



# Interdisciplinary Journal of the African Child

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## **An Assessment of the Challenges of Children in Prison with their Mothers: A Case of Langata Women Maximum Prison**

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### **Abstract**

Children growing up in prison with imprisoned mothers are faced with many challenges. The Kenyan laws allow toddlers to stay with their incarcerated mothers in prison up to the age of four. Definitely, the children who live in prison are not criminals and as such should not be subjected to any treatment and environment that reduces their human basic natural rights. It is against this backdrop that this paper assessed the challenges of children in prison with their mothers in Lang'ata Women's Maximum Prison. Specifically, the paper assessed the social, psychological and educational challenges. The paper was intended to influence the justice system in the best interest of the child. The study used a naturalistic design which was purely qualitative in nature to collected data. The researcher purposively sampled only women with their children in the prison. The data collected was analysed using content analysis to generate qualitative report which was presented in a continuous prose and verbatim citations. The social development challenges were mostly observed. The study found out that prisoners were subjected to severe overcrowding, insufficient food supply, mothers had to share their portion with the children, poor sanitary conditions, inadequate water supply and bedding. Police and prison guards subjected prisoners to torture and inhuman treatment such as handcuffing, punishing and shouting at the mothers in front of the children causes psychological trauma to the children. It further found that there are no enough learning materials at the centre. In conclusion, whatever is done in all actions considering children, whether undertaken by private or public social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interest of the child shall be a main consideration**. Both the society and the government should operationalize this fact.

**Key words:** Social, Psychological, Educational, Spiritual, Challenges, Children.

### **Introduction and Background**

Rights of children have been a part of the human rights since 1919 when the International Labour Organisation made a number of conventions relating to labour standards for working children (Awene, 2014). However, application of the rights for children started to gain widespread recognition after Geneva Declaration of the Rights of the Child, adopted by the League of Nations in 1924 (National Council for Children's Services, 2013). Nevertheless, despite the ideological differences between those rights and the rights recognised and championed all over the world currently, the 1924 Declaration served as a crucial base for the rights of children.

Afterwards, the rights of the child gradually evolved towards empowering the child. In particular, the 1989 Convention on the Rights of the Child (CRC) signals a clear move towards recognizing that children are active holders of rights and not only passive objects (Amnesty International, 2009). Although, CRC is the main source of children's rights, it is not the only source for children's rights in international human rights law. As was noted by The Committee on the Rights of the Child, the Convention "reflects a holistic perspective on early childhood development based on the principles of indivisibility and interdependence of all human rights".

Additionally, there are numerous instruments recognizing and securing the rights of individuals deprived of liberty, among them being the United Nations Universal Declaration of Human Rights (1948) in Article 25(2) which recognized the need of motherhood and childhood to "special protection and assistance" and the right of all children to "social protection". Other such instruments exist on International, Regional and National levels, in the form of declarations, agreements and conventions. The preamble of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty (2009) notes the precarious situation of those detained in prisons and the critical conditions endured. Principle VIII-XX provides that "Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, paediatric, and nutritional services, in order to protect the best interest of the child" (Amnesty International, 2009).

Children growing up in prison with imprisoned mothers are faced with numerous challenges ranging from social, educational, economic, psychological and environmental. Such children include those that are either born to inmate mothers or those that accompany their mothers when convicted of serious crimes that they have to be incarcerated for a long time. These children are exposed to all manner of crimes and criminals at a tender age (Tomkin, 2009). The children of incarcerated mothers have long been an almost invisible population, but in recent years, they have begun to receive attention from public policymakers, traditional social



service providers and academic researchers. Out of this, some are concerned about the rapidly growing correctional population of more than two million children worldwide in prison; others fear that these children are at a higher risk of being incarcerated themselves as adults, while others are motivated by a desire to better understand and promote the well-being of children living in challenging life circumstances (Shavisa, 2015).

It is also important to note that global attempts have continually been made to improve the plight of children living in prisons such as; The draft on United Nations minimum Rules for the treatment of women prisoners and non-custodial measures for women offenders (2010) especially Rule 48 which states in part that increased attention be devoted to women in prison and their children. It also states: Pregnant or nursing women prisoners shall receive advice on their diet and appropriate food must be provided for babies, children and breast-feeding mothers, free of charge (Republic of Kenya, 2009). Although Kenya has ratified these rules, the extent to which they are applied is of great concern.

Notwithstanding the foregoing, The Kenya Prisons Act section 30(4) also states that; The infant child of a female prisoner may be received into prison with its mother and may be supplied with clothing and necessities at public expense: Provided that such child shall only be permitted to remain in prison until it attains the age of four years or until arrangements for its proper care outside prison are concluded, whichever shall be the earlier (Republic of Kenya, 2009).

A paper presented by the Commissioner General of Prisons entitled “Towards Decarceration: A Statistical Analysis of Imprisoned Offenders” revealed that there were 2599 convicted female offenders and over 387 children accompanying their mothers in prison in Kenya in March 2016 only (Njoki & Karige, 2016). These numbers however, often fluctuate as some inmates are released when their jail term ends while others are remanded or jailed when found guilty of offences. For example, in Kenya, 4,053 and 3,348 children under the age of four spent some time in prisons in the year 2005 and 2009 respectively (Kenya Prisons Service, 2005; 2009). Although the children in prison with incarcerated mothers may be bonding with their mothers, prison settings generally do not provide the best environment for children’s growth and development. Article 3 of the Convention on the Rights of the Child takes into consideration the Best Interest of the Child and as such all actions undertaken either by any institution or legislative bodies should consider the best interest of the child as a primary consideration. However, in Kenya, almost all the children are confined in the cells with their mothers throughout the day and night as they have no day care centers for children.

On the other hand, the Government of Kenya through the prison’s administration upholds Article 3 of the CRC by allowing children of imprisoned mothers to remain with them till the age of four. It also recognizes that for the positive development of a child’s personality, the child should grow up in an environment of happiness, love and understanding although this may not be achievable in a prison environment. The environmental interaction in prison influences behavior and development is considered a reaction to rewards, punishments and stimulated reinforcement. Once these children are removed from prisons, they may have difficulty coping with the outside world. In another unpublished paper presented by the Commissioner General of Prisons (2015), stated that the quality of early attachment is an important predictor of children’s later social and emotional functioning although at times an outcome of contact between children and incarcerated parents offer mixed findings.

Children of imprisoned women can be categorized into two: those who are separated from their mothers while the mothers are imprisoned, and those who go into prison with their mothers (Alejos, 2005). Internationally it is not uncommon for a child to spend some of his or her childhood in prison during the parents’ prison sentence (Poso *et al.*, 2010). This study focused on children who went into prison with their mothers and those who were born in prison at the Lang’ata Women’s Maximum Prison in Kenya. The Lang’ata Women’s Prison is the only maximum female security institution in Kenya. It is located on the edge of Kibra sub-County, Nairobi County approximately 8.5 Km from downtown Nairobi. It has two sections; remand and main prison. The remand prison houses prisoners awaiting trial while the main prison houses convicted prisoners. Some serving short-term sentences and others long sentences ranging from many years to life sentence to condemned prisoners. At the time of this research there were close to 1000 inmates serving different sentences ranging from murderer on death row, to drug dealers, armed robbers and petty thieves. Out of this number, 75 were mothers serving sentences for crimes ranging from homicide, theft, kidnapping to drug trafficking.

Omukhweso (2007) posited that children in prisons ought to be considered as children under difficult circumstances in the need of assistance but they have never been classified as such by any international organization or agency. A review of the literature available on children living with incarcerated mothers showed that there were no comprehensive studies done that directly addressed the social, spiritual, psychological and educational needs of such children. Hence this modest attempt endeavored to assess the social, spiritual, educational and psychological challenges of children living in prison with their mothers.

The Lang’ata Women’s Prison being the only maximum female security in Kenya institution has more inmates than any other female prison in Kenya. It also has more children living in the prison with their imprisoned mothers. Its proximity to the capital city of Kenya has attracted many sympathizers and institutions to go in and help the children to grow up and attain some development in a relatively conducive environment. One such institution is Faraja Trust Institution that has built an early child development centre inside the prison to cater for the children’s needs. This study was justified because although Faraja provided the institution with the children’s day care centre, the effectiveness in meeting the social, spiritual, educational and psychological challenges of the children is not known to the best knowledge of the researcher.

