



Identify Children's Rights in the Juvenile Justice System

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Abstract

The study's objective was to identify children's rights in Juvenile Justice System. The research has been done on the assumption that there are gaps in juvenile laws. The study was based on a desktop research method where both primary and secondary sources of information were utilised. Children in conflict with the law are protected under various legislations both domestically, regionally and internationally, which provides for their rights within the administration of justice. However, Kenya's legal framework has not adequately protected juveniles who come into contact with the law as is a requirement. In conclusion, the study has discovered that laws enacted have gaps, and thus this forms the main reason behind the violation of children's rights within the justice system; if this is not addressed in time, children in conflict with the Law will continue to suffer in several ways. The judicial Service Commission should develop clear guidelines for the courts on how children in conflict with the Law should be handled. There should also be specially trained Legal officers responsible for hearing and determining children's cases. Law Society of Kenya should encourage Advocates and Activists to represent children who are unable to cater for legal fees on a pro bono basis. This should be a requirement for renewals of practising licenses.

Key terms: Children's rights, juvenile justice system.

1.0 INTRODUCTION

Protecting and promoting children well-being is a collective responsibility that ensures both state and non-state actors come together to address challenges facing children within the juvenile justice system. Internationally, human rights development has been a concern to states and governments after the atrocities committed by the Nazis in Germany. The Nazis advocated killing children of groups as part of the racial struggle or as a preventative security measure. The Germans and their collaborators murdered children for these ideological reasons and in retaliation for real or alleged partisan attacks (Laqueur 2001). A number of international instruments provide children right, notably the Declaration of the Rights of the child in 1959, which found its origin when the League of Nations adopted the Geneva Declaration in 1927. Other instruments include the CRC, Beijing Rules, and Riyadh Guidelines. The African continent consists of the majority of developing countries. Some of these countries also have challenges with their laws, and as countries develop, laws are also not left behind. Regionally, the ARWC is the main instrument that provides for children's rights and protection. A set of non-binding international laws came into effect before the enactment of the CRC. These Rules and Guidelines guided States on how they should develop their respective juvenile justice in the administration of justice. CRC and ACRWC are the two main instruments that provide for the protection of children's rights. Kenya, being a dualistic state, ratified and domesticated both the CRC and ACRWC by enacting the Children's Act 2001, which has been the most significant law in Kenya on children's rights both within and outside the administration of justice.

Despite the ratification of international laws and enacting some of the best Laws, including the Constitution and the children's Act, Kenya's Legal framework has not satisfactorily protected juveniles in contact and conflict with the law. Children's rights have only been strengthened and promoted in other areas, including healthcare and education but have been neglected when it involves access to justice. As a result, children face some of the most inhumane treatments in police lock-up facilities, courts and, at times, correction centres. Promoting social justice regarding juvenile delinquents is the duty of everyone who interacts with children in different spheres. Juveniles in Kenya face serious concerns, as is reflected in her Juvenile Justice system. There's a lack of resources to ensure the upholding of juvenile offenders' rights, considering their needs. Children in conflict with the law face physical, mental and sexual abuse, disregard of legal assistance, physical and sexual violence, arbitrary detention, bail denial, intimidation, especially during examination by the prosecution, police interrogation in the absence of parents or guardian, a degrading condition in remand and rehabilitation centres et cetera.

There is a lacuna in Law in the manner children within the juvenile justice system are handled. The challenges are thus twofold; inadequate Laws protecting children in conflict with the Law and the manner in which these Laws are implemented. In *MWK and Cradle v AG and 4 others*, this was a constitutional petition in which the petitioner, a student, alleged violation of her constitutional rights not to be subjected to a violation of her rights upon arrest, inhuman treatment, and a violation of her right to privacy. The facts of the petition were that on 5 August 2015, police along Karatina - Nairobi road, acting on news from the public of a vehicle carrying students who were alleged to be intoxicated. Upon entering the vehicle, police noted used cannabis on the floor, and a search on the petition revealed hidden cannabis in her undergarments. As a result, she was detained, arraigned in court, pleaded guilty and was convicted and sentenced to probation service.

What drew the attention of the public was the circulation of her nudes in social media and thus questions; what was the conduct of the police during the search, whether the search was conducted in accordance

with the law and whether her rights to dignity, not to be subjected to degrading treatment were also infringed on. The court relied on International instruments ratified by Kenya together with local laws in its decision. The court found that the search by the police on the petitioner was done in a degrading manner and in presence of other respondents and thus made her suffer a physiological disorder, thus a violation of Articles 38 and 53 of the Constitution. Therefore, this study sought to identify children's rights in Juvenile Justice System.

