

Participation of Child Offenders and Victims in the Criminal Justice System in Kenya

by

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Declaration of originality

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Dedication

I dedicate this work to my family, my father, Stephen Arap Rono, and my mother, Cecilia Rono, who sacrificed a lot to take me to school.

Acknowledgement

I wish to acknowledge the support of those who contributed to the successful completion of this dissertation. I thank God for His abundant blessings that saw me through the period of carrying out the research. My utmost appreciation first and foremost, goes to my immediate supervisor Dr Nkatha Murungi, who provided insightful guidance and invaluable input during the development of the research proposal and support throughout the writing of this dissertation.

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Abbreviation

ACPF	The African Child Policy Forum
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
Beijing Rules	United Nations Standards Minimum Rules for the Administration of Juvenile Justice
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
DAC	Day of the African Child
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and Communication Technology
IJS	Informal Justice System
IPOA	International Policing Oversight Authority
JDL	United Nations Rules for the Protection of Juveniles Deprived of Liberty
NCAJ	National Council for the Administrative of Justice
ODPP	Office of the Director of Public Prosecution
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency
UDHR	Universal Declaration of Human Rights

Abstract

The purpose of this mini-dissertation is to analyse the participation of child offenders and victims in the criminal justice system in Kenya. Child offenders and victims are vulnerable individuals; hence their interaction and participation within the justice system requires consideration of their best interest. This study takes a theoretical framework and applies a human rights-based approach, which places an obligation on states to promote and respect human rights of child offenders and victims as the right holders.

This study extensively reviews the conceptual and legal framework available for the participation of child offenders and victims in criminal justice within international, and regional instruments, and harmonisation in the national laws. Further, to establish whether there is sufficient legal framework on the participation of child offenders and victims in the criminal justice system in Kenya. The study examines the roles played by the institutions in criminal justice such as the police service, prosecutions, courts and the rehabilitation centres in ensuring that the right to participate is fulfilled. This analysis identifies gaps in the implementation of participation of child offenders and victims in the criminal justice system. It proposes good practices on promoting child-friendly justice and participation.

The study finds that there are inadequate provisions in the Children's Act and the Constitution of Kenya, which are inconsistent with international law and standards on the participation of child offenders and victims in the criminal justice system. Further, there are challenges in the implementation process that guarantees fair trial and participation of child offenders and victims by actors of the criminal justice system.

CHAPTER 1

Introduction

1.1. Research Background

Children are vulnerable individuals who need guidance and protection during their physical and mental development stages¹. It is, therefore, necessary to develop and implement policies that protect their legal rights and interests. In Kenya, policies are shaped by laws put in place in the Constitution and other enacted legislation. Policies and laws affecting children partially or fully are needed to protect not only the child rights and legal interests but also to assuage their proper development. In the justice system in Kenya, children can interact with the institutions of justice either as victims, witnesses or participate in proceedings involving adoption, separation and divorce or as child offenders. Where there are special cases of children like asylum seekers, refugees or those involved in armed conflict, special attention in the justice system must be observed.² There exist challenges in the Kenyan justice system that have derailed application, and follow up of best practices when child offenders and victims get involved in the criminal justice system despite the presence of such rules and laws.³

Various policies and legislation have thus been developed over the years to support the participation of child offenders and victims in the criminal justice. Kenya has, for instance, ratified several international and regional instruments which deal with the rights of the child. This includes the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). These two instruments outline the standards, rules and procedures to ensure access to justice for the children.

¹ T Liefwaard `Access to Justice for Children: Towards a Specific Research and Implementation Agenda` (2019) 27 *International Journal of Children's Rights* 195-227.

² Committee on Rights of Child General Comment No 12 the right of child to be heard, CRC12(2009) para 32 <https://www2.ohchr.org> (accessed 25 February 2020).

³ Committee on Rights of Child General Comment No10 Children's rights in juvenile justice, CRC10(2007) para 28 <https://www2.ohchr.org> (accessed 25 February 2020).

Specifically, the CRC⁴ and ACRWC⁵ provide for the right of the child to be heard and to participate in matters concerning them as they seek justice. The CRC also grants a child the freedom of expression, freedom of association and the right to peaceful assembly as a means of achieving child participation.⁶ The CRC extensively elaborates the rights of the child to exercise participation,⁷ thus imposes such obligations on state parties to not only ensure that judicial systems guarantee the right of the child to participate by adopting or revising its laws but also imposes a duty to monitor and prescribe new regulations and laws to promote child participation.⁸

The Constitution of Kenya 2010, recognises treaties it has ratified as part of its laws⁹ and provides for the best interest of the child as paramount in all matters involving the child.¹⁰ This Constitution does not however explicitly elaborate procedures for child participation in matters affecting them unlike the Bomas referendum draft.¹¹ The Children's Act of 2001¹², which domesticates the CRC and ACRWC, also recognises the best interest of the child as a consideration for participation in judicial and administrative proceedings. The state has the responsibility to ensure compliance and inclusion of the rights of the child as outlined in the CRC.

There are, however, significant variances in the theoretical and practical implementation of the CRC in Kenya's criminal justice system.¹³ The reality is that many are yet to enjoy the proclaimed rights and standards provided for in the CRC.¹⁴ For instance, while the rights of the child to participate is presumed to be universal in most cultural society and family backgrounds, it is frequently assumed that children have no right to be heard.¹⁵

⁴ CRC art 12(1)(2).

⁵ ACRWC sec 4(2).

⁶ CRC art 13,14&15.

⁷ A Stewart & M Hill `Justice for Children` (1994) 25.

⁸ CRC General Comment No 12(n 2 above) para 15.

⁹ Constitution of Kenya Art 2(6) "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

¹⁰ Constitution of Kenya art 53(2).

¹¹ Draft Constitution of Kenya (Bomas Draft) 2004 art 40(k).

¹² Children Act cap 141 of 2002 Sec 4(4).

¹³ V Odala `The spectrum for child justice in the International Human rights framework: from "reclaiming the delinquent child" to restorative justice` (2012) *American University International Law Review* 544-579.

¹⁴ S Achilihu `Do African Children have rights? A Comparative and Legal Analysis of the United Nations on the Rights of the Child` (2010) 4.

¹⁵ Achilihu (n 14 above) 8.

Duty bearers should ensure that due process is adhered to from the pre-trial stage to the adjudication of the matter.¹⁶ They include the police, prosecutors, judicial officers, children's department and the correctional and rehabilitation department who have a responsibility in ensuring that the child offenders and victims fully participate in the criminal justice system.¹⁷ An advocate can also represent the views of the child, however, they are not bound by the instructions of the child as they play a role in making submissions and presenting evidence to help the judicial officer determine the matter.¹⁸

In Kenya, legal cases against the institutions of criminal justice have been brought for failure of the duty bearers to accord justice and to respect the rights of children to participate. This is shown in cases such as *C.K. (A Child) Through Ripples International as her Guardian and Next Friend & 11 Others V Commissioner of Police/Inspector General of the National Police Service & 3 Others* where, it was held that the police officers were in contempt, for failure to undertake investigations on twelve children whose rights had been infringed upon.¹⁹

Child participation should thus be based on established procedural law and accompanied by mechanisms and resources for effective realisation of the right.²⁰ Laws not only influence policies but are also used to enforce the implementation of CRC.²¹ Children involvement in decisions affecting them has a reflective impact on them as the right holders rather than the passive recipient of the rights.²² The criminal justice system ought to focus on the educative and social measures and should limit deprivation of liberty after arrest and through the hearing and during sentencing.²³

¹⁶CRC General Comment no 10(n3 above, para 43.

¹⁷ T Brown & A Renata ` *Child Abuse and Family Law: Understanding the issues Facing Human Service and Legal Professionals` (2007)3.*

¹⁸ Brown & Renata (n 17 above) 4.

¹⁹ *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others* [2013] eKLR.

²⁰ Stewart & Hill (n 7 above)152.

²¹ Achilihu (n 14 above) 8.

²² C Fenton-Glynn `The Child's Voice in Adoption Proceedings European perspective` (2014) 22 *International Journal of Children's Rights* 135-163.

²³ General comment No 24 (2019) on children's rights in the child justice system para 19 <http://docstore.ohchr.org> (accessed 25 February 2020).

The courts should also ask follow-up questions to the child to ensure effective participation and contribution to decision making process.²⁴

It is within this context that this study will examine the institutions in criminal justice, the trial process and to what extent the children can participate and access justice.

1.2. Statement of the problem

Child offenders and victims in criminal justice are required to be handled differently from adults as their best interest should be the main consideration in making any decisions concerning them.²⁵ The laws that deal with child offenders and victims include the Children's Act 2001, the Criminal Procedure Code and the Evidence Act amongst other laws of Kenya. The international and regional instruments, rules and regulations guide the criminal justice institutions on the process involved while dealing with children in the justice system. Despite the existence of these instruments, there is no sufficient procedures that ensure child-friendly facilities in the courts, separate holding facilities and lack of information on the right to participation of child offenders and victims in their matters.

The Children's Act 2001 outlines specific measures, laws, and procedures guiding institutions that deal with the rights of the child. This Act has incorporated some provisions stipulated in the CRC and ACRWC. Section 4 of the Children's Act however limits participation to only matters of procedure, and the decision to determine the views is upon an adult who shall consider the age and maturity of a child. This section has a claw-back clause as it limits child's participation as the child's views 'may' be considered signifies that the right to participate is not absolute.

Based on the above context, it is necessary for child offenders and victims to participate in the criminal justice during pre-trial, trial and after sentencing. This study will thus examine the laws, practices, and policies of the institutions involved in the criminal justice process to determine the extent of participation of child offenders and victims.

²⁴ E Sutherland, 'Listening to the Voice of the Child: The Evolution of Participation Rights' (2013) *New Zealand Law Review* 335.

²⁵ Odala (n 13 above) 550.

1.3. Research questions

The main question for research in this dissertation is what is the level of participation of child offenders and victims in the criminal justice system in Kenya? To answer this, the following sub-themes shall guide the research:

- a) How adequate is the legal framework in enabling participation of child offenders and victims in the criminal justice system in Kenya?
- b) To what extent does criminal justice system implement the participation of child offenders and victims in Kenya?
- c) What are the challenges to participation of child offenders and victims in criminal justice and how can they be addressed?

1.4. Methodology

The research will use a qualitative method to obtain information and data analysis. The primary sources of information are: the Constitution of Kenya, Children's Act, and other relevant legislation; research publications and reports by human rights advocacy institutions including National Council on Administration of Justice (NCAJ) report; Save the Children, UNICEF reports, Kenya law report and data from the judiciary on matters relating to child participation. Scholarly articles such as books, journals and internet sources shall form part of the study.

The methodological approach this study explores will firstly, examine the international legal framework, the national framework on participation of child offenders and victims in the criminal justice system and analysis on the implementation of the substantive rights. Further, the study will examine the general comments from the CRC Committee on respecting the child views and comment on periodic reports and concluding observations. Secondly, a critical evaluation of how child offenders and victims participate in criminal justice institutions will be analysed from various legal precedents and legal framework on procedures so as to qualitatively determine the various gaps and measures for closing them.

Thirdly, the study will undertake an analysis of challenges encountered by the child offenders and victims in accessing the right to participate in criminal justice system and the opportunities available. This study shall be guided by a human rights-based approach where promotion and

encouragement of human rights norms are enforced through national laws and policies and international cooperation on children matters.²⁶ The international, regional instruments and general comments from various committees act as guiding instruments to achieve systems that conform to the policies, plans and processes of development. The human rights-based approach therefore places a responsibility on the state to respectfully defend and uphold human rights for children as right holders.

1.5. Limitation of the study

The study is limited to the participation of child offenders and victims in criminal justice system. It does not address other areas relevant such as participation of children in divorce or family proceedings, adoption matters or children in need of care and protection.

The research would have been more informed if a field study was carried out by getting the views of child offenders and victims. Children with the experience or undergoing trial process in criminal justice and the actors in the criminal justice system would be a great source of information, however the same is not achievable due to limited time and resource constrains. Secondary data obtained is, however, considered adequate for the analysis of participation of child offenders and victims in criminal justice system.

1.6. Chapter breakdown

Chapter One outlines the research background, statement of the problem, research questions, research methodology, limitations of the study and a review of various works of literature.

Chapter Two evaluates a conceptual and international legal framework on the participation of child offenders and victims on criminal justice.

²⁶ E Mendez `Origin, Concept and Future of Human Rights: Reflections for a New Agenda` (2004) *International Journal on Human Rights* 9.

Chapter Three analyses the legislative measures Kenya has taken to implement child participation in criminal justice. An in-depth analysis of compliance of the institutions in criminal justice to ensure participation of child offenders and victims will form this chapter.