The general objective of the study was to assess the challenges of children living with their imprisoned mothers in Lang'ata Women's Maximum Prison. Specifically the study sought to establish the social environment of the children at the Lang'ata Women's Prison, examine the psychological challenges of children born or raised in prison in their first 4 years of life and to determine the educational challenges of children living in prison with their parents.

Reports released by various human rights lobby groups indicated that children accompanying mothers in prisons are hardly served with wholesome meals as stipulated in the *First Schedule* (Republic of Kenya, 2009). There are frequent reports of food shortage, congestion, lack of clean water, inadequate clothing, and poor sanitation across all the prisons in Kenya (Kenya Human Rights Commission, 1996). Under such circumstances, children are likely to be faced with high cases of malnutrition and morbidity compromising their growth and development (UNICEF, 1998).

### Methodology

This was a case study which was purely qualitative and relied on interview and observation to collect data from 30 mothers who were purposively selected out of a total of 105 mothers who had their children within the prison. For the children, observation was generally used because the children were too small to comprehend a number of things. The qualitative data obtained from interviews was analyzed using content analysis to generate qualitative report which was presented in continuous prose and verbatim citations.

The study population was women prisoners who were admitted in at the Langata Women's Prison during the study period and the children living in prison with their mothers aged one to four years, caregivers at Faraja Centre and prison officers. The population of the children was 75 and the mothers were 105, caregivers were 4 and prison officers were over 400. The target population was women prisoners living in prison with their children below the age of four at the Langa'ta Women Prison. Observation was also used within the prison and Faraja Day Care Center. For data collection one semi structured questionnaire was used to collect data. This was used to guide the interviews with the parents and the caregivers at Faraja Centre as well as prison officials who were considered as key informants. The study used random sampling technique. This technique was suited for this study because it ensured that a sample population which best represented the entire population was obtained.

Ethical considerations were observed while carrying out this study in that confidentiality was maintained and the information obtained that was not confidential was presented to the public in writing this paper.

### Findings and Discussion

At the time of the study there were 75 children living with their mothers within the prison, most of who m were born in prison and therefore the only home known to them was the prison.

In order to determine the social challenges faced by the children, the study focused on the following areas: environment in which the child was born, play equipments and facilities, co-operation with playmates, ability to develop new skills, and behaviours and ability to observe rules. It has been noted that for children to overcome social challenges as they grow up; children need to learn to co-operate with others in work and in play, in a manner best fitted for their associates' highest development. Children also need to be encouraged to play and to have playmates. As children grow they need to have an opportunity to explore and develop new skills and interdependence. They also need to learn that certain behaviours are unacceptable and they are responsible for their actions. Children should also be enabled to learn rules in an environment where guidance and discipline that is fair and consistent is offered in a loving environment. This is a great challenge for children growing up in prison with their incarcerated mothers as they miss out on such opportunities in life.

The study found that jailed pregnant women in Lang'ata Women's Prison had an opportunity to deliver in Kenyatta National Hospital. They also received both pre and post-natal care for their children. The study also found out that the institution had a day care centre for children where incarcerated mothers dropped their children in the morning and pick them up in the evening. They were only allowed to visit their children during short mid-day visits or while they were nursing. At all other times, the children were kept away from their mothers in a sub-standard nursery while their mothers were in their cells or doing what they had been assigned to do.

The study further found out that prisoners were subjected to severe overcrowding, and insufficient food supply as the mothers had to share their portion with the children. Poor sanitary conditions, inadequate water supply and lack of adequate beddings were also witnessed. It was also reported that police and prison guards subjected prisoners to torture and inhuman treatment. Some of these are discussed as follows;

One of the respondents said that;

*"When I was sentenced, my child was one year old. He was then taken away from me to a children's home, I missed out on the privileges of being a mother to my only son at that tender age, I appealed and he was brought back to me. All the same, I did not get enough time to mentor him. He is now three and a half years old. He keeps to himself and is never free to talk*

*even to me his mother. Sometimes we are also scolded and beaten in front of the children by the officers’.*

According to Bandura, (1968), the social environment in which a child is born has a lot to do with the future socialization of the child. Human beings are a product of social environment, and the future behaviours and actions are but a reflection of the socialization process that human beings are subject to. The social environment results revealed that there were 27 toys, 5 skipping robes, 4 balls and other outdoor playing materials like swings and other equipments. Hence, there were not enough playing tools to allow the children to just be children and to play. The day care had two full time caregivers and sometimes the mothers took turns to take care of the children.

The study considered the following indicators to test the psychological challenges experienced by the children in the prison, namely: the caregivers’ training to handle the psychological needs, treatment of the mothers such as handcuffing of the mothers, punishment and shouting at the mothers in front of the children and the relationship between the caretakers and the children. A thirty-two year old participant said *“It is not a good scenario, that they (the prison wardens) beat you, in front of your child, it really reduces the spirit of your child. It happens severally to me and my fellow mothers inmates”.*

These findings confirmed that the Children’s Act (Act No. 8 of 2001), requirement of separation of children in prison facilities is not really enforced. The researcher was informed that this has been caused in part by the failure of most judicial officers to regularly inspect prison as ex officio visiting justices as provided by section 72 of the Prisons Act (Cap 90 Laws of Kenya) and the Chief Justice’s Practice Directions 2008....” This condition has been complicated by the fact that the current prison facilities hold more than double its capacity.

The findings on social challenges further revealed that children went back to their mothers in the evenings, suggesting that their interaction with their mothers was limited. One respondent said,

*“When we reunite with the children in the evenings, the children are excited to want to share what they learnt in the centre but we are not interested because of hard day’s work and stress of being in prison. This killed the children’s self-esteem, enthusiasm and strained relationship with the parents”.*

Socially imprisoned mothers should embrace their children and try to listen to their days happy moments and the challenges encountered during the day.

On spiritual development, although this challenge was not highlighted in the objectives the researcher had indicated that the spiritual need of children has a stake in the growth and developmental behavior of the children later in life. The study findings revealed that there was no provision for Sunday school in the prison. Children joined their mothers on Saturdays or Sunday s for prayers. This helped the children spiritually to know that when asked to pray they would close their eyes and try to sing Christian songs they have heard. Lack of provision for Sunday school for children would mean that, there were no spiritual activities such as Bible storytelling and other activities that children engaged in.

Research also showed that contact between children and their inmate parents is a complex issue. A review of the research suggested that contact between children and incarcerated parents are related to a number of factors ranging from the inmate’s relationship with the children’s caregivers to family economic resources and jail and prison policies.

To establish how teaching and learning facilities affected provision of education at the prison, the researcher used the observation schedule to assess the adequacy of teaching and learning materials at the prisons. In this regard, the researcher observed that classrooms and learning materials were inadequate. There were only two caregivers who doubled as teachers at the centre for 75 children, which widened the teacher-pupil ratio. Playground was observed to be small compared to the number of children in the centre. Chairs and desks in the classroom were for the children above two years. The day sleeping area and beddings were not enough, forcing children to share the few blankets available, which meant that during the cold season these children are exposed to the cold. Hence, generally the learning atmosphere was not up to standard as per the Ministry of Education’s curriculum for early childhood education.

Another major challenge that the researcher established was the period of incarceration of the mother, in that some mothers were serving longer periods while others were serving shorter terms in prison. This greatly made it impossible for the children to actively participate in any meaningful educational activity. One of the caregivers suggested that, due to the age differences of the children and the difference in the jail terms of the mothers, different programmes could be organized for the different groups according to age. This was also because some of the children may have been in ECDE programmes before their mothers were convicted.

When the caregivers were asked to indicate the challenges that they faced in the education of the children in the prison, they identified shortage of caregivers and teachers and suggested the addition at least two caregivers and one trained teacher on ECDE. They also indicated irregular and fluctuating salary payment, as well as lack of qualified teachers and teaching materials.

Other challenges that faced the education of children accompanying their mothers in prison included lack of conducive learning environment in the prisons, frequent changes in the time tables, and lack of proper follow-up of learning. The researcher



further established that it was not possible to offer educational care effectively due to different times that mothers entered prisons and left. For example, one of the caregivers indicated that some mothers could come to prison in the morning after conviction while the child would enter the class the following day.

