JUVENILE JUSTICE IN RELATION TO CHILD ARREST AND SENTENCING IN CRIMINAL OFFENCES IN NAIROBI. A CASE STUDY OF KABETE REFORMATORY BROSTAL

BY

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DECLARATION

This is to certify that the research is my original work and has not been presented for examination in any other University or institution for award of any certificate.

Mr. Didier Madzayo

26th May 2014

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Signature Date

APPROVAL

This research has been submitted for examination with my approval as Kampala International University Supervisor

Mr. Ogwal Samuel

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27/05/2014

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HOD Pub/Comp Law

27/5/14

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DEDICATION

This research proposal is dedicated to my loving family whose support has enabled me to complete it. My sincere thanks go to my supervisor, Mr. Ogwal Samuel who has always guided me.

Special thanks to God Almighty for giving life and attaining this level of education.

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CHAPTER ONE: INTRODUCTION

1.0 Introduction

This chapter explored various details in relation to the study. It encompassed background of the study, statement of the problem, scope of the research, hypothesis, and significance of the study, literature review, methodology, research design, sampling techniques, research instruments and questionnaires amongst others.

1.1Background of the study

According to,[1] delinquent and criminal behaviour among young people has been rampant as they negotiate the transition from childhood to adulthood in an increasingly complex and confusing world. Some basic assumptions relating to delinquent behaviour are followed by a description of the various factors underlying or contributing to this phenomenon. Some regional variations are always highlighted. Effective approaches and measures for preventing juvenile delinquency are detailed, with particular attention given to the development of educational, professional development and community programmes, improvements in family relations and parenting skills, and the value of restorative justice for both perpetrators and victims.

In view of[2]for many young people today, traditional patterns guiding the relationships and transitions between family, school and work are being challenged. Social relations that ensure a smooth process of socialization are collapsing; lifestyle trajectories are becoming more varied and less predictable. The restructuring of the labour market, the extension of the maturity gap (the period of dependence of young adults on the family) and, arguably, the more limited opportunities to become an independent adult are all changes influencing relationships with family and friends, educational opportunities and choices, labour market participation, leisure

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[1] Hirschi Travis "*Causes of Delinquency*" Transaction, New Brunswick, 2002.

[2] Osgood Wayne and Chambers Jeff, "*Community Correlates of Rural Youth Violence*", OJJDP Bulletin, online at http://www.ncjrs.gov/html/ojjdp/193591/contents.html Accessed on 22.05.2008

activities and lifestyles. It is not only developed countries that are facing this situation; in developing countries as well there are new pressures on young people undergoing the transition from childhood to independence. Rapid population growth, the unavailability of housing and support services, poverty, unemployment and underemployment among youth, the decline in the authority of local communities, overcrowding in poor urban areas, the disintegration of the family, and ineffective educational systems are some of the pressures young people must deal with. Youth nowadays, regardless of gender, social origin or country of residence, are subject to individual risks but are also being presented with new individual opportunities—some beneficial and some potentially harmful. Quite often, advantage is being taken of illegal opportunities as young people commit various offences, become addicted to drugs, and use violence against their peers. Statistical data indicate that in virtually all parts of the world, with the exception of the United States, rates of youth crime rose in the 1990s. In Western Europe, one of the few regions for which data are available, arrests of juvenile delinquents and under-age offenders increased by an average of around 50 per cent between the mid- 1980s and the late 1990s. The countries in transition have also witnessed a dramatic rise in delinquency rates; since 1995, juvenile crime levels in many countries in Eastern Europe and the Commonwealth of Independent States have increased by more than 30 per cent. Many of the criminal offences are related to drug abuse and excessive alcohol use[3].

As said by [4]the majority of studies and programmes dealing with juvenile delinquency focus on youth as offenders. However, adolescents are also victims of criminal or delinquent acts. The continuous threat of victimization is having a serious impact on the socialization of young men

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[3] Waring, Elin, and David Weisburd, eds. *"Crime and Social Organization"*, Transaction Publishers. New Brunswick ,2002.

[4] Carter Hay, Edward N. Fortson, Dusten R. Hollist, Irshad Altheimer and Lonnie M. Schaible *"The Impact of Community Disadvantage on the Relationship between the Family and Juvenile Crime"*, Journal of Research in Crime and Delinquency 2006; 43; 326

and on their internalization of the norms and values of the larger society. According to data on crimes registered by the police, more than 80 per cent of all violent incidents are not reported by the victims. Information about the victims allows conclusions to be drawn about the offenders as well. Results of self-report studies indicate that an overwhelming majority of those who anticipate in violence against young people are about the same age and gender as their victims; in most cases the offenders are males acting in groups. Those most likely to be on the receiving end of violence are between the ages of 16 and 19, with 91 in every 1,000 in this group becoming victims of some form of crime. Surveys have shown that men are more likely than women to become victims. In the United States, 105 in every 1,000 men become crime victims, compared with 80 per 1,000 women. Men are 2.5 times more likely to be victims of aggravated assault. Older people are less often affected; as mentioned, crimes are usually committed by representatives of the same age groups to which the victims belong. Young people who are at risk of becoming delinquent often live in difficult circumstances. Children who for various reasons—including parental alcoholism, poverty, breakdown of the family, overcrowding, abusive conditions in the home, the growing HIV/AIDS scourge, or the death of parents during armed conflicts—are orphans or unaccompanied and are without the means of subsistence, housing and other basic necessities are at greatest risk of falling into juvenile delinquency. The number of children in especially difficult circumstances is estimated to have increased from 80 million to 150 million between 1992 and 2000.3 The problem of juvenile delinquency is becoming more complicated and universal, and crime prevention programmes are either unequipped to deal with the present realities or do not exist. Many developing countries have done little or nothing to deal with these problems, and international programmes are obviously insufficient. Developed countries are engaged in activities aimed at juvenile crime prevention, but the overall effect of these programmes is rather weak because the mechanisms in place are often inadequate to address the existing situation. On the whole, current efforts to fight juvenile delinquency are characterized by the lack of systematic action and the absence of task-oriented and effective social work with both offenders and victims, whether real or potential. Analysis is further complicated by a lack of international comparative data. It is impossible to develop effective prevention programmes without understanding the reasons behind juvenile involvement in criminal activity. Different approaches are used in scientific and practical literature on juvenile crime and violence to define and explain delinquent behaviour by young people. To

criminologists, juvenile delinquency encompasses all public wrongs committed by young people between the ages of 12.

The Convention on the Rights of the Child entered into force in 1990 with Kenya becoming a signatory in the same year. The Rights of the Child has come to be an important issue in international law and human rights, Kenya cannot ignore the significance internationally of ignoring its international legal obligations in this area. Furthermore, it is a well-accepted principle of judicial interpretation that when faced with ambiguity in domestic legislation, courts must adopt the presumption that Parliament intended to act in accordance with international obligations. It was seen that the legislation is relatively clear; however, if faced with ambiguity, courts must interpret in conformity with the Convention on the Rights of the Child, as well as other international instruments dealing with the issue. Furthermore The Children's Act is designed to implement international instruments, therefore, it is expected that when dealing with similar provisions, courts seeked guidance from comparative jurisprudence, as well as recommendations and decisions from the relevant international committee.

By failing to provide children with legal assistance, Kenya is in contravention of a number of its international obligations. The International Covenant on Civil and Political Rights ensures the right to a fair trial, which can be said in certain cases to include legal representation. Kenya is a signatory to the ICCPR[1] Pursuant to Article 14.3 (d)[5]: In the determination of any criminal charge against him, everyone shall be entitled to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, assigned to him in any case here the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.

Article 14 ICCPR also guarantees the right to a fair and public hearing. On this basis alone it would seem that Kenya violates international law. It is evident that the interests of justice require that a child be represented in legal proceedings.

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[5] ICCPR

Article 10(2) (b) ICCPR states that an accused juvenile shall be separated from adults and brought as speedily as possible for adjudication.

Article 10(3) provides that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and status. The results illustrate that this is not occurring.

The African Charter on Human and People's Rights also embodies the right to a fair hearing. It has been recommended by the Committee that States Parties to the African Charter on Human and peoples' rights to create awareness of the accessibility of the recourse procedure to provide the needy with legal aid[6].

International Law dealing specifically with Children:

The primary source of international rights of the Child is the Convention on the Rights of the Child to which Kenya is a party. Kenya is also a signatory to the African Charter on the Rights and Welfare of the Child. By failing to provide legal assistance, a number of Articles in these instruments are violated.

Article 37(d) of the CRC provides that States Parties shall ensure that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court of other competent, independent and impartial authority, and to prompt decision on any such action.

Article 40[7]

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and

[6] ACHPR/Res.4(XI): Resolution on the Right to Recourse and Fair Trial (1992)
[7] CRC

the desirability of promoting the child's reintegration and the child's assuming a constructive role in society

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(b) Every Child alleged as or accused of having infringed the penal law has at least the following guarantees:

i. To be presumed innocent until proven guilty according to law;

ii. To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

iii. To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in eth presence of legal or other appropriate assistance and, un

iv. less it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

The reference to *other appropriate assistance* makes it possible for a child to have his or her defence assured by non-lawyers. However, it must be presumed that, in the best interests of the child[8] and for reasons of justice, such other appropriate assistance should only be resorted to in cases of minor infringements of the law. The Human Rights Committee has often noted with concern that the right to free legal assistance provided for by article 14, paragraph 3(d), of the Covenant does not seem to be guaranteed in all cases.

According to Human Rights Watch has also expressed disapproval; in Kenya in 1996 they found that street children were committed for years to juvenile correctional proceedings with no legal representation[7]. The African Charter on the Rights and Welfare of the Child mirrors these provisions in Article 17. Specifically, for our purposes, article 17(3) requires States to ensure that every child

[8] See Article 3 CRC

By not providing children with free access to legal aid, Kenya can be seen to be in violation of a number of other provisions of the Convention on the Right of the Child and the African Charter on the Rights and Welfare of the Child:

Article 2 CRC provides that States have an obligation to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind .By failing to provide access to free legal aid, Kenya is discriminating against children who cannot afford such assistance in ensuring the right to a fair trial.

Article 3(1) provides that the best interests of the child must be a primary consideration in all actions concerning children. The committee has commented that the principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or were affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

According to CRC/GC/2003/5, the best interests' principle is reflected in Article 4 African Charter on Rights and Welfare of the Child.

Article 6: the child's inherent right to life and the States parties' obligation to ensure to the maximum extent possible the survival and development of the child. Statistics illustrate that without legal representation children are more likely to face time in prison, clearly failing to ensure the possible survival and development of the child. Indirectly, by failing to provide legal assistance, Kenya is violating the child's right to privacy work on the basis of a unifying, comprehensive and rights-based national strategy, rooted in the convention[9].

It was further stated that:

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[9] CRC: Article16 Convention on the Rights of the Child

assistance, Kenya is violating the child's right to privacy work on the basis of a unifying, comprehensive and rights-based national strategy, rooted in the convention[9].

It was further stated that:

> The strategy must not be simply a list of good intentions; it must include a description of a sustainable process for realizing the rights of children throughout the State; it must go beyond statements of policy and principle, to set real and achievable targets in relation to the full range of economic, social and cultural and political rights for all children. The strategy inevitably set priorities, but it must not neglect or dilute obligations which states parties have accepted under the Convention. The strategy needs to be adequately resourced, in human and financial terms.

In many ways Kenya has adopted this holistic approach, however, funds need to be directed towards legal assistance. A failure to provide children with legal assistance indirectly affects almost every facet of a child's life. Prison terms, particularly if placed with adults, following an unfair and unjust trial, invariably lead to violations of the right to privacy, freedom from torture, right to education, the survival and development of the child as well as a direct contravention of the best interests of the child principle.

asserting that "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances" Whatever their economic circumstances, States are required to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups. On this analysis, Kenya would seem to fail to provide such evidence and therefore violate the convention.

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[9] CRC: Article16

1.2 Statement of the problem

Kenya is bound by the Convention on the Rights of the Child (hereafter CRC) and is also a signatory to the African Charter on the Rights and Welfare of the Child. Kenya has implemented these international instruments domestically through the Children's Act, 2001. The failure of the government to provide free legal assistance to children where necessary is in violation of both domestic and international law. Juvenile delinquency and involvement in crime has experienced a sharp increase in the past few years. This may be attributed to the increase in poverty in the rural areas and the high incidence of alcohol and drug abuse in the urban areas. Similarly, cases of child abuse and neglect are on the rise. Kenya is witnessing unprecedented incidents of child sexual abuse and parental physical assaults on children.

There is an expectation to receive legal aid where the court deems it necessary, and that the legal aid should be granted under a system set out and paid for by funds allocated by parliament. The expectation to receive legal aid concerns itself with expectations of fair procedures meant to create and sustain a fair system of justice. By failing to lay such a system in place, the National Council for Children's services has provided a ground for judicial review related to the fairness of a decision(s). Children are often convicted for crimes without a satisfactory adversarial trial to show whether the child is guilty or innocent of the crime, or whether there are any defenses or mitigating circumstances. Further, children who appear in court as victims/complainants often have their cases dismissed because they do not have sufficient legal knowledge of the evidence they must provide to prove their cases, resulting in child abusers going unpunished and often reoffending. Furthermore, children may be condemned to an institution for an unduly long period of time without a fair trial to establish guilt or innocence. The effect of placing children in institutions manifests itself negatively in their later lives.