2.0 LITERATURE REVIEW

Sigmund Freud's Psychodynamic theory posits that human personality is controlled by unconscious mental process developed early in their childhood. According to Sigmund, violations of laws are the product of abnormal personality structure formed early in life and which controls human behaviour thereafter. According to him, human personality consists of Three components; The *Id*, which dictates what a human wants and desires in life, *Ego* which evaluates reality and *the superego*, which counteracts the *Id* by fostering human feelings of what morality holds. In his arguments that have been developed further by others, when the three operate simultaneously, youths would experience unconscious feelings associated with fear, confusion and hatred. Children might regress if these fears cannot be reconciled, resulting in criminal behaviour.

Black's Law dictionary will facilitate the examination of this study regarding the definition of terms. An analysis of the Juvenile justice system has been done by Siegel and Welsh (2009). The authors present various theories and views on delinquency. The book explains the individual view of delinquency, social structure, and process culture. The authors also analyzed community and environmental influences on delinquency. It has examined past and present juvenile justice, police with juveniles, juvenile courts and juvenile corrections, all of which are part of this study. Critical factors believed to cause delinquency are Interpersonal interactions, community conditions, exposure to violence, social change, low socioeconomic status etc.

Parens patriae is evaluated as a norm where the authority of a state acts as a parent or guardian of a child to offer protection to them from neglect by their parents. Child savers believed that treating a child and adults the same violated the humanitarian ideals of society (Siegel & Welsh, 2011). For many years, children were deprived of their due process rights because *the parens patriae* doctrine governed their relationship to the juvenile trial. The re-Gault decision brought an impact on the juvenile justice system as far as due process is concerned.

3.0 RESULTS AND DISCUSSIONS

Legal Framework on the Juvenile Justice

Human rights are entitlements that human beings have by virtue of them being human beings. These rights protect the duty holders from derogations and limitations of their rights by the duty bearer. Human rights can be enforced when there is a duty bearer, and the state is the main duty bearer of human rights and thus is obliged to ensure that such rights are not threatened, infringed, violated or even derogated. The State should ensure, among other things, that;

- i. It has refrained from interfering, threatening to interfere either directly or indirectly with the enjoyment of juvenile rights. The state, through its actors, including the police, should not arrest juveniles without following laid down procedures in-laws.
- ii. It prevents others from interfering with the enjoyment of children's rights.
- iii. Educating right holders on their rights and the enforcement of these rights. Educating juveniles on their rights empowers them on their rights during arrest and at trial as provided for in the constitution. The state can, for example, empower arrested juveniles on their right to bail.
- iv. Provision of assistance in the achievement of juvenile rights by ensuring that juveniles are offered legal representation in courts at the state's expense.

Historical Background of Children's Rights Protection

Protection of juveniles can be traced back to the 20th century in England when specialised procedures for handling youthful offenders were recorded as early as the 1820s when magistrates of Warwickshire quarter sessions adopted the practice of sentencing youthful criminals to prison terms of one day and releasing them under the supervision of their parents (Kelinger et al., 1976). Events in England greatly impacted the reformation of the juvenile justice system protection. During the Puritan period reform (1646- 1824), children were inherently considered sinful and were punished. Hess et al. (2012) states that the refuge period between 1824 and 1899 saw the creation of separate institutions for children offenders, including houses of refuge, reform schools and foster homes.

By the mid-19th century, more reform schools were developed to provide discipline in a home-like set-up, as it underscored in education programs. Child savers came in, and there were many reforms, including the establishment of the child-saver movement. These reformers held a view that children should not be tried like adults in adult courts. They also believed that society owed more to children. Therefore, child savers put forth a thought that children's contact with the juvenile justice system should not be a process of arrest but rather a determination of an issue in the juvenile justice on how children should be dealt with, taking into account the best interest of the child to save them from waste lives. In the year 1889, the first juvenile court was established in Illinois, USA. Prior to the establishment of juvenile courts, children were tried in adult courts, together with adult offenders.

Juvenile Justice in the International Arena

This section looks into how various international instruments provide a framework for children's rights. These instruments have been ratified by virtue of Article 2 of the Constitution of Kenya (2010). Human rights, specifically children's rights, developed significantly when children's rights were first recognised internationally. However, children's rights were not given attention until 1989, when the UNCRC was drafted. The first instrument to provide children rights was the Geneva Declaration on the Rights of the Child, which the League of Nations adopted in 1924. However, its implementation failed because the organization was weak. UNCRC was adopted in 1989 and in came into operation in 1990. All these international laws ratified by Kenya form part of national laws.