### **Conclusions and Recommendations**

Based on the findings of this study, it was concluded that, in any situation the best interest of child must take precedence. The prison system as is currently constituted does not factor in the best interest of the child. In the first place, children who did not commit crime are subjected to conditions that violate their basic rights thereby exposing them to social psychological and educational challenges which pre-expose them and potentially expose them to crime. The early years of a child's life presents a unique opportunity to lay a foundation for a healthy development. Negative early in life experiences could impair children's mental health and affect their cognitive, behavioral, social and psychological development.

Recommendations highlighted for policy considerations for improving the frequency and quality of contact between inmates and their children include the following.

1. Mothers of young children should be treated with dignity in the presence of their children even though they may be criminals.
2. That prisons departments should recruit and hire qualified and permanent teachers/caregivers who are able to teach children accompanying their mothers in prisons. Those already employed should be sponsored to do relevant courses in relation to child development and counseling.
3. The prisons authorities should provide appropriate teaching and learning facilities at the day care centre by increasing children's play materials such as skipping robes, balls, toys, swings, sea-saws and the play area should be safe and conducive. Books relevant to the age groups of the children attending the day care center should be provided so that teaching and learning could be conducted effectively.
4. Brutal punishment on inmates should not be carried out in front of the children as this causes low self-esteem, anxiety and psychological torture on the children.
5. Prison authorities should set aside more money for good and balanced diet for the children and the mothers in prison. Currently, the children share food with their mothers which is sometimes little and not balanced in terms of nutrition. This may cause other problems such as malnutrition for the children.
6. Kenya Prison Services should make provision for Sunday school with teachers to teach the children the word of God. Proverbs 22:6 mothers and the church to train up a child in the way he or she should grow and when he or she is grown, he or she will not depart from it.
7. There is need for further research in the field of social development and the challenges that face children of imprisoned mothers.

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## **A Review of the Multi-Disciplinary Approach in addressing Sexual Violence against Children in the Criminal Justice System**

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### **Abstract**

The criminal justice process begins at the time a report is made at a police station. Proper investigations are the foundation of any trial process. Historically, investigations into cases of child sexual violence have been characterized by the lack of specialized investigators, which has led to insensitivity, poor investigations and consequently low conviction rates. The newly formed specialized Child Protection Unit within the Directorate of Criminal Investigations, formed by the Inspector General pursuant to Section 10(1) (h) of the National Police Service Act of 2011, is a positive development that heralds a new era in investigation of child sexual violence cases. The bulk of investigations, however, remain wanting in terms of the trial process. The Kenyan trial process has been historically adversarial. International best practices provide that children must have psychosocial support to mitigate against the effects of the typically traumatic trial process (Cross, Jones, Walsh, Simone, & Kolko, 2007). A key objective of this paper is to highlight how a collaborative, multi-disciplinary approach ensures that any issues arising over the course of the trial, including custody, medical, and psychological needs of the child are met. With this approach, the court hearing the matter can give directions on any issue arising rather than directing a new process to be instituted in the children's court. This paper posits that a multi-disciplinary approach (MDA) involving investigations, legal representation, and aftercare specialists safeguards the child's best interest during all stages of the criminal trial.

### **Introduction and Background**

The Kenyan criminal trial process has been historically adversarial with a normative burden passing from one stage and/or actor to another. In a typical criminal trial for a victim of child sexual abuse, the case begins at a police station where the initial report is made. It is then transferred to the medical fraternity where a doctor is expected to examine the victim, fill in the prerequisite forms and then refer the matter back to the police station. Once received, and the police finalize all investigations, the case is then transferred to the courts and handed over to the Director of Public Prosecution (DPP) for prosecution. It is unfortunate when the victim is re-traumatized through the tedious court processes (Cross, Jones, Walsh, Simone, & Kolko, 2007).

International best practices provide that children must have psychosocial support to mitigate against the effects of the traumatic trial process. With this general rule, a collaborative multi-disciplinary approach is a supported method where all the main actors in the criminal justice system work closely together and the risk of re-traumatization is minimal (The United Nations, 1989, art. 39).

Different agencies working on a child's case after the alleged abuse is reported usually need to have the child's account of what happened, often at different times. This leads to multiplicity in reporting in different locations with new and different people which can have harmful effects on the child victim. The child may be re-traumatized as he or she has to recount the traumatic event in particularly stressful environments. Investigations can generate painful experiences for the child victim (Lalayants, 2011).

In addition, the multiple interviews in typically non-child-friendly facilities are equally harmful to the criminal investigation as the repetition can distort the child's account. The high stress levels preclude optimal expression for the child and therefore a total account of events is often not acquired. With younger children, especially between ages 3-9 years, suggestibility is high as the different interviewers ask leading and misleading questions, creating discrepancies in the child's story. The lack of coordination between different stakeholders involved, absence of interview guidelines, and lack of personnel with appropriate training and specialization ultimately violate the principle of "best interest of the child" (Lalayants, 2011).

The multi-disciplinary approach ensures that from the time of a complaint at the police station and throughout the trial process until completion, the principle of best interest of the child is the driving force. It ensures that the criminal justice community provides the child victim with timely and appropriate responses.

A growing number of jurisdictions around the world have established multi-sectorial teams (MST) comprising professionals from law enforcement, child protective services, prosecution, medicine, counseling and related fields, to minimize additional trauma to children and increase their investigative result. These professionals work together in a coordinated and collaborative manner that ensures an effective response to reports of violence against children (Bilchik, 1998, p. 5).

The UN Convention on the Rights of the Child, Article 3.1 stated: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.” Since January 1990, Kenya has been a signatory to the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child from July 2000. In fact, work to establish a child protection system in Kenya began in 2002 with the objective of “promoting the well-being of children through prevention of violence and exploitation ensuring that in case it happens, prompt and coordinated action is taken to prevent further occurrence” (NCCS, 2011, p. iii).

The Children’s Act, passed in 2001, comprehensively codified the rights and protections of children. In 2006, the Kenyan parliament passed the Sexual Offenses Act (SOA), criminalizing all forms of sexual offenses against children. By 2008, the Government had launched the first ever National Plan of Action for Children, running through 2012, pledging to focus investment in prevention and improving the functioning of state institutions responsible for law enforcement.

Children who find themselves as victims in the criminal process are not treated in the same manner as children in conflict with the law, despite the protections envisaged in both the Children’s Act and the Victim Protection Act. Matters involving children in conflict with the law are heard and determined in children’s court, in a timely manner, where there are specialized personnel exclusively dealing with children’s matters. Furthermore, the children’s court has a wide jurisdiction to deal with any issue arising in the course of the trial including custody, and medical and psychological needs of the child since the child’s best interest remains the goal of the trial process. The court is equally set up in a child friendly manner (Sec 76, Children’s Act, 2001).

In contrast, child victims go through the normal criminal justice system that is not set up to meet the children’s needs, from the personnel, the structure and the model of the trial. Moreover, should an issue arise related to the best interest of the child during the “normal” trial process, directions on that issue have to be transferred to the children’s court for determination. This means the a magistrate can only direct a new process to be instituted in the children’s court. This causes delays in dealing with critical and immediate issues of the child’s welfare that perpetuates re-victimization (Sec 73, Children’s Act, 2001).

In 2014, the Victim Protection Act (VPA) was passed into law as recognition that child victims needed to be part of the process as the Act outlines their rights and protection within the trial process. Victims have direct access to court and are now not limited to do so through the state. The court is privy to the needs of the victim and is able to address them (Sec 4(2), VPA, 2014).

One of the objectives of the VPA is to prevent re-victimization of child victims during the trial process. Despite this clear objective of the Act, it does not provide guidelines or processes on how to achieve this. The trial process translates the child’s legal representative to the child’s psychosocial support system. What is more, the legal representative, will seldom have the skills required to help the child effectively participate in the trial process nor the ability to identify the child’s needs.

