

**THE PROTECTION OF RIGHTS OF JUVENILES IN  
THE CRIMINAL JUSTICE SYSTEM IN KENYA**

**BY**

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## DECLARATION

I, MUTHONI VIOLA WAKUTHII hereby declare that this dissertation is original and has neither been submitted nor is being currently submitted for a degree in any other university, college or educational institution for the purpose of meeting any academic requirement. I also declare that secondary information has been used in this dissertation.

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## **DEDICATION**

To my mother, for her inspiration and relentless support.

To my only sister, a source of joy in my life.

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*Almighty God*, The giver of life, intelligence and resource.

*Supervisor*, Correcting my mistakes and eliminating my ignorance.

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The Kenya Constitution

The Children's Act Cap 8

Universal Declaration of Human Rights

United Nations Convention on the Rights of the Child

United Nations Rules for the protection of Juveniles Deprived of Their Liberty

African Charter on the Rights and Welfare of the Child

United Nations Guidelines for the Prevention of Juvenile Delinquency

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

## **ABSTRACT**

The objective of this research is mainly to expose current abuses of the rights of juvenile offenders in order to ensure conformity with international treaties and conventions. Having recognized that there are efforts towards achieving the protection of the rights of juvenile offenders, it was discovered that much still needed to be done. The methodology used is library research, achieved through the analysis of books, reports and newspaper/magazine articles. Data was also sourced from the internet.

The findings of this research were that abuses of the rights of juvenile offenders include beatings during arrest, torture during questioning of the offenders to extract a confession. Other abuses are that the children are often remanded together with adults, thus exposing them to hardened criminals and to other forms of physical, emotional and sexual abuse by the older criminals. Many of the children are tried in adult courts since their ages are rarely ascertained at arrest to ensure that they are tried in children courts. Violations of the rights of juvenile offenders also include arbitrary detention, denial of bail, disregard of legal assistance and intimidation. The ideal situation of having the juveniles' parents present during their questioning is more often than not disregarded. The children are often detained for unnecessarily long periods under dehumanizing conditions, which include poor feeding, lack of medical care, poor sanitation and bedding, not being allowed to bathe or play and being infested with insects.

This research recommended several measures to uphold the rights of juvenile offenders within the criminal justice system. These include the training of law enforcement personnel and other stakeholders in the system in dealing with juvenile cases. Further it has been proposed that there be prohibition of the use of brutal force during arrest by police and prosecution of crimes so-related so as to challenge the culture of impunity. Other recommendations include that there should be established child protection units in police stations and placement of trained child protection officers at police stations. There is need to ensure that children are diverted from police stations and courts since the focus is more on rehabilitative rather than retributive justice. Detention

should be for the shortest time possible and the law should impose certain limits on the periods of detention and ensure that remand homes are only a temporary measure.

Other recommendations include that children should not be mixed with adults both in remand and committal. There should be prohibition of physical and sexual abuse of the children by older inmates and staff. This can be done by having strict measures to deal with cases of abuse. Conditions in remand homes should be improved, for instance overcrowding. It was discovered that the poor conditions in remand centers often lead the children to plead guilty so as to avoid being taken back there. It has also been noted that there is need to establish more juvenile courts around the country and to train more magistrates to specifically handle juvenile cases. There should be systematic and diligent efforts to establish the ages of young persons appearing before court so that juveniles' cases are heard in the juvenile courts. Cases of children in need of care and protection should be distinguished from criminal cases and free legal assistance provided for those accused of crimes.

## **ABBREVIATIONS**

UDHR- United Nations Declaration for Human Rights  
UNCRC- United Nations Convention on the Rights of the Child  
ACRWC- African Charter on the Rights and Welfare of the Child  
CRADLE- Child  
NAP- National Action Plan for Refugees  
UNICEF- United Nations Children's Fund  
OFFLECK-Oscar Foundation of Kenya  
ICCPR- International Convention on Civil and Political Rights  
ICESCR- International Convention on Economic, Social and Cultural Rights  
NGO-Non- Governmental Organizations  
CLEAR-Christian Legal Education, Aid and Research  
IJM- International Justice Mission  
CLAN- Children Legal Action Network  
LRF- Legal Resources Foundation Trust  
JJN-Juvenile Justice Network  
ANPPCAN- African network for the Prevention and Protection against  
Child Abuse and Neglect  
H.R.W- Human Rights Watch  
C.S.C-Consortium for Street Children  
SOS- Save the Children  
NAP- National Action Plan for Human Rights

# **CHAPTER I**

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## 1.0 INTRODUCTION

A juvenile is a person who has not reached the age (usually 18) at which one should be treated as an adult by the criminal justice system.<sup>1</sup> Juvenile delinquency refers to antisocial behavior by a minor especially which would be criminally punishable if the actor were an adult but is usually punished by special laws pertaining only to minors.<sup>2</sup>

Children are the most vulnerable members of our society<sup>3</sup> and their well-being is a measure of the success of any society in ensuring a fair and healthy populace. Children are the focus of this research due to their being: the cornerstone for the survival of the human race, reservoirs of intelligence, databanks of future world leaders and fountains of joy and knowledge.

More often than not, children are usually forced into crime by social factors such as poverty and lack of education.<sup>4</sup> They are sometimes used by adults to perform illegal acts due to their reduced ability to resist adult compulsion, inability to assess the consequence of their actions and their dependence on adults.<sup>5</sup> Child offenders should therefore be treated with special care, with the goal of rehabilitation rather than punishment. It is in this regard that the rights of children are reviewed in this paper and their enforcement mechanisms analyzed, particularly rights of child offenders in Kenya.

Many domestic laws and international treaties laws have been put into place to ensure protection of the children in conflict with the law for instance; *Convention on the Rights of the Child*, *United Nations Guidelines for Prevention of Juvenile Delinquency*, *United Nations Minimum Rules for Administration of Juvenile Justice*, *African Charter on Rights and Welfare of the Child* and the *United Nations Rules for Protection of Juveniles Deprived of Their Liberty* among others.

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<sup>1</sup> Black's Law Dictionary

<sup>2</sup> *ibid*

<sup>3</sup> Uganda Human Rights Commission's Quarterly Review (1999)

<sup>4</sup> Referred to as status offenders as discussed in the Regional Pro bono Conference on Juvenile Justice held in Uganda on 20<sup>th</sup> Nov. 2003

<sup>5</sup> 'Kids as a Commodity: What needs to be done' Esther Onchana, Daily Nation Jan. 14, 2007

These rights however remain in the statute books with no practical relevance except in the presence of effective enforcement mechanisms. Children belong to society and there is need to sensitize the masses on their role in rehabilitation and re-integration of child offenders into the society. This can be done for instance by recognizing the day of the African child (16<sup>th</sup> June) and publishing information or allowing participating of the public through seminars and talk shows, among other awareness campaigns. All players in the criminal justice system should also be a target.

Kenya, a former island of tranquility was recently hit by a tsunami of violence following the December 2007 disputed elections. Women and children were the worst affected and some children, now living in abject poverty are forced into crime so as to provide for their needs following the demise or incapacitation of their parents. On a longer time frame view the country is still a third world country, with more than half of the population living below the poverty level. Substance abuse is also rampant in such conditions thus explaining most of the delinquents' propensity to crime.

Despite numerous setbacks however, Kenya has not been left out in the global awakening as regards human rights, and particularly child rights. She has shown her commitment by ratifying the *UN convention on the Rights of the child* and the *African charter on the Rights and welfare of the child*. Also by the numerous domestic laws on the same. More vigorous work however needs to be done on the ground by using the available resources and discouraging corruption and embezzlement of the meager resources. There also needs to be greater accountability among the juvenile justice stakeholders.

## 1.1 JUSTIFICATION FOR THE STUDY

The subject of this study is not entirely novel and it has been explored before especially by the CRADLE<sup>6</sup> in Kenya. It has however been mostly in a broader perspective under the ambit of children rights and therefore this research seeks to highlight the plight of child offenders in specificity, this research seeks to bring forward recommendations on practical way to ensure enforcement of the said rights.

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<sup>6</sup> The Child Rights Advisory Documentation and Legal Centre

Children are the fountains of joy and knowledge, cornerstones for survival of the human race, reservoirs of intelligence and databanks of world leaders. Studies such as these are therefore not just a list of complaints; but rather are just but a dim reflection of the terrible experiences of children<sup>7</sup> currently incarcerated in Kenya's judicial and Penal system. It is in appreciation of all that children are that this study was inspired.

The criminal justice system in Kenya is tailored to meet the needs of adult offenders as shall be seen within this study. The system is therefore not friendly to juveniles. This is evident from the kind of facilities provided, for instance prisons, court structure, remand and cell facilities which serve the needs of adults in the system. This study will therefore highlight the need to concentrate also on juvenile facilities to ensure rehabilitation of the same.

The study also briefly explores the causes of juvenile delinquency and suggests effective ways to reduce recidivism since juveniles are hypothetically easier to rehabilitate than adults and as the saying goes, 'teach a child the way he should go and he won't depart from it.' The rights of juvenile offenders are specifically explored to highlight the fact that the same need to be more practical than currently where they remain dead letters in the law. The research is a consolidation of the specific provisions of the law, both domestic and international, as regards child offenders as well as the implementation of the same in the current juvenile justice system in Kenya.

## **1.2 STATEMENT OF THE PROBLEM**

More than any other segment of humanity, today's children are suffering from the vileness of mankind and the neglect and abuse of our families and communities. Numbering in millions, they face some of the most inhuman conditions ever experienced by anyone in the sewers of our cities in the brothels ones, locked into baking hot shacks in slums, forced to work, wasting away from basic curable diseases.<sup>8</sup> It is paradoxical that we expect a morally upright and socially acceptable future generation having been raised in such conditions. It is also impracticable to pay lip service to the commitment to ensure rehabilitation and reformation of children in conflict with the law and expect

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<sup>7</sup> Memorandum for NAP-Juvenile Remandees ( Research undertaken in the Coast Province.)

<sup>8</sup> Wesley Campbell and Stephen Court, Be a Hero, Destiny Image Publishers Inc. 2004

positive results. It's one thing to be a voice to the voiceless and it is another to act in pursuance of the protection of their rights.

It is easy to overlook the needs of child offenders since they are perceived difficult and delinquent and assumed to deserve the treatment they get within the criminal justice systems. With the current wave of activism however, it is impossible to remain silent in the wake of blatant violation of rights even of those who commit socially unacceptable acts, and expose violators who do so in the pretext of administering justice to the victims of crime.

Winston Churchill<sup>9</sup> described a mandate as, "...akin to ones head; you've got it, whether you choose to use it or not is up to you, but it's yours."

The mandate to promote social justice as regards juvenile delinquents is the mandate of all stakeholders in the justice system but also to the populace to hold them accountable since in the balance hangs the legacy of our generation- the future of our children. Dare anyone then aver that this is no pertinent issue? This research aims at examining how the said rights can be protected.