A study[10] in 2002: 15 Cases of which none of the children were represented. 2003: 61 cases of which only 39 were given pro bono aid by CHILAC. 2004: 61 cases at 28th July. In none of the cases did the Magistrate inquire from the accused whether they required legal representation. In Eldoret, Kenya illustrates that the absence of legal representation results in the following:

i. In many instances children are first taken to the ordinary courts for taking of plea. It is only when they appeared before the sitting magistrate that they were referred to the children's courts. As a result of this children were mixed with adult offenders

ii. The right to have a case determined without delay is also not observed by the courts in the absence of legal representation. The prosecution obtained adjournments of matters on grounds such as 'witnesses were not bonded' and 'police file missing'. Last adjournments are never final. The fate of the minor is still left to the discretion of the magistrate notwithstanding the mandatory provision of Rule 12 of the Child offender Rules.

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[10] Year 2002: 15 Cases of which none of the children were represented. 2003: 61 cases of which only 39 were given pro bono aid by CHILAC. 2004: 61 cases at 28th July. In none of the cases did the Magistrate inquire from the accused whether they required legal representation.

[12] See 18(3) Children's Act and Rule 6 Child Offender Rules

Example cases No 26/03. The accused was aged 16 years, charged with possession of narcotics. He pleaded guilty. He was finally sentenced on 22/7/2004. He pleaded guilty to the charge; however the conviction can be challenged as there were no exhibits presented before the court neither the government analysis report in such a charge

iii. It was also seen in the study that there was a pattern relating to children pleading guilty to charges. On first appearance in court the child pleaded not guilty and be remanded at the juvenile remand home. At his next court appearance the child tends to change his plea[13].

1.3 Specific Objective of the studies

1. To assess the extent at which the laws on juvenile justice determines child arrest and sentencing in criminal offences in Nairobi, Kenya
2. To identify obstacles children face in exercising juvenile justice during arrest and sentencing over criminal offences in Nairobi, Kenya
3. To find out ways of eliminating or minimizing these obstacle that hinder children from attaining juvenile justice during arrest and sentencing over criminal offences in Nairobi, Kenya
4. To formulate strategies aimed at deepening children understanding to legal, cultural and economic consequences of operations as regards juvenile justice during arrest and sentencing over criminal offences in Nairobi, Kenya

1.4 Scope of the research

This study was conducted on juvenile justice in relation to child arrest and sentencing in criminal offences in Nairobi, Kenya. The respondents were drawn from judges, lawyers, administrators from juvenile correctional institutions and police administration. The respondents were drawn from a series of constituencies; Makadara, Kamukunji, Starehe,Langata,Dagoretti,Westlands,Kasarani, and Embakasi.

1.5 Research questions

1. What is the extent at which the juvenile justice determines child arrest and sentencing in criminal offences in Nairobi, Kenya?

2. What is obstacles children face in exercising juvenile justice during arrest and sentencing over criminal offences in Nairobi, Kenya?
3. What are the ways of eliminating or minimizing these obstacle that hinder children from attaining juvenile justice during arrest and sentencing over criminal offences in Nairobi, Kenya?
4. Which strategies can be employed to deepen children understanding on legal, cultural and economic consequences of operations as regards juvenile justice during arrest and sentencing over criminal offences in Nairobi, Kenya?

1.6 Significance of the study

1. The study formed a good foundation for further research on juvenile justice in relation to child arrest and sentencing.
2. The research can now assist the legislators, policy makers and children themselves to ensure that children right to juvenile justice during arrest and sentencing are worked upon.
3. The study can now aid in identifying the gaps in Kenyan laws in reference to juvenile justice during arrest and sentencing
4. This study enabled the researcher to fulfil the requirement for an award of degree in bachelors of law.

1.9 Methodology

This is was step process of how the researcher intended to achieve the objectives of the study and answer the research questions. The methodology included the research design, target group,

sampling techniques, research instruments and methods of data collection. The questionnaires interviews were scheduled and observational forms to be utilized to collect information for the study. Each question on the questionnaire was developed in a specific research question. The kinds of questions used in the questionnaire were structured or closed ended questions.

The closed ended questions were easier to analyze and administer than the unstructured or open ended questions.

The researcher carried out a pilot study to pretest and validates the data. According to (Cooper and Schindler, 2003), the pilot group can range from 25 to 100 subjects depending on the method to be tested but it does not need to be statistically selected. This was in line with a qualitative research design methodology to be employed in this research proposal.

1.10 Research design

This research design was selected to accommodate the limitation in terms of time and resources available to conduct the study.

Donald (2006) notes that a research design is the structure of the research; it is the "glue that holds all the elements in a research proposal together. Further, Orodho (2003) defined a research design as the scheme, outline or plan that is used to generate answers to research problems. The type of research design used was descriptive. This design described the relationships that exist between the independent and dependent variables, (Kothari, 2003).

1.10.1 Sampling techniques

In this study, stratified sampling was employed because stratified sample helped the researcher obtain sufficient sample points to support a separate analysis of the subgroups involved (Mary & Mugenda, 2003). According to Welman and Kruger (2001), in the simplest case of random sampling, each member of the population has the same chance of being included in the sample. The target population was divided into regions to ensure that the sample taken was a true reflection of the different classes of employees in the organization. The researcher used stratified sampling to obtain data from each stratum. Respondents from each stratum were selected using random sampling. Purposive sampling is to be used to select the respondent. The researcher was going to use a total of 30 potential respondents as the sample size.

1.10.2 Data Collection procedures and instruments

The questionnaires interviews were scheduled and observational forms utilized to collect information for the study. Each question on the questionnaire was developed in a specific

research question. Interviews as oral administration of the questionnaire involved face to face contact with the respondent. Interviews to provide in-depth data which could not be possible to get using a questionnaire. Lastly, the observation guides aided obtain data on this study. An observation checklist were designed and used to record the behaviors of the respondents observed during data collection.

The researcher carried out a pilot study to pretest and validates the data. According to (Cooper and Schindler, 2003), the pilot group can range from 25 to 100 subjects depending on the method to be tested but it does not need to be statistically selected. These were in line with a qualitative research design methodology employed in this research proposal.

According to (Berg and Gall, 1989) validity is the degree by which the sample of test items represents the content the test is designed to measure. Content validity which was employed by this study is to measure of the degree to which data collected using a particular instrument represents a specific domain or content of a particular concept. Mugenda and Mugenda (1999) contend that the usual procedure in assessing the content validity of a measure is to use a professional or expert in a particular field.

To establish the validity of the research instrument the researcher seeked opinions of experts in the field. This facilitated the necessary revision and modification of the research instrument thereby enhancing validity. In addition, considerations were made on importance of protecting the privacy and rights of the participants in the research. These fundamental rights and privacy were protected by adopting the following procedures during the field work. Furthermore, the participation in the research was voluntary. Therefore participants had the right to decide whether to take part in the survey or not while the researcher focused on group data when presenting the results of the research. The result was presented based on statistical averages to avoid the possibility of revealing the information provided by individual respondents.

1.10.3 Questionnaires

The kinds of questions used in the questionnaire were structured or closed ended questions. The closed ended questions were easier to analyze and administer than the unstructured or open ended questions.

These questions which shared the same set of response were grouped together. These questions were easy to complete and the respondent are not likely to be put off. Interviews were also be used to collect data for this study.

1.10.4 Interviews

Interviews provided in-depth data which could not be possible to get using a questionnaire. Lastly, the observation guide aided obtains data on this study. An observation checklist were designed and used to record the behaviors of the respondents observed during data collection.

1.10.5 Limitations of the study

Time: The research lacked sufficient time that could give in-depth understanding of juvenile justice on child arrest and sentencing in Nairobi, Kenya.

Biased respondents: Given the fact that the study focused on Nairobi only, possibility existed that the some participants could respond positively with the aim to reflect a good picture of the situation.

2.0 CHAPTER TWO: LITERATURE REVIEW

1.8.1 Introduction

This chapter gave the legal framework, international laws that relates to the juvenile delinquency on children. It examined what research has shown as regards effectiveness juvenile justice during child arrest and sentencing. As stated by[11], juvenile crime in colonial Kenya was often regarded as a manifestation of the social and economic changes associated with urbanization. The concerns aroused by the growth of an urban population in colonial Africa have many parallels with nineteenth-century responses to the rise of the urban working classes in Britain. As Burton has put it in reference to colonial Dar es Salaam: 'In the colonial rhetoric regarding the effects of urban growth in Tanganyika are traces of the Victorian anxiety towards the transformation of British society. There is the same idealization of country life and corresponding concern over the detachment of the urban migrant from his rural community. The superintendent of Kenya's Kabete Reformatory, Captain Wood, saw urban life, and the incapacity of some Africans to cope with it, as a cause of juvenile delinquency: ' It would appear to be quite necessary to determine what percentage of inmates are unfit for town life, either by reason J. Gillis, 'The evolution of juvenile delinquency ', Past and Present, 67 (1g75), pp. 96-1 26, at Ibid., p. 98. P. 197. J. M'.Slaughter, the adolescent (London, 191 I). See also M. G. Barnett, Young delinquents –a study of' reforms and industrial schools (London, 1gI 3).Springhall, Coming of age, pp. I 76-7. I2 A. Burton, 'Wahuni (the undesirables)' (PhD thesis, London, zoo), pp. 26-7 of mental inefficiency, or criminal tendencies; also to devise some means of keeping boys out of towns as practically all reconvictions occur in townships. ""Anderson has demonstrated that there was a sharp increase in the amount of cognizable crime in settled and urban areas in Kenya in the early 1930s. The majority of this increase in convictions consisted of minor offences, with offences against property and the Stock and Produce Theft Ordinance also rising. Law and order had always been a powerful political issue for European settlers, and this was intensified in the 1930s within official opinion as well: 'There was a clear sense among the police and the judiciary of the

[11] Rubin Sol (1961)

emergence of a "criminal class" in Kenya by the 1930s. A combination of economic depression and drought certainly contributed to the increase in crime between 1930 and 1936, but it was also apparent that crime was becoming more professional. "Alarm was particularly caused by the increase in recidivism at this time. Juveniles were of particular relevance to the question of recidivism and professional crime as it was asserted that juvenile offenders were the recidivists of the future.

As stated by [12]in colonial Kenya the treatment of children was confused by racial attitudes. Compulsory education for European children in Kenya was introduced in 1934. This came about after a long-running debate in the press and Legislative Council about the risk of a poor white class development. The attempted introduction of universal education had been essential in Britain in bringing about changing attitudes towards childhood. In Kenya, the desire to maintain white prestige as well as the financial constraints on the colonial state meant that childhood was a luxury that was unevenly distributed between the races. African education was predominantly in the hands of rnissionary organizations. Mission schools were found in rural areas, with virtually no educational facilities in Nairobi. In 1932 there were 578 boys and girls attending school in Nairobi, and a further pupils attending night school. This was our first of all estimated population of 2,608 juveniles under the age of sixteen living in Nairobi, with another 838 resident in the Native location. Despite the recommendations of the 1934 on juvenile crime that African education be made compulsory in; Nairobi, no funds were made available. Race undoubtedly played a role in the analysis of the causes of juvenile offending, and, therefore, its treatment. The fact that there was a majority of Kikuyu among the inmates of Kabete Reformatory was explained by its superintendent, Captain Wood, in the following terms: 'Racial turpitude is in my opinion the only answer, coupled with the undoubted fact that there is more unrest amongst this large, but perhaps not the largest, branch of the native population.'" An example of the difference that race made in the punishment of offenders can be seen in the case of a ten-year-old Asian boy called Ali Mohamed Haji Omar, who was sentenced to four years at Kabete after being convicted of three offences of breaking into shops. The boy was released to the care of his family rather than being made to serve the sentence, partly on the grounds of his race, as well as his young age:" European youths were not sent to the Reformatory. One of the problems with the management of juvenile delinquency in Kenya was that the lack of a compulsory, universal

[12] (Seale Clive ed. 1998)

education system meant that there was no obvious way of becoming aware of potential offenders: in Britain the link between truancy and juvenile delinquency, and its use as a flag for delinquency was well-established. In Kenya, without the necessary educational infrastructure, the alternative to truancy as an indicator of juvenile misbehavior in urban areas was vagrancy.