Conclusions have been drawn to recommend presentation of a united knowledge front to perform effective investigation and prosecution. Children’s Advocacy Centers (CACs) have been developed with an aim to improve child forensic interviewing following allegations of child abuse. The intent is to coordinate multiple investigations, provide child-friendly interviewing locations, and limit redundant interviewing. These CACs also are designed to improve the community collaborative response to child sexual violence and the criminal justice processing of these cases. In Kenya there are three such centers in Malindi, Nakuru and Garissa. Malindi has been in operation for the past six years. Free legal services and self-representation training are offered through the CACs. Also, the different actors carry out a collaborative approach of assisting victims which prevents re-interviewing and consequentially re-traumatizing them. These are great strides; however challenges such as funding, mutual professional respect, government driven commitment and collaborative guidelines between the different actors are still an impediment (Muoki, 2016).

The International Justice Mission (IJM) has been representing victims in child sexual violence (CSV) cases in Kenya since 2001. IJM has identified a lack of coordination amongst responders to child abuse as a key impediment to the effective functioning of Kenya’s child protection system. The traditional process of investigating and prosecuting child sexual violence is not child friendly. Taking a child through the adult-oriented, adversarial process can have a detrimental impact and impede the child’s ability to recover from the initial victimization. Therefore, IJM’s empirically supported intervention to child sexual violence has been the multi-disciplinary approach comprising investigators, advocates and victim aftercare specialists. This approach embodies the functions of the different actors in the justice system, i.e., the police, to carry out the investigation, the advocate to represent the victim in the trial process while assisting the Office of the Director of Public Prosecution (ODPP), and the aftercare specialist to provide psychosocial support for the victim.

## Literature Review

There has been significant pressure around the world and locally for professionals working in children’s matters to act promptly, yet professionally and with best practices, when faced with a report of child sexual abuse. However, there is no single profession or department that has the ability to respond adequately without the support of others. Lone interventions always leave gaps in the area of expertise the intervening group is lacking. For this reason, there has been numerous studies on how to make a multi-sectoral team function well and lessons from existing teams have been learned (Lalayants, 2011).

One study conducted in a multidisciplinary clinical consultation program in a large, governmental child protection agency in the UK, examined best practices using program development theory by Tripodi, Fellin, and Epstein (1977). Bielawski and Epstein (1984) found that multidisciplinary collaboration is multidimensional, interactional, and developmental and that several factors affect collaboration. Most of the factors identified were interactional in nature as opposed to the protocols. Six factors identified as important for successful collaboration were: pre-planning, commitment, communication, strong leadership, understanding the culture of collaborating agencies, structural supports and adequate resources for collaboration. In addition, the research findings concluded that strategies to achieve success in collaboration must include efforts at dual levels: individual and organizational (National Children's Advocacy Center, 2010).

Although the above study's data were drawn from only one program, the issues uncovered and generalizations drawn were consistent with research in other organizational environments suggesting that the types of difficulties experienced in the collaborative process may be highly transferable and strategies for improving collaborative practices may be applicable to a variety of settings, including Kenya (Flâm, 2009). According to Newman and Dannenfelser (2005), the process of collaboration in child abuse investigations has been emphasized since 1974. One of the major barriers identified to the process of collaboration was conflicts over case control and lack of cross training. This is consistent with many studies, where teams did not appreciate other team members' origin of work ethic. In the process, the child was then viewed as a means to an end and hence deprived of protections and re-victimized by the process.

In Kenya, the VPA (2014) guarantees victims a right to protection from intimidation, harassment, fear, tampering, bribery, corruption, and abuse. This right extends to their families as well as their property. Further, where the personal interest of the victims is affected, they are entitled to have their views presented before court in person or by their legal representative. The previous status of the victims' legal representatives was limited to a supportive role in the proceedings, and as such they had no right to address the court as was held in *R v Florence Wambui*

Njuguna, in the High Court in Kisumu, Criminal Case No. 7 of 1990. The right to cross-examine a witness is the preserve of the advocates for the prosecution and defense. Section 9 of the VPA now allows for the victims' concerns and views to be presented and considered at stages of the proceedings that the court may deem appropriate provided that such indulgence does not prejudice the rights of the accused or affect the process of a fair trial. Section 4 of the Act underscores the fact that victims' participation in court is a policy goal of the Act. At the International Criminal Court trials, victims' lawyers are allowed to cross-examine witnesses.

Arguably, victims can by themselves or through their advocates address the court, raise an objection, make an application or submit before the court at an appropriate stage of the trial, for example, a victim impact statement (*Honorable Mwiti Vs ODPP & Others*, Petition No 151 of 2015). For the successful implementation of the Sexual Offences Act and the Victim Protection Act, there requires a multi-sectoral concerted effort of key players in the criminal justice system and members of the public. Everyone on the team must be committed to the concept that a coordinated and collaborative process is required for a successful investigation of reported instances of child sexual abuse. That commitment may not be fully developed when the team is first formed, but there must be at least an agreement to implement the MDA team philosophy. To be viable, such collaboration must have support of the leadership of its member organizations and agencies. There is overwhelming evidence that supports collaborative team effort which reveals that in jurisdictions where this is present, there is a close working relationship between law enforcement and child protective services; and that most cases result in convictions as the children are well supported and their best interests taken care of, hence reducing system intervention trauma (National Criminal Justice Reference Service, 2016).

## Findings and Discussions

The IJM has learned over the years that guidelines on interventions between the differing professionals are paramount in order to maintain high quality and consistent responses in the long-term. However, the role and responsibilities of core responders need to be very clear. There is need for development of protocols customizing individual worker responses into an ideal multidisciplinary, coordinated response; and a clear working tool that shows the distinct and interrelated responsibilities among the team members (MNCASA, 2017; NSVRC, 2011, p. 6).

Due to different backgrounds in training on the MDA team, structures and accountability processes are needed that allow for flexibility based on specific case variables. Inter-departmental accountability is enhanced when policies are followed. This has reduced conflict because there is a shared understanding of intervention practice. Diminished inter-disciplinary conflict means more energy and attention are spent on the case and individual client, contributing to swifter and more precise resolution. That in turn has alleviated trauma to children and their families as children's best interests are always at the fore by the team, and especially by aftercare specialists (SART, 2016).

Confidentiality was another barrier to effective teamwork. Information sharing between teams allows key and crucial information to be shared and supports the success of the case and caters to the child's best interest. Conflict resolution practices must be developed within the team as conflicts are bound to arise as child abuse cases are complex, demanding and frustrating. When conflict is resolved, mutual respect is developed. Finally, periodic self-analysis and accountability is crucial to ensure the needs



of child victims are met. Team members of the MDT should be encouraged to attend trainings together. Equally, cross-discipline training allows all members to operate from a common set of principles. It is therefore important for professionals from differing backgrounds and training to understand and respect each other's work and professional abilities.

A case in point.

*\*Joan was a 13-year-old minor with mental disabilities, who was defiled by her neighbor. Her parents reported the matter to the nearest police station for redress. The investigating officer processed the case but realized he could not make headway with the child, as interviewing her was difficult. Recognizing his inadequacy in these skills, he brought in a children's officer to help in retrieving the abuse story. After their concerted efforts they were able to record the complaint and witness statement. The team escorted the child to hospital where they briefed the doctor, the child was treated and a mental health assessment conducted that was later useful in court during the trial process. Once the case was in court, the prosecutor was briefed by the investigating officer who continued supporting the team in further prosecution-led investigations. During the trial process the team worked together in the best interest of the child and her family. At one point, Joan could not testify due to heightened trauma reactions coupled with constant threats. This was brought to the attention of the court through the children's officer and the investigating officer. The court was able to deal with the matter expeditiously. The team stayed on until the conclusion of the trial process (IJM, 2011).*

It is now well supported that the best response to the challenge of child sexual violence investigations and prosecutions is the formation of a multi-disciplinary teams. The approach promotes well-coordinated child abuse investigations that benefit from the input and attention of many different professionals, especially law enforcement, prosecution, medics and child protective services, to ensure a successful conclusion to the investigation and to minimize additional trauma to the child victim.

## Conclusion and Recommendations

In conclusion, successful investigations of cases of child sexual violence that are attentive to the best interests of the child require the full participation and collaboration of team members who share their knowledge, skills, and abilities. An effective response to reports of child abuse and neglect entails an investigation that is timely and objective and that causes the least possible trauma to children and families. Team members remain responsible for fulfilling their own professional roles while learning to take others' roles and responsibilities into consideration. Effective teamwork can prevent further abuse of children and can bring those who harm children to justice. These benefits can translate into safer communities.