The criminal justice system in Kenya faces pertinent problems which are reflected greatly in her juvenile justice system. There is great lack of resources to ensure upholding of juvenile offender's rights considering their special needs. Heavy work loads on magistrates and courts also cause unnecessary delay in the administration of justice among other factors.

Children in conflict with the law face physical and sexual abuse(both from police and adult inmates), violence, arbitrary detention, denial of bail, disregard of legal assistance, intimidation especially during questioning in absence of their parents/guardians, detention with adult offenders or for unnecessarily long periods of time, dehumanizing conditions in remand and rehabilitation centers-which include poor feeding, lack of medical care, poor sanitation and bedding, not being allowed to bathe or play and being infested by insects among other gross violation of their rights.<sup>10</sup>

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<sup>9</sup> Prime minister of Britain from 1951-1955

<sup>10</sup> Juvenile Justice Worldwide by Defense for Children International (2001)

Children are sometimes sent to rehabilitation schools (where only proven delinquents should be sent) instead of approved homes (where those in need of care and protection only should be sent especially those below 12 years.) Such irregularities, mostly caused by lack of awareness by judges, result in rights violation of the children and should be addressed. Children trials also take unnecessary long periods of time, sometimes stretching for years, at which time the children are held on remand thus depriving them of their liberty. There being few remand homes as compared to the number of juvenile delinquents, courts and the police are often stranded with juveniles for lack of placement institutions. More often than not, these end up being mixed with either adult offenders or older juvenile offenders and are prone to abuse and contamination.

Delays are mostly caused by irregular sitting of children courts, late coming of magistrates, trial on different days, slow investigations, backlog of cases, and lack of enough resources for instance transport facilities important to avail the juveniles for trial. The children in question are particularly at risk due to their inability to assert their rights, ignorance and poverty of parents/guardians who would assert such rights on behalf of their children.<sup>11</sup>

Other violations include lack of access to family and lawyers. In Kenya, children are often picked up, held in police lockups where they are often beaten, held together with adults and later released on the streets. For others, the case files get lost and the juvenile gets 'forgotten' for years.<sup>12</sup> During detention, children are often held in unhealthy accommodation and lack the supervision of specially trained staff considering their needs. At times the juveniles are locked up for up to 23-24 hours a day thus being denied *inter alia* their right to recreation which practices clearly contravene the requirements of treatment of juveniles in detention. The fact that police don't often document particulars of juveniles in detention makes it difficult to identify individual cases and seek protection of their rights.

Children are mostly charged with minor offences that include theft, minor assault, idleness, petty theft, vandalism, truancy and assault.<sup>13</sup> These are often caused by poverty, lack of education

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<sup>11</sup> Supra note 5

<sup>12</sup> Lawrence Gidudu, Report on The Chainlinked and the Juvenile Justice System of the Kampala Circuit Chain-linked Committee meeting of 10<sup>th</sup> Sept. 2003

<sup>13</sup> Information by Nick Aluoch, Deputy Manager, Wamumu Approved School, Kenya

and ignorance of the law and should be leniently dealt with. Capital offences include murder, robbery, treason and defilement- which is the most common. There is need to ensure quick investigations and disposal of the cases. Defilement as relates to juveniles should be redefined to differentiate child abuse and sex between two consenting adolescents.

Gaping loopholes are evident in the way that children within the criminal justice system are handled and also those released there from who are particularly prone to stigmatization. In the case of *R.V.RMM*<sup>14</sup> a child was implicated for the crime of murder which was proved beyond reasonable doubt. The court was however dismayed by police's treatment of the child, which included; detention for months before arraignment in court and questioning of the child in absence of his parent/guardian or children's officer; thus contravening *Rules 4 (1), (2), (3) and (4)* of the *Child Offender's Rules*.<sup>15</sup> There was no mention as to enforcement of the said child's rights.

Such measures should not be seen to condone crimes by minors since the same are *doli incapax* especially those above the age of criminal responsibility (8 for Kenya) but to ensure their rehabilitation while retaining their capacity to re-integrate into society and become responsible members therein.

In Kenya, several players are involved in the criminal (juvenile) justice system. *The Child Rights Advisory Documentation and Legal Center (CRADLE)* was founded in 1997 to respond to the need for provision of juvenile justice and to address the issue of legal aid to children. It therefore addresses particular needs of child offenders and is a member of the steering committee of the *National Policy and Action Plan on Human Rights*.<sup>16</sup>

In all measures taken to correct and rehabilitate child offenders, account should be taken of the children's needs, which includes: physical needs (clothing, food, shelter, medical care and

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<sup>14</sup> 2005 eKLR

<sup>15</sup> Kenyan Children's Act Cap 8

<sup>16</sup> Committee on *The United Nations Convention on the Rights of the Child* 44<sup>th</sup> Session on implementation of the convention in Kenya (1998-2004)

Protection), spiritual needs (faith and prayer, sense of hope for the future, sense of moral life), emotional needs (love, care, acceptance, being appreciated).<sup>17</sup>

Despite the many efforts being geared towards sensitizing the masses about their rights and ways to enforce the same, there happens to be areas that need particular attention. The right holders in this instance are the child offenders while the duty bearers include all stakeholders in the criminal justice system. Codes of conduct that govern juvenile justice personnel aren't enough since they don't provide for specific enforcement measures where a right has been violated. There needs generally to be awareness of rights of child offenders by the children themselves, the community at large and implementers of juvenile justice.

This research looks at the rights, their abuse, enforcement and recommendations as regards the juvenile justice system of Kenya.

### **1.3 OBJECTIVES**

- 1) To expose the rampant abuse of juvenile offenders in the criminal justice system in Kenya.
- 2) To show the successes of various attempts to enforce the rights of juvenile offenders in Kenya.
- 3) To analyse the shortcomings of these attempts and their impacts on those within the juvenile justice system.
- 4) To propose recommendations to improve on the effectiveness and practicability of rights of juvenile offenders.

### **1.4 METHODOLOGY**

This research will be effected through library research. This shall constitute consultation of relevant text books, newspapers and magazines articles, the internet, domestic laws of the country under scrutiny, international conventions and treaties, workshops and seminar papers, published and unpublished literature among others materials.

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<sup>17</sup> World Vision's Guide to Mobilizing and Strengthening Community-led care for Orphans and Vulnerable Children.

## 1.5 SCOPE OF STUDY

This research shall cover all the rights that accrue to child offenders on arrest and with in the criminal justice system and how these are being enforced. It will also include recommendations.

The target population includes juvenile justice personnel, the child offenders themselves and society at large so as to expose the evils of violation and suggest causes of action in pursuance of enforcement.

## 1.6 LITERATURE REVIEW

Much has been written concerning rights, especially the rights of children. Most literature in this area has been put together by non-governmental organizations that deal with child rights for instance THE CRADLE<sup>18</sup>, Defense for Children International among others. Other data has been got from different reports combined by research groups, reports by the human rights commission and compilations of conferences and workshops for instance the regional *probono* conference on juvenile justice (2003) and workshops held by criminal justice agencies and stakeholders in Kenya. Reference has also been made to manual guides to paralegal community workers in Kenya.

The CRADLE in its report, *In Quest of Juvenile Justice* addresses in essence the motivation behind protecting the rights of children in conflict with the law in Kenya and thus assisting this research with data for purposes of analysis of the situation as intended herein. It also scrutinizes the challenges and constraints that face the juvenile justice system in Kenya.

Defense for Children International in its report, *Juvenile Justice Worldwide number 1 of 2001* also highlights the abuse of the rights of child offenders which include police abuse, violence, arbitrary detention, disregard of legal assistance, deprivation of liberty among others. It however doesn't point out the mechanisms available or measures required to be put in place to ensure protection of the said rights.

The report on the *Regional Pro bono Conference on Justice* held on 20<sup>th</sup> Nov.2003 gives different causes of abuse of the rights in question and gives different recommendations on how to

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<sup>18</sup> The Child Rights Advisory Documentation and Legal Centre (Kenya)

uphold these rights. The CRADLE in its report <sup>19</sup> on the 2<sup>nd</sup> Regional Probono Lawyer's and Juvenile Justice Conference<sup>20</sup> gives the situation of compliance with juvenile rights in Kenya. It notes that there is separation of children in need of care and protection from those in conflict with the law. Further and in contrast, that the ideal- as set out in the Children's Act about legal aid is not sufficiently offered in practice. Rights of a child offender in this respect include the right to be informed of the charges to legal aid and to privacy as set out in the Juvenile Justice Journal by CRADLE<sup>21</sup> of Nov. 2003. The Manual Guide to Paralegal Community Workers compiled by the Paralegal Support Network in September 2005 gives the trial procedure for adult offenders as well as delinquents and the rights that accrue to the accused persons. This guide also gives the different ways to dispose of a child's case.

On the implementation of child rights, reference has been made to the Committee on the Rights of the Child.<sup>22</sup> The Law on Children (A Case Digest) a publication of Kenya's Legal Action Network has also been referred to for examples on violation of child offenders' rights. Wesley Campbell in his book, Be a Hero<sup>23</sup> highlights the plight of children in the wider perspective and this gives the impetus to highlight the status quo of those in conflict with the law who are inevitably at a disadvantage.

Justice for children<sup>24</sup> gives the relevant provisions of international conventions that regard juvenile justice and also the recommendations to help improve the system and reduce cases of recidivism. For instance that restorative justice and diversion from the criminal justice system are more effective in reducing juvenile crime as compared to deterrence and retribution- the object of most criminal justice systems.

The Human Rights Sourcebook for Africa<sup>25</sup> has also been referred to since it gives the provisions of the Kenyan Children Act and the Penal Code Act as regards juvenile justice. Children

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<sup>19</sup> Making the children count (2004)

<sup>20</sup> Held on the 20<sup>th</sup> Nov.2004 in Kenya

<sup>21</sup> Supra note 18

<sup>22</sup> Supra note 16

<sup>23</sup> Supra note 8

<sup>24</sup> Colla Petty and Maggie Brown, Save the Children (1998)

<sup>25</sup> Beattie *et al.* (ed) British Institute of International and Comparative Law(2005)

Rights Recommendations and Resolutions<sup>26</sup> provides universal recommendations for upholding of the rights of children and these shall be used herein for recommendations to improve Kenya's situation. *The Innocenti Digest* (Google search)<sup>27</sup> examines the international instruments that govern the handling of juvenile delinquents. These include the *Beijing Rules*<sup>28</sup>, *the Riyadh Guidelines*<sup>29</sup>, and *the Convention on the Rights of the Child*.

The report on *Street Children and Juvenile Justice in Kenya* prepared by the Consortium for Street Children, CRADLE and the UNDUGU Society of Kenya (2004) contains recommendations as regards juvenile justice in Kenya. It addresses a recommended change in the laws relevant, training of juvenile justice personnel and other recommendations at the pre-trial, trial and post-trial stages. These have been of great assistance to this research.