As stated by, [13]it is useful to grasp the actual frequency of juvenile crime in Kenya in the 1930s. This has been the cause of an increase in the number of sentences imposed on juveniles in Kenya in the interwar period according to the statistics given by the Prisons Department. The figures indicate a wave of higher crime levels in the period 1930 to 1934. These five years, as well as being a period of economic depression, coincided with the development of policy on juveniles and the reformatory system. However, the figures also show that the vast majority of sentences throughout were of corporal punishment or short prison sentences of less than three months. The figures given in the Prisons Department reports for these years unfortunately do not distinguish between caning only sentences and those of short imprisonment of less than three months; but where this distinction is made in earlier reports, the number of caning only sentences greatly outweigh the sentences of short imprisonment. This is because it was felt that corporal punishment was preferable to imprisonment, which risked exposure to more serious criminals.23 Therefore, the preponderance of sentences. Annual report[14], Kabete Reformatory, 1929, KNX, P/I/ p. 2. The registrar, the supreme court, to the acting colonial secretary, 12 July 1933, KNX, AP/ I/ 700. 22 J. Willis, "Thieves, drunkards and vagrants: defining crime in colonial Mombasa, 19021932', in Anderson and Killingray, eds., Consent, coercion and control, pp. 219-35. See also

Cameron, superintendent of Dagoretti, to the chief inspector of approved schools, 27 Oct. 1945, KNX. AHL/z/z.23 Another point in reference to corporal punishment is that many prison sentences also included a whipping, but the figures about caning given in Table I are for sentences where caning was the only part of the sentence. Other offences Total adult convictions (Judicial Department annual reports, 193I -I 937). In the peak period of juvenile crime in 1930-4, the proportion of sentences that were of caning only was higher, at go per cent, compared to the period 1925-9 when the figure was 67 per cent. This suggests that the bulk of the crime that initiated such anxiety about juvenile delinquency in Kenya was social crime such as petty theft

[13] (Skelton, A, 2002)
[14] www.kenyalaw.org/annualreport/1929/KabeteReformatory

and the transgression of the Vagrancy Ordinance and Township Regulations, resulting from economic retrenchment. In fact, the number of more serious crimes committed by juveniles, meriting a sentence in the reformatory, was actually declining at the very time when interest in the reformatory system was at its height. Figures from the Judicial Department reports of 1931 to 1937 indicate a similar trend: Township Regulations offences and offences in the category of Revenue, Roads and Other Laws relating to Social Economy (predominantly vagrancy) constituted the majority of crimes. A comparison between the total amount of juvenile and non-juvenile crime demonstrates that juvenile crime constituted only a small amount of the overall level of crime in it was rising at a slower rate than adult crime. Prosecutions for crimes such as housebreaking and burglary, the kind of crimes which settlers had in mind as evidence of the threat posed to law and order, were relatively small in number. With its emphasis on crime in urban and settled areas, vagrancy and transgressions of Township Regulations were the most common offences. The anxiety about the urbanization and detribalization of African youths itself caused crime through the resulting legal restrictions that were placed on the movement of juveniles in settled and urban areas. These restrictions particularly caused an increase in offences in a period of economic downturn when youths were more likely to move around in an attempt to find alternative forms of economic support.

Central to the story of juvenile delinquency in colonial Kenya is Kabete Reformatory, which until 1937 was the only institution in Kenya that exclusively detained juvenile offenders. Kabete's history is best characterized as crisis-ridden inertia. The reformatory was relatively small: the average number of inmates between 1926 and 1930 was 185. Despite its relative unimportance in the broader picture of law and order in Kenya, the reformatory came to symbolize the commitment of the state to the maintenance of social control. The interwar period was, therefore, punctuated by bouts of concerned inquiry into the effectiveness of the reformatory; both in the quality of care it provided and its rehabilitative success. 'The apparent discrepancy between the tables, in those greater figures for the amount of crime taking place is accounted for with those passing through the prison system. [15] Annual report, Kabete Reformatory, 1930, KNA, AP/ I 1700, p. I.

[15] www.kenyalaw.org/annualreport/1930/KabeteReformatory

The provision of a separate facility for juvenile offenders was established at Kabete, a few miles from Nairobi, in February 1909. Now a suburb of the city, Kabete was, from its inception and in the interwar period, an agricultural area settled by Europeans, among them Lord Delamere. The reformatory workshop soon became a source of cheap furniture and household implements for neighboring settlers. Kabete Reformatory was founded because of concern about the corrupting effects of life in the townships on boys, 'loafers', and 'idlers', which were not necessarily criminals themselves, but were potentially exposed to criminal influence. 'Governor Hayes-

Sadler wrote to Elgin, secretary of state for the colonies, in 1907, asking to establish some sort of reformatory." Hayes-Sadler stated that he had the 'strongest approval ' of Winston Churchill, who had a keen interest in the management of juvenile delinquents in Britain."

In its early years, the reformatory lacked a clear direction. It was initially established as a farm, and was a part of the government experimental farm at Kabete. This meant that the institution was under the administration of the Agricultural Department and that the boys at Kabete, rather than undergoing any serious attempt at reformation or education, spent their period of incarceration working as farm labourers. By August 1910, it had twelve boys on its books. By 1916, the institution consisted of three large stone buildings, capable of housing 100 youths. It had an average number of seventy inmates monthly. Each boy was given a small plot of land on which he was encouraged to grow European vegetables for his own consumption.

According to the Agricultural Department the farm was run thus: Under the supervision of the farm staff and the warders the youths are employed in the lighter operations of the Kabete Experimental Farm. . Apart from the foregoing work the boys receive elementary instruction on ordinary school subjects. On the completion of his sentence each boy is given a certificate stating the branch of work in which he has become especially efficient. But the system was not running as effectively as this description suggests. In 1916, an outburst of complaint about the management and level of care at Kabete led provincial commissioner, John Ainsworth, to write to the director of agriculture to complain that 'the boys generally appeared to me to be dirty and uncared for and left to their own resource. The system by which the inmates were the responsibility of the Agricultural Department and the subsequent conditions at Kabete were deemed unacceptable by many officials: 'it appears to me that the present situation is entirely wrong. As Judge 2G Typescript of conversation with Kathirli Graham, Huxley papers, Rhodes

House Library, Oxford (RH). Hamilton says, the boys are merely labourers on the Government Farm. I cannot consider that herding stock and planting cabbages are the occupations in which they ought to be engaged. In response to these complaints it was decided that a qualified European superintendent should be employed and that more consideration should be put into the education given to the boys. In Kabete Farm became a reformatory, where offenders could be committed for between three and seven years, in which time it was hoped that they might learn a trade. It was felt that given the lack of Africans artisans in Kenya, the reformatory should be used to teach boys skills such as carpentry, masonry, and thatching. This interest in teaching the inmates of Kabete a trade was a part of an ongoing dialogue about the values of a technical as opposed to a literary education. Typically there was reluctance, particularly on the part of the new superintendent, Captain Wood, to provide 'literary' education -the teaching of practical skills was regarded with much less suspicion. There was, therefore, little general education at the reformatory; neither does there seem to have been much monitoring of the inmates' behaviour, they were left entirely to their own devices in their spare time. On leaving, there was no system of after- care: on discharge, the inmate was given a registration certificate, a railway warrant to get passage home, and whatever sum of money he might have earned. The management of juvenile offenders between the formation of the reformatory in 1909 and the early 1930s does not seem to have undergone much improvement. Apart from becoming a reformatory, and the change in emphasis from farm labour to the teaching of a trade, there was no significant rethinking of policy or treatment of juvenile offenders. Kabete also steadily expanded in this period, the average monthly number of inmates by 1928 being 1 79.38

Kabete appeared particularly ineffective in meeting the objective of reform; in 1932 it was reported that Kabete was 'rather of the nature of a prison than a school, there is little, if any, reformation, and quite inadequate education '.'" There were expressions of concern about the methods of the superintendent, Captain Wood, in particular his lack of effort to create a rehabilitating system which rewarded good behaviour1925 had done a great deal to modernize and improve the methods of policing in Kenya, wrote in his report of 1928: The reformatory figures do not augur well for the future, for of I 98 boys scheduled no less than 38 have more than one conviction and 49 have four or more convictions. These facts must be faced and are inevitable with detribalization, education and sophistication. Juvenile offenders were also perceived as being more difficult to manage, a concern that was linked to anxiety about African political protest: In addition to the initial handicap of morally and mentally undeveloped

parentage, the average youth admitted to the Reformatory School today, displays a regrettable truculence and aggressiveness not noticeable in his confreres of a decade ago. These features, subversive as they are to communal discipline, appear to me to be the result of misguided outbursts by leaders controlling associations which could of their very nature concentrate on the moral uplifting and social welfare of the communities. This fear about the politicization of delinquents increased when Wood reported that discipline had been undermined by the 'clandestine introduction' of the Kikuyu Central Association's newspaper, Mugithania, to the inmates of the reformatory. Policy towards juvenile offenders underwent a transformation in the first half of the 1930s with a series of legal changes and an updating of the reformatory system along the lines of the most recent British developments. This adoption of recent British legislation corresponds with an interwar trend described by legal historians, Morris and Read, who identified a movement from nineteenth- century Indian to British law. This was generally associated with the enactment of more liberal legislation that was in tune with modern British social policy. Although the nature of the changes made to the legislation conformed to this wider legal trend, the process by which these changes were judged and evaluated as appropriate to the 'Kenya native' uncovers a fascinating discourse on social policy and the nature of African development. In this process, three important reports were produced; two ordinances were passed relating to juvenile offenders in 1933 and 1934; and two further amendment acts were passed in 1935 and 1936.

(Williams Brian, 2004), many of them have left their parents in the Reserve and have come to Nairobi to look for employment. Some of them are children of irregular and temporary unions; others are children of prostitutes and unknown fathers. In many cases these obtain intermittent employment with Indians, Somalis and others, for no regular or stated wage but for bod and an occasional present. As a result of test round-up made by the Superintendent of Police, 47 unemployed juveniles were brought to the Police Station in two and a half hours. Among juvenile delinquents in London it has been found that physical defects are 25 times as frequent as among non-delinquents from the same areas ('The Young Delinquent' by Cyril Burt). In this connection I would stress the desirability of a comprehensive medical examination, both physical and mental, of every juvenile delinquent. Defects might be found which: possibly, would throw light on the causes leading up to the lapse and which might modify considerably the punishment afflicted. The tendency to attribute such social problems to individual physical or mental failings had a history in the discourse of the urban poor in Britain and was the kind of social question to

which the British Eugenics Society devoted much of its analysis. However, the main emphasis of the Crime committee report was on the unhealthy and unsuitable living conditions as the underlying causes of most delinquency in Nairobi. The report was discussed at a meeting of the executive council in July 1932, and resulted in the recommendations that the report be referred to the committee of visitors at Kabete, that the attorney-general should be consulted and asked to make recommendations on the Juvenile Offenders Bill, and that La Fontaine be sent to England to examine procedure there on dealing with juvenile delinquency. In particular, at this meeting the need to protect the irredeemable juvenile criminal from the redeemable was fully appreciated.

The Report of the committee on juvenile crime and Kabete Reformatory was not produced until 1934, by which time the new bill had already been passed into law. Chaired by La Fontaine, the committee's terms of reference were to consider possible measures to deal with juvenile crime and to make recommendations about the future of Kabete Reformatory, bearing in mind that no measure could be entertained involving any considerable expense in the immediate future. Among other recommendations, the report suggested that compulsory education be introduced for native children in Nairobi; that probation officers be introduced; it also recommended new classifications of detention centres, along British lines, with an industrial school for those who had not committed any serious crime but were vulnerable to criminal influences through problems such as vagrancy. The report made it clear that these different institutions should be grouped together under the title of approved schools, and run according to a unified policy. The influence of La Fontaine's visit to England was clearly apparent. This mirrored the English 1933 Children and Young Persons Act which deliberately blurred the distinction between reformatories and industrial schools by placing them under the grouping of approved schools. This change reflected the strengthening of the idea that children who were neglected and suffering from environmental deprivations were more likely to offend. The Kenyan report caught the spirit of this new sentiment: As to the training at these institutions, we agree that the first essential in the 'reformation' of the African child or youth, who shows signs of criminal tendencies, is to be taught discipline, and, in this, the ideal to be aimed at in Kenya, should follow that of England and America, viz. That discipline should be instilled, not by fear of punishment, but rather by careful leadership and example. Under the recommendations of the report, Kabete would change from being a reformatory to a training school (for boys aged fourteen to nineteen who had committed a crime), along the lines of British in England. The

committee also recommended another reformatory school be established at Eldama Ravine in the Rift Valley (although this was never implemented).

In 1934, influenced by the Report of the committee on juvenile crime and Kabete Reformative, the 1933 Juvenile Offenders Ordinance and the Reformatory Schools Ordinance were repealed and a new Juveniles Ordinance was passed in Kenya, which was based on recent English legislation. The new ordinance redefined the age of a 'young person' as being between fourteen and eighteen, rather than sixteen; established remand homes in every district; and established approved schools under the supervision of an approved school board, which took the place of the old industrial and reformatory schools. These new approved schools were to be divided into three classes: Class I for the detention and training of unconvinced children and young person's found to be living in an unsatisfactory environment where they might be exposed to criminal influences; Class II for the committal and training of convicted children up to the age of sixteen; and Class 111, run according to the British system, for the committal and training of convicted young people up to the age of eighteen. This legislation was then further amended in 1935 making it possible to detain a young person in a Class 111 approved school until the age of twenty-one (instead of eighteen). According to the 1934 law, a juvenile who had escaped from an approved school could only be punished by increasing the period of detention by six months at the most. This was considered to have little effect on all amounted to a major re-thinking of policy towards the treatment of juvenile offenders in Kenya, characterized by attempts to bring the running of the reformatories up-to-date with the metropolitan system. In January 1935 an officer from the British service in England took charge of Kabete approved school. Commander W. H. L. Harrison, who had been honoured at HW1 Corporal Institution at Portland and before that an officer in the navy, became the new superintendent.