Chapter Four analyses the challenges and good practices in enforcing participation of child offenders and victims in the criminal justice in Kenya.

Chapter Five concludes the paper with a summary of the findings.

1.7. Literature review

The literature shall be guided by the research questions highlighted in the section 1.3 in the realm of existing legal framework, policies and practices. Child participation in the criminal justice system in Kenya is stipulated by laydown procedures in law and therefore all institutions must take steps to implement these rules. In the following part, there are eight sections detailing various junctures at which child offenders and victims interact with the justice system.

1.7.1. The principle of child participation

The principle of child participation is a fundamental human right under international law derived from the CRC. Child participation is a complex process it involves implementing the right of the child to express their views and to be heard in all matters concerning them. It creates an obligation on the state to ensure this right is guaranteed.²⁷ Child participation is linked to access to justice for child offenders and victims while in criminal justice so that they can have opportunity to give their opinion, to be listened to, space to express themselves and to have their opinion taken into account.

The Children's Act has four principles applicable to child rights which are the right to life survival and development, the principle of best interest, non-discrimination, and the right to be heard.²⁸ The principle of child participation involves hearing the child and involving them in all matters that

²⁷ P McCafferty `Implementing Article 12 of the United Nations Conventions on the Rights of the Child in Child Protection Decision –Making; A Critical Analysis of the Challenges and Opportunities for Social Work` (2017), *Child in Practice Journal* 328.

²⁸ G Odongo `Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms `)(2012) *African Human Rights Law Journal* 121.

affects them. Further, the Constitution of Kenya 2010 has extensive provisions on the rights of the child.²⁹

There are instances where children assist in making decisions such as during the compilation of Kenya's state reports to the CRC Committee. Children participating in gathering data, giving their opinion on matters of policies and issues affecting them is an important achievement to their rights. Further, challenges of enforcing child participation are derailed by the socio-cultural and customary approach that considers children's views as part of a family and therefore a private affair as opposed to a public one.³⁰

1.7.2. Procedure and capacity to participate

The child's views are critical and carry a particular weight when they are involved. In referring to this critical nature, the CRC under Article 12 captures the child's views as closely linked to their best interests in any judicial or administrative process.³¹ Legal systems outline rules and procedures that require giving information to the child as a key for them to participate in proceedings. A child has a right to be informed of the hearing procedure, impact of participation and redress in case the decision is not satisfactory.

However, children's capacity to form their own views in relation to age and maturity is something that is contentious. It is more common to find children accompanied by their parents and even not so uncommon to realise the child represent their parent's views. As such, there exist various competing interests between the child and parents on who makes the right choice or a justification on the decisions for the best interests of the child. This uncertainty presents a loop-hole that creates an avenue where child's best interests and rights are undermined.³²

1.7.3. Legal representation

While legal representation is a significant source of important increased level of child participation, inadequate resources have posed a greater challenge when according such legal

²⁹Odongo (n 28 above) 121.

³⁰Odongo (n 28 above)126.

³¹K Lothar 'The Weight of Childs view Article 12 of the Convention on the Rights of the child' (2010) *International Journal of Children's Rights* 507.

³²Lothar (n 31 above).

representation to children in the justice system.³³ It is noted that significant jurisprudence has been developed on the right to child legal representation by non-governmental organisations that have played a critical role in representing child offenders and victims in criminal matters. This is reinforced by Article 40 of the CRC where child offenders are entitled to legal representation and should adequately be assisted to prepare for their defence.³⁴

1.7.4. Child-friendly procedures

There is an inherent and notable absence of child-friendly language in the courts yet there exist policies and rules that guide communication to children. The language practices around a child matter in the justice system is a complete contrast to the Children's Act which creates special children's court that gives children a chance to be involved in giving their opinion on matters that concern them.³⁵

Similarly, advocates violate rights of the child when they continue to use adult aimed techniques during cross-examination. It emerges that a review of the law is urgently needed in order to implement the provisions of substantive laws especially for child victims in sexual assault cases where such are inadequate.³⁶ In addition, the Evidence Act and the Criminal Procedure Code stipulates that a child victim must testify through oral evidence in presence of the accused person for purposes of identification.³⁷ It is also necessary to have a separate waiting area and holding facilities as well as a designated children's court for child offenders to ensure a child friendly environment.³⁸

1.7.5. Institutions in criminal justice

³³ J Sloth-Nielsen `Realising Children's Rights to Legal Representation and to be Heard in Judicial Proceedings: An Update` (2008) *South African Journal on Human Rights* 495-524.

³⁴ CRC Article 40 (b)(ii)(iii).

³⁵ S Omondi `The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya` (2014) *Quest Journals Journal of Research in Humanities and Social Science* 38-60.

³⁶Omondi (n 35 above) 51.

³⁷ Evidence Act sec 63, Criminal Procedure code sec 300&302.

³⁸ C K Wangamati et al; `Sexualized violence against children: a review of laws and policies in Kenya, Sexual and Reproductive Health Matters` (2019) <https://www.tandfonline.com/loi/zrhm21> (accessed on 3 June 2020).

To achieve an effective child participation in justice system, there is need to restructure police stations, rehabilitation centres and the courts.³⁹ Firstly, child-friendly structures which are not intimidating to the child should be established in all the institutions of criminal justice. Secondly, training of judges, lawyers and police in matters involving children is of importance to enhance effective child participation. The trial process must use child friendly techniques and language bearing in mind the development and age capabilities of a child. With the advent of new technology, it is safer for a child to participate in court by way of video linkages, written statements or televised conferences.⁴⁰

The time taken to prosecute child offenders can be long and inefficient leading to psychological or behavioural disturbance in children placed in remand homes. The criminal justice processes and procedures harbours long sessions that often a times intimidate child victims.⁴¹ From filing a report to investigations then to a doctor's assessment and finally to the Office of Director of Public Prosecution, the process takes long. In some instances, unnecessary delays in taking children's matters to court have had effects of child offenders spending more time at the remand homes.⁴²

It is significantly noted that, in terms of procedural law, child victims in a criminal trial are not treated the same as child offenders. Child offenders have their matters heard and determined in children's court and a child-friendly environment as envisioned in Children's Act while child victims pass through the general criminal justice system from hearings conducted in other courts not designated as children's courts which are not child friendly thus hinders their participation.⁴³ Further, the court ruled in *Gedion Mwiti Irea V Director of Public Prosecutions & 7 others* that a victim as a complainant has a right to communicate and respond to criminal proceedings in court directly or with the help of a representative.⁴⁴

³⁹ Berrick et al; `International Perspectives on Child-responsive Courts ` (2018) *International journal of children's rights* 253.

⁴⁰ Berrick (n 39 above)255-256.

⁴¹ E Njuguna & J Muchemi `Review of the Multi-Disciplinary Approach in addressing Sexual Violence against Children in the Criminal Justice System (2019) *Interdisciplinary Journal on African Child* 11.

⁴² National Council on Administration of Justice (NCAJ) & Legal Resources Foundation Trust and Resources Oriented Development Initiatives ` Understanding pre-trial detention in respect to case flow management and conditions of detention` (2006) Criminal Justice System in Kenya: An Audit report.

⁴³ Njuguna, & Muchemi (n 42 above).

⁴⁴ *Gideon Mwiti Irea v Director of Public Prosecutions & 7 others* [2015] eKLR.

1.7.6. Legal system

The principle of child participation benefits from a supportive and engaging legal system during a trial.⁴⁵ Two traditional systems are in operation, the adversarial system which is associated with English Common law and the inquisitorial system that is associated with European Civil law. Under the inquisitorial system, the trial judge investigates, interrogates and validates the child's statement while the legal representative must prepare the child before trial begins.⁴⁶

In the adversarial system, court proceedings revolve around the court, prosecutor and defence attorney, the child's views are hardly heard during trial, and the legal representative brings his own views and position.⁴⁷ The trial court would hardly ask the child for opinion on the issues raised. It is usually through the examination chief, a child victim has a chance to answer questions, respond to facts or half-truths while facing the accused.⁴⁸

1.7.7. Access to justice

Access to justice for child offenders or child victims in an efficient way is realisable fully when children participate in court. Yet the justice system has failed to create trust and value to children by its systemic failure to protect the child rights by not considering children vulnerabilities.⁴⁹ Madalyn, gives a scenario of what happens in Kenyan courts and how the rights of the child are violated by the justice system court in her article that⁵⁰

“the magistrate glances up at the man and down at the file. As she looks up again, she demands his age. “Sixteen,” he answers. She demands to know why he's in her courtroom. He shrugs, not understanding the question in the language of the court—English. After the court clerk para-phrases her question in Swahili, the boy still no answer. The magistrate, frustrated, remarks that he should not be there and transfers his case to the Children's Court. He sits back down, returning the hands of the men on either side of him to their laps. The magistrate and prosecutor move on to the next case on their long docket, but you continue contemplating what you've just seen. You don't know how long the boy has been in custody. Given how often the truck is

⁴⁵ A Daly & S Rap `Children's Participation in Youth Justice and Civil Court Proceedings: Have States made Sufficient Progress?` In U. Kilkelly & T. Liefwaard (2018) (Eds.), *International Children's Rights Law* 6.

⁴⁶ Daly & Rap (n 45 above) 7.

⁴⁷ Daly & Rap (n 45 above) 8.

⁴⁸ R Songca ` Children seeking justice: safeguarding the rights of child offenders in South African criminal courts` (2019) *De Jure Law Journal`* 352.

⁴⁹ M Wasilczuk `Substantial Injustice: Why Kenyan Children are Entitled to Counsel at a State Expense` 2012 New York University Journal of International Law and Politics 291-334.

⁵⁰ Wasilczuk (n 49above).

broken down and can't bring prisoners to court, it's possible it's been several weeks. As he sits, shackled between adult men, it's clear what that delay might have meant. Nevertheless, until now, no one had noticed that he was a boy being held with men. Without a lawyer, he has not been informed of his rights and therefore is unable to assert them. Without the appointment of a lawyer, the protections of the law will likely continue to fail him”.

Participation of child offenders and victims has a close link with child-friendly proceedings, structures, legal representation and access to justice. This can be achieved by to adequate training, review of the law and procedures in the criminal justice system, structural changes in the institutions directly related as well as a careful review of all the interacting processes revolving around child participation. By qualitatively interpreting the available laws, rules, policies and regulations on child participation this study assesses and interprets the level of child participation in the criminal justice system. Furthermore, by analysing the process of participation of child offenders and victims in the institution of criminal justice through proceedings and precedents, this dissertation will reveal the underlying challenges towards a proper and inclusive approach to the problem.

CHAPTER 2

Conceptual and Legal Framework on Child Participation in Criminal Justice

2.1. Introduction

This chapter reviews key concepts which are: child participation, justice and access to justice. It analyses the development of international and regional framework on child participation; CRC, International Covenant on Civil and Political Rights, (ICCPR), ACRWC and studies non-binding instruments. This review and analysis of the legal framework and non-binding instruments forms the basis for evaluating the Kenyan legal framework on the participation of child offenders and victims in criminal justice against the set standards in the international and regional instruments.

2.1.1. Concept of child participation

There is no universal definition of child participation. It, however, refers to the involvement of children of all ages and abilities in decisions, processes, programmes and policies that affect their lives.⁵¹ Participation is crucial as it involves hearing the views of the child at all levels domestically at home, by the governments at local and international levels. Child participation promotes the child's understanding and respect of the rule of law.⁵²

The CRC provides for the right of the child to be involved in decision-making processes in matters affecting them. The concept of child participation takes more a human right centred approach in conferring the rights directly upon the child to be actively involved in development and upholding the rule of law. Article 12 of CRC was however considered a very ambiguous provision during the drafting of the treaty, with the perception of the drafters who were adults, that it would undermine adult authority.⁵³ In 2006, the CRC committee held discussions on the meaning of article 12 of CRC and its significance and difficulties of implementing it. In 2009, the CRC Committee

⁵¹ Save the Children(2005) `Practice Standards in Child Participation`
<https://resourcescentre.savethechildren.net/library/> (accessed 14 June 2020).

⁵²L Lundy& L McEvoy `Children's rights and research process: Assisting children to (in)formed viewsChildhood` (2011) in T Gal,et al; International Perspectives and Empirical Findings on Child Participation: *From Social Exclusion to Child-Inclusive Policies*(2015)50.