The United Nations Convention on the Child Rights of the Child - UNCRC (1989)

In 1990, the UNCRC came into operation. The Convention has been one of the most significant and well-detailed pieces of legislation on juvenile rights. Kenya ratified the Convention in 1990, and as of July 2022, a total of one hundred and ninety-six countries had ratified the Convention. Article 1 of the Convention

defines a child as a person below the age of 18 years (United Nations Convention on Rights of the Child (UNCRC), 1989).

Article 3 provides that all actions concerning the rights of the child shall be taken in accordance with the best interest. However, according to Mahlobogwane (2005), a Law lecturer at the University of South Africa, when dealing with a child, Courts and children Institutions have, in many instances, considered different issues when determining what constitutes best interest of a child.

- i. Which interest is at issue?
- ii. Is it made based on short-term, medium-term or long-term perspectives?
- iii. Are the criteria used for determining such interest objective, or are they made on the basis of the child's subjective wishes?

The Convention in Article 37 provides that a child shall not be arbitrarily deprived of his or her freedom except as a measure of last resort, and this should be done within the shortest appropriate time possible when detained; they should be treated with dignity and should be granted access to legal assistance. Children should not be subjected to inhuman treatment, corporal punishment or torture. Article 2 provides for the non-discrimination of the child. Article 13 provides for freedom of thought, conscience and religion. Article 40(2) provides for a presumption of innocence, the right not to be compelled to confess and the right to have the matter determined expeditiously before a competent, independent and impartial authority. Article 8 provides for child protection of his or her trial and periodic review of children's institution where they are placed. The juvenile justice system ought to form a circle around all these rights in the Convention to ensure capacity and status of children are maintained.

The United Nations Guidelines for Prevention of Juveniles Delinquency - Riyadh Guidelines (1990)

In 1990, United Nations General Assembly adopted the Guidelines, a year after UNCRC came into force. They make provisions on measures necessary to prevent children from committing crimes. The effect of the Guidelines is that it is a soft law instrument and thus non-binding for international and national children's institutions. Grandjean (1988), in her journal, argues that however much the guidelines are not directly binding, they are, as is the case, indirectly binding.

Riyadh (1990) Guidelines has a general principle, which provides that children should be prevented from criminal acts by ensuring that their minds are engaged in lawful activities. Article 7 provides for the interpretation and implementation of guidelines within a broad framework of other human rights instruments like the Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR), which are three binding instruments. The Guidelines provide that law enforcement and other relevant personnel should undergo training to respond to the needs of the juvenile and should have familiarity aspect in respect to the use, to the maximum extent possible, programs, for the diversion of children from the juvenile justice system. Article 54 prohibits children from being put through harsh correction measures in children's institutions.

The United Nations Standards Minimum Rules for the Administration of Juvenile Justice -The Beijing Rules (1985)

The United Nations General Assembly employed these Rules in 1985. The Rules have extensively provided for juvenile rights protection at the international level in the manner in which the rules have been broadly laid down on how a juvenile justice system should operate. However, the rules are soft law non-binding in nature and thus only give guidance to States on how they should develop their Juvenile justice system.

Beijing Rules underscores the issue of the administration of justice for children who come into conflict with penal laws. Rule 2 emphasizes that a juvenile is a young person and should be dealt with for an offence committed in a manner different from an adult. Moreover, efforts should be made to meet the varying needs of the child offenders while protecting their basic rights, including their right to education, adequate health, et cetera.

Rule 4 provides for the criminal responsibility age of the child. A country's legal system should not fix this age too low. Age determination analysis should be done based on the environment and culture a child is brought up in. Rule 6 supports accountability in matters of juvenile offenders, including appeals and reviews. Rule 7 lays out juvenile rights, which include a child being presumed innocent until the contrary is proven, the right of an appeal to a higher competent tribunal for revision of a decision given in children's court, right to have a guardian present. These rights ensure that due process of law is followed in courts. Rule 8 provides juvenile protection of privacy rights. Rule 11 lays out diversion measures which agencies should take to ensure that trial is not the first stop when a young person is apprehended but redirects them to community support services. Rule 12 provides on how police should deal with a juvenile. They should treat them as a child, a person in need of care and protection, and not as a mature individual who can account for their acts.

The African Charter on the Child Rights and Welfare - ACRWC (1990)

This Charter was adopted in 1990 by the then Organization of African Union (OAU). The instrument recognises that a child occupies a unique and privileged position in African society and that for the full and harmonious development of his personality, the child should grow up in a family set up in an atmosphere of love and understanding. Article 1 obligates state parties to take measures in the realization of the rights of juveniles. Furthermore, states should recognise juvenile rights in their respective legal systems. Article 4 provides the best interest principle should be taken into account in all matters a child is involved in. Article 16 provides for the right against abuse and torture of a juvenile while in rehabilitation centres and other places where the administration of justice takes place. Article 17 deals with the administration and justice of juveniles. These include a right to be presumed innocent before the law when accused of any offence, and only a court of the competent authority may hold a child guilty.