Margaret Myers (2000), the methods used to instil discipline in the school were in keeping with the ideals behind the corporal system, avoiding brutalizing punishments, and emphasizing the value of leadership and example, rewarding good behaviour with greater freedom and trust, and encouraging hard work: The first essential of any reformative institution is discipline. This should not conjure up visions of chain gangs, bolts and bars, and warders armed with rifles. The degree of discipline should be felt rather than seen. At Kabete boys can be seen working in small parties under no supervision beyond that of an occasional visit by one of the Staff. Naturally, at first, trust in a boy is sometimes misplaced, but often after one warning and no punishment the

boy is found to be worthy of the trust placed in him. The approach adopted in Kabete after the reforms of the 1930s was characterized by an optimism and faith in modern methods that emphasized the environmental causes of juvenile offences and the capacity for rehabilitation through the right reforming environment. 'Juvenile crime was always be a source of concern to the authorities and it was always be with us', wrote the superintendent of Kabete in 1935, 'but by applying modern methods of reform to African juvenile delinquents it is believed that a great deal can be done to turn potential criminals into useful citizens.

The optimism inspired by the introduction of the new system did not erase all concerns about Kabete and Dagoretti. In 1938, the acting director of education in the colony complained about the lack of training or education given to the inmates, who still spent most of their time engaged in manual agricultural labour.75 Another failing of the system was the lack of a probation service or after-care system for ex-inmates; this was supposed to be a crucial component of the rehabilitative programme of approved schools. Provision had been made for the appointment of a probation officer in the 1934 ordinance, but it was a matter of continuing concern for officials involved that a probation. This context of settler suspicion of the promotion of what was termed 'native development' reflects how some of the more liberal and progressive European settlers and officials in Kenya supported the eugenics movement and subscribed to the value of the research carried out by Gordon and Vint, even if they did not agree with all of Gordon's and Vint's conclusions. When it comes to the management of juvenile delinquency in Kenya in the 1930s we find a similar tension between eugenic and liberal thought. Some of those who reported on juvenile delinquency in the 1930s were involved with the KSSRI and supported Gordon's and Vint's research on race and intelligence, yet they also encouraged the development of a justice system more sensitive to the needs of juveniles and the establishment of an approved school system based on the most modern British theories.

Reformatory for the purpose of detecting amentia (mental deficiency) .The research was undertaken privately, but the report was circulated among the officials and settlers interested in Kabete; it was a radical statement on the high incidence of mental deficiency in the African population. Gordon's experiment at Kabete led him to the extraordinary conclusion that of the 2 19 subjects he assessed, not one attained the European standard of normal intelligence. In the course of his inquiry, Gordon made over forty visits to the reformatory and used an obscure combination of measurements and tests : 'Anthropological measurements, of physiological tests,

of clinical examination more particularly of the nervous system and to detect abnormalities attributable to defects of germ plasma (so-called stigmata), and of psychological or mental tests.'8' Gordon borrowed this combination of methods from the well-known British anatomist and eugenicist, Professor R.J.A. Berry, who believed that amentia was almost always caused by inadequate brain development resulting from hereditary failings." Berry, FRCS, FRSE, was the director of medical services at the Stoke Park Colony in Bristol. This was an institution established under the auspices of the 1913 Mental Deficiency Act; it was designed to provide the accommodation in which to segregate the mentally deficient under the 1913 Act." When Gordon performed intelligence tests on all 2 19 of the inhabitants of the Reformatory, he found that 45 were medium-grade aments (imbeciles), 144 were high-grade aments (idiots), 24 were borderline normal, and 6 were low-grade normal. Not one of the inmates was considered to reach the conventional standard of normal, which led Gordon created the new category of 'low-grade normal '.

Gordon's report was an important statement of his methods and ideas at the outset of his interest in race and intelligence. But what influence did it have in shaping ideas about juvenile offenders in Kenya? As well as sending a copy of this study to the British Eugenics Society, it was also widely distributed within the Kenya government. A summary of Gordon's conclusion was printed in the annual report for Kabete of 1930,'~ and the minutes of the committee of visitors for Kabete Reformatory show an interest in Gordon's analysis (although no full discussion of the report is recorded in the surviving documents)." Gordon's expertise in diagnosing mental problems among African juveniles was clearly accepted by the authorities: in his 1934 contract of employment as visiting physician at Mathari Mental Hospital, he was required to visit Kabete to report and advise on the mental health of youths brought before a juvenile court, as well as to assess the mental health of prisoners at Nairobi Prison.

John Gilks, director of medical services, responded by reiterating Gordon's qualification: that it was to be expected that there would be fewer people of normal capacity in a reformatory and that the report used classifications based on European standards, which might be distorting. Gilks further attempted to soften the extremity of the report by saying that a re-survey might transfer some of the high-grade aments to low-grade or borderline normal, and that also pending resurvey, the borderline normal should be regarded as normal, bringing the total figure for normal up to 13.7 per cent.95 But Gilks also suggested that some sort of separate institution for

segregation was advisable: 'Those left in the high grade class after re-survey could be divided into those suited for some suitable training or for socialization after discharge and those for whom permanent segregation is necessary. Medium grade "aments" are suitable only for permanent segregation. "13 The eugenic agenda behind the advocacy of segregation at this time adds an extra dimension to Gordon's findings.

Gordon did not represent the only connection between eugenic thought and an interest in juvenile delinquency. The crime committee of 1932 included among its members Mary Shaw, who was on the board of visitors of Kabete Reformatory and was also secretary of the KSSRI. It also included Captain Ward, who, along with his wife, was another active member of the KSSRI, and the Approved Schools may be compared with the last reserves to be used in the battle against juvenile crime, in which better parental control and improved housing and hygienic conditions should be the first lines of skirmishes and compulsory education the main attack. If the latter fail in their object the training in the Approved Schools may be regarded as the last hope before the juvenile delinquent becomes the adult criminal. A skilful use of reserves has turned the scale in many a battle. If the Approved Schools are well administered and their aim is clear there should be an equal chance of .The recurrent theme in this change in approach towards juveniles was concern about the effects of urban life on African culture and behaviour. The further trajectory of this can be seen in the Report of the committee on young persons and children, published in 1953: In the case of Africans we have found that the impact of western civilization is steadily breaking down the pre-existing influence of parent and clan."" The juvenile delinquent in Kenya came to represent the problems of urban poverty and social breakdown induced by developments imposed by the colonial state. However, the acknowledgement of the environmental factors in the rise in juvenile crime was tempered by the discourse on either the neurological or emotional incapacity of the African to deal with change. The 1930s saw a transition from the blatantly eugenic racism of Dr Gordon to a more environmentalist approach, but one that still maintained an emphasis on the problem of African incapacity. For a time, therefore, the discourse on delinquency in colonial Kenya accommodated colonial contradictions about 'native development ', criminality, and eugenics. Significant changes were introduced as a result of the upsurge of interest in delinquency in the early to mid-ages, but the extent to which African juveniles were effectively regulated (whether out of a desire to civilize or a desire to suppress speedy social progress) was limited because of the absence of a wider network of social control, involving services such as education and probation.

Currently in 'Street children' are indeed particularly vulnerable in this regard, and are often apprehended by the police on such grounds, on an individual *ad hoc* basis or as part of a deliberate strategy that may or may not be sanctioned by domestic law. This practice has been documented worldwide, in countries as far apart as Bangladesh and Peru. In Kenya, "[t]he three most common legal bases for the detention of children in juvenile remand homes are: 'destitution and vagrancy' (1,800); 'beyond parental control' (500); and 'found begging' (480)". Legislation specifically targeting juveniles in this way is increasingly contested as discriminatory and as unnecessarily 'criminalizing' the acts and situations involved. The CRC avoids explicit mention of the issue, although its provisions clearly militate against the application of repressive measures in such cases. The non-binding Riyadh Guidelines, however, state without hesitation that "legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person". It is interesting to see this stance taken in the context of is positions designed to prevent offending, rather than in what might be seen as a pure 'children's rights' text.

2.2 Theoretical Framework

The first part will present theoretical framework. The second part of the chapter will present a literature study on international laws on juvenile justice, Human and People's Rights that highlights some key obstacles already identified by the researcher in the area of juvenile justice in relation to child arrest and sentencing. The third part will consist of the Kenya Constitution and penal codes. The information obtained from the literature study will be summarized and serve as a guide in designing the questionnaire for the research project. A number of theories had been developed to explain criminality and delinquency and these theories include biogenetic, rational choice, psychoanalytic, learning, labeling, conflict, social disorganization, strain, feminist and social control theories. In providing a transnational perspective, I find the last four theories very relevant and for that reason I have chosen to explore them further for sake of this study. There are far too many theories that describe criminality. Bernard in Farrington (2005:9) argued that criminology had failed to make scientific progress because no criminology theory has even been falsified; all that happens over time is that new theories are added. The theories explored here have at their core the element of control and although they are distinct theories explaining criminality, they tend to overlap to a certain extent. Thus, feminist theories argue that women are more controlled than men; social disorganization argues that individuals lose

networks that acted as forms of control while strain results into criminality when the individual lacks social emotional control.

2.2.1 Control Theories

Social Control theories are sociologically rooted; they look at the social processes and social organizational arrangements to help explain crime and deviance. Most control theories assume that people are socialized into conventional behaviour from an early age but something breaks or weakens the bonds to convection and frees a person to deviate (Henry and Lanier 2006:109). The breaking of the bond can be as a result of isolation and social disorganization. It can also be a failure to bond due to parental failure especially the inability to provide a secure attachment required for satisfaction of childhood needs of emotional and physical security. "Control theory assumes that the bond of affection for convectional persons is a major deterrent to crime. The stronger this bond is, the more likely the person is to take it into account when and if he contemplates a criminal act" (Hirschi, 2006:83). There is a link between attachment and the adequacy of socialization, the internalization of norms. The emotional bond between the parent and the child presumably provides the bridge across which parental ideas and expectations pass.

In a self-reported study of the link between delinquency and attachment to parents, Hirschi (2006:86-90) argues that the more the child is accustomed to sharing his mental life with his parents, the more he is accustomed to seeking or getting their opinion about his activities, the more he is to perceive them as part of his social and psychological field, the less likely he would be to neglect their opinion when considering an act contrary to law. In a related study, he found out that intimacy of communication between child and parent is strongly related to the commission of delinquent acts. Those who spend much time talking with their parents are only slightly less likely than those who spend little time talking with their parents to have committed delinquent acts. Hirschi (Ibid: 94) concludes that, "the closer the child's relations with his parents, the more he is attached to and identifies with them, the lower his chances of delinquency...the more strongly a child is attached to his parents, the more he is bound by their expectations and therefore the more strongly he is bound to conformity with the legal norms of the larger system" Nye as cited in Henry and Lanier (2006) identifies four kinds of controls. Direct control relying on punishment and rewards to gain compliance, indirect control relying on appeals to effective attachment and emotional investments in social relationship, internalized

control relying on gradually changing people's beliefs or impulses through socialization, conditioning, persuasion or brainwashing and opportunity control relying on manipulating the behavioral alternatives from which people can choose in fulfilling their needs. "Direct control reduces the likelihood of delinquency through the consistent sanctioning of delinquent acts and acts conducive to delinquency like associating with delinquent peers" Britt and Gottfredson (2003:56)

Research had been conducted into the effectiveness of direct versus indirect forms of control. Popular opinion favours direct control and is seen to echo the universally quoted adage 'sparing the rod spoilt the child. Hirschi (2006:120) argue that utility of direct controls is limited among adolescents, especially older ones since they are hard to monitor behaviour and they are more involved with peers. Research also indicates the causal connection between parental control and delinquency may be reciprocal. Children are increasingly being viewed not only as a product of their parents but also as having an effect on their parent behaviour (Gecas and Seff as cited in Henry and Lanier, 2006). Children who are delinquent may cause their parents to either be tough on them or give up on them.

Involvement in convectional activities is part of control theory. "Many persons undoubtedly owe a life of virtue to a lack of opportunity to do otherwise. Time and energy are inherently limited" Hirschi (2006:21). The assumption is that a person may be too busy doing convectional things to find time to engage in deviant behaviour. This reasoning is responsible for the stress placed on providing youths with recreational facilities. Sutherland in (Ibid: 22) notes "in the general area of juvenile delinquency it is probable that the most significant difference between juveniles who engage in delinquency and those who do not is that the latter are provided abundant opportunities of a convectional type for satisfying their recreational interests, while the former lack those opportunities or facilities"

Control theories of crime start with the assumption of value consensus, or that all human societies prohibit acts of force and fraud undertaken in the pursuit of self-interest. The assumption is consistent with the control theory assumption that humans are by nature self-interested and unconcerned with the consequences of their actions for others. In order to function, social groups must have some mechanism for controlling the self – interested tendencies of their members. These mechanisms include the formal actions of the state to

sanction offenders, informal ones such as parental control and socialization of children, and our tendencies to control each other's behaviour in both overt and subtle ways (Britt & Gottfredson, 2003:87). The cause of criminal, delinquent and disruptive behaviour in the control theory perspective is simply individuals acting on their natural tendencies because of a failure in some respect of social control. As children grow older, the internalized sense of self-control becomes the dominant restraint on their behaviour, largely replacing direct parental control. Delinquents lack self-control because of ineffective child rearing practices in the early years where the trait of self-control is being developed. Strong direct controls exerted by parents later in adolescence cannot compensate for or correct weaker self-control acquired in the early formative period. Henry and Lanier (2006)

2.2.2 Social Disorganization Theory

In the classic work of the Chicago school of urban sociology in the early twentieth century, it was thought that population density, low economic status, ethnic heterogeneity and residential instability led to the rapture of local social ties, a form of social disorganization that in turn accounted for high rates of crime and disorder (Kornhauser cited in Henry and Lanier, 2006). Social disorganization is defined as an inability of community members to achieve shared values or to solve jointly experienced problems (Bursik in Osgood and Chambers, 2003).