⁵³L Lundy `Voice` is not enough: conceptualizing Article 12 of the United Nations Convention on the Rights of the Child (2007) *British Educational Research Journal* 927–942.

published General Comment No. 12 on the right of the child to be heard which further acts as guidance on the interpretation of Article 12 of CRC.⁵⁴

2.1.2. Interpretation of article 12 of the CRC

Article 12 of the CRC addresses rights to participation of children as follows:

- (1) “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.
- (2) “For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

State parties to the convention have an obligation to fully guarantee the right of the child to be heard mainly in the judicial system, through enacting laws where necessary and amending them to promote the implementation and realisation of this right.⁵⁵

2.1.3. State parties’ obligation and capacity of a child

The state “shall assure”⁵⁶ “the right of a child to express their views” means that the state is under obligation to take appropriate measures to ensure that matters affecting the child are taken into consideration. The state has a mandatory duty to pass legislation, policies and procedures on child participation and for it to be fulfilled. A child able to form their own views has all the right to be allowed to present them according to procedures and rules laid down to help them do so. A child is deemed to have the capacity to communicate their interests, and or wants with their innate cognitive and communication abilities right from their early ages, hence can interact with adults in their surroundings.⁵⁷

⁵⁴CRC General Comment No 12 (n2 above) para 15.

⁵⁵As above, Para 15

⁵⁶As above, Para 19

⁵⁷ R Bosisio “Children’s Right to Be Heard: What Children Think” (2012) *International Journal of Children’s Rights* 141-154.

General Comment No 12 obligates the states to take necessary measures for the full realisation of participation of child offenders and child victims.⁵⁸ The CRC Committee further, emphasises that state parties should not impose any age limit on the right of the child to express their views. Capacity of the child, however, has limitations because some children are not capable of expressing their views.⁵⁹ States should thus ensure that children who have difficulty in communicating, and making their views should have other basic modes of communication.⁶⁰

2.1.4. Right to express views freely in matters affecting them

The right of the child to freely express their views is associated with the child giving their views without any undue influence.⁶¹ A child is at liberty to form and express their opinion freely without any external pressure. Further, emphasis is on creating an environment that the child can express themselves. A child-friendly justice process requires limiting interviews to the child victim to avoid trauma while allowing ease of participation.⁶²

A child articulating matters affecting them is a fundamental condition for their views to be respected this is according to the General Comment No 12. This clause is considered too broad as the CRC does not define the kind of matters affecting the child. It can also be premised on an assumption that, for interpretations, the first step is to ask the child whether the matter affects them.⁶³ In most instances a child depends on adults to act on their behalf, and parents decide on their behalf of the problems they face hence creating a dilemma of children expressing their views without any undue influence.⁶⁴

2.1.5. Giving due weight and right to be heard in proceedings

⁵⁸CRC General Comment No 12(n 2 above), para 21 “States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child”.

⁵⁹ Liefwaard (n1 above) 194.

⁶⁰CRC General Comment No 12(n 2 above), para 21.

⁶¹ A Moyo `Child Participation Under South African Law: Beyond the Convention on the Rights of the Child?` (2015)31 *South African Journal on Human Rights*,173-184.

⁶² CRC General Comment No 12(n 2 above), para 22&23.

⁶³ Lundy (n 53 above) 931.

⁶⁴R Sheeman `Magistrates –Decisions Making Child Protection Cases (2001) 9.

Giving due weight means taking into account the opinion of the child and which shall form part of an outcome of the decision.⁶⁵ Children have different levels of understanding, depending on their age. Maturity of a child is very hard to define; a child must express their views reasonably to evaluate the level of maturity. Hence, evaluation of a child's opinion should be handled on case by case basis.

Judicial proceedings refer to the matters in court affecting the child⁶⁶ while the administrative proceedings are decisions concerning child's education, health, environment and the living conditions, among other issues.⁶⁷ The use of alternative dispute resolution mechanisms is encouraged in judicial and administrative proceedings in matters concerning children. Proceedings involving a child must be child-appropriate with attention focusing on the delivery of information to the child in a friendly manner. This includes having trained staff in court, the judicial officers and advocate should not have intimidating attire, the courtroom should be designed to fit a child-friendly environment and have separate waiting rooms for children before the trial begins.⁶⁸

The CRC committee under paragraph 35 of General Comment Number 12 of 2009 recommends that a child "must have an opportunity to be directly heard in proceedings or through a representative such as a "parent" or "a lawyer" or "any other person like a social worker". The interpretation is that there can be room for alternatives to legal representations by other persons.⁶⁹ The provision has a shortcoming in that it only states the mode of child participation which is through limited representation. Specifically, it does not mention the mode of implementation and how a state can guarantee that legal representation and accountability are met.⁷⁰

2.2. Concept of justice and access to justice

The concept of justice refers to the standard of rights with outlined procedures or defined by law and enforceable by an institution within the state with the responsibility of protection of those

⁶⁵ CRC General Comment No 12(n2 above), para 28 &29.

⁶⁶ As above, para 32.

⁶⁷ As above n 64.

⁶⁸ CRC General Comment No 12(n 2 above), para 35.

⁶⁹ N Zaal & A Skelton `Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts, ` (1998) *South African Journal on Human Rights* 539-559.

⁷⁰ Zaal & Skelton (n 69 above).

rights.⁷¹ This concept has come to mean not only fair procedures but also a socially fair outcome. Modern states thus recognise that affirmative state action is required to realise the right to effective access to justice.⁷²

A child justice system refers to circumstances where a child is involved in either criminal or civil justice systems and procedures such as administrative procedures which can be formal or informal.⁷³ The criminal justice system involves child offenders who are accused of infringing the law in addition to a child who is a victim or witness to a crime. Civil justice involves children in need of care and protection, custody disputes, adoption issues and unaccompanied children, among other issues.⁷⁴

In addition, administrative procedures can also include areas of education for example when children go through school disciplinary proceedings or through institutions of care and procedures.⁷⁵ The Informal Justice System (IJS) refers to forms of dispute resolution that take place outside the formal courts. The IJS has no formal structure or procedures to follow, it may involve traditional or customary disputes resolution mechanisms. They have a certain degree of stability, institutionalisation and legitimacy within a designated constituency.⁷⁶

Access to justice is a process which starts with enactments of the law, creating awareness of the law, ease and accessibility of information on the rights, enforcement law agencies and easy access to the justice system.⁷⁷ It is important to provide legal representation for a child in order to access justice, as the legal representative has a duty to explain and discuss the procedure to the child and ensure they fully participate and understand the consequences of the court orders.⁷⁸

⁷¹ R Sackville `Some Thoughts on Access to Justice` (2004): *New Zealand Journal of Public and International Law* 87.

⁷² Sackville (n 71 above).

⁷³ Liefgaard (n 1 above) 201.

⁷⁴ The African Child Policy Forum (ACPF) & Defence for Children International Secretariat (DCI) `Achieving Child-Friendly Justice in Africa` (2012) <http://www.africanchildforum.org> (accessed 30 July 2020).

⁷⁵ ACPF&DCI (n74 above).

⁷⁶ E Kinama `Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya, 2010` (2015) *Strathmore Law Journal* 32.

⁷⁷ C Ngondi- Houton `Access to Justice and the Rule of Law in Kenya` (2006) A paper developed for the commission for empowerment of the poor.

⁷⁸ G Bohr `Children's Access to Justice` (2001) *William Mitchell Law Review* 231.

It is also necessary to have child-friendly procedures to achieve access to justice.⁷⁹ In the Kenyan context, the importance of the concept of access to justice has been underpinned under article 48 the Constitution of Kenya 2010, where the state must safeguard access to justice to everyone including children. The Constitution also attempts to remove any financial barrier in accessing justice by providing that if any fee is required when litigating on an individual's rights, then such fee shall be realistic and will not hinder access to justice.⁸⁰

2.3. Legal framework of child participation in criminal justice under international law

Human rights evolved at the end of the World War II and the term "rights" emerged at the formation of the United Nations in 1945.⁸¹ This led to the development of the Universal Declaration of Human Rights (UDHR). The UDHR urged respect for human rights and treatment of each other with dignity.⁸²

The UDHR prohibits discrimination while maintaining that everyone is equal before the law; this includes children who are entitled to a fair and impartial hearing in the determination of criminal charges.⁸³ To strengthen participation, Article 19 of UDHR gives all persons the right to express their opinion and also to seek information. It is noted, however, that UDHR is not a binding treaty hence the development of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR).⁸⁴

2.3.1. International Covenant on Civil and Political Rights

⁷⁹H Stalford Etaal; `Achieving Child Friendly Justice through Friendly Methods: Let's Start with the Right to Information` (2017) *Social Inclusion Journal* 207-218; Defines "Child friendly justice is in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life to integrity and dignity".

⁸⁰Constitution of Kenya art 159(2) is also important regarding access to justice on the basis that it promotes substantive justice devoid of technicalities.

⁸¹C P Cohen, "Developing Jurisprudence of the Rights of the Child, The " (1993) 6:1 *St Thomas Law Review* 1.

⁸² Universal Declaration of Human Rights, preamble.

⁸³ UDHR Art 10.

⁸⁴ GV Bueren *The International Law on the Rights of the Child* (1998) 19.

ICCPR came into force in 1976⁸⁵ as the first binding treaty that introduces child-friendly justice.⁸⁶ It introduces the general rights of the arrested persons while explaining the importance of participatory rights of child to be conversant of reasons for arrest and the preferable charges instituted against such.⁸⁷ The most crucial clause on child participation is the separation of child offenders from the adults. Article 10 of ICCPR generally provides some requirements for accused persons to be informed of the charges in a language they understand which includes interpretation in a simple language that the child offender is comfortable in.⁸⁸

The rights to privacy of a child is protected in criminal proceedings. The ICCPR stipulates obligations on the state not to publicise the judgment to the press and public in matters concerning a child. Further, the state is under obligation to establish trial procedures that is child friendly while considering the age of child offenders during trial with a focus on rehabilitation.⁸⁹

The ICCPR is an internationally binding instrument capable of being applied in the rights of the child, but it does not integrate a child-centred approach setting out all necessary rights, it does not adequately provide a framework and procedures on child participation in criminal justice system.⁹⁰ The necessity for such an instrument was the enactment of CRC internationally and ACRW regionally to safeguard the rights of the child.

There are other nonbinding international instruments that deal with the development of child access to justice and participation of child offenders and victims in the criminal justice system. These are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh rules) and United Nations Rules for the Protection of Juveniles Deprived of Liberty (the JDL rules)

⁸⁵UN General Assembly Resolution 2200A(XXI) of December 1966, came into force March 1976

⁸⁶ S Nagendra *Enforcement of Human Rights: In Peace & War and the Future of Humanity* (1986) 37.

⁸⁷ International Covenant on Civil and Political Rights Art 9.

⁸⁸ ICCPR Art 10 2(a)(b).

⁸⁹ ICCPR Art 14 4.

⁹⁰ Bueren (n84 above) 20.

and United Nations Economic and Social Council's Guidelines on Justice for Victims and Witnesses of Crime. These will be discussed in detail in the sections below.

2.3.2. United Nations Standard Minimum Rules for Administration of Juvenile Justice

The Beijing rules was enacted, marking a significant milestone in provision for the rights of child offenders and setting procedures for participation in matters concerning them.⁹¹ The Beijing rules set procedural safeguards from an institution such as the police officers who have the responsibility to inform the child offender of the offence committed and inform the guardian of the arrest.⁹² Rule 12 of the Beijing Rules draws attention to the need for specialised training on all law agencies dealing with children. This is in line with improving the handling of child offenders during the arrest and adjudication process.

To enhance the participation of child offenders, emphasis is laid on a conducive atmosphere.⁹³ However, there is no definition of what this 'atmosphere' is that the child offender can participate in or a clear guideline on the same procedures. Rule 15.2 also allows parents to participate in matters concerning the child offender; this might be interpreted that the parent will be assisting the child to be heard or can as well give his or her own views and not those of the child.

2.3.3. United Nations Guidelines for the Prevention of Juvenile Delinquency

The Riyadh guidelines assists states to take necessary measures to prevent children from committing a crime and further to enact laws that protect child offenders.⁹⁴ The guidelines trace the foundation of a child committing crime as emanating from various background issues such as orphan-hood, anti-social behaviour and rebelliousness.

⁹¹UN General Assembly Resolution 40/33 of 29 November 1985.

⁹² Beijing rules 10.1.

⁹³ As above Rule 14.2 "The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely".

⁹⁴ Riyadh guidelines Rule 52 & Rule 53.

The guidelines offer a proactive approach that aims for social integration of such children instead of granting punishment for violations of the law. Such punishments only lead to further neglect of children, abandonment and sometimes more abuse.⁹⁵ Article 9 of the guidelines prescribes an approach where children are involved more in community work, victim compensation and assisting in family chores through a policy focused on participation.