Reference has also been made to newspaper articles. Some are got from the Daily Nation of June 16<sup>th</sup> 2008.<sup>30</sup> These include the article by Hon. Esther Murugi, Minister for Gender and Children Affairs in Kenya *Ensure Children Enjoy their Rights, Allow Children Free Expression* by Esther Gwiyio<sup>31</sup>, *Involve Children in Decision-making* by Prof. Jacqueline Oduor<sup>32</sup>, and *Time to Reflect on the Well-being of the Child* by Ahmed Hussein.<sup>33</sup> Also Esther Onchana's articles in the Daily Nation on Children and the Law; *Kids as a Commodity: What needs to be done*<sup>34</sup> *Child Offenders, Be Warned*<sup>35</sup> and *Know your Rights*.

Reference has also been made to World Vision's *Guide to Mobilizing and Strengthening Community-led Care for and Vulnerable Children. A situation Analysis of Child Rights Protection under the Children Act* (of Kenya)<sup>36</sup> has also been referred to. It shows the loopholes that make

<sup>26</sup> Human Rights International Alliance, Westminster Central Hall, London

<sup>27</sup> Compiled by UNICEF's Nigel Cantwell (1998)

<sup>28</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*

<sup>29</sup> *United Nations Guidelines for Prevention of Juvenile Delinquency*

<sup>30</sup> Day of the African Child celebrated to commemorate the massacre of South African Children

<sup>31</sup> Permanent Secretary in the Ministry of Gender and Children Affairs in Kenya

<sup>32</sup> Secretary for Children Affairs in the Ministry of Gender and Children Affairs

<sup>33</sup> Director Children Services/ Secretary National Council for Children Services.

<sup>34</sup> January 14<sup>th</sup> 2007

<sup>35</sup> December 17<sup>th</sup> 2006

<sup>36</sup> After the Promise, Millie Akoth Odhiambo, The Children Foundation- THE CRADLE (Nov 2003)

violation of offenders' rights inevitable. The writer gives recommendations on how to improve the system.

A Last Resort: A Summary Guide to the National Inquiry into the Children Immigration Detention (Australia) by the National Inquiry into Children in Immigration Detention highlights rights that accrue to children in detention which include education, recreation and play, care, religion and culture. These rights are also relevant to children accused with offences. For these, detention should be a measure of last resort. The children have the right to challenge the legality of their detention and to be held for the shortest time possible. This book presents the situation in Australia but the same are experienced by children both in Kenya and Uganda considering great lack of resources.

The book, Eliminating Corporal Punishment: The Way Forward to Constructive Child Discipline as edited by Stuart N. Hart has been referred to for effective alternatives to the criminal justice system to ensure rehabilitation of child offenders. It focuses on principles for constructive child discipline viz:

- Respect for the child's dignity
- Development of pro-social behavior ,self- discipline and character
- Maximize the child's active participation
- Respect the child's developmental needs and quality of life.
- Respect the child's motivation and life views
- Assure fairness and transformative justice
- Promote solidarity

The above measures don't promote rather they discourage violation of child rights while ensuring that the said delinquents are fully reformed. These would be useful if adopted in the juvenile justice systems both in Kenya and Uganda and they have been used as recommendations in this research.

*Justice for Children*<sup>37</sup> by the Centre for the Study of the Child and Society by the University of Glasgow and UNICEF explores the plight of child offenders in Scotland. It highlights the important role of the lawyer in the process of trial of a child to enhance right protection and fairness as well as to strengthen the accountability of the hearing process. This book also gives the guiding principles in the Scottish hearing system, which principles would be helpful if adopted in the Kenyan juvenile system. Lockyer in chapter 8 of the book contends that children rights can be sustained by a combination of formal and informal processes outside a court setting. Despite the different societies and legal systems in the UK and in East Africa, the latter could borrow a leaf from the effective systems of the former.

*Child Abuse and Human Rights*<sup>38</sup> deals with different forms of child rights violations viz trafficking, labor exploitation, the girl child, indigenous and tribal children. It however doesn't touch on child offenders of whose rights are often violated. Child offenders aren't often referred to in discussions of child rights protection and this research aims at placing them in the limelight and end the silence as regards their rights and entitlements both as human beings and as children.

Ngair Naffine in her article, *Children in the Children's Court: Can there be rights without a remedy*,<sup>39</sup> explores the fact of the rights of children in a children's court as contrasted with the need for justice. This book gives the situation in Australia. The courts would base their decisions as regards children on the welfare principle. Here the gravity of the crime did not determine the extent of punishment. This system was found wanting for its informality and court's discretion whose effect was to frustrate society in its demand for a fitting retribution. The system has since change by adopting the criminal process of trial for trial for children as done for adult offenders. Here the child offender is accorded full rights as entitled to an adult offender. That there should be no erosion of the fundamental rights of accused persons under the guise of 'helping the child.'<sup>40</sup> Child offenders are now entitled to the 'due process' of the law as in *Re Gault*.<sup>41</sup> The literature explored above shows

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<sup>37</sup> Malcolm Hill and Stewart Asquith (ed), Martinus Nijhoff Publishers (1994)

<sup>38</sup> Jyotsna Tiwari (ed) 2004

<sup>39</sup> John Seymour, Phillip Aliston and Stephen Parker (ed), Children Rights and the Law, Claredon Paperbacks Oxford (1992)

<sup>40</sup> Report by the Royal Commission (Mohr Report) of 1977 Australia

<sup>41</sup> (1967) US 1 387

that the subject of the research is not unexplored. The issue of enforcement of the said rights will however be addressed in this research unlike in the afore-mentioned.

The Oscar Foundation of Kenya (OFFLACK) in 2006 in their report on Repression of the Child- A Juvenile Justice Report on the State of Juvenile Justice, Delinquency and Human Rights in East Africa<sup>42</sup> examines the statistics and compliance of the said systems with the international standards set by the international laws and treaties. It shows the diversity in legislation, policy and practices in East Africa's judicial systems. It also highlights the different categories of vulnerable children in need of special protection and notes that the same may be involved in crime as a survival tactic. This report however only looks at the issues with regard to Kenya's situation in brief since it broadly reports on the situations in Uganda, Tanzania, Rwanda and Burundi and also in the US, England and Wales. The foregoing research will focus on Kenya's situation, in detail.

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<sup>42</sup> A comparison of juvenile justice and delinquency in East Africa and United States, England and Wales, 2006

## **CHAPTER 2**

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## **2.0 RIGHTS OF JUVENILE OFFENDERS.**

Human rights are entitlements that human beings have by virtue of their being human. These protect all people from exploitation and dominance by more powerful people.<sup>43</sup> Rights can only be enforced where there are rights holders and duty bearers. Duty bearers have four duties as relates to upholding rights of the rights holders:-

- a) Duty to refrain from interfering directly or indirectly with the enjoyment of the rights.
- b) To prevent others from interfering with the enjoyment of the rights.
- c) To facilitate enjoyment of rights by for instance adopting legislative, administrative, budgetary and other measures towards realization of the said rights.
- d) To direct and provide assistance or services for the realization of the rights.
- e) To educate the rights holders on their rights and how to enforce them.

The state is the main duty bearer as regards rights of child offenders. It should ensure such rights are not violated and that impunity is discouraged through punishment of violators. Rights of child offenders are contained both in international and domestic instruments as shall be explored herein. So as to discover whether there are violations or not, it is imperative to enlist authority and provision for specific rights. To be looked at are domestic laws of Kenya as regards juvenile delinquents and international instruments which the country has ratified.

### **2.0.1 INTERNATIONAL TREATIES**

#### **(a) The United Nations Convention on the Rights of the Child(1989)**

This convention (hereinafter the **UNCRC**) entered into force on the 2<sup>nd</sup> of September 1990 and was ratified by Kenya on 31<sup>st</sup> June the same year. It begins by defining a child as a person below 18 years of age (**Art 1**). Its **Art 3** provides that all actions concerning children shall be taken in the best interests of the child. A child offender, in particular has the same rights as those of adults charged with various crimes. The system however tends to cater for the needs of the

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<sup>43</sup> A handbook for paralegals, September 2005

adult offenders more than those of the child offenders. **Art 40** of the convention provides that such a child is entitled to humane and dignified treatment. **Art 40(2)** provides for the presumption of innocence, the right not to be compelled to confess guilt and the right to have the matter determined without delay before a competent and impartial tribunal.

**Art 37** provides that a child shall not be arbitrarily deprived of his/her liberty except as a last resort or within the shortest time possible. Also that children deprived of their liberty should be treated with dignity and granted access to legal assistance. Further that they should not be subjected to torture, abuse inhuman and degrading treatment or punishment. Other rights include the right to non-discrimination (**Art 2**), expression (**Art 13**), freedom of thought, conscience and religion (**Art 14**), to medical care, (**Art 24**), education (**Art 28**) *inter alia* and these accrue as much to child offenders as they do to other children. Juvenile justice systems should therefore encompass all these on their plight to reform the children and ensure their capacity to become responsible and productive citizens is maintained. **Art 8** provides for the protection of a child's trial, **Art 25** for the right of children in institutions to periodic review of their placements.

#### **(b) African Charter on the Rights and Welfare of the Child (1990)**

This (herein the charter) also has provisions similar to those of the **UNCRC**. It defines a child in its **Art 2** and provides for consideration of the child's for best interests in all actions concerning children (**Art 4**). **Art 17** of the charter deals specifically with the administration of juvenile justice. **Clause 1** upholds the essential right to special treatment consistent with the child's sense of dignity and worth. **Clause 2** provides for freedom from torture, inhuman or degrading treatment, and separation from adults in detention, presumption of innocence, right to be informed of charges, legal aid, speedy and fair trial. Further the right of the child to have his/her privacy respected during the whole process of trial.

Other rights include the right to education (**Art 11**), to leisure, recreation and cultural activities (**Art 12**), to health and health services (**Art 14**) and right against abuse and torture (**Art 16**).

**(c) United Nations Rules for the Protection of Juveniles Deprived of their Liberty.**

This is based on the recognition that children deprived of their liberty are highly vulnerable to abuse, victimization violation of their rights. **Rule 11** provides that a juvenile should not be detained unless it is so determined by law. **Rule 17** provides for preference to alternative measures to detention, and expeditious trial of those detained, also that untried juveniles should be separated from convicted ones. **R. 18** provides for the presumption of innocence, right to legal counsel, opportunity to pursue work and continue with education and that juveniles should be allowed to retain materials for their leisure and recreation.

**R 19** provides that records for the juveniles should be kept. **R 28** and **R 29** provides for the requisite conditions in detention facilities. **R 31**, it is the right of juveniles deprived of their liberty to have the right facilities and services that meet all the requirements of health and dignity. The juveniles have a right to practice their religion (**R48**) and right to medical care (**R 49**), also a right to contact with the outside community (**R. 59**), and right to limited use of restraint and force in the name of discipline.

**(d) United Nations Guidelines for Prevention of Juvenile Delinquency: The Riyadh Guidelines (1990)**

This places the responsibility of preventing juvenile crimes on al society and calls for fairness and equity in dealing with issues of young persons with the goal of safeguarding their well-being, development, rights and interests. It notes that labeling of young persons as ‘delinquent’ or ‘deviant’ often contributes to the development of a consistent pattern of undesirable behaviors of young persons. States are conferred on the duty to preserve the integrity of the family and to ensure the full development of the child through education.