Kenya requires an MDT implementation policy. Currently teams work together due to goodwill, but protocols with well-laid-out consequences are not required. Kenya needs to harmonize its various laws dealing with children's matters so as to develop proper policy guidelines that include the roles and expectations of each stakeholder.

There is therefore need for specially trained MDT personnel dealing wholly with children's matters in relation to sexual-gender based violence (SGBV). These include trained prosecutors, magistrates, medics, police investigators and children's officers. There is also need for well-equipped specialized courts and waiting areas in courts for children.

The government should set aside resources to deal with SGBV and fund various programs around child sexual violence. One of the areas that would require funding is a government laboratory to deal with the rising number of cases that require DNA evidence. Therefore, there is a need for resources, infrastructure, oversight and political will to get the work done by effectively prosecuting violence against children (Alai, 2016).

We recommend local research in the MDA to identify intervention areas and usefulness in tackling violence against children. Currently, local documentation on its effectiveness is lacking. Findings on why a MDA has not been adopted by government bodies would enrich this area.

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## **Evidence Based Programming in Improved Quality of Education to Children in the Developing World: A Review of Selected Documentation in Africa.**

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### **Abstract**

This paper sought to explore the institutional commitment to the welfare of children to access quality education as a basic right and hence let the sector work in the best interest of the child. Its scope covered the linkages between quality education as an inalienable right to the child, increased enrolment, life transformation, sustainable development and the role of monitoring and evaluation in the promotion of evidence-based management of the sector. This paper therefore delved into the prevalent practices in sub-Saharan Africa with the intent to bring to the fore the extent to which evidence-based planning might have been used to influence practice in delivering education as an indispensable nurturing service to the child. It is a desk review paper spanning the predominant practices reflecting on cases drawn from a number of selected countries in sub-Saharan Africa. It is noted that every civilization tends to be in a perpetual quest for its preservation through inherent procreative endeavour and hence in zest embrace deliberate nurturing systems, structures and processes for its posterity and legacy. One of the pivotal pillars in propelling a people into their appropriate, enviable socio-economic growth and development in pursuit of their preferred civilization is formal education to its budding population, the children. Persons who acquire ample art and science of learning availed through formal education also broaden their prospects for better living. Nevertheless, the pursuit of knowledge, skill and capacity enhancement in a large proportion of the less developed nations of the sub-Saharan Africa is obscure, rudimentary and inaccessible to the majority of children in both the urban and rural poor. Similarly, the quality of education is too basic to make a difference in the lives of the millions of the affected children. Equally perturbing is the absence of evidence-based education sector management where results from monitoring and evaluation exercise does not seem to inform policy and practice. Such gaps may often push the stakeholders into a state of disillusionment and apathy which denies the child quality education, which is a right for all children.

**Key words:** Quality, Education, Developing Countries, Programming

### **Introduction and Background**

Humanity from time immemorial has tended to be preoccupied not only with its preservation through innate procreative endeavour, but it is also deeply immersed in socializing its progeny in perfecting survival excellence (Long-Crowell, 2016). This commitment may be responsible for its often spirited efforts to create an enabling environment for nurturing and sustaining the desired resilience to defy all odds and preserve the next generation and its heritage. Consequently, every culture adopts either a single or multiple forms of education which are fundamental vehicles through which the life skills for quality life are chiselled and engrained into the life patterns of the young ones (Hewlett Foundation, 2016). Whether systematic or haphazard, the platform provides avenues through which values and practices are propagated. The adopted form of education in any civilization is therefore considered critical in the holistic character formation of the children; hence its unfettered access is bound to work to their best interest.

Formal education as a sector is one of the fundamental systems of capacity building widely perceived as a vital ingredient in propelling any society into its contextual, enviable socio-economic growth and development in pursuit of its preferred civilization (Burchi, 2006; Krishnaratne, White, & Carpenter, 2013). Persons or children who acquire the essential life skills embedded in both the art and the science of literacy, algebra, arithmetic, calculus, critical thinking, conceptual framework and the associated predispositions of formal learning/education tend to also widen their opportunities for better incomes, higher agricultural output, healthier offspring and better quality of life (Long-Crowell, 2016). Studies have shown that a child who has received quality education is well positioned to take up responsibilities and be more successful than the contemporary who either has poor education or no education at all (Krishnaratne, White, & Carpenter, 2013). The power in formal education seems undisputable in preparing generations in their respective societies to acquire the essential framework to successfully function and be appropriately adjusted members of their respective societies. This notwithstanding, the pursuance of knowledge, skill and capacity in the developing countries of sub-Saharan Africa is elusive and tends to be a mirage to millions who have limited access to quality formal education.

The status of quality education in sub-Saharan Africa is grossly complicated by the duality of the appreciation that access to this commodity is both a basic human right and its pursuit is regarded as a crucial ingredient in the societal commitment to the

best interests of the child, leading to full realization of the individual's potential (Krishnaratne et al., 2013; UNICEF, 2014). It is indeed the right of every child to access quality education and thus every effort to make education available to children is for all purposes perceived as an integral milestone in the walk to secure and safeguard the best interests of the child (Krishnaratne et al., 2013). Consequently, education is viewed as a pivotal haven to anchor and launch the child to face the challenges of life. Any education system, public or private, not working to make the process of learning more successful is thus treated as being ill-fated and counterproductive to the inalienable rights of the child. It is against this view that this paper explores the utilization of evidence availed through monitoring and evaluation to influence access to quality education, the right of every child and hence work in the best interests of the child in sub-Saharan Africa and beyond.

In spite of the popular notion that sound formal education is one of the crucial prerequisites to better living, far too many children in the developing world and especially the poorest of the poor in Sub-Saharan Africa either miss out completely or access a quality of education which is too compromised to deliver the desired results for transformative development and self-advancement (Hewlett Foundation, 2016; UNICEF, 2014). Both private and public institutions feel obliged to enhance access to education, hence the myriad pro-access policies and approaches pushed in most of the developing countries of sub-Saharan Africa. It is appreciated that most of these countries focused mainly on enrolment with minimal attention to retention, completion and attainment of quality learning (UNICEF, 2007). Nevertheless, the efforts have led to increased enrolment rates and thus the number of children accessing education has increased tremendously.

While to some extent the push might have been spontaneous, international pressure like the Millennium Development Goals (MDGs) have necessitated adoption of styles such as free primary education, cost sharing in secondary schools, public provision of scholastic materials and other support systems (UNICEF, 2010). These approaches have had mixed results in most of the sub-Sahara African countries. In some of these countries, the education infrastructure and the support system is too poor to promote quality education even as the enrolment numbers have continued to rise (UNECA, 2015; UNICEF, 2010). It is lamentable that despite the push for improved access and increased enrolment in both primary and secondary schools, between the year 2000 and 2007, the sub-Saharan region saw the share of total government education expenditure dedicated to basic education decline from 49% to 44% (UNESCO, 2010).

The above scenario puts into jeopardy the progress in the sector and the welfare of the children, accessing to them a quality of education which is too low to prepare them for the challenges in life. The emerging trends show that the bulk of the pupils leaving primary school are ill-prepared and hence hardly have any capacity to read, write or engage in any numeracy skills (Krishnaratne et al., 2013). Accruing evidence on disconnect and the gaps as presented by diverse monitoring and evaluation efforts does not seem deliberately used to inform practice in the struggling education sector in sub-Saharan Africa. Such compromises could lead to a diminished actualization of their potential, a factor not working in their best interest.

## Methodology

This paper was based on information generated through desk review. The author went through existing literature on the emerging trends on access to education to children in sub-Saharan Africa. The scope of the paper covers enrolment patterns, quality of education offered, and its transformative nature. The author further explored the existing literature to assess the role of monitoring and evaluation in informing practice in the education sector in sub-Saharan Africa. The United Nations (UN) and its primary agencies such as UNICEF; UNESCO; and UNDP formed an important source of data on education both in sub-Saharan Africa and beyond. The paper is therefore descriptive in nature and thus presents the prevalent patterns as informed by the available literature.