Current versions of social disorganization theory assume that strong networks of social relationships prevent crime and delinquency. When most community or neighborhood members are acquainted and on good terms with one another, a substantial portion of the adult population has the potential to influence each child. The larger the network of acquaintances, the greater the community's capacity, for informal surveillance because residents are easily distinguished from outsiders. For supervision because acquaintances are willing to intervene when children and juveniles behave unacceptably, and for shaping children's values and interests. According to the current theory, community characteristics such as poverty and ethnic diversity lead to higher delinquency rates because they interfere with community members' abilities to work together (Osgood and Chambers, 2003). More recently, the intellectual tradition of community-level research has been revitalized by the increasing popular idea of 'social capital' that Putman in Henry and Lanier (2006) define as networks, norms and trust that facilitate coordination and cooperation for mutual benefit. Sampson in (Ibid: 2006) argues than neighborhoods lacking

social capital especially of dense social networks are less able to realize common values and therefore cannot maintain the social controls that foster safety. Social Disorganization theory could be viewed as a micro level variant of social control theory; it considers the criminogenic implications of loosened geographical and cultural ties. The researchers at the Chicago school saw the zone of transition as a place peopled by groups that were losing the social norms of their culture of origin but had yet to take on those of their new culture. Thus norms of behaviour were in a state of flux and this resulted in social disorganization (Shaftoe, 2004).

The concept of social disorganization does not have to be a geographically rooted phenomena; it can also be a result of familial, cultural or religious changes. The combination of loosening extended family networks, cultural rejection and religious abandonment have undoubtedly led to a new generation of people from all ethnic groups feeling isolated and alienated from main stream social organizations and structures, which may make them feel less concerned about contravening laws which have been set up to protect the interests of the society and networks from which they are excluded (Shaftoe, 2004:59). The author goes on and gives the example of the two ethnic groups in Britain that are least likely to feature in offender statistics (people of Asian Indian or Chinese descent), who have clung most tightly to their cultural, religious and familial antecedents.

The belief that a neighborhood is a social unit and should possess intimate relations has been portrayed as false by Sampson in Waring and Weisburd (2002:99), he observes that "at the macro level, one might even have an active and shared willingness to intervene among complete strangers. Consider, Sweden as a society. There are strong norms about public behaviour-drunk driving, hitting children, littering and so on. Public expectations about responding to such acts lead to high social control, regardless of personal ties among potential participants. The nature of social ties and its relationship to social control is thus empirically variable". In terms of crime prevention, this theory supports the importance of facilitating stable, integrated and socially cohesive communities.

International laws on Juvenile Justice

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

("**The Beijing Rules**") Adopted by General Assembly resolution 40/33 of 29 November 1985[16]

General Principles

1. Fundamental perspectives

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")[17] rule 15.1 states:

> Throughout the proceedings the juvenile shall have the right to be represented by a legal [17]adviser or to apply for free legal aid where there is provision for such aid in the country.

The standard minimum rules are deliberately formulated so as to be applicable within different legal systems and, at the same time, to set some minimum standards for the handling of juvenile offenders under any definition of a juvenile and under any system of dealing with juvenile offenders. The Rules are always to be applied impartially and without any distinction of any kind. The commentary to rule 15.1 states that it uses terminology to that found in rule 93 of the Standard Minimum Rules for the Treatment of Prisoners. Legal counsel and free legal aid are needed to assure the juvenile legal assistance.

Similarly, the United Nations Rules for the Protection of Juveniles Deprived of their liberty [18] rule 18(a) Juveniles should have the right of a legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisors. The Vienna Guidelines for Action on Children in the Criminal Justice System[19] states that measures relating to policy, decision-making, leadership and reform should be taken, with the goal of ensuring that the Principles and Provisions of the Convention on the Rights of the Child and the United Nations standards and norms in juvenile justice are fully reflected in national and local legislation policy and practice, in particular by establishing a child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of children, promotes children's sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society.

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[16] [16] Adopted by general Assembly resolution 45/113 of 14 December 1990

[17] Adopted by General Assembly resolution 40/33 of 29 November 1985

[19] Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997

Priority should be given to setting up agencies and programmes to provide legal and other assistance to children, if needed free of charge, such as interpretation services, and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected in practice[20].

These rules further provide:
Rule 17: juveniles who are detained under arrest or waiting trial are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible. Untried detainees should be separated from convicted juveniles.

The committee on the Right of the Child has, on numerous occasions, made comments expressing the need for States parties to provide legal aid. The committee stated to Cameroon[18] that it recommends that the State party provide children with legal assistance at an early stage of the proceedings. To Greece, the Committee noted that it remains concerned that the right of children to legal representation or other appropriate assistance is not always systematically guaranteed.[19]

In relation to Kenya, the Committee recommended that the State party take all appropriate measures, including the enactment of the Children Bill, to implement a juvenile justice system with the Convention, in particular articles 37, 39 and 40 and of other United Nations standards in this field, such as the United Nations Minimum Rules for the Administration of Juvenile.[20]

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[18] Cameroon, CRC, CRC/C/111 (2001) 71 at para. 393

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[20] ibid para 16

[19] see also Switzerland, CRC, CRC/C/118 (2002) 78 at paras, 310 and 311. Saint Vincent and the Grenadines, CRC, CRC/C/118 (2002) 101 at paras, 463 and 464; Netherlands (Antilles), CRC, CRC/C/118 (2002) 129 at paras. 587 and 588; Estonia, CRC, CRC/C/124 (2003) 9 at para. 73; Republic of Korea, CRC, CRC/124 (2003)

[20] at paras. 134 and 135; Romania, CRC, CRC/124 (2003) 49 at paras 260 and 261; Bangladesh, CRC, CRC/C/133 (2003) 93 at paras. 509 and 510

1.1 Member States shall seek, in conformity with their respective general interests, to further the wellbeing of the juvenile and her or his family.

1.2 Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.

1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

1.4 Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.

1.5 These Rules shall be implemented in the context of economic, social and cultural conditions prevailing in each Member State.

1.6 Juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.

These broad fundamental perspectives refer to comprehensive social policy in general and aim at promoting juvenile welfare to the greatest possible extent, which will minimize the necessity of intervention by the juvenile justice system, and in turn, will reduce the harm that may be caused by any intervention. Such care measures for the young, before the onset of delinquency, are basic policy requisites designed to obviate the need for the application of the Rules.

Rules 1.1 to 1.3 point to the important role that a constructive social policy for juveniles will play, inter alia, in the prevention of juvenile crime and delinquency. Rule 1.4 defines juvenile justice as an integral part of social justice for juveniles, while rule 1.6 refers to the necessity of constantly improving juvenile justice, without falling behind the development of progressive social policy for juveniles in general and bearing in mind the need for consistent improvement of staff services.

Rule 1.5 seeks to take account of existing conditions in Member States which would cause the manner of implementation of particular rules necessarily to be different from the manner adopted in other States.

2. Scope of the Rules and definitions used

2.1 The following Standard Minimum Rules shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

2.2 For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal systems and concepts:

a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;

b) An offence is any behaviour (act or omission) that is punishable by law under the respective legal systems;

c) A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence.

2.3 Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed:

a) To meet the varying needs of juvenile offenders, while protecting their basic rights;
b) To meet the need of society;
c) To implement the following rules thoroughly and fairly.

The Standard Minimum Rules are deliberately formulated so as to be applicable within different legal systems and, at the same time, to set some minimum standards for the handling of juvenile offenders under any definition of a juvenile and under any system of dealing with juvenile offenders. The Rules are always to be applied impartially and without distinction of any kind. Rule 2.1 therefore stresses the importance of the Rules always being applied impartially and without distinction of any kind. The rule follows the formulation of principle 2 of the Declaration of the Rights of the Child.

Rule 2.2 defines "juvenile" and "offence" as the components of the notion of the "juvenile offender", who is the main subject of these Standard Minimum Rules (see, however, also rules 3 and

4). It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of "juvenile", ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems and does not diminish the impact of these Standard Minimum Rules.

Rule 2.3 is addressed to the necessity of specific national legislation for the optimal implementation of these Standard Minimum Rules, both legally and practically.

3. Extension of the Rules

3.1 The relevant provisions of the Rules shall be applied not only to juvenile offenders but also to juveniles who may be proceeded against for any specific behaviour that would not be punishable if committed by an adult.

3.2 Efforts shall be made to extend the principles embodied in the Rules to all juveniles who are dealt with in welfare and care proceedings.

3.3 Efforts shall also be made to extend the principles embodied in the Rules to young adult offenders.

Commentary

Rule 3 extends the protection afforded by the Standard Minimum Rules for the Administration of Juvenile Justice to cover:

a) *The so-called "status offences" prescribed in various national legal systems where the range of behaviour considered to be an offence is wider for juveniles than it is for adults (for example, truancy, school and family disobedience, public drunkenness, etc.) (rule 3.1);*
b) *Juvenile welfare and care proceedings (rule 3.2);*
c) *Proceedings dealing with young adult offenders, depending of course on each given age limit (rule*

3.3) The extension of the Rules to cover these three areas seems to be justified. Rule 3.1 provides minimum guarantees in those fields, and rule 3.2 is considered a desirable step in the direction of more fair, equitable and humane justice for all juveniles in conflict with the law.

4. Age of criminal responsibility

4.1 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

Commentary

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other

social rights and responsibilities (such as marital status, civil majority, etc.). Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

5. Aims of juvenile justice

5. 1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

Commentary

Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the wellbeing of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. (See also rule 14.)

The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

By the same token, reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as have been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded.

In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles.

6. Scope of discretion

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

Commentary

Rules 6.1, 6.2 and 6.3 combine several important features of effective, fair and humane juvenile justice administration: the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the actions deemed to be most appropriate in each individual case; and the need to provide checks and balances in order to curb any abuses of discretionary power and to safeguard the rights of the young offender. Accountability and professionalism are instruments best apt to curb broad discretion. Thus, professional qualifications and expert training are emphasized here as a valuable means of ensuring the judicious exercise of discretion in matters of juvenile offenders. (See also rules 1.6 and 2.2.) The formulation of specific guidelines on the exercise of discretion and the provision of systems of review, appeal and the like in order to permit scrutiny of decisions and accountability are emphasized in this context. Such mechanisms are not specified here, as they do not easily lend themselves to incorporation into international standard minimum rules, which cannot possibly cover all differences in justice systems.

7. Rights of juveniles

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

Commentary

Rule 7.1 emphasizes some important points that represent essential elements for a fair and just trial and that are internationally recognized in existing human rights instruments (See also rule 14.). The presumption of innocence, for instance, is also to be found in article 11 of the Universal Declaration of

Human rights and in article 14, paragraph 2, of the International Covenant on Civil and Political Rights.

Rules 14 seq. of these Standard Minimum Rules specify issues that are important for proceedings in juvenile cases, in particular, while rule 7.1 affirms the most basic procedural safeguards in a general way.

8. Protection of privacy

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published. ***Commentary***

Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".

Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle. (The general contents of rule 8 are further specified in rule 2 1.)

9. Saving clause

9.1 Nothing in these Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations and other human rights instruments and standards recognized by the international community that relate to the care and protection of the young.

Rule 9 is meant to avoid any misunderstanding in interpreting and implementing the present Rules in conformity with principles contained in relevant existing or emerging international human rights instruments and standards-such as the Universal Declaration of Human Rights, the International

Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and the Declaration of the Rights of the Child and the draft convention on the rights of the child.

It should be understood that the application of the present Rules is without prejudice to any such international instruments which may contain provisions of wider application. (See also rule 27.)

Investigation and prosecution

10. Initial contact

10.1 Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.

10.2 A judge or other competent official or body shall, without delay, consider the issue of release.

10.3 Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or hi m, with due regard to the circumstances of the case.

Commentary

Rule 10.1 is in principle contained in rule 92 of the Standard Minimum Rules for the Treatment of Prisoners.

Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, nonintervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response.

This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.

As stated in rule 11.2, diversion may be used at any point of decision-making-by the police, the prosecution or other agencies such as the courts, tribunals, boards or councils. It may be exercised by one authority or several or all authorities, according to the rules and policies of the respective systems and in line with the present Rules. It need not necessarily be limited to petty cases, thus rendering diversion an important instrument.

Rule 11.3 stresses the important requirement of securing the consent of the young offender (or the parent or guardian) to the recommended diversionary measure(s). (Diversion to community service without such consent would contradict the Abolition of Forced Labour Convention.) However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes.

Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application". (The "competent authority," may be different from that referred to in rule 14.) Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).

The question of release (rule 10.2) shall be considered without delay by a judge or other competent official. The latter refers to any person or institution in the broadest sense of the term, including community boards or police authorities having power to release an arrested person. (See also the International Covenant on Civil and Political Rights, article 9, paragraph 3.)