**Principle 23** provides that the state should ensure awareness of young people about their rights. It should put together policies for prevention of substance abuse by young people (**P 25**). Children who find it difficult to comply with attendance codes should be given special assistance (**P30**) and those beyond control should be institutionalized (**P 46(e)**). Rules should be enacted that protect the well being and promote the rights of young people (**P 52**). **P 54** provides for

protection of delinquents from harsh or degrading correction or punishment at home, school or any institution.

The guidelines lay down several measures to ensure compliance. **P 57** provides that an Ombudsman should be established to ensure compliance. Enforcement personnel should be specially trained (**P58**) and there should be intensification of exchange of information, experience and expertise relating to youth crime, delinquency prevention and juvenile justice (**P 61**). The guidelines propose a child-centered orientation.

**(e) United Nations Standard Minimum Rules for Administration of Juvenile Justice:  
The Beijing Rules (1985)**

These rules serve as a model for UN member states in the treatment of juvenile offenders. They take into account that the young require particular care and assistance with regard to physical, mental and social development, and require legal protection in peace, freedom, dignity and security. These are aimed at, either preventing intervention by the juvenile justice system or reducing the harm caused by such intervention.

The rules define a juvenile as a child who under the respective legal systems may be dealt with for an offence in a manner different from an adult. An offence is any behavior punishable by law under the respective legal systems and a juvenile offender is a child or young person alleged to have committed or found to have committed.

**Rule 2** provides that efforts shall be made to meet the varying needs of juvenile offenders while protecting their basic rights. **R 5** emphasizes the well-being of the juveniles and of applying the principle of proportionality. **R 6** supports accountability in matters concerning juvenile offenders, which include review and appeals.

**R 7** provides for the rights of a juvenile offender as also contained in the **Universal Declaration of Human Rights (1949)**, **Art 11 and 14 of the International Convention on Civil and Political Rights (1966)**. The right to privacy is provided in **R 8** and the right to have one's

case determined without undue delay as in Art 9(3) of the ICCPR (above), R 10 of the **Beijing Rules** and R 92 of the **Standard Minimum rules for Treatment of Prisoners**.

R 11 provides for consideration of diversion of juvenile offenders from the criminal justice system. R 13 provides for considerations where the offender is detained pending trial, also Arts 9, 10(2) (b) and 3 of the ICCPR. R 14 provides that the case should be determined by a competent authority applying the rules of a fair and just trial. R 14.2 provides that the atmosphere should allow the juvenile to freely express himself, R 15 for the right to legal representation as in R 93 of the **Standard Minimum rules for Treatment of Prisoners**.

R 16 and 17 give strength to consideration of the circumstances of the juvenile. This is also in Resolution 8 of the 6<sup>th</sup> United Nations Congress. R 17.2 prohibits capital punishment and so does Art 6(5) of the ICCPR. R 27.3 prohibits corporal punishment as in Art 7 of the ICCPR. R 18.2 and Art 10(1) of the **International Covenant on Economic, Social and Cultural Rights** provides that no juvenile shall be removed from parental supervision unless circumstances so permit. R 19 emphasizes that placement in an institution should be a last resort and for the minimum time possible.

R 26 provides for protection from the negative influence of adult offenders. Fair and equal treatment is encouraged. R 20 provides for the expeditious determination of cases. Early and frequent recourse to conditional release is an ideal (R 28) and modifications of rules to meet the specific needs of juveniles (R27).

#### **(f) United Nations Minimum Rules for Non- Custodial Measures: The Tokyo Rules (1990)**

These are intended to promote greater community involvement in the management of criminal justice specifically in the treatment of offenders in restorative justice. These promote among offenders a sense of responsibility towards society.

## **2.0.2 DOMESTIC LAWS**

### **(a) The Constitution**

It is worth noting that the Kenya constitution is seriously lacking in many aspects including child rights. In its **Chapter V**, the present constitution provides for the fundamental rights of an individual. Of relevance to this paper are **S 72** which provides for the rights to liberty and security, **S.70** which provides for freedom of expression and assembly, **S.72 (2)** which provides for the right to be informed of the reasons for a person's arrest, **S. 73** which provides for protection from slavery and forced labour and **S. 74** for protection from inhuman treatment.

The above rights accrue to an adult as they do to a child offender. A person arrested has the right to bail (**S. 72**) and for child offenders, bail must be granted and the child should only be held for 6 months. In **R.V M.**<sup>44</sup> trial of a minor charged with murder lasted for 8 months. Court granted him bail, though **S 123 of the Criminal Procedure Code** prevents bail grant for capital offences, since his right not to be held for extended periods had been violated.

**S 22(2)** vests the high court with special powers to safeguard human rights and it is the right forum for recourse for violation, in this case of the rights of juvenile offenders.

### **(b) The Children's Act (Cap 8<sup>45</sup>)**

This seeks to give effect to the principles in the **UNCRC** and the **ACRWC**.<sup>46</sup> It places children at the centre stage in the quest for a just, respectful and peaceful society. **S 6** of this **Act** provides that every child shall have a right to live with and be cared for by his parents. A child can therefore only be separated from his family with leave of court or pursuant to a court order. This means that a child's incarceration and subsequent estrangement from his family is only lawful pursuant to a court order that is after full hearing of his case. With regard to this therefore, measures should be put in place to depopularize pre-trial remand of child suspects, unless under unavoidable circumstances.

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<sup>44</sup> Criminal Case of 2003

<sup>45</sup> Act No 8 of 2001

<sup>46</sup> Preamble to the Act

S 54(2) provides for after-release supervision for a period of two years. S 55 on the other hand lays down requirements where a child is to be detained. Children over the age of 16 should be sent to a borstal institution<sup>47</sup> and medical treatment plus counseling should be offered where necessary. S 75 provides for exclusion of uninvolved parties from the court during a child's trial. Orders in a court are only made in the child's best interests (S 76). Proceedings are to be determined without undue delay, the child's ascertainable wishes should be considered and also his/her special physical and emotional needs. The child is entitled to legal aid which may be ordered by court (S 77). S 186 (b), such legal such may be provides by government. The child also has a right of appeal (S 80).

Children matters should be heard in the children's court (S 73) which should have a friendly setting (S 188 and 189). Guarantees of a child offender are provided under S 186 and include:- the right to be promptly informed of charges, legal aid, expeditious determination of matter, no compulsion to give testimony or confess guilt, free services of an interpreter, right of appeal, privacy and special care if disabled. Other rights include the right to medical care (S 187(2)), no imprisonment or detention (S 190), no death sentence and no corporal punishment(S 191(2)).

Child offenders should not be kept together with adult offenders as provided in the 4<sup>th</sup> Schedule to the Act, should be granted bail and if on pre-trial remand, should be produced in court after 24 hours at maximum. Pending trial, a child should not be held for over 6 months (if charged with a capital offence) and 3 months (for non-capital offences). This is per the **Child Offenders Rules** in the 5<sup>th</sup> Schedule to the **Children's Act**. Special care should be taken for disabled children.

## 2.1 CRIMINAL RESPONSIBILITY

This means the age below which a child cannot be held accountable for his/her actions, amounting to a crime. International conventions and treaties leave it to the states in question to fix the age for criminal responsibility. In Kenya, the age of criminal responsibility is 8 years as per S 14 of the **Penal Code Act Cap 63**. Such a low age usually results in very early contact of the juveniles with the criminal justice system, which is particularly unsuitable for them.

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<sup>47</sup> Special institutions established in Kenya by the **Borstal Institutions Act** for the placement of offenders above 16 years and below 18 years.

Age of criminal responsibility is a variable that influences how juveniles are treated by justice systems. Other variables include whether there is a separate court and jailing system or juvenile system based on child rights, whether juveniles are subject to punitive measures or only social-economic measures. A juvenile system provides legal protections and an objective standard for treatment. Absence of this places youngsters in danger of arbitrary or harsh treatment in the adult system.<sup>48</sup> There is need to revise this age and develop measures to address situations of crime by children below 12 years, for instance policies on diversion from the criminal justice system and separation of Borstal institutions from the prison system to ensure that children are handled in a child-friendly manner.<sup>49</sup> In *Njoki V. R*<sup>50</sup> it was held that children under 8 years of age are not criminally responsible for any acts or omissions. Delinquents of such age and below should be dealt with as children in need of care and protection.

According to Nick Aluoch, Deputy Manager Wamumu Rehabilitation School,<sup>51</sup> children in Kenya are mostly charged with crimes such as, petty theft, defilement, murder, manslaughter, assault, vandalism, robbery with violence and truancy. It is imperative to note here that many of these are status offenders and commit the crimes due to lack of parental care and education. These should therefore be tried with consideration of their circumstances and need. Those charged with status offences should not be mixed with the 'hardcore' ones charged with more serious offences. Other offences As regards theft, which is the most common crime among juveniles, only repeat offenders should be incarcerated. Other offences that children are charged with include graffiti, harassment, arson, refusing to pay fare, riots, threats for money and burglary.<sup>52</sup> Recidivism<sup>53</sup> is currently the major challenge facing the system.

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<sup>48</sup> Innocenti Digest- UNICEF Compressed by Nigel Cantwell (1998)

<sup>49</sup> Committee on the rights of the child 44<sup>th</sup> Session (1998-2004)

<sup>50</sup> (1988) KLR 342

<sup>51</sup> High risk correctional centre for children between 11 and 17 years in Central Province.

<sup>52</sup> Repression of the Child. Report by the Oscar Foundation of Kenya on Juvenile Justice and Delinquency in East Africa. (2006)

<sup>53</sup> Repeat offences. Information courtesy of Mr DM Omari, District Officer- Kirinyaga District.

There is need to address the fact of children charged together with adults since these are tried in adult courts. Children courts have no jurisdiction<sup>54</sup> as regards to joint accused persons- adults and children. This status quo most definitely leads to exposure of the juveniles to adult offenders, which may cause them to be hardened thus difficult to reform.

## **2.2 CURRENT RESPONSES TOWARDS CHILD OFFENDERS; ATTITUDES TOWARDS CRIME AND PUNISHMENT**

When a child is found guilty of a certain crime, relevant orders are made, which are geared towards reforming and rehabilitating the said juvenile. Such measures exclude imprisonment, life<sup>55</sup> or otherwise, capital punishment<sup>56</sup> and corporal punishment.<sup>57</sup>

**The United Nations Standard Minimum Rules for the Administration of Juvenile Justice** in its R. 8 lays down the several ways of disposing of child offenders' cases. The following orders can be issued:-

- i. Care, guidance and supervision orders, especially for status offenders.
- ii. Probation
- iii. Community service orders
- iv. Financial penalties, compensation and restitution- mostly paid by the child's parents.
- v. Intermediate treatment and other treatment orders
- vi. Participation in group counseling
- vii. Foster care, living communities, educational settings
- viii. Other relevant orders

Implementation of these is underway in Kenya and this ensures that rights of offenders are upheld. A diversion program is currently being implemented to divert child offenders from the criminal justice system since most violations and abuse of their rights occurs at the time of

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<sup>54</sup> S 184(1) (b)

<sup>55</sup> Art 37(a) United Nations Convention on the Rights of the Child.