2.3.4. United Nations Rules for the Protection of Juveniles Deprived of Liberty

The JDL guidelines stipulate standards for child offenders deprived of their liberty. These are children who are held in custody before the trial begins, during the trial and those who are in rehabilitation institutions.⁹⁶ The JDL describes deprivation of liberty as any form of restriction without any permission to leave on own will.⁹⁷ The key principle is that arrest, detention and imprisonment should only be a measure of last resort for child offenders.⁹⁸ The JDL also provides classification procedures when placing children according to age, sex and offence.⁹⁹

Rule 29 of JDL advocates for juveniles in detention facilities to be separate from adults except when they are family members. Child offenders who are deprived of their liberty have a right to participation and communication to any person at least two times a week. Further, child offenders have a right to be involved in the daily activities of a rehabilitation institution.¹⁰⁰ For any decisions affecting such child offenders especially on the right to engage in work or contributing their views towards inspection of the rehabilitation institution, there must be participatory options for them.¹⁰¹

2.3.5. United Nations Economic and Social Council's Guidelines on Justice for Child Victims and Witnesses of Crime

⁹⁵ E Verhellen & G Cappelaere United Nations Guidelines for the Prevention of Juvenile Delinquency: Prevention of Juvenile delinquency or promotion of a society which respects children too? (1996) *International Journal of Children's Rights* 57-68.

⁹⁶ G Cappelaere et al; `Children Deprived of Liberty: Rights and Realities` (2005) <https://www.unicef.org> (accessed 24 June 2020).

⁹⁷ JDL Rule 11.

⁹⁸ As above, Rule 1&2.

⁹⁹ As above Rule 28.

¹⁰⁰ As above Rule 43.

¹⁰¹ As above Rule 73.

Child victims who come to seek justice in courts occasionally face victimisation at the institutions of justice.¹⁰² The guidelines on Justice for Child Victims and Witnesses of Crime defines who a child victim is,¹⁰³ and further, it creates controversy by defining a child victim as one who takes part in offence is still regarded as a child victim. This creates a conflict between the definition of a child offender and a child victim in the criminal justice system.

Child victims have the right to be informed of the procedures in the criminal justice process, the role they play and their right to participate in the proceedings.¹⁰⁴ The mode of questioning and support mechanisms to make a complaint and participating in court proceedings should be made available, and the child victim should also be notified of the time, venue of the hearing and available mechanism for review of decisions affecting them.

Actors in the justice system are urged to enable child victims to express their views freely in their own manner regarding their involvement in the process. While executing these functions, the actors must give regard to the child views or explain disagreeable issues with the child¹⁰⁵

The Beijing Rules, Riyadh Guidelines, JDLs and UN Economic and Social Council's Guidelines on Justice for Child Victims and Witnesses of Crime on juvenile justice give a comprehensive framework on rights of the child to access justice and right to participation either as a child offender or child victim, the only limitation is that they are recommendations which are persuasive but non-binding to the states.

2.3.6. United Nations Convention on the Rights of the Child

The CRC is the key international instrument on rights of the child, which provides a legal framework for the participation of child offenders and child victims.¹⁰⁶ The CRC is guided by four fundamental principles in realising the rights of the child and interpretations of the other

¹⁰² G Woldemariam `The predicaments of child victims of crime seeking justice in Ethiopia: a double victimization by the justice process` (2011) *Afrika Focus Journal* 11-3.

¹⁰³ UN Economic and Social Council's Guidelines on Justice for Child Victims and Witnesses of Crime Rule 9 "children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders"

¹⁰⁴ As above, Rule 19.

¹⁰⁵ As above Rule 20.

¹⁰⁶ General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

articles.¹⁰⁷The four general principles are non-discrimination¹⁰⁸ best interest of the child¹⁰⁹, the right to life, survival development¹¹⁰, and the right of the child to participate. The principle of best interest is to be considered in all actions, laws and policies concerning the child.

It provides for a child offender and child victim to fully participate in the criminal justice system and to access justice, there must be elaborate procedural safeguards, substantive laws and the institutions must be child friendly. Article 37 and 40 of the CRC set out the requirements for child-friendly systems to ensure that child offender participates in criminal justice. These safeguards are the establishment of detention should be a measure of last resort, guarantees of a fair trial, rights of child victims.

The CRC has been ratified by several states after its adoption.¹¹¹ It has created a great influence in drafting most national constitutions, judicial decisions, especially in policy development on the rights of the child. The Committee on the Rights of the Child (CRC Committee) oversees monitoring and compliance of the convention and give its recommendations through the general comments.¹¹² State parties are also required to submit to the CRC Committee regular national reports on the advancement of the child rights. It is through the reports that the CRC committee can carry out an evaluation of the situation of compliance by the state parties.¹¹³

2.3.7. Detention as a measure of last resort

CRC outlaws the denial of liberty of a child, and states that it should only be imposed as a measure of last resort, and be carried out for the shortest period.¹¹⁴ Child offenders should not stay in pre-

¹⁰⁷B Memzur 'The African Children's Charter versus the UN Convention on Rights of the Child: A zero-sum game?' (2008) *South Africa Public Law Journal* 4.

¹⁰⁸ CRC art 2 "irrespective of the child 's or his or her parent 's or legal guardian 's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

¹⁰⁹ CRC art 3 "The best interests of the child must be a primary consideration in all decisions or actions that affect the child or children as a group. This holds true whether decisions are made by governmental, administrative or judicial authorities, or by families themselves".

¹¹⁰ CRC art 6 "children have a right to life and development in all aspects of their lives, including the physical, emotional, psychosocial, cognitive, social and cultural; as such the Member States must provide access to health care and education, and protecting the child from economic and social exploitation".

¹¹¹ J Tobin *The UN Convention on the Rights of the child: A commentary* (2019) 1.

¹¹² Memzur (n107above)7.

¹¹³ J Tobin (n 111 above).

¹¹⁴ CRC art 37(a); see also Beijing rule 17 (1) (b).

trial detention and recommends the use of non-custodial measures during the trial process. The CRC, however, fails to provide guidance on detention as a last resort.¹¹⁵ CRC further prohibits the subjecting of children to imprisonment for life without the option of being released.

It is a requirement that as soon as a child is arrested, they have a right to contact their family members and to be visited at the detention centre, they are also to be held separately from adults. They also have a right to access legal assistance upon arrest and during trial. Additionally, they have a right to contest legality of the detention before court and be involved in the decision of deprivation of liberty.¹¹⁶

2.3.8. Guarantees of a fair trial

A fair trial demands that a child offender is presumed innocent until the prosecution discharges the burden of proof that the child committed the offence beyond reasonable doubt.¹¹⁷ Participation of the child offender requires that they are promptly and directly informed of charges in a language they understand as soon as they are arrested.¹¹⁸ The arresting police officer with the help of a children's officer has a duty to first inform the parent or guardian of a child offender as soon as they are arrested. Similarly, all communication must be relayed to the child, the parent or guardian on the rights of the child, why they must be arrested if it is necessary and what privileges they do have access to as well as their right to participation.

Child offenders have a right to legal representation or other support to adequately prepare for their defence. A child offender can get to participate in the justice system with legal representation whether at the point of arrest or during trial.¹¹⁹ The child offender is also protected and should not be compelled to give self-incriminating evidence during interrogation and when recording statements. A child offender has an opportunity to express their views by cross-examining witnesses and agreeing to being cross-examined during trial.¹²⁰

¹¹⁵ Memzur (n 107 above).

¹¹⁶ CRC art 37(d).

¹¹⁷ As above art 40(2)(b)(i).

¹¹⁸ As above art 40(2)(b)(ii).

¹¹⁹ As above art 40(2)(b)(iii).

¹²⁰ As above art 40(2)(b)(iv).

The right to appeal the decision if found guilty is also provided for and should be filed in a higher court.¹²¹ The right to an interpreter free of charge is also guaranteed to enhance child participation in criminal justice especially where a child understands a particular language not conversant with the court.¹²²

2.3.9. Rights of the child victim

Article 39 of CRC provides for emotional and physical recovery of a child victim, who should be treated in a manner to raise self-respect, dignity and not to be exposed further to abuse, mental or physical torture, cruelty or inhumane and degrading treatment. The CRC Committee gives emphasis to the participation of child victims by following the laid down guidelines according to the UN Economic and Social Council's Guidelines on Justice for Child Victims and Witnesses of Crime. The child victim must be consulted in all matters involving them and should freely be allowed to express their views when involved in the judicial process.¹²³

2.4. Regional legal framework on participation of child offenders and victims

2.4.1. The African Charter on Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the Assembly of Heads of States of the then Organisation of African Unity in 1990.¹²⁴ It was adopted slightly after the CRC as Africa felt the need to have an African voice on the protection of children's rights.¹²⁵ However, during the drafting of the ACRWC just like the CRC, children were not involved in voicing their views on their rights.¹²⁶ This can be attributed to the adult drafters that in consideration of the best interest of the child the freedom of the child to express themselves should be limited to certain matters.¹²⁷ The monitoring body of the ACRWC is the

¹²¹ CRC art 40 (2) (b) (v), see also article 14(5) of International Convention of Civil and Political Rights.

¹²²As above art 40 (2) (b) (vi).

¹²³General Comment No 12(n 2 above) para 62: "The child victim and child witness of a crime must be given an opportunity to fully exercise her or his right to freely express her or his view in accordance with United Nations Economic and Social Council resolution 2005/20, "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime".

¹²⁴ A Lloyd, "A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child" (2002) *African Human Rights Law Journal* 11-22.

¹²⁵ Lloyd (n124 above) 14.

¹²⁶ Lloyd (n124 above) 24.

¹²⁷ O Ekundayo "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the

African Committee of Experts on the Rights and Welfare of the Child (ACERWC) which has an exclusive mandate on compliance by state parties to the charter.¹²⁸

The ACRWC acknowledges the best interest of the child as paramount in consideration of all actions concerning the child. Article 4 (2) of ACRWC state as follows:

“In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law”

The ACRWC elaborates on the importance of a child taking part in justice proceedings to a certain extent. It restricts child participation in judicial and administrative proceedings as opposed to the CRC which gives an open clause as to all matters affecting the child. Participation is restricted to the child to directly participate or through an impartial representative although the meaning of an impartial representative has not been defined. ACRWC gives state parties an obligation to ensure that child offenders fully participate in juvenile justice by presumption of innocence as well as being held separately from adults. Furthermore, in ensuring that they are informed of charges against them, a language comfortable to them must be used to allow full participation once understanding is realised. ACRWC states the importance of a speedy trial for children as well as the crucial need for legal representation for purposes of preparation of a defence.¹²⁹

In comparison with the CRC and Beijing Rules, the ACRWC does not adequately provide for requirements to fulfil child participation in criminal justice. For example, in giving guideline for the rights of the child victim in the criminal justice system, it has not mentioned it or provided for restorative measures. Notably too, the ACRWC does not provide for alternative measures of dealing with child offenders unlike as provided for in the CRC. Further, the ACRWC does not incorporate express provisions on the obligation on the state to establish a specialised criminal justice institution and personnel.¹³⁰ Additionally, it recommends that state parties should have a

Differences between the ACRWC and the CRC (2015) *International Journal of Humanities and Social Science* 143-158.

¹²⁸ Odala (n13 above) 568.

¹²⁹ ACRWC art 17.

¹³⁰ Odala (n13 above) 570.

child justice system that aligns with international law and charter through amendments of its laws.¹³¹

The ACERWC annually celebrates the Day of the African Child (DAC).¹³² The DAC usually has important themes on the rights of the child. In this significance, every year the theme carries a unique message intended to rhyme with ACERWC activities as captured in DAC. For example, in year 2020, the DAC theme is “Access to a Child- Friendly Justice System in Africa. The African states have realised the importance of the right of child in accessing justice hence addressing challenges and making recommendations that are meant to enhance child friendly justice systems for child offenders and victims. The ACERWC also receives complaints on violations of the rights of the child and rule on the communication like for instance the ACERWC issued a landmark decision that found Kenya in violation of the rights of Nubian child.¹³³

In 2013, Kenya submitted its first state party report to the African Union on the implementation of African Charter on the Rights and Welfare of the Child.¹³⁴ Among the issues addressed are access to child justice, institutions dealing with child justice and progressive strides that have been made in enhancing child justice by introduction of mobile courts, court users committee and drafting of Children law amendment Bill.

2.5. Conclusion

This chapter analyses key concepts such as child participation, justice and access to justice. The ICCPR establish child-friendly procedures such as having separate holding facilities for adults and children. Beijing rules provide for how the institutions in criminal justice should handle child offenders during the adjudication process. Riyadh guidelines links child offenders to the break

¹³¹ General Comment on Article 31 African Committee of Experts on the Rights and Welfare of the Child on “The Responsibilities of the Child” 2017 para 44.

¹³² “The African Union and its members States celebrate DAC to commemorate 16 July 1976 of students uprising in Soweto, South Africa, where students who marched in protest against apartheid-inspired education, were brutally murdered” <https://au.int/en/newsevents/20200616/day-african-child-2020>(accessed 20 July 2020).

¹³³ *IRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya V Kenya* (2011) AHRLR181 (ACERWC 2011).