Rule 10.3 deals with some fundamental aspects of the procedures and behaviour on the part of the police and other law enforcement officials in cases of juvenile crime. To "avoid harm" admittedly is flexible wording and covers many features of possible interaction (for example the use of harsh language, physical violence or exposure to the environment). Involvement in juvenile justice processes in itself can be "harmful" to juveniles; the term "avoid harm" should be broadly interpreted, therefore, as doing the least harm possible to the juvenile in the first instance, as well as any additional or undue harm. This is especially important in the initial contact with law enforcement agencies, which might profoundly influence the juvenile's attitude towards the State and society. Moreover, the success of any further intervention is largely dependent on such initial contacts. Compassion and kind firmness are important in these situations.

11. Diversion

11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

Commentary

Varying physical and psychological characteristics of young detainees may warrant classification measures by which some are kept separate while in detention pending trial, thus contributing to the avoidance of victimization and rendering more appropriate assistance.

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in its resolution 4 on juvenile justice standards, specified that the Rules, inter alia, should reflect the basic principle that pre-trial detention should be used only as a last resort, that no minors should be held in a facility where they are vulnerable to the negative influences of adult detainees and that account should always be taken of the needs particular to their stage of development.

Adjudication and disposition

14. Competent authority to adjudicate

14.1 Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.

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

Commentary

It is difficult to formulate a definition of the competent body or person that would universally describe an adjudicating authority. "Competent authority" is meant to include those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates as well as administrative boards (for example the Scottish and Scandinavian systems) or other more informal community and conflict resolution agencies of an adjudicatory nature. The procedure for dealing with juvenile offenders shall in any case follow the minimum standards that are applied almost universally for any criminal defendant under the procedure known as "due process of law". In accordance with due process, a "fair and just trial" includes such basic safeguards as the presumption of innocence, the presentation and examination of witnesses, the common legal defenses, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc. (See also rule 7.1.)

13. Detention pending trial

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality.

Commentary

The danger of juveniles "criminal contamination" while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. By doing so, rule

13.1 encourage the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile.

Juveniles under detention pending trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners as well as the International Covenant on Civil and Political Rights, especially article 9 and article 10, paragraphs 2 (b) and 3.
Rule 13.4 does not prevent States from taking other measures against the negative influences of adult offenders which are at least as effective as the measures mentioned in the rule.

Different forms of assistance that may become necessary have been enumerated to draw attention to the broad range of particular needs of young detainees to be addressed (for example females or males, drug addicts, alcoholics, mentally ill juveniles, young person's suffering from the trauma, for example, of arrest, etc.).

15. Legal counsel, parents and guardians

15.1 Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

15.2 The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

Commentary

Rule 15.1 uses terminology similar to that found in rule 93 of the Standard Minimum Rules for the Treatment of Prisoners. Whereas legal counsel and free legal aid are needed to assure the juvenile legal assistance, the right of the parents or guardian to participate as stated in rule 15.2 should be viewed as general psychological and emotional assistance to the juvenile-a function extending throughout the procedure. The competent authority's search for an adequate disposition of the case may profit, in particular, from the co-operation of the legal representatives of the juvenile (or, for that matter, some other personal assistant who the juvenile can and does really trust). Such concern can be thwarted if the presence of parents or guardians at the hearings plays a negative role, for instance, if they display a hostile attitude towards the juvenile, hence, the possibility of their exclusion must be provided for.

16. Social inquiry reports

16.1 In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority.

Commentary

Social inquiry reports (social reports or pre-sentence reports) are an indispensable aid in most legal proceedings involving juveniles. The competent authority should be informed of relevant facts about the juvenile, such as social and family background, school career, educational experiences, etc. For this purpose, some jurisdictions use special social services or personnel attached to the court or board. Other personnel, including probation officers, may serve the

same function. The rule therefore requires that adequate social services should be available to deliver social inquiry reports of a qualified nature.

17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authority shall be guided by the following principles:

a. The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

b. Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

c. Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

d. The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

17.2 Capital punishment shall not be imposed for any crime committed by juveniles.

17.3 Juveniles shall not be subject to corporal punishment.

17.4 The competent authority shall have the power to discontinue the proceedings at any time.

Commentary

The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:

a. Rehabilitation versus just desert;

b. Assistance versus repression and punishment;

c. Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;

d. General deterrence versus individual incapacitation. The conflict between these approaches is more pronounced in juvenile cases than in adult cases. With the variety of causes and reactions characterizing juvenile cases, these alternatives become intricately interwoven. It is not the function of the Standard Minimum Rules for the Administration

of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles. Therefore the essential elements as laid down in rule 17.1, in particular in subparagraphs (a) and (c), are mainly to be understood as practical guidelines that should ensure a common starting point; if heeded by the concerned authorities (see also rule 5), they could contribute considerably to ensuring that the fundamental rights of juvenile offenders are protected, especially the fundamental rights of personal development and education.

Rule 17.1 (b) implies that strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.

In line with resolution 8 of the Sixth United Nations Congress, rule 17.1 (b) encourages the use of alternatives to institutionalization to the maximum extent possible, bearing in mind the need to respond to the specific requirements of the young. Thus, full use should be made of the range of existing alternative sanctions and new alternative sanctions should be developed, bearing the public safety in mind. Probation should be granted to the greatest possible extent via suspended sentences, conditional sentences, board orders and other dispositions.

Rule 17.1 (c) corresponds to one of the guiding principles in resolution 4 of the Sixth Congress, which aims at avoiding incarceration in the case of juveniles unless there is no other appropriate response that will protect the public safety. The provision prohibiting capital punishment in rule 17.2 is in accordance with article 6, paragraph 5, of the International Covenant on Civil and Political Rights. The provision against corporal punishment is in line with article 7 of the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the draft convention on the rights of the child. The power to discontinue the proceedings at any time (rule 17.4) is a characteristic inherent in the handling of juvenile offenders as opposed to adults. At any time, circumstances may become known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case.

18. Various disposition measures

18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:

a. Care, guidance and supervision orders;
b. Probation;
c. Community service orders;
d. Financial penalties, compensation and restitution;
e. Intermediate treatment and other treatment orders;
f. Orders to participate in group counselling and similar activities;
g. Orders concerning foster care, living communities or other educational settings; h. Other relevant orders.

18.2 No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

Commentary

Rule 18.1 attempts to enumerate some of the important reactions and sanctions that have been practised and proved successful thus far, in different legal systems. On the whole they represent promising opinions that deserve replication and further development. The rule does not enumerate staffing requirements because of possible shortages of adequate staff in some regions; in those regions measures requiring less staff may be tried or developed. The examples given in rule 18.1 have in common, a reliance on and an appeal to the community for the effective implementation of alternative dispositions. Community-based correction is a traditional measure that has taken on many aspects. On that basis, relevant authorities should be encouraged to offer community-based services.

Rule 18.2 points to the importance of the family which, according to article 10, paragraph l, of the International Covenant on Economic, Social and Cultural Rights, is "the natural and fundamental group unit of society". Within the family, the parents have not only the right but also the responsibility to care for and supervise their children. Rule 18.2, therefore, requires that the separation of children from their parents is a measure of last resort. It may be resorted to only when the facts of the case clearly warrant this grave step (for example child abuse).

19. The Kenya Constitution on Juvenile Justice

The above international law obligations do not have automatic effect in Kenya. However, Kenya has shown its commitment to the rights of the child through ratification of the treaty, as well as directly reflecting its provisions in domestic legislation. Kenya has done nothing to illustrate an intention to contravene the provisions of the CRC. If it is seen that the domestic legislation is ambiguous as to whether it requires the government to immediately provide legal assistance to children, then the courts must use international law to resolve this ambiguity. In South Africa, it has been held that:

"International agreements and customary international law accordingly provide a framework within which [the bill of rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments such as the United Nations Committee of Human Rights, The Inter-American Commission on Human Rights, the Inter American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and, in appropriate cases, Reports of specialized agencies such as the International Labour Organization may provide guidance as to the correct interpretation of the provision [of the bill of rights]."

Under the traditional doctrine of international law, international obligations become domestic law when those obligations are re-enacted as local law by municipal legislatures. In relation to Children's rights, Kenya has adopted legislation to reflect the international law. If the courts see this legislation as ambiguous as to whether it requires the Council to provide legal aid, courts must look to the international law itself and will see that it has been reiterated that where children face legal proceedings, they must be provided with legal aid. Hence, any uncertainty that exists on the face of the Children's Act must be resolved in this manner.

20. Domestic Obligations

Kenya has legislated to give effect to these international obligations and by failing to set up a children's legal aid service it is in breach of domestic legislation as well. To domesticate these International Conventions, Kenya enacted the Children's Act, 2001. The enactment of the Act was meant to give effect to the common principles, highlighting the need to protect children. The rights include: - Non-discrimination

- Right to Parental care
- Right to education
- Right to religious education
- Right to health care
- Protection from child labour and armed conflict
- Protection from abuse
- Protection from harmful cultural rites
- Protection from sexual exploitation
- Protection from drugs
- Leisure and recreation
- Right to privacy

To access these rights, children are often required to obtain legal advice. Section 3 of The Children's Act; place the Government under an obligation to "take steps with a view to achieving progressively the full realization of the right of the child." In a state where legal aid is not a civil right, where there is no public defender system, it is incumbent that a system be developed that can avail access to legal advice for children.

Section 18(4) provides: A child who is arrested and detained shall be accorded legal and other assistance by the government and his family.

Section 77(1): where a child is brought before a court in proceedings under this act or any other written law, the court may, where a child is unrepresented, order that the child be granted legal representation.

Section 77(2): Any expense incurred in relation to the legal representation of a child under subsection (1) shall be defrayed out of moneys provided by parliament.

Section 186 provides:

Every child accused of having infringed any law shall –

a. Be informed promptly and directly of the charges against him
b. If he is unable to obtain legal assistance be provided by the government with assistance in preparation and presentation of his defense

Part 5 of the Children's Act establishes the National Council for Children Services, creates a body corporate with capacity to sue and be sued on its own behalf.

Section 30(2) (g) empowers the Council to do or perform all such other things or acts for the proper performance of its functions under this Act which may lawfully be done or performed as a body corporate. It should be seen that the allocation of funding for child legal aid is one such function that the council must perform in order to realize the proper effect of the Act.

Section 30(2)(e) of the Act permits the Council to Receive grants and gifts for child related projects.

The council is vested with power under the Act to exercise general supervision and control over the planning financing and co-ordination of child rights and welfare activities and to advise the government thereof; section 32(1) Section 32(2) Provides:

Without prejudice to the generality of subsection (1), the Council shall:

a) Design and formulate policy on the planning, financing and co-ordination of child welfare activities;

b) Determine priorities in the field of child welfare in relation to the socio-economic policies of the government;

c) Plan, supervise and co-ordinate public education of the Government;

d) Facilitate donor funding of child welfare projects

e) Coordinate and control the disbursement of all funding that may be received by the council for child welfare projects;

f) Provide technical and other support services to agencies participating in child welfare programs.

g) Prescribe training requirements and qualifications for authorized officers;

h) Ensure the enhancement of the best interest of children among displaced or unaccompanied children held in care whether in refugee camps or in any other institutions;

i) Ensure the full implementation of Kenya international and regional obligations relating to children and facilitate the formulation of appropriate reports under such obligations;

j) Participate in the formulation of policies on family employment and social security that are designed to alleviate the hardships that impure the social welfare of children.

k) Work towards the provision of social services essential to the welfare of families in general and children in particular;

l) Consider and approve or disapprove child welfare programmes proposed by charitable children's institutions in accordance with section 69;

m) Formulate strategies for the creation of public awareness in all matters touching the rights and welfare of children;

n) Set criteria for the establishment of children's institutions under this Act;

o) Design programmes for the alleviation of the plight of children with special needs or requiring special attention;

p) Establish panels of persons from whom guardians *ad litem* appointed by the court may be selected by the court to assist the Minister in carrying out his duties under this Act, and in particular in eth appointment of any officers prescribed under this Act, in establishment of children's institutions and the formulation of any regulations that may be provided under this Act.

q) Establish Area Advisory councils to specialize in various matters affecting the right s welfare of children

r) Create linkages and exchange programmes with other organizations locally and abroad;

s) Endeavour to create an enabling environment for the effective implementation of this Act It can be seen that by failing to create a legal services department, the Council has failed to create an enabling environment for the realization and effective implementation of the Children Act.

Furthermore, Rule 4(3) of the child offender rules provides that the police shall ensure that the parent or guardian of the child, or an advocate appointed to represent the child is present at the time of any police interview. It is obvious that Kenya is legally obliged to set up and facilitate legal assistance to children who are unable to access such assistance otherwise. Kenya's domestic legislation unambiguously allows for this. If there is any uncertainty as to whether the government is compelled to realize this right immediately, guidance can be had from international law on the subject and it is clear and undeniable that this right is not to be realize progressively but immediately in the best interests of the child.

This case brings to light the need for Kenya to implement National and International standards on the rights and welfare of the child. It is important that the courts recognize that these obligations are not in mere wording and legislation, but must be met in a comprehensive manner. It must be seen to the Kenyan people as well as to the international community that Kenya intends to respect the rights of the child in practice as well as in theory. Kenyan legislation provides for the Council to offer access to legal representation, and Kenya's international obligations require that it does so.