<sup>56</sup> Ibid. Also R. 17.2 Beijing' Rules and Art 6 ICCPR

<sup>57</sup> R. 17.3 Beijing' Rules and Art 7 ICCPR

arrest, during questioning, during remand and during the trial process. Research <sup>58</sup> has shown that after trial, most children are well taken care of. The older ones (11 and above) are sent to rehabilitation schools and younger ones to welfare homes.

Community clearly shuns and condemns child offenders. Such attitudes stigmatize the children and hamper their re-integration into society. There is need to look at the child offender, not in isolation but in the context of his/her family and community. Members of society should be sensitized on their crucial role in reformation of juvenile delinquents, not only during their post-release but throughout the juvenile justice system.

The principle of proportionality should be applied as regards to punishment being proportional to the crime committed. It has been noted that community resolution is desirable. There are however setbacks to community resolutions, for instance the fact that the juvenile's side of the story is rarely heard. With proper supervision, these are evidently insignificant as compared to the injustices occasioned by contact with the criminal justice system. Mechanisms of community resolution should therefore be properly established and the role-players sensitized on taking into account rights of the children. It has been noted that children easily change behavior if given adequate care and protection; a duty of society as a whole. Ways of resolution like reconciliation, apology and caution are highly desirable as opposed to retributive measures, for instance institutional placement, except for serious cases.

## 2.3 THE TRIAL PROCESS

This subtopic is relevant to highlight the steps through which a juvenile delinquent goes through in order to later establish the chain of abuse. The process begins with arrest which may be done by citizens, police or magistrates. Child offenders should be arrested by a police officer accompanied by a children's officer, though in most cases, arrest is done by civilians. Then comes remand followed by arraignment in court, <sup>59</sup> then plea-taking. At this point, one may apply for bail, which is a constitutional right, <sup>60</sup> or be granted bond - free or otherwise.

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<sup>58</sup> As got from a correctional institution supra note 48

<sup>59</sup> The 5<sup>th</sup> schedule to the Childrens Act provides for proceedings in a juvenile's trial

<sup>60</sup> Art 72 of the Constitution.

Then comes hearing during which the prosecution presents its case. Court rules whether the accused has a case to answer or not. In the event that he/ she does, the defense presents its case and final submissions, to which the prosecution answers and also gives its final submissions. It is after this that the court gives its judgment. If the accused is found guilty, mitigation and sentencing follows which includes giving of the relevant orders in the case of a child offender. The child is then committed till her/his term expires. An appeal may be filed either against the court's finding and/or against the order given.

As seen above, an arrested person (read child offender) has a right to be presumed innocent until proven guilty, to be informed of the charges preferred against him/her, to be granted enough time to prepare his defense, to legal representation and to an interpreter where he/she does not understand the proceedings.<sup>61</sup> A 'convict' (read child found guilty of a crime) has among other rights the right to medical care, separate accommodation for males and females, right to be released on account of good conduct, to be sentenced to community service- for lesser offences and to be released, on serving their time.

The trial process constitutes 'due process'<sup>62</sup> which enables offenders to appear before a competent and impartial authority so as to be heard. All accused persons have a right to a fair trial and to *habeas corpus*.<sup>63</sup> Due process however should be adopted to meet the needs of juveniles so that they don't have to go through the same process as adult offenders.

## 2.4 THE JUVENILE JUSTICE SYSTEM

The juvenile justice system refers to the sum of machinery put in place to ensure arrest, trial and placement (where necessary) of child offenders. In Kenya, children are tried in children's courts. These have been provided for in S 73 of the **Children's Act**. These courts should have a friendly setting. Specific children's courts however only exist in the capital, Nairobi, and up-country, children are tried in the same court setting as adults. Their matters are however heard on specific days and are given priority over all other matters.

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<sup>61</sup> As outlined and referenced in 2.0 above

<sup>62</sup> Refers to the all the process a suspect under goes till he/she is convicted or acquitted, whatever the case may be. A definite due process is available for adult offenders but not the case for juveniles.

<sup>63</sup> Art 23(9) supra note 54

The **Child Offenders Rules** provide that children should not be remanded together with adult offenders. Remand facilities in Kenya exist for younger children (11 years and below) but the older ones are more often than not remanded together with adult offenders. The system allows the police and even citizens to arrest child offenders and in so-doing, they sometimes beat the children so as to extract confessions from them.

Where there are no children courts, for instance upcountry, matters are communally dealt with. Trial in Kenyan courts as in other developing countries takes very long at which time the juvenile is periodically brought to court to answer charges, for mentions, hearings and sentencing. Despite the children having a right to defend themselves, they often inadequately do so, thus resulting to unjust determination of their cases. Hence they are denied the right to a fair hearing.

Once child offenders are found guilty, they are usually committed to Gitathuru, which is a withholding ground, and later sent to different institutions countrywide depending on their age, crime convicted of and whether they are repeat offenders. Considerations of age are however often overridden by the concern not to mix less serious offenders with more serious ones. This can be attributed to the lack of sufficient resources to ensure all considerations are taken when committing the said children to the various correctional institutions.

There lacks an information system to sensitize the offenders of the structure of the system, of their rights and entitlements, on how to defend themselves among other issues of importance to them in the circumstances. Such intricate work is usually left to non-governmental organizations and their related networks. The **Juvenile Justice Network** for instance is made up of a coalition of Kenyan organizations committed to ensuring better protection of children within the juvenile justice system. Through accountability by the afore-mentioned, the system emphasizes on merit other than technicalities and procedure mainly to achieve speedy trial and to dispense justice expeditiously.

## **CHAPTER 3**

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### 3.0 CHAIN OF ABUSE

#### 3.0.1 Arrest procedures

The proper procedure for arrest constitutes:-

- i. Identification of the arrester.
- ii. Notification of the reasons for the arrest
- iii. Touching or confining the person to be arrested
- iv. Search of the person arrested
- v. Use of reasonable force to prevent escape (if necessary)

Several parties have the power of arrest and these include:-

- i. A citizen
- ii. A police officer accompanied by a children's officer
- iii. A magistrate

In most cases of child offenders, arrests are carried out by the public<sup>64</sup> and where they are done by the police officers, it is not always practical to have children's officer also present. The ideal is to have girl offenders arrested by female officers but this is not always possible, thus exposing the said girls to possible abuse in the hands of male officers. Where civilians make the arrest, they are encouraged to take the child offender to a police station as soon as possible.

Where the arrest is done by civilians, they often beat up the offender and may even lynch him/her. This is a clear abuse of the offender's right to be presumed innocent until proven guilty. Such action is often unnecessary since previous research<sup>65</sup> has shown that most children do not resist arrest. Most are just persuaded to walk with a police officer to the station when approached and told the reason for the arrest. There are however a few exceptions, inevitably.

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<sup>64</sup> Source- interview of the District Children's Officer, Central province

<sup>65</sup> Done by Save the Children, an NGO in Uganda in the year 1997

In Kenya, Street children are often the victims of arbitrary arrest due to their being in a position to witness street crimes. They are consequently vulnerable to being wrongly or mistakenly accused of crimes, and where they actually commit crimes, they are usually status offenders, in need of care and protection. There have been several attempts to address such injustices, for instance the repeal of the **Vagrancy Act**<sup>66</sup> to prevent arbitrary arrest. There are also recommendations<sup>67</sup> that include bringing to an end the rounding up and arbitrary arrest of children and prohibition of use of brutal force during arrest by police.

Other recommendations include establishment of child protection units in police stations. It is desirable that children be diverted from police stations and away from the courts. Children should be brought to court within 24 hours of arrest. This has not been fully implemented though and children end up spending months- even years in remand in the name of police carrying out investigations.

Further, parents/guardians of the child arrested should be informed of the child's arrest and should be present during her/ his questioning.<sup>68</sup> This is not always the case and few, if any of the officers involved actually inform the suspect's parents of the arrest. The children therefore end up not having anyone to cater for their legal proceedings.<sup>69</sup>

### **3.0.2 Remand**

Remand refers to detention after arrest pending trial. Remand of arrested child suspects should be for the shortest time possible. It should be seen as just a temporary measure. This is unfortunately not the case in the Kenyan juvenile justice systems. There lacks adequate remand facilities for children and more often than not, older children from 15 years to 17 years are remanded together with adults. During such remand, the children are denied their entitlements that include: - food, sleep and play owing to the fact that police cells are woefully equipped to deal with the needs of children. Poor hygiene and health conditions also contribute to the

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<sup>66</sup> Cap 58

<sup>67</sup> Street Children and Juvenile Justice in Kenya; Recommendations. A report by Consortium for Street Children, CRADLE & Undugu Society of Kenya, Spring 2004.

<sup>68</sup> Rule 2(a) of the Child Offenders Rules in the 5<sup>th</sup> Schedule to the Children's Act

<sup>69</sup> Report on Children in Remand and Care Facilities, by CLEAR, IJM CLAN and LRF (NGOs in Kenya). Research carried out in the remand centres at Kamiti, Nairobi Area and Nairobi Children Remand Home

children constantly falling ill and thus being unable to attend their court proceedings. This is contrary to their right to health.<sup>70</sup> There lacks special facilities for the children, who end up staying locked up,<sup>71</sup> which is contrary to their playful nature and right to leisure as provided for in Art 12 of the ACRWC.

Such mixing also places the children at risk of being physically, emotionally and sexually abused by the older remandees. They are also prone to becoming hardened due to continuous exposure to adults being held on suspicion of crimes ranging from drunk and disorderly to robbery with violence and rape, thus increasing chances of recidivism. Poor conditions in remand such as overcrowding and the resulting suffering and discomfort usually compels some juveniles to prove guilty to crimes they did not commit just to avoid remand.<sup>72</sup>

The most common form of abuse of the juveniles' rights is the issue of overstaying in police custody. Many of the suspects stay in detention for days, weeks or even months before being arraigned.<sup>73</sup> This is despite the fact that the **Constitution** only allows detention for 24 hours for non-capital offences and 14 days for capital offences.<sup>74</sup> According to the **Child Offenders' Rules (R 4)**, a case should be dismissed after 6 months if the case has not been concluded if a capital offence and 3 months for a non-capital offence. This however does not happen. It is imperative to put into consideration that suspects are not always convicted and it is unfair to hold them in inhuman conditions seeing there is no compensation at all once the suspect is acquitted.

### 3.0.3 Questioning process

The ideal situation as regards questioning of arrested children is that parents/guardian, legal representative or a children's officer should be present.<sup>75</sup> **Rule 4** of the **Child Offenders Rules** provides that where it is not possible to contact the child's parents, a children's officer should be present. This is to avoid intimidation caused by police officers and the possibility of the child being coerced to admit the offence. During questioning, the age and needs of the child should be

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<sup>70</sup> Art 14 of the ACRWC

<sup>71</sup> Supra note 67

<sup>72</sup> Information obtained from Wamumu Rehabilitation School, Supra note 50

<sup>73</sup> Memorandum for National Action Plan for Human Rights; a research on the condition of juvenile remandees in Coast province

<sup>74</sup> S 72(3) (b)

<sup>75</sup> Rule 3 Supra note 66

taken into account. Sometimes the children don't understand the proceedings and are at other times harassed to force information out of them, instead of giving them comfort and support.