¹³⁴ 1st State Party Report to the African Union on the Implementation of the African Charter on the Rights and Welfare of the Child 2008-2011 <https://www.acerwc.africa> (accessed 20 July 2020).

down in the society and recommends diversion as a form of programme that is aimed at reintegrating them back to the society.

The JDL guidelines stipulate standards for participation of child offenders in criminal justice; detention and imprisonment should be a measure of last resort. UN guidelines on Justice for Child Victims and Witnesses of Crime defines rights of a child victim such as being informed of the place, time and hearing of the matter and the actors of criminal justice to ensure procedural guarantees are observed. CRC and the ACWRC defines child participation and places responsibility on the states to guarantee access to justice and provides procedures for participation.

The next chapter provides an analysis of the Kenyan legal framework on the participation of child offenders and victims and to examine the institutions in the criminal justice and to what extent it complies with the requirements set in the international and regional instruments.

CHAPTER 3

Legal Framework and Role of Institutions of Criminal Justice in Kenya

3.1. Introduction

The criminal justice system in Kenya, regarding participation of child offenders and victims, establishes the institutions and roles of the actors during trial process. This chapter analyses the legal framework and the role of institutions in criminal justice in the context of child participation. The legislation includes: the Constitution of Kenya, Children's Act, Children Bill of 2018, Criminal Procedure Code¹³⁵ and Victim Protection Act¹³⁶ among other Acts shall form part of the study. The study notes that participation of the child victims in the criminal justice is very minimal unlike participation of the child offender. The child victim has a right to participate in proceedings, however in many instances the victim only participate as a witness during trial.¹³⁷

3.1.1. Constitution of Kenya 2010

The independence Constitution of Kenya did not include a Bill of Rights.¹³⁸ It was not until 1969 through an amendment of the Constitution that the Bill of rights was introduced. However, there was no provision for child rights.¹³⁹ The Constitution of Kenya 2010 envisions a comprehensive and progressive Bill of Rights that not only reviewed the civil and political rights, socio-economic and cultural rights but also for the first time brought to the fore specific rights of a child.¹⁴⁰

The Constitution does not provide a specific section on child participation, unlike the Bomas draft as discussed in chapter one.¹⁴¹ The Constitution, however, provides for freedom of expression and right to seek and receive information.¹⁴² In addition, the Constitution guarantees the rights of

¹³⁵ Cap 75 Laws of Kenya.

¹³⁶ Act 17 of 2014.

¹³⁷ Criminal Procedure Code sec 329.

¹³⁸ A Munene `The Bill of Rights and Constitutional Order: A Kenyan Perspective` (2002) African Human Rights Journal 135.

¹³⁹ Munene (n138above).

¹⁴⁰ J Jarso `Implementing the Children's Rights Agenda in Kenya: Taking Stock of the Progress, Hurdles and Prospects` (2012) 27 *American University International Law Review* 697.

¹⁴¹ Bomas draft (n 11 above).

¹⁴² Constitution of Kenya Article 33(1)(a) `;` Victims Protection Act 17 of 2014 sec19 `;` Access to Information Act 31 of 2016 sec 4

arrested persons and provisions of due process to ensure a just and fair process.¹⁴³ In a separate provision, it emphasises that child's best interest should be a consideration in all matters affecting them which is closely linked to child participation.¹⁴⁴

The Constitution balances all rights of the children whether a child offender or a child victim. A child victim, for example, the Constitution considers their vulnerability and hence stipulates that a court may allow their participation in a criminal trial although as assisted by an intermediary for purposes of communication to the court.¹⁴⁵

Article 50 of the Constitution places an obligation on the state to ensure that there are programmes that cater for the minority groups who include children to participate and influence policy formulation in representation of governance issues. The National Council of Children Services has introduced a forum known as Kenyan Children's Assembly where children participate in the formulation of policies and laws.¹⁴⁶

3.1.2. Children's Act

Upon colonisation by the British, Kenya adopted the concept of separate institutions for child offenders from the British system.¹⁴⁷ The aim of having a different institution for child offenders was for their rehabilitation and to reintegrate back to society.¹⁴⁸ The applicable laws then were:

¹⁴³ Constitution of Kenya Art 49 (1)(a) to(h) "the right to be informed promptly language they understand the reason for arrest, the right to remain silent, to communicate with and advocate or other person for assistance, right not give self-incriminating evidence, right to be held separately from other convicts, to be brought to court within 24 hours, to be informed of reason of further detention, to be released on bail or bond pending charge or trial unless there is a compelling reason".

¹⁴⁴ Constitution of Kenya (n10 above) "A child's best interests are of paramount importance in every matter concerning the child".

¹⁴⁵ Constitution of Kenya Art 50(7).

¹⁴⁶ National Council for Children's Services `National Plan of Action for Children in Kenya 2015-2020`
`http://www.childrencouncil.go.ke (accessed 29 July 2020).

¹⁴⁷ C Campbell `Juvenile delinquency in colonial Kenya,1990-1939` (2002) *Historical Journal* 130.

¹⁴⁸ Campbell (n 147 above)131.

The Children's and Young Person's Act,¹⁴⁹ Adoption Act¹⁵⁰ and The Guardianship of Infants Act¹⁵¹ These statutes were repealed by the Children's Act of 2001.¹⁵²

The Children's Act¹⁵³ is the principal legislation dealing with rights of the child in Kenya and it takes a child-friendly approach to the provisions on rights and welfare of a child, custody and maintenance, guardianship and how child offenders are to be served, assisted and incorporated in the system.¹⁵⁴

The Act does not expressly provide for child participation, but it provides for the right of every child to be granted an opportunity to express their views in matters of procedures that affect them depending on age and maturity and the views “may” be considered.¹⁵⁵ This provision is limited to the child expressing their views only in matters of procedure that affects them and further the decision to consider their views is not mandatory thus limiting child participation. As discussed in chapter two unlike CRC and ACRWC provide a mandatory clause on states obligation on child participation in any judicial or administrative process.¹⁵⁶ The Children's Act also provides measures towards child participation such as that the courts should be child friendly with an atmosphere that accommodates child offenders and victims. It lays down procedural rights for the child offenders and victims which shall be discussed in detail hereunder.

3.1.3. Children Bill of 2018

In 2010, a task force was formed comprising of stakeholders to review Children's Act of 2001. The Children Bill of 2018 designed to amend the Children's Act of 2001, gives clear guidelines

¹⁴⁹ Cap 141 Laws of Kenya.

¹⁵⁰ Cap 143 Laws of Kenya.

¹⁵¹ Cap 144 Laws of Kenya.

¹⁵² G Odongo `The domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of Kenyan Example` (2004) *International Journal of Children's Rights* 419-430.

¹⁵³ Children's Act n 12 above.

¹⁵⁴ Odongo (n 28above)114.

¹⁵⁵ Children's Act Sec 4(4) “In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity”.

¹⁵⁶CRC General Comment No 12(n 2 above) para 19.

on child participation. The Bill proposes that all procedural rights enumerated in Article 50 of the Constitution are followed strictly if a just and fair trial is to be guaranteed.¹⁵⁷ It proposes that the state is obliged to put up mechanisms to ensure that child offenders and victims can lawfully participate in judicial proceedings by putting necessary modes of communications.¹⁵⁸

The Bill further stipulates that the children's court shall have a friendly setting and criminal matters involving children shall be held specifically in the children's court.¹⁵⁹ Further, the Bill proposes an ambiguous clause that children who attain the age of 16 years can represent themselves in court and in any event they require legal aid, they will inform the court.¹⁶⁰

3.2. Role of the institutions in the criminal justice system

The institutions in criminal justice are composed of the police, the judiciary, office of the director of public prosecutions and the rehabilitation centres. An analysis of their functions and the roles they play in ensuring proper child participation in the criminal justice will be discussed in this chapter. The Criminal Procedure Code ¹⁶¹(CPC) provides detailed procedures to follow in criminal cases. These procedures are applied in all the institutions of criminal justice. The World Congress on justice for children 2018 proposes that children's opinion be heard at all stages of criminal justice, at the time of arrest, during court proceedings and even when spelling out the punishment.¹⁶²

3.2.1. Role of the National Police Service in criminal justice

¹⁵⁷ Children Bill 2018 Sec 226 “Presumption of innocence, right to be notified of charges, right to legal representation, the right to the presence of a parent or guardian, the right to present and examine witnesses, right to remain silent and the right to appeal”.

¹⁵⁸As above, sec 226(4).

¹⁵⁹ Children Bill Sec 87.

¹⁶⁰ Children Bill Sec 90.

¹⁶¹ CPC(n135 above).

¹⁶² World Congress on Justice for Children strengthening justice systems for children 2018 Paris Declaration. <https://defenceforchildren.org/outcome-of-the-world-congress-on-justice-for-children> (accessed 30 July 2020).

An estimated 10,000 children are held in detention and custody every year in Kenya.¹⁶³ Absence of proper records among police stations, however, reveals an immediate need to clarify the actual figures of such children. The national police service is established under the Constitution of Kenya.¹⁶⁴ The national police service is vested with powers and duties to maintain law and order, investigate crime, apprehend offenders, and enforce rules and regulations.¹⁶⁵ The Constitution mandates the national police service to ensure that human rights and freedoms are respected.¹⁶⁶

A police station has various departments for handling various crimes including children matters. Most police stations have established child-friendly desks meant to handle children's cases. The child desk usually has a police officer trained in child-friendly practices and procedures. A police officer is mandated to investigate all matters brought to them and provide necessary information such as the reason for arrest, the right to remain silent and right not to give self-incriminating evidence which all contributes and aids the participation of child offenders and victims as they exercise their rights.¹⁶⁷ Besides the right to access the statement recorded by the police officer, a child offender or victim has the right to interpretation of the statement and a right to change the statement where they feel it is necessary.¹⁶⁸

A police officer meets a child victim after receiving a report on infringements on the child's rights. The Victim Protection Act provides that a child victim has a right to express their views and be heard by the police officer by taking action and investigating the matter.¹⁶⁹ The Act further stipulates that those in administrative authority should not discriminate against a victim based on age rather, they should strive to protect the dignity of the victim.

However, there are instances where the police have failed to take up responsibility to investigate complaints by child victims, like in the *C.K.* case discussed in chapter one¹⁷⁰ the matter involved 12 children who were minors and victims of sexual violence. The High Court in Kenya issued an

¹⁶³ D Ottolini ` Guidelines Manual on Juvenile Justice Best Practices on Juvenile Justice Best Practices: An Evidence-based approach to Justice Reforms in Kenya. (2016) 14.

¹⁶⁴ Constitution of Kenya Art 243 &246.

¹⁶⁵ Police Act cap 84 Sec 14(1).

¹⁶⁶ Constitution of Kenya Art 244 (c).

¹⁶⁷ Stalford et al;(n 79 above)212.

¹⁶⁸ Police Act Sec 22(3).

¹⁶⁹ Victim Protection Act of 2014 Sec 4 (2) (b).

¹⁷⁰ *C.K* case, (n 19 above).

order to the commissioner of police to undertake investigations on the alleged sexual violence presented by the petitioners. In this case, the first petitioner's rights were infringed by a state organ that has duty to protect the rights of child as guaranteed in the constitution.¹⁷¹ Failure of the police to give due weight to the reports made by the child victims occasioned to denial of the right to participate.

3.2.1.1. Arrest and detention

Arresting a child offender is different from addressing an adult offender. Since children are protected by the Constitution of Kenya and the Children's Act, a police officer must be aware of the legal implications surrounding a child offender's arrest and detention. An officer may require obtaining a warrant of arrest based on the material evidence presented upon the victim recording a statement.¹⁷² Committing a crime in the presence of a police officer, however, requires no warrant of arrest.¹⁷³ There are instances where a warrant of arrest is issued against the child offender by the court.¹⁷⁴ The police officer must consider the best interest of the child and respect of their human rights especially when conducting the arrest. The provisions of Article 49 of the Constitution and Section 184 of the Children's Act on rights of arrested persons, should be adhered to when dealing with a child offender.

A child offender who on suspicion of committing a crime has a right to be produced in court not more than 24 hours after time of arrest.¹⁷⁵ Where the apprehension goes beyond 24 hours, it must be with the leave of the court.¹⁷⁶ The officer in charge of the police station should inform the parents or guardians of their child arrest .¹⁷⁷ The police have to ensure the presence of parents or guardians of the child or an advocate during the child's interrogation. In any circumstances where the parents or guardians of the child are not reachable, the presence of a children's officer is

¹⁷¹ Constitution of Kenya Art 21 (1).

¹⁷² Criminal Procedure Code sec34.

¹⁷³ As above, Sec 29.

¹⁷⁴ Criminal Procedure Code Sec 39.

¹⁷⁵ Constitution of Kenya Art 49 (f).