1. Section 18(4) requires children to have legal assistance. Section 77(1) allows for the court to order assistance where necessary. In conjunction with the above mentioned sections of the act requiring the Council to facilitate the implementation of the Act, it is appears prima facie that there is a domestic obligation for the Council o set aside funds and offer legal representation to children, at least within the criminal justice system. The court should see the Children's Act as unambiguously requiring the Council to set up a system for the provision of legal aid to all children who may find themselves in the legal system.

2. Alternatively, if there is considered any ambiguity as to whether the provisions of the Children's Act require immediate implementation, courts must look to International Law to resolve this ambiguity. The courts must presume that in the absence of clear expression to the contrary, Kenya intended to legislate to give effect to its international obligations. Courts must therefore interpret the Children's Act to reflect the international consensus that children are to be provided with legal assistance to ensure a fair trial.

3. It is recommended that a writ of Mandamus be sought against the National Council for Children Services, compelling the council to set up provision of legal aid to all children who cannot access legal assistance. The power of the High Court to exercise a supervisory jurisdiction is a fundamental element of the Constitution, which is based on the rule of law. This judicial review, directed at the National Council for children Services, demands that the council calls into operation section 32 (1) of the Act and specifically provides in its financial planning and coordination, elements of a system that avails resources for child legal aid. The High Court has jurisdiction to order the Council to exercise its powered the withholding of which is detrimental to children's legal services

4. In order to bring the proceedings, the name(s) of one of the clients in the remand homes shall be the aggrieved party. The Centre shall provide a next friend to comply with the Act. The

court, in *R v Secretary ex parte World Development Movement Limited*[21] stated that a party's locus goes to the jurisdiction of the matter and it is not to be treated as a preliminary point. It is to be taken in the legal and factual context of eth whole case. The dominant factor to be considered is whether the applicant has sufficient interest in the relief sought.

A child, who has been denied the right to a fair trial, will satisfy the requirement of sufficient interest. In Lord Diplock's famous formulation for Judicial Review by reference to the threshold of classification, it is the "procedural" improperly such as negligent reluctance or refusal by the Council to set up a child legal services department, which provides the heading for the fairness of the decision.[22]

It is the province of the High Court to redress wrongs of every kind when a peculiar remedy is not provided.[23] It is a principle of law that bodies exercising statutory powers are required to do so if by withholding action they deny a right which a statute confers.

The order of Mandamus sought here is issued in cases where there is a duty of a public or quasi-public nature, or duty imposed by the statute. It compels the fulfilment of a duty where there is lethargy on the part of the officer or body concerned. Any of the children in the civil or criminal justice system qualify as plaintiffs in this case.

It is our argument that by refusing to allocate funding for children's legal aid the Council is frustrating legislative powered and is thereby causing a denial of justice to children. The High court should give a purposive construction to eth relevant provisions of the Children's Act in accordance with Kenya's domestic and international obligations.

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[21] (1995) 1 WLR 386

[22] see *Council of Civil Service Unions v. Ministry of Agriculture* (1985) A C 374 at 410 - 411

[23] see *R v Ministry of Agriculture, Fisheries & Food ex parte Hamble Fisheries Limited*(1995) 2 ALLER 714

3.0 CHAPTER THREE: DATA ANALYSIS, RESULTS AND DISCUSSION

3.1 Introduction

This chapter is a presentation of results and findings obtained from field responses and data, broken into parts that relate to the objectives of the study. The sections present findings of the analysis, based on the objectives of the study where descriptive statistics has been employed in this analysis to discuss the issues in the best way possible.

3.2 Sample Characteristics

(33) potential respondents (5 judges,14 lawyers, 6 administrators in juvenile schools and 8 Kenya police officers) in the institution were targeted in the study and 27(4 judges,12 lawyers, 5 administrators in juvenile schools and 6 Kenya police officers) turned up for the interview. This represents 81.8% percent return rate. The researcher deemed it as adequate and decided to proceed with the data analysis and present the findings. According to Mugenda and Mugenda (2003) a 50% response rate is adequate, 60% good and above 70% rated very well. This also collaborates with Bailey (2000) assertion that a response rate of 50% is adequate, while a response rate greater than 70% is very good. This implied that based on this assertion; the response rate in this case of 80% is very good.

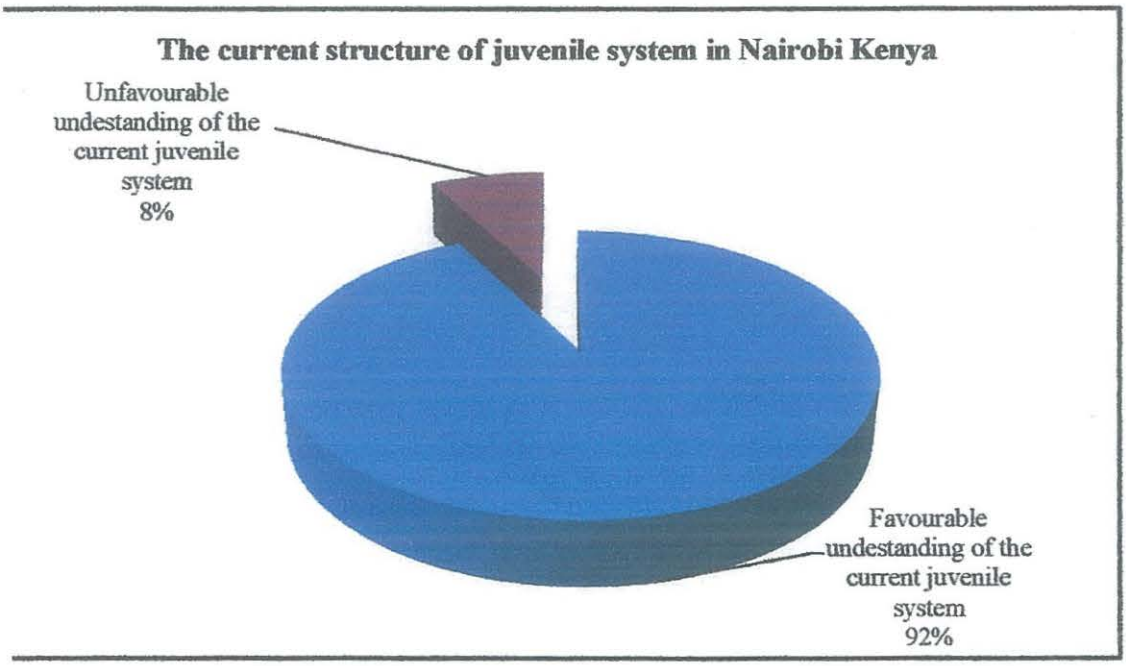
This high response rate can be attributed to the data collection procedures, where the researcher pre-notified the potential participants of the intended study. The interview guide sourced data regarding Juvenile justice in relation to child arrest and sentencing in criminal offences in Nairobi Kenya.

3.3.1 The current structure of juvenile system in Nairobi Kenya

The question sought to find out whether the respondents understood the current structure of juvenile justice system in Kenya. The majority of the respondents (92.5%) demonstrated good understanding of the structure. The formal child protective system has been developing since independence in the early 1960s. Legislation addressing children's issues was in place since this time and included the Children's and Young Person's Act, the Guardianship of Infants Act, and the Adoption Act. These statutes remained in legal force up and until March 2002, when the new

hildren's Act of 2001 entered into force. There has also been a Children's Department, which is ɔsted under the auspices of the Ministry for Home Affairs and specifically tasked with dealing ith issues of implementation of child care and protection and juvenile justice. Furthermore, ere are children's courts all over the country, with magistrates specifically assigned as ıildren's courts magistrates. The Nairobi Children's Court, however, remains the only ıysically separate, child-friendly court in the country. All Children's Courts are courts of first stance, with the effect that they lay beneath the High Court in the court structure. Finally, the ivate sector (nongovernmental organizations) runs foster care and reception centers and ograms that cater for children without family care. These must be registered with the ıildren's Department. It should be noted that some respondents at 7.5% had shallow derstanding of the system and felt that it was losing the grip due to resources not meeting the rrent demand.

gure 3.3.1 The current structure of juvenile system in Nairobi Kenya



ırce (Researcher) Year 2014

m the results, a conclusion could be drawn that suggests the respondents adequately lerstand the current juvenile justice system in Nairobi Kenya to be more structured due be the dquarters though it faces overwhelming demand from various accused persons. This acute ıand causes relatively long cycle times to offer services and dispensation of justice. These has

indeed led to enhancement of online-linked services that included. These involve identifying the need, seeking potential partners, pre-qualifying and getting in service level agreements

3.3.2 Age of criminal responsibility in relation to child arrest and sentencing in criminal offences in Nairobi Kenya

The question sought to find out age of criminal responsibility in relation to child arrest and sentencing in criminal offences in Nairobi Kenya. The majority of the respondents at 88% acknowledged that a child who is aged under 10 is irrefutably presumed to be incapable of committing an offence. Prior to 1998, a child aged between 10 and 14 was presumed to be incapable of committing an offence unless the prosecution were able to prove that the child knew the difference between right and wrong, although a range of mitigating factors particular to childhood are normally taken into account in Kenya. Now, children aged 10 and 17 are capable of committing offences and it is not possible for a child to avoid liability by showing he does not know the difference between right and wrong. However, a child should not be found guilty if he is unfit to plead. The respondents stated that in exceptional circumstances, children can be tried as an adult in an adult court. From the age of 17 onwards, individuals are then considered an adult in the eyes of the law. Therefore, all punishment given by the courts or other law enforcement agencies will rest solely upon them.

From the results, a conclusion could be drawn that suggests that after a person aged ten to 17 has been arrested and taken to a police station, the Police and Criminal Evidence Act 1984 requires that the custody officer ascertain the identity of a parent, guardian, Local Authority carer or any other person who has assumed responsibility for the juvenile's welfare and must inform them of the arrest. The custody officer should inform the appropriate adult (who may or may not be the same person) of the grounds for the detainee's detention and ask the adult to come to the police station to see the detainee. The juvenile should be told of the duties of the appropriate adult and that the juvenile can consult privately with the appropriate adult at any time, but warned that such conversations are not privileged. The juvenile may not ordinarily be interviewed, be asked to provide or sign a written statement under caution, and be asked to sign a record of interview without an appropriate adult being present.

3.3.3 Aims of juvenile justice in relation to child arrest and sentencing in criminal offences in Nairobi Kenya

The query pursued to study aims of juvenile justice in relation to child arrest and sentencing in criminal offences in Nairobi Kenya. The preponderance of the respondents (94%) accredited that the juvenile justice according to The Kenyan Children's Act echoes the ideals of Article 12 of the Convention on the Rights of the Child[24], stating, "In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity. "In addition, Section 77 goes on to assert the possibility of the child's representation and/or legal aid, declaring, "[w]here a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation." Children's Officers are civil servants under the Ministry of Home Affairs and are employed by the Children's Department to advocate for the child. A court also appoints a guardian *ad litem* to safeguard the interests of the child. In addition, Civil Procedure Act allows for the role of guardians ad litem suing and defending any civil claims on behalf of minors, or persons under 18. Such persons must formally apply to the court and would be competent representatives until the child attains the age of majority.

From the outcomes, an inference could be drawn that submits that in practice, most legal representation for children in need of care and protection is voluntary. The right to legal representation at the government's expense is only granted for children in the juvenile justice system. Legal aid clinics tend to do general work on legal awareness in Kenya, and the child rights nongovernmental organization sector and a couple of individual practicing lawyers are very active in the legal representation of children in judicial proceedings and creating awareness. This effort, is however, mainly concentrated in the urban areas, particularly Nairobi, the capital. Although Kenya has made significant efforts to implement the ideals in the Convention on the Rights of the Child, some advocate the cementation of children's rights in a new Constitution which would protect against the event of appeal or amendments to the Children's Act. The public referendum held on November 21, 2005, rejected the proposed Draft Constitution of Kenya 2004. The proposed Bill of Rights was not one of the contested provisions, however. There, the

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[24] Waring, Elin, and David Weisburd, eds. *"Crime and Social Organization"*,Transaction Publishers. New Brunswick ,2002

Constitutional Review Commission[25] suggested the following guarantee: "Every child has a right to have a legal practitioner assigned to the child by the State and at State expense in other proceedings affecting the child, if injustice would otherwise result; and know of decisions affecting the child, to express an opinion and have that opinion taken into account, taking into consideration the age and maturity of the child and the nature of the decision." It is likely, although uncertain, that legislation were passed in the next year that will start the process of obtaining consensus on a new Constitution. Additionally, there are calls for more training of public officers, professionals, and judges on children's rights guaranteed by the Act.

3.3.4 The scope of description of juvenile justice in relation to child arrest and sentencing in criminal offences in Nairobi Kenya

The researcher sought to realize the scope of description of juvenile justice in relation to child arrest and sentencing in criminal offences in Nairobi Kenya. 67% of the respondents recognized Standard Minimum Rules are applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. For purposes of these Rules, a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult; an offence is any behaviour (act or omission) that is punishable by law under the respective legal systems; a juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence. Efforts had been made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed; to meet the varying needs of juvenile offenders, while protecting their basic rights; to meet the need of society; To implement the following rules thoroughly and fairly.