The duration of questioning depends on the nature of the case, but should not exceed 30 minutes. Serious crimes may take longer. It should be done during the day by specially trained officers, preferably women officers. During this process, children are susceptible to abuse and intimidation particularly since there is no clear and mandatory procedure on the same. Interviewers are therefore left to their own devices. Some children are never even questioned<sup>76</sup> since the arresters' testimony is usually taken as gospel truth. In promoting adherence to children's views and opinions,<sup>77</sup> the process should be made more child-friendly to ensure that even those arrested have the confidence to express themselves.

### **3.0.4 Handling by the courts**

This ranges from the length of trial to the conduct of proceedings. Due process constitutes the charge, plea-taking, hearing, sentencing and committal. All matters that concern children should be handled by the children's court.<sup>78</sup> This court should be appropriate and therefore child-friendly. It is proposed that the judge and prosecutor should not be in uniform, that a local language should be used and that the proceedings should be done in camera. The words 'convict' and 'sentence' should not be used in a children's court and instead 'found guilty' and 'committed' should be used.<sup>79</sup> This requirement has however not been implemented.

Courts don't seem to understand the need for psychosocial support for children. Many are tried in adult courts and therefore their right to privacy is often violated. Currently, children's cases drag for many months- even years. It should be noted that any delay in the necessary process is detrimental to the child's right to liberty. In light of the lack of resources and the current challenge of case backlog, the requirement that trials take 6 months and 3 months for capital and non-capital offences respectively is practically unworkable and more needs to be

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<sup>76</sup> Supra note 70

<sup>77</sup> Theme of the Day of the African Child, 16<sup>th</sup> June 2008-Promoting Child Participation

<sup>78</sup> Part VI of the Children's Act

<sup>79</sup> Millie Okoth Odhiambo, A Situation Analysis of Child Rights in Kenya. Also Rule 9 opp cit

done to make the same practical. Also, investigations take too long and sometimes the magistrates are not available, being on leave or otherwise.

During trial, many children are unable to defend themselves and it is their right to have legal representation, which may be catered for by their parents and by the government where they are unable to do so. This is rarely done especially for orphans and children with poor parents. Their ignorance of their children's rights hampers their ability to help assert them. Magistrates should be especially trained to handle juvenile cases and to know the rights of the child since they have the powers to make orders as to the proper handling and treatment of the children in custody after assessing their condition as they appear in court.

Few of the juveniles have lawyers, most of which are provided by local NGOs and few of their families can afford a lawyer. This occasions them injustice seeing that they rarely have charges and proceedings properly explained to them. They also have no information as to their sentences and consequences of either plea they prefer to enter. There is no provision to educate remandees on their rights and what law applies to them and most are just dragged through the process, being ignorant of what is happening.

There should be establishment of enough children's courts since lack of the same in some areas results in cases being heard in the traditional systems, where children are there to be seen and not heard, where the society has a right to discipline the child despite the mode of instilling such discipline and where the elders are 'always' right. The offenders are therefore never given a chance to defend themselves and little if any regard is had to their rights. There also needs to be diligent efforts to establish the age of young persons appearing before court so that their cases are only heard in juvenile courts; it is not always possible to ascertain whether one is a minor just by looking at him/her. The needs of the child and individual circumstances should also be taken into consideration since there needs to be a distinct difference in treating criminal cases *per se* as opposed to children in need of protection or discipline.

Bail is a constitutional right of offenders except capital ones and should be granted once the person requests for it unless there is clear reason not to grant the same.<sup>80</sup> According to the common law case of **R V. Rose**<sup>81</sup> the purpose of bail is to be to secure attendance of the accused at trial. **Rule 9** of the **Child Offender's Rules** provides that bail should be granted once a child appears in court and where the same is denied, reasons for the same should be recorded by the magistrate or judge. It is desirable that children be granted bail or bond with sureties and blatant denial of the same in absence of justifiable reason amounts to abuse of his/her rights by negating the presumption of innocence.<sup>82</sup> Such bail may be given with the child's own recognizance and no cash should be demanded for the same, unless the child's parents can afford to pay it. Children need to be sensitized as to their right to free bond and corruption( courtesy of which parents of child offenders are made to pay money for bail not knowing that their children are entitled to free bond.) dealt with to ensure that the children actually enjoy this right.

### **3.0.5 Sentencing and treatment**

Juveniles are protected from capital punishment and imprisonment. They are sent to corrective centres, not prison. A juvenile offender's case may be disposed of by:- making a probation order committing the juvenile to the care of a fit person, sending the child to a rehabilitation school if above 10 years and below 15, order of payment of a fine, sending the child to a borstal institution if above 16 years, placing the child under care of a qualified counselor, sending him to a vocational/ educational institution, and making a community service order.<sup>83</sup> Corporal punishment is prohibited.<sup>84</sup>

Magistrates in children's courts often use custodial treatment which is not the most ideal. Custodial centres are more like prisons and not rehabilitation centres.<sup>85</sup> In **Peter Nakale Lugulai V. R.**,<sup>86</sup> the appellant, when 16 years old was charged with robbery with violence contrary to **S 296(2)** of the **Penal Code Act**.<sup>87</sup> He was convicted and sentenced to death! He had been arrested

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<sup>80</sup> Art 72(5)

<sup>81</sup> (1855-99) All ER

<sup>82</sup> Provided in S 77(1) (b) of the Constitution

<sup>83</sup> S 191 Children's Act

<sup>84</sup> S 191(2) ibid

<sup>85</sup> Street Children and Juvenile Justice in Kenya: Recommendations 2004

<sup>86</sup> Criminal Appeal 363 of 2002

<sup>87</sup> Cap 63

by members of the public of whom none testified. The trial court in this case did not inquire into the age of the offender, which is a crucial matter to be determined so as not to impose the same sanctions and procedures as those applied to adults. The appellate court in this matter quashed the conviction and set aside the sentence. The juvenile's rights had however already been violated following a simple undoing on the part of the trial magistrate in failing to ascertain the age of the offender *ab initio*. The long process of appeal and the stigma attached to the death sentence given against the minor could have been avoided.

The sentencing process should ideally begin with a background report as to the child's needs and his/her past criminal record if any. These guide the court in deciding the most appropriate order to make. Children should be given a voice in the sentencing process; in which case they would be able to inform the judge incase they have been in custody too long, which is currently not the case. The judge may then issue a sentence of time already served. Judges should also avoid using language that is strange and alienating to children, and further take into account doubly vulnerable children like girls, mentally ill children and those involved in substance abuse.

### **3.0.6 Pre and post-release measures**

Most abuses of juvenile offender's rights are evident in the period before this stage. A few loopholes are however explored here referring to abuses in custodial institutions and on release of the juvenile.

In most custodial institutions in Kenya, the mode of separation of juveniles is by age, as seen that younger children below 11 years are sent to welfare homes while older ones to rehabilitation schools and borstal institutions. There is need to also classify and separate the children according to their offences in order to avoid contamination by serious offenders. The system as it is offers two options, where serious and repeat offenders are sent to high-risk centres while the rest are sent to corrective and rehabilitative schools. Others are cautioned and released. There is also need to provide separate accommodation for children in need of care and protection and the offenders.

In institutions, children are prone to corporal punishment, physical and sexual abuse especially by the staff. Some of the punishments given to children in these institutions includes:- solitary confinement, reduction in diet and hard, manual labour.<sup>88</sup> A great challenge facing these institutions is provision of adequate medical care, due to lack of enough medical facilities and personnel. To ensure that the offenders' right to good health is upheld, the state needs to provide the needed funds and budgetary allocation to make the same a reality. Sanitation conditions are also not up to standard and need prioritization.

Pre and post- release support is vital for the successful re-integration of children into their community and society. Despite ratification of the country to the **UNCRC** and the **ACRWC**, cases of violation of child offenders' rights are still at alarming proportions. This is evident in not only the numbers but also the nature of the abuses. Much has been done to arrest the situation and to stop the chain of abuse though what remains to be done is a lot more. The below phrase envisages the seriousness of the situation.

'Today in Kenya, no criminal activity is complete without sexual violence... A society that doesn't protect its children is a sick society.'<sup>89</sup>

### **3.1 CASE STUDIES OF ABUSE**

Here, scenarios and court cases will be highlighted to show practical cases of abuse of rights of child offenders in various instances.

In **R V.J.O.**,<sup>90</sup> a 15 year old boy was charged with careless driving of a bicycle causing an accident and damage to a motor vehicle. This boy was remanded with adults. His case was heard in an adults' court, in open court and for more than the stipulated 3 months. Further, he had no legal representation. An application to declare the said actions violations of his rights by CRADLE was denied by court.

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<sup>88</sup> Supra note 70

<sup>89</sup> The CRADLE's publication, Making the Children Count (2004)

<sup>90</sup> Busia SRM 152/02

In **R V. RMM**,<sup>91</sup> a child was charged and convicted of murder. The case was proved beyond reasonable doubt. However, the court was dismayed by police's treatment of the child. He had been arrested and detained at Naivasha police station for months before being arraigned in court, contrary to **Rule 4(1)** of the **Child Offenders Rules** and had recorded his statement in the absence of his parents, guardian or children's officer as required by **Rules 4(2),(3)** and **(4)**. In response, court stated that police officers should know these rules so as to apply them and protect rights and welfare of children, who are vulnerable.

In **R V. S.A.O**,<sup>92</sup> the accused, a minor was alleged to have committed murder when she was 12 years old. The child had been questioned by a male police officer and had been in custody for 6 months. Court in her application for bail stated that the abuse of the child's rights should be redressed. This may not have actually come to pass seeing the difficulty to enforce a judgment against the police, an arm of government.

In **O.O.N (a minor) V. R**,<sup>93</sup> the appellant was charged with murder and pleaded guilty to the offence of manslaughter on which he was convicted. By then, he was 16 years old. The appellate court held that the offender should have been sentenced under the **Child Offenders Rules**. Incorrect application of adult procedures on the juvenile inevitably resulted in abuse of his rights, which was not redressed. The settings of an adult court substantially hamper among others, the right of the child to freely express him/herself, and to fully participate in his/her trial.

In **Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai V. R**<sup>94</sup> the appellants were tried and convicted on a charge of robbery with violence and sentenced to death. On appeal, it was noted that the 2<sup>nd</sup> appellant was a child at the time of the crime. The sentence of death against him was subsequently set aside and substituted with an order for detention at the pleasure of His Excellency. This case shook the terrain in the realm of children law and poured cold water on the **Child Offenders Rules**.<sup>95</sup> Now children charged with offences punishable by death as per the

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<sup>91</sup> (2005) eKLR

<sup>92</sup> Criminal Case 236 of 2003

<sup>93</sup> Criminal Appeal 257 Of 2003

<sup>94</sup> Criminal Appeal 239 Of 2004

<sup>95</sup> Which were declared to be unconstitutional to the extent of allowing bail for children charged with capital offences.