¹⁷⁶ Child Offenders Rules Rule 4(1) ' ;' *DMO & another JB v Republic (2013) eKLR* The Prosecution applied leave of the court to determine age assessment of the minors before charging them. The age assessment took four days.

¹⁷⁷ As above rule 4 (4).

recommended during the child's interview.¹⁷⁸ However, it is worth mentioning that a legal representative's role during interrogation is not so clear.¹⁷⁹

The police are under obligation to release the child offender to the parents in minor offences and if they do not pose a threat to the community. It is the responsibility of the officer in charge of the police station and remand home to inform the child offenders of the availability of legal aid. Further, they have the responsibility of maintaining a register that contains the response of the child offender if they desire to seek legal aid.¹⁸⁰ This, however, is yet to be implemented in most of the police stations. The child offender usually is accorded legal aid and representation through a court order before a plea is taken.

The police have, in some cases failed to release the child offender like in *MWK & Another v Attorney General & 3 others* eKLR.¹⁸¹ The first petitioner was arrested with other students while travelling in a motor vehicle and upon the police officers conducting a search on the students, it was reported drugs like *Cannabis Sativa* were present under the student's garments. The police violated the first petitioner's rights by booking her in a police station for more than 24 hours. In addition, her privacy was wholly disregarded as naked images of her at the police station surfaced on social media. Thirdly, there was no express contact with her parents or guardian at the time of arrest.

The High Court held that the police violated the Constitutional rights of the first petitioner; it is a requirement under the constitution that detention of a child should be a measure of last resort. There was no justification for detaining the child offender. Overnight bail should have been enough. Secondly, searching child offender in the presence of other police officers and allowing the taking of photographs and the circulation of the child images violated the rights to dignity, privacy and right not be subjected to degrading treatment.

¹⁷⁸Child Offenders Rules Rule (n 173 above).

¹⁷⁹T Liefwaard ' Juvenile Justice from an International Children's Rights Perspective' in W Vandenhoe et al *Routledge International Handbook Children's Rights Studies* (2015)921.

¹⁸⁰ Legal Aid Act of 2016 sec 42.

¹⁸¹ *MWK & Another v Attorney General & 3 others* (2017) eKLR.

According to a Transparency International survey, most police officers informed the arrested persons of the reasons for arrest. In contrast, the right to remain silent and the consequences of not remaining silent were not informed to the arrested persons.¹⁸² The majority were not allowed to contact any person and were subjected to confess that they committed the offence.

The Independent Policing Oversight Authority (IPOA) is mandated to inspect the police stations and detention facilities to ensure compliance with the Constitution and human rights standards.¹⁸³ According to a police performance report by (IPOA), children protection units lack officers in charge as the same is attributed to the transfer of trained police officers on children cases.¹⁸⁴

The report details an acute absence of children protection units in most police stations either due to poor planning where there is no space to erect such units or lack of finance in setting up one. A more common precursor of this problem is the acute shortage of trained police officers in handling children matters. Whether by absence of such training in-service programmes or by personal choices against attending such trainings, the report places no particular mention of these circumstances. Lastly, in some police stations, lack of cooperation from the children's officers is a challenge while dealing with children's matters that require a children officer's presence.¹⁸⁵

3.2.2. The role of the Office of the Director of Public Prosecution in criminal justice

The Constitution of Kenya establishes an independent Office of the Director of Public Prosecution (ODPP).¹⁸⁶ The ODPP has the mandate to institute and undertake the prosecution of all criminal matters. It has the mandate to decide not to prescribe any charges against a child offender, the same is done in writing to the investigating officer and in consultation with the victim.¹⁸⁷ The ODPP has a juvenile justice department composed of a witness and victims protection unit albeit only situated

¹⁸² Transparency International Kenya `Kenya police service Satisfaction Survey and Needs analysis Report (2016) 26 <https://tikenya.org> (accessed 5 August 2020).

¹⁸³ RH Kempe `Civilian oversight of the police: The case of Kenya (2020) *The Police Journal: Theory, Practice and Principles* 217.

¹⁸⁴ Independent Policing Oversight Authority `Performance Report July-December 2019` <https://www.ipoa.go.ke> (accessed 5 August 2020)32.

¹⁸⁵ As above, 181.

¹⁸⁶ Constitution of Kenya Art 157.

¹⁸⁷ `Guidelines on decision to Charge` 2019 34 <http://www.odpp.go.ke> (accessed 10 August 2020).

in Nairobi with a marked absence in other office units in the country.¹⁸⁸ The juvenile justice department has specialised prosecutors who are trained in handling child victims and witnesses. The juvenile justice department creates a sufficient child-friendly environment for the child victim and child offender to freely participate.

Diversion is the standard alternative available for child offenders in order to protect them from a formal criminal justice system.¹⁸⁹ The ODPP recognises the importance of diversion when dealing with child offenders' cases in the criminal justice.¹⁹⁰ The diversion policy has been formulated to enable the prosecutors to divert cases from court process to allow out of court settlement. The policy provides for various diversions options such as reconciliation, rehabilitation and counselling sessions aimed at the offenders' psychological or behavioural alterations.¹⁹¹ Diversion takes place in consultation of child offenders and victims before deciding to divert the matter from court and the decision is put into writing.

3.2.3. The role of courts in the criminal justice process

The Judiciary is one of the three arms of government established under Article 160 and 161 of the Constitution. The courts have a mandate to deliver justice in a timely manner with the priority and regard on protecting and promoting the Constitution.¹⁹² Part VI of the Children's Act establishes the Children's court. The Children's courts normally have jurisdiction to hear all matters involving the child except when the child is charged for murder or when a child is charged together with an adult.¹⁹³ The Chief Justice is mandated to appoint a magistrate to preside over cases involving children through a gazette notice.¹⁹⁴ The gazetted magistrate presiding over children matters also handles cases of other matters involving other litigants.

The judicial training institute offers regular training to newly recruited magistrates on matters of law, evaluation of evidence and matters of procedure and other areas of expertise including child

¹⁸⁸ ODPP `Organisational structure` <http://www.odpp.go.ke> (accessed 10 August 2020).

¹⁸⁹ ODPP, Diversion Policy of 2019 Clause 24& 27.

¹⁹⁰ As above, clause 13.

¹⁹¹ As above.

¹⁹² Constitution of Kenya Art 159.

¹⁹³ Children's Act Sec73(b).

¹⁹⁴ Children's Act Sec 73(d)(ii).

rights.¹⁹⁵ It has not been established whether there is a training curriculum specifically on child participation.

3.2.3.1. Separate courts and child-friendly procedures

Child offenders and victims should not go through the standard rigorous formal court procedure as adults as envisioned under article 40 of CRC and article 17 ACRWC. A child-friendly environment and court are desirable for hearings either from child offenders or child victims to enable their proper participation in these processes.¹⁹⁶ The Children's Act envisions that the Children's court sits in a different building or during different times from which other courts sit and the same should be closed away from access by members of the public.¹⁹⁷

Despite the Children's Act coming into force in 2002, achieving child-friendly courts has been slow in Kenya. To date, there are only two gazetted Children's courts, Milimani Law Courts, Nairobi and Tononoka Courts, Mombasa, that handle children matters.¹⁹⁸ The Tononoka Courts is fitted with screens that protect child victims while testifying in presence of the accused. Further, two more Courts, Makadara in Nairobi and Nakuru Law courts; have been redesigned to create child friendly registries fitted with counselling rooms for children.¹⁹⁹ In these two courts, the children do not mix with adults as they await their matters to be heard. They are free to interact with their parents and freely express their views freely.²⁰⁰ In other courts in the country, the magistrates handle the children matters in camera which is either carried out in chambers or in ordinary courts which are designated for adults hence creating an unfriendly environment for child participation.

3.2.3.2. Trial process

¹⁹⁵ Judiciary Training Institute www.judiciary.go.ke (accessed 10 August 2020).

¹⁹⁶ Children's Act Sec188.

¹⁹⁷ As above, Sec 74.

¹⁹⁸ Farso (n 140 above) 713.

¹⁹⁹ National Council on the Administration of Justice (NCAJ) `Status Report on Children in the Justice System in Kenya (2019) ` [https://: www.ncaj.go.ke](https://www.ncaj.go.ke) (accessed 9 August 2020).

²⁰⁰ Aluanga-Delvaux L `Uniqueness of children`s court and how magistrates decide cases <https://www.standardmedia.co.ke> (accessed 10 August 2020).

The trial process starts when the prosecution brings charges against a child offender. It is the court's duty to read and interpret the charges to a child offender in a language they understand to enable them to participate in the proceedings.²⁰¹ The court shall record the child offender responses to the charges and the language the child understands. In the case of *JSS V Republic (2017) eKLR*²⁰² the trial court failed to indicate if the charges were read to the child offender or not, secondly, the language in which the charges were read and the response of the child was not indicated; therefore, making the proceedings null and void and hence not able to ascertain participation of the child offender.

The courts have a duty to inform the child offender of their right to be released on bail/bond pending the hearing and determination of the matter.²⁰³ The court has a duty to grant a child offender bail and bond unless there is a compelling reason not to do so.²⁰⁴ The effect of detention is likely to expose the child offender to physical, psychological abuse and interfere with their education. It is in the child's best interest to be released from detention and be with the parents or guardians.

The children's court has an obligation to seek the views of a child victim when an application for bail and bond is filed by an accused. The bail and bond policy mandate the courts to consider the views and safety of the child victim and family before granting bail to the accused. Further, the child victim must be informed on the outcome of such an application for bail and bond.²⁰⁵

3.2.3.3. Right to legal representation

Section 186(b) of the Children's Act guarantees the child offender's right to legal representation at the government's expense as anchored in the Constitution of Kenya.²⁰⁶ Prior to the enactment of the Legal Aid Act, civil society and non-governmental organisations such as CRADLE, International Justice Mission and Kituo Cha Sheria, amongst others played a critical role in representing child offenders and victims in the criminal justice system.²⁰⁷ Kenya has made

²⁰¹ Children's Act Sect 186(a)&(e).

²⁰² *JSS V Republic (2017) eKLR*.

²⁰³ Bail and Bond Policy Guidelines 2015 <http://www.judiciary.go.ke> (accessed 13 August 2020)9.

²⁰⁴ Children's Act Sec 184(4).

²⁰⁵ Bail and Bond Policy Guidelines (n 202 above) 10.

²⁰⁶ Constitution of Kenya Art 50 (2)(h).

²⁰⁷ Wasilczuk (n 49 above).

commendable steps to establish legal aid which is an attempt by the state's legal system to enhance access to justice to indigent child offenders.

The enactment of the Legal Aid Act²⁰⁸ has facilitated access to justice by child offenders who appear before the court unrepresented. The court is deemed to have powers to order for legal representation at the onset of trial for child offenders.²⁰⁹ The Act has not explicitly defined which child is entitled to legal representation because ordinarily the child victims in the justice system are rarely offered any representation as their role is primarily that of witnesses.

The International Commission of Jurist criticises the provisions of Legal Aid Act, citing challenges in the realisation that the government may come short in availing sufficient legal representation for all the cases brought forward for the board's approval.²¹⁰ There are instances where the pro bono lawyers appointed by the state to represent the child offender are not paid so they end up not showing up in court or discontinuing their services. In some instances, the courts fail to appoint a legal representative like in the case of *MS alias MDA V Republic (2019)* eKLR.²¹¹ The High Court in Kenya held that the trial court's failure to ensure that the minor had legal representation limits the right of child offender to participate and understand proceedings in court.

3.2.3.4. Right to privacy

The CRC under Article 40 and the ACRWC under article 17 as discussed in chapter two has a clear emphasis on the essential nature of privacy for child participation. The proceedings involving children should not disclose the particulars of the child such as the name, home and the relatives as well as not publishing their photographs.²¹² Failure to adhere to this attracts a fine of one hundred thousand Kenya shillings (approximately equivalent to 920 US dollars or three months in

²⁰⁸ Legal Aid Act 6 of 2016.

²⁰⁹ As above, Sec 43 (3).

²¹⁰ International Commission of Jurist 'Access to Justice: Reflections on salient features of the legal Aid Act 2016' <https://icj-kenya.org> (accessed 13 August 2020).

²¹¹ *MS alias MDA V Republic (2019)* eKLR.

²¹² Children's Act sec 76(5).

prison or both.²¹³ The aim of protecting the rights of the child is to promote reintegration back to society after the court process without any stigmatisation.

Courts in Kenya have fully implemented the right not to publicise the names of the child offenders and victims. It is for this reason that the Kenya law report publishes matters involving children by only using initials. The court held the circulation of the photos of the minor in the social media was a violation of her rights to privacy.²¹⁴ The right to privacy also extends to the keeping of permanent criminal records of a child offender. The High Court declared that keeping a permanent record of a child offender is a violation of their right to privacy and it is unconstitutional.²¹⁵ A child offender should be able to apply and obtain a certificate of good conduct from the Criminal Investigations Department to show that they have no criminal record and they can participate in securing employment.