United Nations Regulation for the Protection of Juveniles Deprived of their Liberty - Havana Rules (1990)

In 1990, the United Nations General Assembly adopted the Rules, which are commonly referred to as the *Havana Rules*. The Havana rules is another soft law non-binding instrument laying down fundamental perspectives upholding the rights and promotion of juveniles' physical and mental well-being. The Rules provide that imprisonment should be used as a measure of last resort when dealing with a child. Rule 31 makes provision for the right to facilities and services for juveniles. These facilities should, however, meet

all the necessary health and human dignity requirements. This, therefore, means that toilet facilities, washrooms and dormitories for these children denied liberty should be maintained in well and conducive humanitarian conditions. Rule 38 stipulates that every juvenile of school-going age has the right to education which should be suited to their needs. Sanitary installations should be located and should be of sufficient standards to enable every juvenile held to comply as required, with their needs in privacy and in a decent manner (United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990). . Other Laws that cover children's rights are the Tokyo Rules 1990; which is a soft Law non-binding in nature, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), Guidelines for the Juveniles Treatment within Juvenile Justice, i.e. the *Vienna Guidelines* (1997) et cetera.

Kenya's Legal Framework on the Juvenile Justice

When it comes to juvenile protection laws, Kenya has not been left behind. Children's rights are provided for in the Constitution of Kenya 2010 and the children's Act 2022, among others.

The Constitution of Kenya 2010

In 2010, Kenya witnessed a progressive new document coming into force, which has been at the forefront of enhancing and promoting democracy and the rule of law. The constitution has achieved national, regional and international recognition in the manner it has provided for and protected human rights. The Constitution of Kenya is the *Grundnorm* from which all other norms, including the Children's Act, derive their legitimacy (Kelsen, 1967).

Article 49 provides for the Right of accused person the right to a fair hearing in Article 50 and particularly 50(h), which provides for the right to legal representation right to have the case heard expeditiously without unnecessary delay as provided for in Rule 12 of the Child Offenders Rules. Article 53 of the particularly 53(f) Constitution of Kenya (2010), which provides that every child has the right not to be detained, except as a measure of the last resort, and when detained, to be held for the shortest appropriate period of time and separate from adults taking into account the child's age and sex. Article 47 provides for Fair Administrative Action, which shall be expeditious, efficient, lawful, reasonable and procedurally fair. These three provisions, among others in the constitution, should be taken into account by institutions and personnel, including the police who interact with child offenders.

Children Act 2022

Twenty-one years after coming into force of the now obsolete Children Act no. 8 of 2001, on 6 July 2022, President Kenyatta signed into law the Children Act 2022. The new law was enacted following several gaps in the Children Act 2001. It makes provision for the Diversion of children offenders away from the court process. The Act raises the age of criminal accountability from 8 to 12 years and makes it obligatory for children in conflict with the law to have legal aid. Thirdly, section 242 of the Act provides a special police protection unit for arresting child offenders, preventing and controlling child offences, and investigating child matters. Finally, county Governments have been mandated to establish child welfare schemes and care facilities.

Methods of dealing with children in conflict with the law are provided for in section 239. In a situation where a magistrate responsible for hearing and determining a child case is satisfied that the minor is guilty of an act or omission, the court has discretion on how it may deal with the offender. For example, the court

may discharge the child, send the child to a rehabilitation institution, order for payment of fines, order the child to community service, make a supervision order, make an order for diversion, order of restorative justice or direct the child to be placed in a probation centre. Moreover, the Act prohibits the use of sentencing and detention terms of child offenders in a children's court. Kenya's Legal framework on children's rights does not offer adequate protection to children who are in conflict with the Law within the juvenile justice system. The repealed Children Act 2001 contained some anomalies in matters of children's protection.

4.0 CONCLUSION

In conclusion, the study has discovered that laws enacted have gaps, and thus, this forms the main reason behind the violation of children's rights within the justice system. If this is not addressed in time, children in conflict with the Law will continue to suffer in several ways. Judicial Service Commission should develop clear guidelines for the courts on how children in conflict with the Law should be handled. There should also be specially trained Legal officers responsible for hearing and determining children's cases. In addition, the Law Society of Kenya should encourage Advocates and Activists to represent children who are unable to cater for legal fees on a pro bono basis. This should be a requirement for renewals of practising licenses.

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