**Penal Code Act** are no longer entitled to bail, and trial can last forever without court's intervention so long as the period is considered 'reasonable.'<sup>96</sup>

The constitution of Kenya does not draw a distinction between adults and children where the charge is one punishable by death. The **Criminal Procedure Code**<sup>97</sup> prohibits release on bail of persons charged with murder, robbery with violence, treason and attempted robbery with violence.<sup>98</sup> Further, the constitution doesn't define 'reasonable time within which child (and other) trials must be completed therefore opening a pandora's box of possible justified violations as regards the said periods.

Other cases happen during questioning, consisting of systematic torture. For instance a 16 year old boy being forced to lift a 20 liter Jerri can with his teeth and a 17 year old being forced to crawl across sharp rocks.<sup>99</sup> Further, few if any of the children have a parent or guardian present during questioning. Parents are usually unaware of the child's location until they are contacted by social welfare officers in various prisons after the child has been arraigned in court. The alternative is to be interviewed by a member of the children's department before being taken to court. This also rarely happens.

Gaping loopholes in the law make worse the situation since must be supported by specific provisions of the law. One can't enforce a right or entitlement if such enforcement and possible remedies are not expressly provided by the law, as is the case presently.

### 3.2 CAUSES OF ABUSE

Lack of awareness of the current violations and of the entitlements of the offenders is a major cause. The children don't know of their rights and entitlements from the time of arrest to release. Those who know have no mechanism for enforcing the said rights. This also affects the police as well as the judges who may not have been trained on how to handle the offenders. They therefore end up subjecting them to the same treatment as adults. Parents and guardians of abused children

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<sup>96</sup> Which has not been defined and can therefore always be justified by police. Court's hands are tied.

<sup>97</sup> Cap 75

<sup>98</sup> S 123 ibid

<sup>99</sup> Cases reported by the National Action Plan for Human Rights, after conducting a research in the Coast province

also lack awareness of their children's rights and how to enforce them. This causes a vacuum in the accountability required for the smooth running of the system and violations continue to occur.

Another cause is unfavorable laws, for instance the **Constitution** and **Criminal Procedure Code** which do not specifically address the needs of child offenders. Entitlements and procedures set out in the Children's Act can easily be declared unconstitutional thereby taking them away one hand with the other claiming to have guaranteed them.; case in point, **Kazungu's Case** above.

Poor record-keeping is another cause. There are inadequate records on individual offenders, from their arrest, through trial and committal. This hampers the efforts to properly deal with them such that some of those whose ages are not ascertained end up being tried through the adult system and subsequently imprisoned instead of being committed with regard to their needs. Magistrates need such records in trial and for sentencing. The process is ineffective in the absence of such records.

An ineffective system is conducive for the abuse of the rights in question- files go missing, forcing the child to stay in remand for and unnecessarily long periods. Impediments like slow investigations, numerous adjournments, unavailability of witnesses, changing of prosecutors, irregular court sittings among others hamper the expeditious disposal of children's cases and as a result the children are deprived of their liberty. Due to delay in the prosecution of cases children, especially the younger ones usually forget evidence. Lack of guidelines on arrest and questioning procedures exposes the offenders to the risk of violence by arresting officers or civilians, often in an attempt to extract a confession.

Inadequate financing. This is a major cause since it undermines the good intentions to improve the juvenile system. For instance, the inadequacy of holding centres for different categories of offenders leads to mixing of less serious offenders with more serious ones and also children in need of care and protection with the offenders. It also becomes difficult to provide separate detention for adults and older children notwithstanding the fact that mixing usually creates a conducive environment for abuse of rights of the children.

Lack of personnel for instance to be present during the arrest and questioning of the children and to take care of them during rehabilitation provides no accountability for the police and other stakeholders to ensure upholding of the said rights. It is quite an uphill task to try to enforce child rights whereas those entitled to do so are unfortunately the perpetrators for instance the police, courts and institutional personnel.

A conservative judicial system can also be said to advance the impunity as regards violation of the rights of child offenders. There is clear pressure against implementing reforms to ensure speedy dispensation of justice and the system is totally inflexible to proposed changes. This negates the proposing of recommendations to improve the system which never get to see the light of day. The old system insists on following laid down procedures despite that they sometimes occasion injustice to the parties involved. The hands of the magistrates are tied not to depart from the same. What results at the end of the day is poor administration of justice.

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## 4.0 MEASURES IN PLACE TO ENSURE COMPLIANCE

It is one thing to have idealized concepts of what the criminal justice system with regard to children should be and it is another to actually acquire the ideal. Several laws are in place in Kenya to ensure that international standards with regard to the same are adhered with. These laws therefore make it possible to enforce violations of human rights of incarcerated children and those who find themselves in conflict with the law. These will be discussed as follows

### 4.0.1 THE CONSTITUTION OF KENYA

S. 84 provides for the enforcement of fundamental rights and freedoms as provided in S. 70 through to S.83. S. 70 provides for the fundamental rights of life, liberty and security of the person. S. 72 protects personal liberty, S.74 protects from inhuman treatment, S.77 for fair hearing and S. 82 for protection from discrimination. All these come into play in a situation of a juvenile offender. According to S. 84, a person alleging contravention of the said preceding sections has recourse to the high court for redress. **Subsection (7)** provides for the right of appeal in this to the Court of Appeal.

The supreme law of the land can therefore be said to cater for the rights of juvenile offenders but only as a matter of inference since the rights of children aren't specified as such. The challenge however comes in implementation where the lack of resources and breakdown of the ideal systems make it a far off dream.

### 4.0.2 THE CHILDRENS ACT (CAP 8)

The 5<sup>th</sup> Schedule to this Act gives the guidelines for the handling of child offenders and procedure from arrest to release in the **Child Offenders Rules**, which must be complied with, by authorities dealing with child offenders.

The 8<sup>th</sup> Schedule to the Act provides for an Inspection Committee whose duties include; inspecting rehabilitation schools and children homes, interviewing children in such institutions, managers or staff members, inspecting conditions and facilities provided by the institution and making recommendations on improvement on the same.

The 9<sup>th</sup> **Schedule** on the other hand provides for the Adoption Committee consisting inter alia of one representative from Kenyatta National Hospital, another from private hospitals dealing primarily with children and one from the Law Society of Kenya knowledgeable in rights and welfare of children.

These two committees are charged with ensuring that the rights of child offenders especially in correctional institutions are complied with. They also make recommendations on improvement of the status quo.

#### **4.0.3 NON- GOVERNMENTAL ORGANISATIONS**

##### **a) THE CRADLE**

This is an organization fully committed to the protection of the rights of children. It provides free legal representation to poor children in conflict with the law who are vulnerable to injustice within the system. CRADLE is committed to uphold and ensure juvenile justice is achieved.

The organization carries out periodic assessments and analysis of the protection of the rights of children within the criminal justice system. These bring to light the most outstanding cases of injustice, expose imminent violations and therefore keep stakeholders in the system on their toes being, accountable to society as a whole, the guardian of children. This is done through publications like, *After the Promise, A Situation Analysis of Child Rights Protection under the Children's Act* (by Millie Adhiambo, 2003). Other such publications have been discussed in the Literature Review section of this research.

##### **b) Juvenile Justice Network (JJN)**

This is made up of a coalition of Kenyan organizations committed to ensuring better protection of children within the Justice system. The Network has made various presentations to parliament and the Constitutional Review Commission. It also participated in Kenya's reporting process for implementation of internationally recognized human rights standards the African Charter for the Rights and Welfare of the Child and the United Nations Convention on the Rights

of the Child. Its participation also cuts across to domestic legislation with regard to the topic in issue for instance, the Criminal Procedure Act, the Gender and Development Act as well as the Sexual offences Act.

**c) Save the Children (SOS)**

This is an organization that is aimed at protecting the rights of children and providing aid to the destitute and vulnerable children in the country. It collects information and makes proposals as well as recommendations on the upholding of the rights of children. Child offenders, being vulnerable children therefore also benefit from the mandate of this organization in its working in coalition to other organizations of the same nature.

**d) African network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN)**

This deals with the translation of legal documents and materials into local user- friendly languages. It also conducts researches into the problems facing children especially street children who result to crime due to absence of necessities that is, status offenders.

**e) Consortium for Street Children (C.S.C)**

This ensures the adoption of recommendations into laws. It is in the limelight to push for the insertion of children rights into the new constitution.

**d) Human Rights Watch (H.R.W)**

Acts as a watchdog on all stakeholders to ensure compliance and upholding of human rights, including of child offenders

**g) Children Legal Action Network (CLAN)**

Provides legal representation for children accused of crimes and ensures justice for those bringing action against other people or institutions. It also carries out trainings to sensitise stakeholders in the juvenile justice system to ensure they uphold the rights of juveniles.

#### 4.0.4 OTHER MEASURES

There exists a Committee on the Rights of the Child which carries out periodic reports on the implementation of the United Nations Convention on the Rights of the Child. This ensures that the measures set down by the UNCRC specifically as regards children offenders are implemented locally. In pursuance to this, the Children Department in Kenya established a National Children Council which monitors and evaluates progress and efficiency of all stakeholders in upholding child rights. This includes the rights of delinquent children. It ensures planning, financing and co-ordination of child rights and welfare activities in the country.

Several offices have been established to deal with children in conflict with the law to ensure that child offenders are treated with the dignity they deserve. These include District Children Officers who work together with the Provincial and national Children's board to ensure proper handling of children within the Criminal Justice System. These officers follow up the children's cases in court and are ideally present during the arrest of a child though this doesn't always happen. They act as watchdogs to ensure that the law enforcement agencies act in accordance with laid down procedures.

There is a requirement of vetting of all children officers and this greatly reduces the possibility of their exploiting the children's vulnerability to engage in acts that infringe on the rights of the children placed in their care. These officers are civil servants and subject to the Civil Servant's Code of Conduct and may be prosecuted in courts of law.

As regards the condition of placement institutions, there are public health workers under the Ministry of Health and officers of the Ministry of Public Works who carry out periodic inspection of the institutions to ensure that the buildings as well as sanitation meets the standards set by the respective ministries.

A diversion program has also been put in place to ensure that child offenders don't necessarily end up in the Criminal Justice System but instead have their matters settled out of court. Some of the remedies offered by the Diversion Program include; caution, community work, guidance and counseling and other non-custodial sentences.

The respect of the child offenders' right and freedom of conscience and belief as guaranteed by S. 78 of the Constitution is upheld by providing respective places of worship for

the children with regard to the religion they profess. Care is taken not to force the children into a particular type of belief.

The children's right to good health is upheld by providing quick and urgent medical care to them. For instance, medical doctors are provided at Gitathuru (a withholding ground where all children found guilty of crimes all over the country.) Here, the health of the children and their age needs are assessed before sending them to different correctional institutions and welfare institutions for those below 11 years of age. Allocation of the children is done after taking into consideration the above issues regarding the children as well as the gravity of their offence so as to ensure that less serious offenders aren't hardened through contact with serious as well as older offenders.