3.2.3.5. Hearing process

The court and prosecutor have a duty to ascertain the age of the child offender and victim before trial begins.²¹⁶ This can be ascertained by having a birth certificate or conducting an age assessment by a doctor.²¹⁷ In *P K v Republic* (2019) eKLR,²¹⁸ the High Court held that failure by the trial court to take notice that the accused was a minor at the time of trial resulted to being detained in prison for 14 months among other adults was a mistrial and a violation of rights to participate as a child. The issue of age has posed a serious challenge because in many instances, the charges are read to the child offender before determination of the age.²¹⁹

It is a requirement that the prosecution have a duty to supply the child offender with a copy of the charge sheet and witness statements to adequately prepare for his/her defense. In the case of *POO (A minor) v Director of Public Prosecutions another* (2019) eKLR²²⁰ the High Court held that the child offender proceeded with the hearing despite his plea to the court he be supplied with all

²¹³ Children's Act Sec 76(6).

²¹⁴ MWK (n 181 above).

²¹⁵ *PMK v Inspector General of Police & 2 others* (2019) eKLR.

²¹⁶ Children's Act Sec 143(1).

²¹⁷ As above Section 143 (2).

²¹⁸ *PK v Republic* (2019) eKLR, see also *DKL V Republic* (2019) (2019) eKLR.

²¹⁹ DMO (n 176 above).

²²⁰ *POO (A minor) v Director of Public Prosecutions another* (2017) eKLR.

witness statements. It is a requirement that for a child offender to fully participate in proceedings, they should adequately be supplied with witness statements.

To ensure that child victims participate during trial and to reduce fear, it is required that they do testify through various ways such as testifying through protected witness box, video link or through an intermediary.²²¹ This is enhanced by the presence of a guardian during the hearing of a case. It is recommended that the questioning technique should be friendly and should avoid using legal jargon during trial.²²²

3.2.3.6. Sentencing process

The child victim can participate by filing a victim impact statement that provides details on particulars of the harm suffered and the impact it has on their lives.²²³ The victim impact statement can recommend an appropriate sentence the victim feels should be meted on the accused. The victim impact statement can be filed through the legal representative or through the prosecutor.²²⁴

The court has a duty to inform the child offender in a language they understand of the verdict of trial. The court should not use language such as sentencing and conviction when dealing with a child offender.²²⁵ Further, for the court to arrive at an appropriate sentence, the probation and children officers have a duty to assist the court in recommending appropriate sentence by doing a background check on the child offender, which includes, social, cultural, economic circumstances and if he or she has a previous criminal record.²²⁶ It is noted that in many instances the children officers and probation officers do not seek to interview the child offender and hear their opinion, thus limiting their participation²²⁷

The court may deal with child offender by discharging the offender, placing them under care with counselling, ordering them to pay a fine, placing them under probation, sending them to rehabilitation schools if they are above 10 years and below 15 years and those above 16 years can

²²¹ Sexual Offences Act of 2006 Sec 31 (1)'; Witness Protection Act of 2014 Sec 4(1).

²²² Omondi (n 35 above).

²²³ Victim Protection Act of 2014 sec 9.

²²⁴ As above sec 12.

²²⁵ Children's Act sec 189.

²²⁶ Judiciary Kenya `Sentencing Policy Guidelines` <https://www.judiciary.go.ke/download/sentencing-policy-guidelines/> (accessed 1 September 2020).

²²⁷ As above, 45.

be sent to the borstal institutions.²²⁸ The court should not impose any death sentence or life imprisonment on the child offender.²²⁹ However, there is some instance where the court is misguided by some Acts that are restrictive on the type of sentences to impose.²³⁰

3.2.4. Rehabilitation centres and remand homes

Part V of the Children's Act provides for the establishment of rehabilitation centres and remand homes. The Act provides for separate remand and rehabilitation centres for boys and girls.²³¹ There are nine rehabilitation centres in Kenya, fourteen remand homes and three borstal institutions.²³² It is noted that the remand homes and rehabilitations centres cater for both child offenders and children in need of care and protection. Child offenders may not be rectified under the remand school centres. Reintegration back into the society for child offenders should use a different approach to ensure that child offenders fit back into the society. It is noted that the rehabilitation schools are very few and far from where the courts are situated which makes child offenders to travel long distance far from their homes which is not in their best interest.

The borstal institution has an aftercare committee that creates a platform for hearing the complaints on things like food, clothing and beddings by the incarcerated child.²³³ The child offenders in the borstal institutions are required to work unless the medical officer recommends otherwise.²³⁴ The right to information is explained to the child offender by an officer in a language they understand of the rules on disciplinary process and what they are entitled to in terms of remunerations to the work done at the institution.

3.3. Conclusion

A summary of this chapter is that Kenya has enacted laws, policies and guidelines that may be sufficient for the participation of child offenders and victims in the criminal justice system. The actors in the institutions in the criminal justice have an obligation to enforce and implement these laws according to their constitutional mandate. The Constitution guarantees child offenders,

²²⁸ Children's Act sec 191.

²²⁹ Children's Act sec 190.

²³⁰ *J K M v Republic* [2017] eKLR.

²³¹ Children's Act sec 48.

²³² C Okech 'The juvenile justice in Kenya: growth, system and structure' 164th International Training Course Visiting Experts' papers.

²³³ Borstal Institutions Act Cap 92 sec 21(1)(a).

²³⁴ As above sec 19.

procedural rights during trial such as to receive and access information, being held separately from adults, speedy trial and access to legal representation. Child participation is closely linked to best interest of the child in all matters affecting them.

There is substantial law to promote child participation, the challenge is the implementation process by the institutions of criminal justice and lack of child-friendly structures to ensure child participation. Some of the procedural rights such as the right to privacy, failure to investigate complaints of child victims, failure to give information are some of the issues that impede child participation.

The next chapter explores the challenges and opportunities for the participation of child offenders and victims in the criminal justice system.

CHAPTER 4

Challenges and Opportunities for Child Participation in the Criminal Justice System in Kenya

4.1. Introduction

This chapter analyses the gaps in the conceptual norms, legal framework and institutional challenges in enforcing the right to participation of child offenders and victims in the criminal justice system. The second part analyses good practices that can be adopted to ensure the right to participate can be enjoyed by the child offenders and victims as the right holders.

4.1.1. Conceptual and legal framework

Kenya has incorporated a monist system through the Constitution of Kenya 2010, and hence bound by international law.²³⁵ Prior to that the implementation of CRC at the national level was through domestication and enactment of the Children's Act of 2001.²³⁶ It was established in chapter three that the institutions of the criminal justice system in Kenya play a critical role in respecting, supporting and enforcing the rights of a child to participate and attaining the best interest of the child as the right holders.²³⁷ As far as the issue of determining the best interest of the child and theoretical approach on human rights on the participation of child offenders and child victims is concerned, it can be concluded that in practice, implementation of the legal framework is wanting.²³⁸ The legal framework on the concept of child participation may be reasonably sufficient, though there are significant challenges in its implementation and practice.

It emerged in the study, that the institutions in the criminal justice work on adult assumptions, thereby failing to understand a child's interests which lockout child participation eventually. The underlying adult culture in the criminal justice system leads to denial of access to justice and hence violation of the rights of child victims and offenders.²³⁹ As a result, the adults' interests, views and assumptions look over children's interests, hence usurping their voices.

²³⁵ Constitution (n 9 above).

²³⁶ Children's Act (n 12 above).

²³⁷ Flenton-Glynn (n 22 above).

²³⁸ Wasilczuk (n 49 above).

²³⁹ Lothar (n 31 above).

It is evident that the provision on child participation in the Children's Act has not clearly been expressed as it provides that child views be heard on only procedural matters and the opinion "may" be considered which is not mandatory as stipulated in the CRC.²⁴⁰ It is also arguable that the Children's Act has gaps relating to the rights of the child to participate as provided in the Constitution of Kenya 2010. There is a need for an amendment of the Children Act to be in line with the Constitution.²⁴¹

4.1.2. Implementation of the normative framework on procedural guarantees

One of the crucial challenges of child participation is delivering information to child offenders and victims when interacting with the criminal justice system. They usually have insufficient information and are rarely able to comprehend the legal procedures. It was established that child offenders who were arrested by police were not informed of their rights and reasons of arrest.²⁴² Issues such as police detaining a child offender for more than 24 hours before presenting them to court and laxity or refusing to investigate complaints by the child victims are some of the factors impeding access to justice.²⁴³

A further observation from the study relates to failure by the actors in the criminal justice system to deliver on their constitutional mandate. For instance, failure to supply witness statements by the prosecution,²⁴⁴ breach of privacy during arrest,²⁴⁵ and failure to adhere to procedural requirements such as the court's failure to read and interpreted charges to the child offender in a language they understand.²⁴⁶ This can be attributed to lack of adequate training on the procedures set out in the Criminal Procedure Code and Constitution and more specific on child participation. The laws and regulation must be preceded by training all actors in the criminal justice system.

In terms of implementing the law, procedures and policies by actors in the criminal justice system on child participation, it was established that the same is yet to be achieved while noting that even a simple thing like determination of age of child offenders before any charges has been a

²⁴⁰Children's Act sec 4.

²⁴¹ Committee on the Rights of the Child Concluding Observation on the combined third to fifth periodic reports of Kenya CRC /C /KEN/CO/3-5 para 7 <https://www2.ohchr.org> (accessed 30 September 2020).

²⁴² Transparency International Kenya (n 182 above).

²⁴³ C.K case (n 19 above).

²⁴⁴ POO Case (n220 above).

²⁴⁵ MKW case (n 181 above).

²⁴⁶ JSS case (n 202 above).

challenge.²⁴⁷ In some instances, the child offenders held in custody with adults than what the law prescribes.²⁴⁸ Erroneous sentences can only follow, leading to further violations of the laid down policies and laws meant to protect the child. It was established that in some instances, the children officer who assists the court in conducting a background check on the suitability of a child offender to serve a non-custodial sentence fails to seek the opinion of the child offender, which hinders their participation.²⁴⁹

As discussed in chapter 3, the Constitution of Kenya and the Children's Act envisages that children have a right to access justice through legal representation.²⁵⁰ Legal representation through an advocate at the state's expense is evident from the statutes, apparently not in practice as there are instances child offenders have gone through the criminal trial without legal representation.²⁵¹ Therefore, it is a denial of the child's rights since their participation in the complex court procedures or proceedings does not make any sense to the child offender. Notably, the procedure by the court to appoint an advocate takes much time. The process has to go through a court order for an advocate to be appointed to represent a child offender, which means that by the time the child offender appears in court before the trial begins, there are high chances they are not represented.²⁵²

4.1.3. Availability of child-friendly structures

The ICCPR, Constitution of Kenya and Children's Act, envisions child-friendly structures at the police stations, for example, should have a separate child holding facility. It emerged from the study that the same is yet to be fully implemented in some police stations as child offenders still continue to share cells with adults or are sometimes held in unfriendly facilities.²⁵³ This is attributed to some police stations have limited space to put up cell blocks and lack of enough finances from the government to put up child-friendly protection units. Decentralization of the

²⁴⁷Child offenders Rules (n 176 above).

²⁴⁸ PK (n218 above).

²⁴⁹Judiciary Kenya (n 226 above)45.

²⁵⁰ Constitution of Kenya art 50.

²⁵¹ MS (n211 above).

²⁵² Legal aid Act (n208 above)

²⁵³IPOA (n184 above).

juvenile department and protection of victim and witness unit at the ODPP is yet to be rolled out to the county offices to enhance child participation. These departments are in Nairobi offices.²⁵⁴

Although the CRC and the Children's Act envisions child-friendly courts, there exists a limitation on the number of child-friendly courts in Kenya. Consequently, most of the children matters are still being conducted in courts used by other court users. From the findings, it was observed that there are only two gazetted child-friendly courts in Kenya. The absence of specialised courts undermines the participation of child offenders and victims in court proceedings.²⁵⁵ The lack of structures like the protected witness box and the absence of televised testifying through video links have complicated implementing child participation processes in the justice system.

As highlighted in chapter three, there is a lack of sufficient rehabilitation centers, remand homes and borstal institutions for placing sentenced child offenders. There are only three borstal institutions in Kenya, Shimo la Tewa, Shikusa Borstal and Kamiti Youth Corrective Centre and are geographical distance from the courts.²⁵⁶ As such, children already sentenced end up losing access to family members and away from their homes. It was further established that designated rescue centers put in place had been converted to remand homes resulting in a mix up for both children in need of care and already sentenced child offenders. It is argued that a child offender has limited right to influence on the choice of the institution they wish to serve their sentence.