## Findings and discussion

### *The Status of Education in the Sub-Saharan Africa*

Access to education in sub-Saharan Africa has remained unreachable to many children, a factor which forces a multitude of them to either have a delayed entry or no entry at all (UNESCO, 2015). The situation is worsened by the persistent high level of poverty whereby the percentage of persons who live on less than US\$1.25 per day only dropped marginally from 56% to 48% in the two decades between 1990 and 2010. Overwhelmed by such palpable poverty, millions of children in sub-Saharan Africa do not get enrolled in basic education level until they are way past the country specific formal entry age (FHi 360, 2011; UNESCO, 2015).

In about half of the region, it is estimated that around 20% of the primary school pupils are overage and the cadre of the overage hardly complete the elementary level of education enrolled into. The fact is that, late entry exposes the children to other competing forces such as the pressure to fend for themselves, provide for their siblings, and take care of their parents and other kin. These extra-responsibilities often lead these children to underperform and hence repeat classes, causing further delay into completion and thus becoming more liable to drop out of school before completion (UNESCO, 2012). Such disadvantages to the vulnerable children deny them the opportunity to acquire the requisite skills and capacity accessible through quality education, hence not working to their best interests.

Low elementary level completion and poor transition into intermediate and secondary school level seem widespread in sub-Saharan Africa. In Mali for example, where elementary school enrolment is estimated at less than 60%, only a small fraction of the children advance from grade 6 to complete grades 7-9 (Mali DHS, 2006; MEABED, 2007). Furthermore, only a paltry 19% of the 13-18 year olds attend secondary school (Mali DHS, 2006). In the same age group, 22% of males compared to 16% of females attend secondary school. The situation is not any better in Senegal where with a seemingly good gross enrolment rate of 90%, barely 50% successfully complete grade 6 (UNICEF, 2015). It is therefore apparent that the enthusiasm in mass enrolment at the commencement level does not reflect an equally impressive completion rate. The failure to complete primary school and the subsequent inability to progress into secondary school tend to lock out millions of children from acquiring the requisite skills, capacity, makes it impossible for them to reap the benefits which would accrue from formal education. This kind of poor performance in the education sector experienced in the primary school level may also be linked to the quality of education accessible in pre-primary or early childhood education.

By global standards, enrolment at the pre-primary level in sub-Saharan Africa has remained very low over the years. In the period between 1999 and 2012, pre-primary enrolment in the region was reported to have risen from almost zero to 20% in 2012 (UNESCO, 2015). While the overall average enrolment rate remained very low, it was also noted that the range was extraordinarily wide. In countries such as Mali, Burkina Faso, Democratic Republic of Congo, and Niger, the pre-primary enrolment was less than 2% compared to the better endowed nations such as Ghana, Mauritius and Seychelles which posted an impressive rate of around 100%. It is also noteworthy that the quality of pre-primary education was heavily dependent on both the teacher-pupil ratio and their capacity. Despite this common knowledge, the pre-primary teachers in the region are often too few and untrained. For example in 2012, the average pre-primary pupil/teacher ratio in the region was about 28:1, stretching from 12:1 in Swaziland to an astounding 57:1 in Tanzania (UNESCO, 2015).

It is indeed worrying to note that in more than half of sub-Saharan Africa since 1999, the pupil teacher ratio has continued to rise. In some of the resource poor countries such as Congo, Mali, Niger and Togo the rise has been more than ten pupils per teacher. It is therefore evident that as a result of the continued increase in enrolment and the declining budget allocation to education, the trained teacher-pupil ratio has a sustained fast negative escalation. In countries such as Eritrea, Mali and Sierra Leone, the proportion of trained teachers has continued to decline. In 2012, the percentage of trained pre-primary teachers ranged from 15% in Senegal to 100% in Mauritius. Sub-Saharan Africa has thus remained a region of great contradictions and the divide between the marginalized and the well-endowed nations extremely wide.

In spite of the seemingly positive increase in school enrolment rates in Sub-Saharan Africa, there is hardly any evidence that the quality of schooling has been bettered (UNICEF, 2010). This indictment is evident in the bulk of the millions of children dropping out of school mid-stream or even released by the ill-equipped education system after the completion of the elementary level without having acquired basic literacy and numeracy skills. This state of affairs tends to demonstrate the often ignored disconnect between quantity and quality in the education sector. It is apparent that the absolute levels of achievement are extraordinarily low in the region. This reality may be amplified further by a close look at an assessment conducted for both language (French) and mathematics capacity in five countries as shown in Table 1. Barely 50% of the 5<sup>th</sup> grade pupils returned a correct response in these two subjects (Clasby, Diallo, & Cryer, 2013). In the same table, it is apparent that the dropout rate was very high in all the countries except in Cameroon which had at least 77% retention at the 5<sup>th</sup> grade. On the basis of these trends, it is apparent that both the high dropout rate and dismal performance in French and mathematics were a reflection of a poor quality education.



*Table 1: Level of Learning Achievement and Enrolment-Retention in 5 sub-Saharan Countries*

Average rate of correct response on key subject matter by 5 <sup>th</sup> grade					
Country	Burkina Faso	Cameroon	Cote d'Ivoire	Madagascar	Senegal
Mathematics	46% (0.33%)	50% (0.37%)	40% (0.31%)	58% (0.33%)	38% (0.40%)
French	44% (0.33%)	55% (0.39%)	50% (0.35%)	42% (0.34%)	34% (0.40%)
Combined grade	45% (0.30%)	53% (0.34%)	45% (0.29%)	51% (0.31%)	35% (0.39%)
Share of Children Reaching Minimum Learning Achievement (MLA) and enrolment rate by 5 <sup>th</sup> Grade					
Country	Burkina Faso	Cameroon	Cote d'Ivoire	Madagascar	Senegal
MLA Enrolment retention by 5th grade	20%	59%	34%	25%	20%
	34%	77%	54%	33%	55%

Source: Clasby et al. (2013)

The requisite for quality education such as teacher-pupil ratio reflects a major shortage whereby in sub-Saharan Africa the pupil-trained-teacher ratios stand at over 80:1 compared to the best practices in developed countries which post a ratio of 16:1 (OECD, 2011; UNESCO, 2015). In some of the countries in sub-Saharan Africa, the pupil-teacher ratio has continued to increase as the enrolment numbers increased. For example in Malawi, the situation deteriorated massively and the ratio increased in an already alarming high level of 63:1 in 1999 to 74:1 in 2012 (UNESCO, 2015). In Central African Republic, an equally gloomy scenario of a pupil-teacher ratio of 80:1 is reported, and worse still, pupil-to-trained teacher ratio of 138:1 was reported in 2012. In Guinea-Bissau, the ratio rose from 44:1 in 2001 to 52:1 in 2010 (UNESCO, 2015). These deplorable learning conditions compare very badly with the globally set standard of 40:1 and the best practices of 16:1 in the developed nations.

In such a poor learning context it is therefore not uncommon to find children who have gone through eight years (elementary) of formal learning and yet they are unable to read and write, leave alone having the capacity to conceptualize and interpret their socio-economic environment with the intent to influence their contemporary production paradigms. Many are devoid of any skills to manage their lives as literates and thus lack the basic capacity to learn a vocation, hence do not have a skill to sell to the job market (UNESCO, 2015). Their incapacity precipitated by a poor education system leave both the learner and the guardian/parent disillusioned not just about the quality of education but the entire education process which does not work to the best interests of the child.

When an education system is seemingly unable to deliver on quality, the stakeholders can easily resign to apathy. Such lethargy may not just be localized among the consumers but can easily permeate the educationists and other policy makers who in the absence of systematic tracking systems may not be in touch with the inherent disconnect. The education sector in sub-Saharan Africa is further compromised in many parts by the biting effects of climate change, a population explosion outpacing resources, poverty, and unending armed conflicts, glaring inequalities based on gender, caste, ethnicity, geographical location, and disease burden (UNICEF, 2015). Faced with these challenges, there is a growing need for the various stakeholders to be deliberate in linking quantity and quality of the education offered.

In keeping with best practices, the education sector in sub-Saharan Africa has to commit to accessing to the children sound teaching and appropriate learning facilities; synchronized curricula which respond to their learning needs and building the requisite life skills; qualified teachers to drive the process; and gender equity for both the boy and the girl child (UNESCO, 2015; UNICEF, 2015). It is the persuasion of the author of this paper that, the more evidence is adduced to the various stakeholders that both quality and quantity education are in tandem with sustainable development, the more the resources will be allocated to the sector. More so, there is the need to maintain consistent monitoring and evaluation to ensure that as the different approaches are embraced, the desired skills and capacity are sustained.