From the findings, conclusion can be drawn that The Standard Minimum Rules are deliberately formulated so as to be applicable within different legal systems and, at the same time, to set some minimum standards for the handling of juvenile offenders under any definition of a juvenile and under any system of dealing with juvenile offenders. The Rules are always to be applied

[25] Constitutional Review Commission of Kenya draft of 2010

impartially and without distinction of any kind. It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of "juvenile", ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems and does not diminish the impact of these Standard Minimum Rules.

3.3.5 Current rights of juveniles in relation to child arrest and sentencing in criminal offences in Nairobi Kenya

The researcher sought to realize Current rights of juveniles in relation to child arrest and sentencing in criminal offences in Nairobi Kenya.93% of the respondents admitted that Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

Hence it can be concluded that there are some important points that represent essential elements for a fair and just trial and that are internationally recognized in existing human rights instruments. The presumption of innocence, for instance, is also to be found in article 11 of the Universal Declaration of Human rights and in article 14, paragraph 2, of the International Covenant on Civil and Political Rights.

3.3.6 The protection of privacy for juveniles in relation to child arrest and sentencing in criminal offences in Nairobi, Kenya

The researcher sought to find out the protection of privacy for juveniles in relation to child arrest and sentencing in criminal offences in Nairobi, Kenya.73% of the respondents admitted that The juvenile's right to privacy is respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender is published.

From the findings, deduction can be made that stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes had provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal". It is important to protect the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle.

3.3.7 The investigations and prosecution of juveniles in Nairobi Kenya

The question sought to find out investigations and prosecution of juveniles in Nairobi Kenya. The majority of the respondents at 83% stated that on initial contacts, upon the apprehension of a juvenile, her or his parents or guardian would immediately be notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian would be notified within the shortest possible time thereafter. In addition, a judge or other competent official or body would without delay, consider the issue of release. Contacts between the law enforcement agencies and a juvenile offender would be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or hi m, with due regard to the circumstances of the case. Furthermore on the issue of diversion for juveniles, many respondents affirmed that consideration is given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority. The police, the prosecution or other agencies dealing with juvenile cases are empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules. Any diversion involving referral to appropriate community or other services required the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application. In order to facilitate the discretionary disposition of juvenile cases, efforts are made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

Conclusions can be made that the question of release is considered without delay by a judge or other competent official. The latter refers to any person or institution in the broadest sense of the term, including community boards or police authorities having power to release an arrested person. To "avoid harm" admittedly is flexible wording and covers many features of possible interaction (for example the use of harsh language, physical violence or exposure to the environment). Involvement in juvenile justice processes in itself can be "harmful" to juveniles; the term "avoid harm" should be broadly interpreted, therefore, as doing the least harm possible to the juvenile in the first instance, as well as any additional or undue harm. Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, nonintervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response.

3.3.8 Detention pending trial for juvenile in relation to child arrest and sentencing in criminal offences in Nairobi Kenya

A total of 86% of the respondents confirmed that detention pending trial is used only as a measure of last resort and for the shortest possible period of time. Whenever possible, it would be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home. Juveniles under detention pending trial are entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations. They are kept separate from adults and detained in a separate institution or in a separate part of an institution also holding adults. While in custody, juveniles receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality.

Conclusion can be drawn that the danger to juveniles of "criminal contamination" while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. By doing so, encourage the devising of new and innovative measures to avoid

such detention in the interest of the well-being of the juvenile. Juveniles under detention pending trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners as well as the International Covenant on Civil and Political Rights. Varying physical and psychological characteristics of young detainees may warrant classification measures by which some are kept separate while in detention pending trial, thus contributing to the avoidance of victimization and rendering more appropriate assistance.

3.3.9 Adjudication and disposition for juvenile justice

A total of 78% of respondents admitted that where the case of a juvenile offender has not been diverted competent authority to (under rule 11), they are dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial. The proceedings are conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely. Throughout the proceedings the juvenile have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country. The parents or the guardian is be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile. Moreover, in all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed are properly investigated so as to facilitate judicious adjudication of the case by the competent authority. The guiding principles in *in adjudication and disposition are;* The reaction taken are always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society; Restrictions on the personal liberty of the juvenile are imposed only after careful consideration and limited to the possible minimum; Deprivation of personal liberty are not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.

Conclusion from the findings can be made that the procedure for dealing with juvenile offenders would in any case follow the minimum standards that are applied almost universally for any criminal defendant under the procedure known as "due process of law". In accordance with due

process, a "fair and just trial" includes such basic safeguards as the presumption of innocence, the presentation and examination of witnesses, the common legal defenses, the right to remain silent, the right to have the last word in a hearing, the right to appeal. Whereas legal counsel and free legal aid are needed to assure the juvenile legal assistance, the right of the parents or guardian to participate as stated in rule 15.2 should be viewed as general psychological and emotional assistance to the juvenile-a function extending throughout the procedure. The competent authority should be informed of relevant facts about the juvenile, such as social and family background, school career, educational experiences, etc. For this purpose, some jurisdictions use special social services or personnel attached to the court or board.

CHAPTER FOUR: SUMMARY, CONCLUSION AND RECOMMENDATION

4.1 Introduction

In this chapter, the most crucial points of concern highlighted in the previous chapters are summarized together with a number of conclusions. Certain recommendations are put forward as well as some suggestions on the areas for further research.

4.2 Summary

The research had aimed to study Juvenile justice in relation to child arrest and sentencing in criminal offences in Nairobi Kenya. From the research questions indicated in the interview guide, various responses had given clear indication various factors influence juvenile justice in Kenya as shown in the data analyzed in chapter four. The majority of the respondents (92.5%) demonstrated good understanding of the structure. The formal child protective system has been developing since independence in the early 1960s. Legislation addressing children's issues was in place since this time and included the Children's and Young Person's Act, the Guardianship of Infants Act, and the Adoption Act. The majority of the respondents at 88% acknowledged that a child who is aged under 10 is irrefutably presumed to be incapable of committing an offence. Prior to 1998, a child aged between 10 and 14 was presumed to be incapable of committing an offence unless the prosecution were able to prove that the child knew the difference between right and wrong, although a range of mitigating factors particular to childhood are normally taken into account in Kenya. Now, children aged 10 and 17 are capable of committing offences and it is not possible for a child to avoid liability by showing he does not know the difference between right and wrong. However, a child should not be found guilty if he is unfit to plead. The respondents stated that in exceptional circumstances, children can be tried as an adult in an adult court. From the age of 17 onwards, individuals are then considered an adult in the eyes of the law. Therefore, all punishment given by the courts or other law enforcement agencies will rest solely upon them. The preponderance of the respondents (94%) accredited that the juvenile justice according to The Kenyan Children's Act clearly echoes the ideals of Article 12 of the Convention on the Rights of the Child, stating, "In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity. "In addition, Section 77 goes on to assert the possibility of the child's representation and/or legal aid, declaring, "[w]here a child is brought before a

court in proceedings under this Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation." Children's Officers are civil servants under the Ministry of Home Affairs and are employed by the Children's Department to advocate for the child. A court also appoints a guardian *ad litem* to safeguard the interests of the child. In addition, Civil Procedure Act allows for the role of guardians ad litem suing and defending any civil claims on behalf of minors, or persons under 18. Such persons must formally apply to the court and would be competent representatives until the child attains the age of majority.

Furthermore, a total of 67% of the respondents recognized Standard Minimum Rules are applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. For purposes of these Rules, a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult; an offence is any behaviour (act or omission) that is punishable by law under the respective legal systems; a juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence. 93% of the respondents admitted that Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. A total of 73% of the respondents admitted that the juvenile's right to privacy is respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender is published. The majority of the respondents at 83% stated that on initial contacts, upon the apprehension of a juvenile, her or his parents or guardian would immediately be notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian would be notified within the shortest possible time thereafter. In addition, a judge or other competent official or body would without delay, consider the issue of release. 86% of the respondents confirmed that detention pending trial is used only as a measure of last resort and for the shortest possible period of time. Whenever possible, it would be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home. Juveniles under detention pending trial are entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations. 78% of respondents admitted that

where the case of a juvenile offender has not been diverted competent authority to (under rule 11), they are dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial. The proceedings are conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely. Throughout the proceedings the juvenile have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

4.3 Conclusions

The juvenile justice in relation to child arrest and sentencing in Nairobi, Kenya is affected with various factors. Failure to address the dynamics will result in failure of many programs aimed at improving the juvenile justice. Several interventions are needed to improve the processes at the institution. Measures are also needed to ensure team spirit across all stakeholders.

4.4 Recommendations

Local authorities, the Children's Department, and police, together should cease the practice of rounding up street children, detaining them in remand centers, and committing them without due process to institutions for their care. Develop guidelines for police on the proper use of regular and lethal force, including in dealing with children, and train all police (including police reserve officers, administration police, city askaris, and CID police) to ensure that such guidelines are enforced. (Current law contains guidelines on the use of firearms only.)

Ensure that police and magistrates make diligent efforts to properly identify young persons as children and determine their age, to ensure that children are accorded the special protections they are entitled to before the law; including separation from adults in detention, and the right to appear in special juvenile courts, rather than in regular courts. Devote resources for the training of magistrates on how to handle children's cases and establish additional permanent juvenile courts in Kenya (at the moment only one exists, in Nairobi). At present, children's cases are often heard in ad hoc juvenile courts where magistrates have little experience or training on how to handle children's cases.

Ensure that the Children Bill (the bill which seeks to reform, among other laws, the Children and Young Persons Act) clearly separates criminal from a protection or discipline cases for children, and that children receive all due process protections required by international law when deprivation of liberty is at issue. Eliminate from all existing laws and regulations all provisions authorizing corporal punishment, reduction in diet, and solitary confinement as punishment for children in courts, regular schools, correctional institutions and other institutions for their care. Train all caretakers of children, including school teachers, on the use of alternative methods of teaching and disciplining children.

Remove borstal institutions from the administration of the Prisons Department, and place under the administration under the Children's Department. Existing laws should be amended to ensure that no one under 18 years be sent to an adult prison. Ensure that all children deprived of their liberty receive an education suited to their needs and abilities, and designed to prepare them for return to society. For girls deprived of their liberty in approved schools, provide access to secondary level education, as is provided for boys. For boys in borstal institutions, primary level education should be provided for all boys, not just for boys in Standards 7 and 8.

Ensure that government officials who work with children are specially educated and trained on how to handle children's cases. Law enforcement personnel, the judiciary (and officers associated with juvenile court proceedings, children's officers and probation officers), and staff at correctional institutions should be sensitized to the special needs and rights of children. All relevant government departments (including the Police Department, the Children's Department, the Prisons Department, the Attorney General's Office, and the Ministry of Education) should initiate prompt investigations into allegations of abuse of children by police, institutional staff, and teachers, and should undertake disciplinary or criminal proceedings where appropriate to ensure accountability of all for their actions.

The new volunteer children's officers should be adequately oriented to "care and protection" activities to ensure protection for all children in difficult circumstances who may be in need of it. District commissioners should be responsible for ensuring that the work of district health, social service and education officers include attention to AIDS-affected children.

4.5 Areas for further Research

To determine how development of research through partnerships with judiciary stakeholders should improve justice offered by the judges and police service. Investigate how insufficient learning resources can hamper performance of the juvenile justice system in relation sentencing and judgment.

REFERENCES

Britt, Chester L., & Gottfredson, Michael R. (Eds.). *"Control Theories of Crime and Delinquency"*. New Brunswick: Transaction Publishers, 2003

Carter Hay, Edward N. Fortson, Dusten R. Hollist, Irshad Altheimer and Lonnie M. Schaible *"The Impact of Community Disadvantage on the Relationship between the Family and Juvenile Crime"*, Journal of Research in Crime and Delinquency 2006; 43; 326

Hirschi Travis "*Causes of Delinquency*" Transaction, New Brunswick, 2002.

Henry Stuart and Lanier Mark eds. *"The Essential Criminology Reader"*, Westview Press, Boulder, 2006.

Margaret Myers, Qualitative Research and the Generalizability Question: Standing Firm with Proteus, *The Qualitative Report*, Volume 4, (retrieved on 15th may 2008), Available online :(http://www.nova.edu/ssss/QR/QR4-3/myers.html), 2000

Olive M. Mugenda, Abel G. Mugenda Research Methods: *Quantitative and Qualitative Approaches*; African Centre for Technology Studies, 1999

Osgood Wayne and Chambers Jeff, *"Community Correlates of Rural Youth Violence"*, OJJDP Bulletin, online at http://www.ncjrs.gov/html/ojjdp/193591/contents.html Accessed on 22.05.2008 2003

Rubin Sol, *"Crime and Juvenile Delinquency: A rational Approach to Penal Problems"*, Oceania, New York, 1961.

Seale Clive ed, "Researching *Society and culture*", Sage, London,1998.

Shaftoe Henry, *Crime Prevention; Facts, Fallacies and the Future*,Palgrave Macmillan, Basingstoke, 2004.

Waring, Elin, and David Weisburd, eds. *"Crime and Social Organization"*,Transaction Publishers. New Brunswick ,2002.

Williams Brian, Restorative *Justice and Incarcerated Young Offenders* in Youth Justice; 4; 191 2004

Welman, J.C. & Kruger, S.J. *Research Methodology*: South Africa: Oxford University Press, 2001.