4.2. Opportunities and good practices for child participation in criminal justice

4.2.1. Legislative framework

It was established there is a proposed Children's Bill of 2018, which addresses the gaps in the Children's Act and has elaborate provisions on the rights of the child to participate in matters involving them. The Children Bill of 2018 has been receiving amendments, and as such, it has not yet been passed into law.²⁵⁷

A Shift from adult culture perception is needed to include children and their abilities to form an opinion and be given space to express their views. Child participation can be enforceable with the enacting of policies and laws. The Children's Bill 2018 provides guidelines and legal framework

²⁵⁴ ODPP (n188 above).

²⁵⁵NCAJ (n199 above).

²⁵⁶ Okech (n 232 above)15.

²⁵⁷Children's Bill (n 156 above)

on child participation in the justice system adoption of the same into law shall be a step forward in regulating child participation.

4.2.2. Innovative technology

The judiciary transformation framework 2012-2016 establishes modes of access to justice by introducing information and communication technology (ICT).²⁵⁸ If implemented well, it would reduce the need for a physical appearance in court while strengthening the introduction of mobile courts to process matters for child offenders and victims in marginalized areas who often have to travel long to search for justice. The introduction of virtual courtrooms during the COVID 19 pandemic should be adopted as opposed to open courtroom when dealing with child offenders and victims.²⁵⁹ The implementation of the use of video conference links can be used to avoid multiple interviews, which would help avoid confrontation with an alleged perpetrator. It is a recommendable approach that can contribute to enhanced child participation.

The introduction of case management systems to manage cases is a step in tracking down cases. Recently a digital occurrence book has been launched and is in the pilot stage, which is a step in getting statistics of child victims and child offender who come into first contact with the police.²⁶⁰ The ODPP and the judiciary have launched digital case management systems which help in tracking cases of child offenders and victims in the justice system.²⁶¹ With the advent of this technology, it is easier to monitor cases of child offenders and victims in criminal justice.

4.2.3. Specialised training

States are bound by international law to create child-friendly procedures by training all officers in the criminal justice system. This actualization has however, not taken place as courts do not understand what it means to have child-friendly procedures when handling child offenders and victims. Training on the requisite child-friendly procedures and child participation creates awareness to the actors in criminal justice, and as a result, the child offenders and victims are

²⁵⁸ Judiciary Kenya `Judiciary Transformation Framework(JTF)2012-2016`

<https://www.judiciary.go.ke/download/judiciary-transformation-framework/> (accessed 1 October 2020).

²⁵⁹ NCAJ `Judiciary to upscale justice delivery through increased use of technology; delay resumption of open court activities` <https://www.ncaj.go.ke> (accessed 1 October 2020).

²⁶⁰ C Ombati `The huge book is gone; National Police Service launches digital OB` C Ombati `The huge book is gone; National Police Service launches digital OB` <https://www.standardmedia.co.ke>(accessed 1 October 2020).

²⁶¹ D Kipsiogok `CJ Maraga, DPP Haji launch digital case management systems` (2020) <https://www.standardmedia.co.ke> (accessed 1 October 2020).

bound to benefit. Apart from the judicial officers who require training, the police, the prosecutors, lawyers, children officers, the after-care service providers and other actors who come into contact with the child offenders and victims should receive child interest's sensitization to actualise the rights of child. The children involved in the criminal justice system should be sensitised on the child participation guidelines too. A curriculum on child-friendly practices such as informing the child offender and victim on their procedural rights to participation would be an effective way of training the actors on evaluated child rights programmes.

4.2.4. Institutional reforms

States should endeavour to establish specialised children's courts that accommodate child-friendly practices as stipulated in the law. In the absence of specialised courts, normal courts should adopt and implement special procedures for child offenders and victims. Allocation of enough resources to institutions like the police will enable them to build facilities such as having separate cells from adults that are child friendly. Although child-friendly courts have been established by legislation, judicial officers can be creative in using normal courts to hear children matters in camera as the judiciary implement the process of putting in place proper court structures that are child friendly.

States should progressively ensure that there is sufficient legal representation that is child right-oriented.²⁶² The legal representatives should adequately provide all necessary information and guidance to child offenders and victims in the criminal justice system to participate in the proceedings. Importance is setting up agencies and programmes to ensure that legal aid is accessible and other assistance for the child offenders and victims in the criminal justice system. The service should be free of charge to ensure that child offenders and victims have access to such support right from the time of arrest, detention and through court procedures.²⁶³

The introduction of NCAJ, a statutory organ established by law has created a collaboration with all the agencies in the criminal justice system who deliberate on the issues affecting the justice system in Kenya. It has various committees and of significance is a special task force on children matters and through its report it has recommended formulation of rules, policies and regulations to enable child participation in the justice system.²⁶⁴ They have further created court users'

²⁶² Children's Bill 2018 sec226(4).

²⁶³ As above sec 226(2).

²⁶⁴ NCAJ (n 199 above).

committees at county levels and children court committees to discuss challenges affecting children in the justice system and propose ways that are in the best interest of the child. The NCAJ, through its annual reports, can establish the gaps and opportunities in implementing child participation.

Adopting and promoting diversion by the ODPP, as discussed in chapter 3 where children can be diverted from the formal court procedures to other alternatives and procedures such as warnings, counselling as well as restorative justice, can go a long way in creating avenues for child participation. Where necessary, a child offender can talk with the victim and come to an agreement as well as child victim engaging the perpetrator of the crime to create a healing process for example or create an environment of forgiveness and restoration of humane emotions. Diversion gives an opportunity for the child offender and victim to participate before a decision is made.²⁶⁵

4.2.5. Potential use of the informal justice system

The informal justice systems (IJS) has been in existence before the formal courts were introduced during the colonial period. In the informal justice systems, disputes were resolved through various setups for example, the traditional justice system resolved matters before it, and all parties were satisfied with the process.²⁶⁶ The only challenge highlighted is that the focus has been on the formal system, and there is no much information on the informal system. The Constitution of Kenya provides for the adoption of alternative disputes resolution to access justice other than the courts. The adoption of the informal system will be relatively more friendly to the child offender and victim as issues such as the language used will be familiar, there will be no detention, accessibility is within the community and focus is on restoration.²⁶⁷

4.2.6 Commendable practices from other jurisdictions

Policies have been put in place to ensure non-custodial sentences of child offenders in Uganda. The non-custodial sentencing of child offenders is a commendable practice; instead of sending child offenders to remand homes, they are handed a non-custodial sentence. Some are sent to charitable homes and vocational training centres. This protects the best interest of a child from

²⁶⁵Children's Bill 2018 sec 228 &230.

²⁶⁶The African Child Policy Forum `Spotlighting the invisible on child justice in Africa`
<https://www.childjusticeinafrica>(accessed 20 October 2020).

²⁶⁷ The African Child Policy Forum (n 266 above).

being in custody and them to be accommodated in a child-friendly environment where they can access education.²⁶⁸

Policies and laws can be enacted to create a ‘one stop shop’ to ensure provision of services such as medical care, social services and legal services are offered under one roof. The purpose of ‘one stop shop’ is to help child victims receive treatment, access medical facilities, access counseling services, and facilities that allow effective investigation and prosecution of the matters and preservation of evidence. An example of such a system was introduced in Malawi.²⁶⁹ In a one stop shop it minimizes the trauma and vulnerability of the child victim and it supports the child as they to go through the justice system.

The use of strategic litigation can address the gaps in the available legal framework on child participation. This can be done at the national level or regional level with the assistance of the civil society organisations or interested groups on the rights of the child victims and offenders to participate, access justice, and ensure enforceability and justiciability of the rights of the child using strategic litigation. Through strategic litigation, the civil society organisations shall effectively support rights of the child to participate and thereby creating jurisprudence and precedents in addressing systematic issues affecting them in terms of participation in the justice system.²⁷⁰

4.3. Conclusion

This chapter analyses the findings of the study on Kenya’s obligation under international law, conceptualisation and implementation aspect of child participation in criminal justice system. It is arguable that there may be sufficient legal framework to enable child victims and offenders to participate in the justice system, disparity is in the implementation process by the actors of criminal justice as established in chapter three. There are still procedural challenges at the institutions of the criminal justice to ensure child participation such as having separate institutions for holding child offenders, failure to adhere to procedural rights of child participation, lack of child friendly courts and environment.

²⁶⁸ As above.

²⁶⁹ Y Mulambia; et al `Are one-stop centres an appropriate model to deliver services to sexually abused children in urban Malawi?` (2018) BMC Paediatric.

²⁷⁰ S Niekerk `Imagining Children Constitutionally Strategic Litigation and Advocacy for Children’s Rights in South Africa` (2019) *De Jure Law Journal* 496.

Good practices that can enable realisation of rights to participation of child offenders and victims include specialised training to all the actors in criminal justice, enactment of Children's Bill 2018 which has a framework on child participation as provided for in the CRC and ACRWC, collaboration of the institutions of the criminal justice with creation of NCAJ, use of technology, diversion, adopting informal justice systems and the use of strategic litigation can enhance child participation.

The next chapter will be the conclusion of the study.

CHAPTER 5

Conclusion

5.1. Introduction

This chapter summarises the analysis and conclusions made in the previous chapters addressing the three research questions guiding the study. These are: how adequate is the legal framework in enabling participation of child offenders and victims in criminal justice system in Kenya? What extent does criminal justice system implement the participation of child offenders and victims in Kenya? and what are the shortcomings undermining participation of child offenders and victims in criminal justice and how can they be addressed? This chapter gives a synopsis of the study's main finding on participation of child offenders and victims in the criminal justice system, where a brief summary of each had been done at the conclusion of each chapter. The study has established that despite ratification and domestication of the laws and policies that guarantee participation of child offenders and victims in the criminal justice system, the challenge is the institutions' implementation process.

5.2. Summary of findings

The study was able to establish through analysis of the international and regional instruments and national legislation that there is sufficient legal framework on participation of child offenders and victims in criminal justice system. States have obligations to ensure the child offenders and victims in criminal justice can access justice and participate through access to information, right to legal representation and the creation of a child-friendly environment. Further, hear the child's views regardless of age and involve them in decisions, processes, programmes and policies in all matters affecting them.

It can be concluded that the Constitution of Kenya and Children's Act, does not specifically provide for child participation but there may be sufficient provisions to guarantee procedural rights to enable them to participate such as right to give the child offenders and victims information, detention being last measure, right to legal representation, separate holding facilities at remand homes and at the police stations and the right of the child victim to testify using intermediaries. The Children's Bill of 2018 defines and proposes modalities of participation of child offenders and victims in the criminal justice system. The study concludes that there is a problem within the

criminal justice system in Kenya on effecting the implementation of the laws and policies on participation of child offenders and victims during pre-trial, trial and post-trial. It has been established that the actors of the institutions of criminal justice contribute to this challenge. Understanding what constitutes an effective child participation has impacted the involvement of child offenders and victims in the criminal justice system.

Furthermore, this study also deduced that the child offenders and victims in the criminal justice system face various challenges thus limiting their participation from giving confidential information. This is attributed to lack of enough structures such as child friendly desks, and holding facilities at the police stations, limited child friendly courts, lack of the requisite information for participation, limited access to legal representation, access to justice to the child victims and failure by the actors of the criminal justice to comply with the laws and policies to ensure that this right is fulfilled and respected.

To fully realise the objectives of participation of child offenders and victims in criminal justice in Kenya, all process highlighted in the legal framework laws and policies need to be addressed. This is by conducting specialised training for the actors in criminal justice. The allocation of sufficient resources by the government for the criminal justice institution can sufficiently have child-friendly structures, sensitisation on a legal aid program and right to information should be adequately available.

The introduction of information technology shall digitalise the processing of information in the institutions of justice systems such as having digital records at the police station, at ODPP and in the courts. The introduction of virtual court system during the coronavirus pandemic is a development to ensure that the child victim can testify without physical intimidation of the accused.

Collaboration of the actors in the criminal justice system through the creation of NCAJ can address the gaps in the implementation of child participation. Further, other jurisdictions have adopted ‘one-stop shops’ to create a child-friendly environment for child victims, use strategic litigation to promote the rights of the child, and use non-custodial sentences to promote child participation in criminal justice in Kenya. The use of the IJS creates an effective system for child offenders and victims to have a voice to access justice in a child-friendly environment that is efficient and promotes restoration.

5.3. Recommendation

This study recommends that though Kenya has made significant strides in enacting legislation and policies that may be sufficient to effectively realise the participation of child offenders and victims in the criminal justice system, there is still more to be done. Further research on modes of monitoring and accountability mechanisms in criminal justice institutions is needed to ensure the safeguarding and implementation of child offenders and victims' participation in the criminal justice system.

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