the different sectors involved and stakeholders which include the prosecutors, the community and the police officers. Capacity building can be defined as a process where the management and governance of a certain organization are strengthened, so that in turn it is able to meet its aims. The state can ensure that its capacity building mission is fulfilled by ensuring that there are enough staff who possess the right skills to ensure that the work under their mandate is fulfilled. Additionally another way to ensure capacity building is by ensuring that there is adequate infrastructure to carry out the diversion exercises, availing sufficient financial support to the relevant stakeholders in order to carry out diversion.

The reverberations of these actions are that the diversion process will be able to be carried out smoothly without any hitches. Additionally, having a registry will ensure that there is a streamlined way of carrying out diversion.



CHAPTER 5: Conclusion and areas for further study

5.1 Summary of Conclusions.

This study has conducted a comprehensive evaluation of the laws of both Kenya and South Africa, to come up with remedies for the issue at hand. The issue at hand is that the diversion process in Kenya has failed to be and leaves the bulk of decision making to prosecutors and magistrates, without an available mechanism for review.

The second chapter of the study analyzed the Kenyan legal framework that governs the diversion programs that are administered to youthful offenders. Even though the study established that Kenya's legal framework indeed included diversion as a means of ensuring that there is justice for crimes committed as substitute of the penal system, it lacks of clear guidelines on which offences are to utilize which different level of diversion programs. This creates potential risks in the administration of justice. The first risk that it possesses is the risk of lack of certainty in the process of decision making. This is due to the Children Act lacking a clear guide that is to be utilized in the entire country. Instead, it leaves the decision making to the prosecution which in turn may have their own bias.

The third chapter examined South Africa's legal framework in relation to the diversion program. This entailed an examination of The Constitution of South Africa which highlights the best interest of the child as a matter that is of paramount importance. Additionally, this chapter probed the CJA (2008). This study took note of the objectives of diversion in the law and the metrics that must be met in order for a youthful offender to be able to have the case diverted. The study also observed that in a bid to make the process simpler, the law categorizes specific offences that a minor could commit and the option available to them. The law appreciates that a crime can be categorized as both a petty crime and a serious crime due to the different degree. The study identifies theft as such a crime where theft of items who's worth is below 1500 rand is a petty crime and the diversion methods are under level 1 while theft of items exceeding 2500 rand is a more serious crimes and warrants one to be under the level 2 diversion options.

Chapter 4 made the necessary recommendations for the shortcomings that were observed in the Kenyan legal framework in order to remedy the issue at hand. This study recommended that the following amendments ought to be made in the Children Act: There ought to be clearly defined levels of diversion, and this should also include the offences that the offences will be

able to remedy. Another proposed amendment that ought to be made in the statute is that the Children Act ought to have schedules which clearly outline the offences which are commonly committed by youthful offenders. These schedules should also correspond to the specific options of diversion that are listed in the Children Act. These options should be proportional to the particular offence that the youthful offender might have committed.

This study also recommends the following institutional remedies: that the ministry ought to ensure that there is a particular registry that would contain the diversion decisions that would be made by prosecutors and the relevant judicial officers, and it should only be available to a limited number of individuals to uphold the privacy of the minors. Alternatively, this registry may be available to all if the names of the minors in the cases are redacted.

5.2 Loopholes, Dead Ends, and Detours: Challenges that may be faced while implementing recommendations.

While the study has been keen to provide the necessary recommendations, there are potential challenges that may be faced during the implementation of these challenges. While the study recommends for the creation of a registry that would ensure that there is reporting of the cases that have been rerouted for diversion, this might be hindered due to the youthful offender's right to privacy which is enshrined under section 31 of the Constitution of Kenya. Additionally, by having such a register, this would mean that the youthful offender's actions remain on record and hence might lead to it being used against them.

With regards to the recommendations made concerning changes to be made on the Children Act, these changes might be hindered by the slow effectiveness of the legislative arm of the government. The National Assembly might fail to effect these changes in due time, and years might take time before the legislature amends these laws.

Lastly, with regards to the recommendation stating that there ought to be assessments made pre diversion process and post diversion process to have feedback on the effectiveness of diversion processes, this might face the challenge of lack of financial resources. In order to carry out these assessments, this would need facilitation of Public Prosecutors, the youthful offenders and the other stakeholders including the relevant community members who were taking part in the diversion process. This might prove to be quite costly for it to be sustained and therefore, it might not be feasible.

5.3 Areas for further research connected to the diversion process

This research has limited its focus to the diversion progress in Kenya, focusing on the levels of diversion, the specific offences which would be remedied by diversion. It has also traversed the process of diversion in Kenya, highlighting the discretion afforded to prosecutors during this process. There ought to be a further study of the diversion processes that ought to be applied in cases of defilement in instances where both the perpetrator and the injured party are minor in relationships named Romeo and Juliet Relationships. This study would set out to produce a remedy on the best options that can be applied in the diversion process in order to deal with the aforementioned cases which are often complex to decide , in order not to disadvantage one party over the other.

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