#### **4.1 EFFECTIVENESS OF MEASURES EMPLOYED TO IMPROVE BEHAVIOUR CHANGE OF CHILD OFFENDERS**

Several factors influence behavior change especially in children since the goal of the juvenile justice system, apart from punishing the offender is to ensure his/her re-integration into society. The following factors influence a child's behavior and therefore contribute to his/her affiliation to crime or the incidental lack of it;

- a. Environment/ life circumstance
- b. Peer groups
- c. Culture
- d. Knowledge and experience
- e. Beliefs
- f. Personality
- g. Emotions, feelings and attitudes
- h. Instincts
- i. Intelligence

The above factors should be taken into consideration in dealing with a child offender and particularly in his/her arrest, trial and committal (if necessary.) This is because the goal of punishment is rehabilitation and retribution as opposed to being only punitive. Taking these into consideration therefore ensures that the root cause of the child's criminal tendencies is addressed and that the same are nipped in the bud and promoting the child's development into a responsible and law-abiding citizen.

The measures discussed in 4.0 above contribute to behavioral change in that where his/her needs and rights are respected and met, the offender is easily reformed as compared to more hostile conditions. The effectiveness of the said measures on behavioral change can be assessed spontaneously to their effectiveness in eradicating or substantially reducing violation of the rights of child offenders. This is especially true of status offenders who result to crime due to necessity.

These coupled with the access of information to juveniles in the criminal justice system, their ability to express their needs and opinions, discouraging of harmful cultural factors would positively impact on the quest to reduce the occurrences of juvenile crimes and to reduce recidivism.

Measures employed to ensure compliance with protecting rights of child offenders have gone a long way to ensure non-abuse of the said rights. Sanctions available against violators discourage would-be perpetrators

## **4.2 THE PURPOSE OF PUNISHMENT**

Punishment has been defined as the deliberate denial of some human right inflicted by those in authority due to their refusal to obey a law or regulation or respect the right of others. It is inflicted with the intention to restore the balance of rights and justice.

Punishment is inflicted with three purposes which include;

- a. Retribution: This refers to punishment being equivalent to the harm done. This is where punishment is employed to ensure a balance between the rights of the victim and those of

the offender. Its objective is to mete out 'just desserts.' This gives justification to the eye-for-an-eye and tooth-for-a-tooth adage.

- b. Deterrence: This is where punishment given to stop or reduce the possibility of future occurrence of the said crime. It acts as an example to prospective criminals to discourage them from such-like acts. This focuses on the society rather than the victim or offender, thus placing its needs ahead of those of the two.
- c. Reformation: This is where punishment is aimed at correcting the offender and ensuring his/her reformation as well as re-integration into the society. This kind of punishment focuses more on the offender but also ensures that the victim gets justice. It benefits the community as a whole and provokes a change of behaviour through offering support and opportunities through social work, supervision, advocacy for education, social security and family guidance.

It is the humble submission of this research that punishment inflicted on child offenders should ideally be reformatory and deterrent rather than retributive. It is important to note that children can become hardened to punishment if it is too frequently and undeservedly given. Punishment for child offenders should therefore always be appropriate; not only to the offence but also to the offender.

Factors causing crime should be assessed in their specificity. Usual causes of crime include:- selfishness, usual provocation, psychological disturbance or illness, revenge, poverty, loss of moral values and cultural conscience, materialism and the like.

Restorative justice should be the main goal of punishment for juveniles. It can be done through mediation between the offender and the victim. In this, two ends are met, in that the victim's rights are upheld as well as those of the juvenile. This is done through diversion from the criminal justice system. Children taken through formal criminal justice systems see themselves as criminals and are likely to behave so. They are also exposed to other criminals thus increasing their propensity to commit crimes in the future.

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## 5.0 CONCLUSION

Abuse of under-age suspects occurs even before they are arraigned in court. Such violations, as set out in this research aren't merely a list of NGO complaints; they are a dim reflection of the delinquents' terrible experiences. It brings to light the challenge that the situation could be better handled, in which case such violations would be a thing of the past. Children are more often than not vulnerable, timid and ignorant of their rights and it is the role of society to be a voice for them.

Rights of juvenile offenders in Kenya exist more in theory than in practice and this needs to be addressed as a matter of urgency

## 5.1 OBSERVATIONS

- i. Children in remand homes are often mixed-suspects and those in need of care and protection.
- ii. After arrest, many children are often mixed with adults in cells.
- iii. Parents are usually not informed of the arrest of their children and are therefore not always present during their questioning as is the ideal.
- iv. Children don't always receive legal aid to ensure that justice is occasioned to them.
- v. Delinquents are never allowed to play and this is detrimental to their well-being and a contravention of the international treaties that provide for a child's right to leisure and recreation.
- vi. The children often fall ill due to unhealthy conditions and bad food and consequently cant attend their hearings. This causes cases to take longer than necessary.
- vii. Cases take too long- more than the ideal three months but are rarely dismissed as is the ideal.
- viii. Offenders in remand are classified according to crime and not age.
- ix. There are inadequate records on individual offenders

- x. Children of tender years accompany their mothers to prison and miss their entitlements as children since they are incarcerated. Some end up in the streets as their mothers serve their terms in prison.<sup>100</sup>

It is not to be assumed that nothing positive has been done to improve the situation of the minors in the juvenile justice system in Kenya. One of the most concerted efforts includes the Juvenile Justice Project, a joint venture between the Law Society of Kenya (Rift Valley Branch) and Newcastle Law Society in the United Kingdom. This has begun offering legal aid to minors in conflict with the law. Such provide a good example of what should be adopted all over the country.<sup>101</sup>

## 5.2 RECOMMENDATIONS

All police stations should have a children's desk. This would ensure that their ages are ascertained once they are checked into the station, that their parents are informed of their arrest and that they are properly placed in children's remand facilities. This would also ensure that officers from the Children's Department would be informed of the said arrests and be present during their questioning.

Legal aid should be mandatory. The experience of court leaves the children feeling alone and alienated, lost in a world where there is little or no assistance available to their like, being least able to understand the complexities of the system which decides their fate, for years to come.<sup>102</sup> Many child offenders don't even understand the charges read to them or their possible sentences. Legal aid would take care of this, ensuring that the children are well represented. Priority in this should be given to remandees accused of crimes with a sentence of 3 years and above.

There should be programmes implemented to educate the juveniles on their rights as well as the working of the system. This would make it possible for them to follow up on the

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<sup>100</sup> Repressing the Child, A Report on Juvenile Justice, Delinquency and Human Rights in East Africa in Comparison to Delinquency and Juvenile Justice in the United States, England and Wales, A report by the Oscar Foundation, 2006

<sup>101</sup> Beatrice Obwocha, New way of dealing with minors who break the law; The Standard May 4 2009

<sup>102</sup> NAP memorandum.

procedures of court and to report any violations of their rights in the system. The older ones would also be empowered to represent themselves in case they are not provided with legal representation. There should also be training for law enforcement personnel in dealing with juvenile cases. These include magistrates, the police and other stakeholders in the criminal justice system.

There should be prohibition of brutal force in the arrest of juvenile offenders by police. Practical punitive measures should also be put in place to increase the prosecution of crimes against juvenile delinquents to challenge the culture of impunity. Detention of juvenile offenders should be for the shortest time possible and the law should impose limits on periods for detention.

Reports on implementation of the various recommendations should be made available to the public. This is to provide accountability for the stakeholders in the juvenile justice system and to ensure that recommendations and laws pertaining to the same are put into practice, not remaining dead letters. There should be regular assessment programmes of the policies in question.

Records should be kept of the individual progress of juveniles' cases to ensure that the same do not drag on unnecessarily and that the needs of the said juvenile are addressed. The directive on capital offences taking 6 months and non-capital ones 3 should be made practical by ensuring that investigations are promptly done, police files are available on the hearing dates, that witnesses are present and the prosecution ready to proceed, to avoid the many adjournments that result from the same not being done.

Children of tender age should not accompany their mothers to prison. They should be instead given to their other relatives and where there are none, they should be taken to children's homes where they can get the requisite care required for their growth and development. Arrangements can then be made for them to be taken back by their mothers once they leave prison.

Diversiory schemes should be used instead of the criminal justice system; where possible. There is need to ensure that children are diverted from police stations and courts. A significant

number of cases could be better handled through this programme as opposed to formal court procedures. In these, the Children's Department brings together the families of the accused as well as the victims to discuss the allegations and attempt to sort out the problems.

There should be investigations into sexual offences in their specificity. This is because of their peculiar nature, where in some cases the victims are alleged to be the accused persons' girlfriends and in many other cases, the victim and accused are of the same age thus presenting the possibility of the victim having 'consented' to the act. These cases are often brought by irate parents who never inquire into the circumstances, but only establish there was sex and then initiate criminal proceedings.<sup>103</sup>

Trials of children should take place during holidays. This is to ensure that their school programme is not interfered with by the numerous court attendances and dragging of cases for too long. The Attorney General should issue guidelines on specific procedures as regards child offenders for instance questioning procedures. These should be for the officers in the children's departments, for the police who handle the juveniles as well as for magistrates when hearing children's cases, for instance requiring that the charge be read out and the potential sentence fully explained. Also that the judge inquire into the times of detention and whether the child's rights were upheld during remand and arrest and make relevant orders taking the same into consideration.

There should be more budgetary allocations for building of more children's holding centres to stop the current trend of remanding children together with adults and mixing offenders with children in need of care and protection. Funds are also needed for the establishment of a training programme for the remandees. There should also be a provision that in cases of alleged abuse, the juveniles should be in a position to communicate with a neutral individual on a regular basis, either from the children's department or an NGO.<sup>104</sup> There should be regular visits to police cells to ensure that inherent and constitutional rights of all minors are being protected by advocates, paralegals and NGO officials.

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<sup>103</sup> Ibid

<sup>104</sup> Ibid

There should be established more juvenile courts to address the large number of juvenile offenders since the current lack of enough of the same inevitably causes the juveniles to be tried in adult courts. Conditions in remand institutions should be improved since it has been noted that some of the children actually plead guilty to crimes they did not commit just so they aren't taken back to remand.

There is also need for diligent and systematic efforts to separate the children in need of care and protection from those accused of crimes. Further, children in conflict with the law should be given a fair opportunity to be heard.

Magistrates handling juveniles' cases should exercise alternatives to custodial treatment which is currently overused as a remedial treatment. Officers dealing with children should facilitate the re-unification of children with their families where possible, especially those who have been acquitted of charges preferred against them as well as those considered status offenders.

There should be more coordination between child rights NGOs to eliminate duplication and to ensure that as many children are reached or benefit. The role of volunteer children officers and community rehabilitation should also be established and strengthened. This would cover for the shortage in children personnel. With such measures also, an effective mechanism for children's complaints about staff and conditions of confinement at institutions should be established to ensure that staff do not abuse their contact with the children.

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