Unfortunately, available literature shows a persistent decline in resources devoted to the education sector in sub-Saharan Africa (UNESCO, 2010). This paper therefore asserts that running an education system without constant tracking in a comprehensive monitoring and evaluation is like flying an airbus without any reference to the radar. Both the public and the private sectors involved in enhanced access to quality education must be committed to not only embrace innovative approaches but through monitoring and evaluation, engage in practices which are tested and tried. The future of the children which is put into jeopardy by any lustre, lethargic and laid-back approach to the education system is most crucial and calls for urgent exploration of ways and means of ameliorating it.

Parental involvement in children's education has been found to have a positive effect in enhancing better performance in the academics and such children were more likely to complete their school compared to their counterparts whose parents were not involved in their school lives (Noel, Stark, Redford, & Zukerberg, 2013). This notwithstanding, parental involvement in children's learning process tends to decline as they grow, with fewer parents participating in primary and elementary levels than in high school and college. Studies have further shown that parental involvement in children's school life had a higher correlation with better academic performance than merely walking with them through their assignments. Teachers of children whose parents were more involved also tended to reciprocate by giving such children personalised attention which enhanced the possibility of early detection of deviant traits as well as timely correction and nurtured a more acceptable character. The collaboration between the parent and the teacher tended to build a more positive image of the latter and thus enhance a better self-image and job satisfaction (Lukalo, 2006).

The level of parental involvement in children's school life may not be a spontaneous flow but a practice with a number of predisposing factors. For example, studies in countries such as the US indicated that parents with college degrees were more likely to be involved in their children's school life (85%) compared to 45% of the children whose parents did not have college education. Other factors which were an impediment to the parental involvement included high poverty levels, and insecure and rigid working conditions of such parents. In a study conducted in the US in 2011-2012, a paltry 27% of children living below the poverty line had parents who volunteered or served on a committee at their children's schools, compared with 45% of children living above the poverty line.

A close look at these inhibitions, would show that if these challenges exist in the developed world, worse handicaps may be the normative in the less endowed economies where low-income parents may not even afford the basic scholastic requirements such as books, pens, pencils, textbooks, school uniform, and shoes, not to talk of transportation to attend interactive meetings with teachers, or even afford the luxury of time to meet with the teachers. Many struggle to subsist; hence interactive meetings with teachers might be viewed as time wasters. Another impediment may be the literacy level of the parents themselves. In sub-Saharan Africa adult literacy is as low as 59%, the lowest compared to other regions of the world (UNESCO, 2013). The participation of non-literate parents may thus be almost negligible in terms of value addition to the student.

There is need for a deliberate effort to draw the causal connection between the various socio-economic and education variables. A thorough investigation and therefore a detailed exploration into the inequities is imperative. It is crucial as much as it is possible to invest in educational programmes which would ease parental pressure to eke a living and be able to create an enabling environment to nurture and thus better quality education sector.

On the face value, the number of children in the developing world attending primary school has improved tremendously in the last fifteen years. It is reported that the numbers increased from 83% in 2000 to 90% in 2012 (Figure 1). It is also noted that still in 2012; 58 million of school going children were out of school. High dropout rates therefore remain a major impediment to universal primary education. An estimated 50% of out-of-school children of primary school age live in conflict-affected areas. Other challenges highlighted include pupil teacher ratio and access to scholastic materials. Countries in the region have however attempted different approaches to ameliorate the situation.

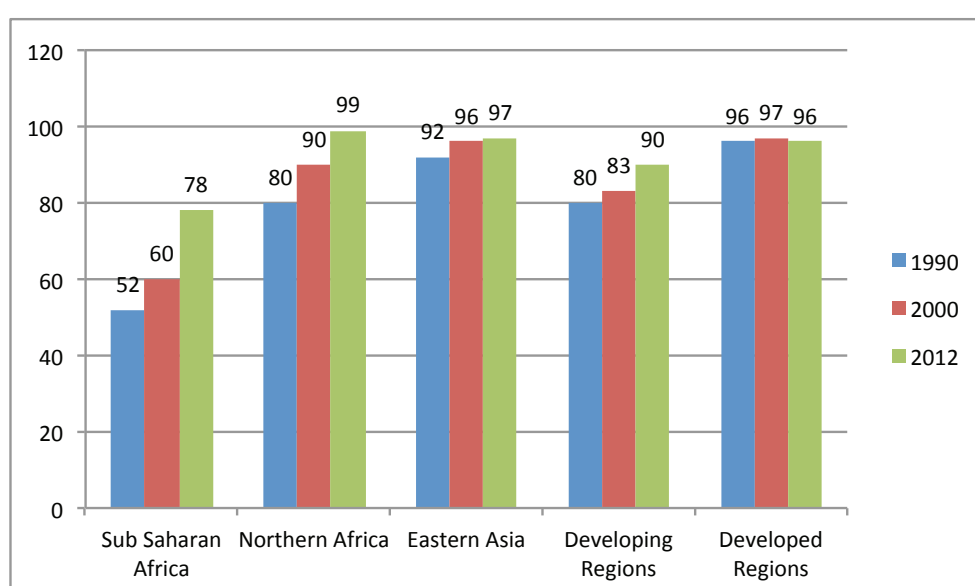


Figure 1: Net Enrolment Rate in Primary School 1990; 2000; 2012

Source: United Nations (2014)

Use of innovative way like contract teachers has been tried in a number of countries with varying degrees of success. It has tended to be more effective where parental or community involvement is strong. In Kenya, for example, positive effects from hiring contract teachers were observed only in communities where parents were trained to monitor teacher absenteeism and time on task, and relatives of local civil service teachers were prevented from being hired as contract teachers (Duflo et al., 2012). In Mali, language and mathematics scores of grade 2 and 5 students were consistently higher under contract teachers closely monitored by the local community (Bourdon et al., 2010).

Nevertheless, the challenge of quantity versus quality remains a perennial hurdle in sub-Saharan Africa. Ghana, one of the countries with fairly promising returns in other socio-economic indicators is still unable to raise the number of qualified teachers needed in the country's education sector (UNESCO, 2015). Consequently, the sector has had to lower entry requirements to the profession. While this increased by 60% the number of primary school teachers and thus a sustained pupil-teacher ratio (PTR) of below 40:1, the proportion of trained teachers dropped from 72% in 1999 to 53% in 2013. It is apparent that while recruitment of untrained teachers may get more children into school and even keep the PTR low, the quality of education tumbles and hence the desired outcome of empowered learners nosedives too.

Owing to the push for free primary education (FPE) initiative, a rapid rise in enrolments at the primary school level has been realised. However, this sector of education is facing serious problems in both qualitative and quantitative growth in terms of access and the fact that the retention, completion and attainment rates are declining, while geographical and gender disparities are becoming even more marked. It is important to note that the sector has not responded adequately to population growth and continues to lag behind in terms of infrastructure, teaching staff and other support services for quality education. The learning centres are further characterized by inadequacies such as: crowded classrooms; insufficient and or untrained teachers; and thus grossly overworked and demoralized.

On the face of declining and inadequate supply of scholastic materials by the public sector, parents are obliged to provide funds for desks, uniforms, books, and construction of buildings. The burden of cost sharing between the parents and the public sector often overwhelms the impoverished parents and guardians. When they have to choose between scholastic materials for their children and food, the latter tends to carry the day and many may drop out of school. Countries in sub-Saharan Africa have tried different strategies in the efforts to improve the quality of education. One such move has been made by deliberately phasing out untrained teachers and enhancing opportunities for in-service teacher training, accessing funds for instructional materials, paying teachers' salaries and employing quality assurance staff. Sadly, none of these efforts have focussed on parental involvement beyond the role of providing funds for schools. The Education Act, Cap. 211, Part III, 9(2), Legal Notice 190/1978 provided for parents to be represented on the School Management Committee (SMC). Nevertheless, only a few parents are legally involved in school management activities. The effective role of parents in school has therefore not been recognised.

## **Conclusion and Recommendations**

It is increasingly clear that across sub-Saharan Africa, there is increased student enrolment in schools, enabling more students to get into the classroom. Nevertheless, most African nations are unable to sustain the momentum of rapid enrolments amidst the scarce support resources. Consequently, learning outcomes have immensely suffered. Governments in collaboration with their partners must therefore be deliberate in investing reasonably in innovative educational policies, objectives and strategies to improve the quality of education at all levels. There is need to deliberately track the outcomes of the education efforts in the region and ensure that the strategies adopted deliver in terms of transformative learning. Consequently, the individuals going through the system should follow through successfully and acquire the necessary life skills courtesy of an effective system.

The bulk of the sub-Sahara African governments hardly invest in making technical and vocational education and training a game changer in terms of equipping children with skills and capacity for self-reliance. Economic crunches often constraint governments to cut down or even shelve Technical Vocational Educational and Training Authority (TVETA) programs in their education systems. Such moves are counterproductive and especially given that the huge numbers of youth who drop out of school are unable to pursue tertiary level of training i.e. college education. TVETA will not only be good for the children/youth but is likely to provide much needed technicians in the budding economies and support the construction industry with the relevant workforce.

All the efforts in the education sector must be guided and closely woven with monitoring and evaluation. This would ensure that the sector gets value for its investment and that obsolete approaches are weeded out in a timely manner. Hence, the underlying principles should be guided by a serious interrogation of the nature of conditions under which the children are learning. While the intentions by the various players may be driven by the best interests for the child, due diligence must be applied in all aspects. It is critical to ensure that the efforts in accessing education in quantitative terms are leading to quality education, an outcome which speaks to socio-economic transformation of the child and holistic environment.

This paper recommends the following actions:

1. An explorative study in the sub-Saharan region to look into the major inhibitions to the use of monitoring and evaluation results in planning and implementing education programmes which could enhance the capacity of the learners in life skills
2. A correlational study in sub-Saharan Africa to assess the causal connection between an enabling learning environment and the acquisition of life skills and thus inform planning and implementation of education programmes which would work for the best interest of the child

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## **Children in Need of Protection: Vulnerability and Utilization of Available Justice System in Addressing Sexual and Physical Abuse of Children**

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### **Abstract**

Kenya has made great strides in establishing mechanisms to protect children from violence. However, research reveals that there is still widespread abuse of children at different levels in the society regardless of the systems and structures that have been put in place. Although some cases of intra-familial child sexual and physical abuse are reported, many go unreported because the majority of the perpetrators provide economic stability and leadership to the victims. These situations create dilemma of missing support as well as fear of intimidation coupled with stigmatization of the victims and the abusers as well. This paper points out that there has been relatively low sensitization on the available legal structures and recommends that a multi-disciplinary approach should be initiated and used where all stakeholders participate in addressing child abuse. Such a process should be respectful, sustainable and less stigmatizing.

**Key words:** Children, Vulnerability, Abuse, Justice System

### **Introduction and Background**

Kenya has made great strides in establishing mechanisms to protect children and young people against abuse, nationally and internally, through active involvement in the following legal instruments: The United Nations Conventions on the Right of the Child (UNCRC, 1989) ratified in 1990; the African Charter was adopted in July 1990 at the 6th Ordinary Session of the Assembly of Heads of State and Government of the African Union (AU) ratified in 2000. In 1996, a conference was held on Declaration and Agenda for Action arising from the World Congress against Commercial Sexual Exploitation of Children (CSEC) which aimed at combating commercial sexual exploitation of children and young people of which Kenya has adopted. Further, Kenya recognizes Commercial Sexual Exploitation of Children (CSEC) as a Worst Form of Child Labor (WFCL) as defined in ILO Convention 182. Kenya ratified ILO Convention 182 in 2001 and in the same year enacted the Children Act and the Sexual Offences Act in 2006. In 2009, National Guidelines on the Management of Sexual Violence in Kenya were adopted. While in 2010, National Children Policy was adopted by the Kenyan government. All these legal instruments show Kenya's commitment in protecting and ending children abuse.

Although the governments have invested a lot in adoption and ratification of the legal instruments, research reveals that there is widespread abuse nationally and internationally of children at different levels in the society. This situation necessitates investigation of the complexities of child abuse and better strategies of mitigating the problem. With this regard, this paper explores the physical and sexual malpractices on children by care givers in Nairobi County, Kenya. The paper investigates the justice system that is available to the affected children, how it is utilized to address the problem, as well as, the challenges hindering its full exploitation in protection of the children. Three main objectives guide the research, namely: assessing the legal provisions on sexual and physical abuse against children in Kenya, exploring the consequences of child abuse by parents and care givers and finally, analyze disclosure and give recommendation on a multi-disciplinary approach to child sexual and physical abuse cases in Nairobi County, Kenya.

### **Methodology**

The research adopts a qualitative research method. The method provides an opportunity to develop a descriptive, rich understanding and insight into individuals' attitudes, beliefs, concerns, motivations, aspirations, lifestyles, cultures, behaviors and preferences as argued by Marimba (2014), which are key areas in analyzing intra-familial sexual and physical abuse. In addition, it enables a balanced approach where results are integrated which strengthens findings and avoids any overlapping weaknesses. The research used non-probability sampling method which was purposive in nature to carry out a survey that drew 55 respondents within Nairobi County. Additional data for in depth analysis was through focused group discussions. Relevant literature in the research area was also consulted.

## Literature Review

According to World Health Organization (WHO), child abuse or maltreatment constitutes all forms of physical and emotional mistreatment, sexual abuse, neglect or negligent treatment or commercial exploitation resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power. In Kenya, the Laws have standardized the definition of child abuse for uniform application and avoidance of contradictions. The Children Act 2001 (Cap 586, Laws of Kenya) defines child abuse as anything that causes physical, sexual, psychological and mental injury to a child. Different cultures and communities may have varied definition of abuse, others placing emphasis on the nature while others, mode or behavior. Nonetheless, there is a general agreement globally that child abuse of whatever form is unacceptable and should be punished (Facchin P, et al., 1998; National Research Council, 1993; World Perspectives On Child Abuse, 2000).

Child abuse is not a new phenomenon in today's society, but has been in the literature, art and science in many parts of the world. Furthermore, reports of infanticide, mutilation, abandonment and other forms of violence against children date back to ancient civilizations (Helfer et al., 1997). Historical record is also filled with reports of unkempt, weak and malnourished children cast out by families to fend for themselves and of children who have been sexually abused. For a long time, there have existed charitable groups and others concerned with children's wellbeing who have advocated for the protection of children. Nevertheless, the issue did not receive widespread attention by the medical profession or the general public until 1962, with the publication of a seminal work, *The Battered Child Syndrome*, by Kempe et al., (1962). The term "battered child syndrome" was coined to characterize the clinical manifestations of serious physical abuse in young children (Kempe et al., 1962). Until the 21<sup>st</sup> century, child abuse, and in particular sexual and physical abuse has continued to be a global problem. It occurs in various forms which are deeply rooted in the cultural, social and economic standing of individuals in the society. Many cases go unreported, while majority of the reported ones faces cultural interference that hamper legal processes put in place. Such global problem therefore requires a much better understanding of its occurrence in a range of settings, as well as of its causes and consequences in the settings. According to the Kenya's Children Department Annual Report (2000), there are over 600,000 children in Kenya who have no proper access to basic human rights, needs and services and are in need of special protection and care. These children have been subjected to this kind of life due to orphanage; change in family structures (declined status of the extended family); sexual/physical abuse; negligence; abandonment; poverty; marital/family conflicts; early and irresponsible pregnancy; war; and diseases, among others. More than 45,000 of these children are in need of institutionalized rehabilitation and care (Children Department Annual Report, 2000). These are considered in more detail below.

### *Legal and Policy Framework*

The Convention on the Rights of the Child recognizes and urges respect for the human rights of children. In particular, Article 19 calls for legislative, administrative, social and educational actions to protect children from all forms of violence, including neglect, physical and sexual abuse. However, research reveal that only a few countries have legal provisions covering all forms of violence against children. Furthermore, lack of coordination between different government departments and between authorities at the national and local level, as well as other factors, have resulted in the often fragmented implementation of those measures that have been ratified. For example, in Ghana, the legal reforms have had only a limited effect as funds to disseminate information and provide the necessary training are lacking (WHO, 2014). While in Kenya which is a signatory, the content of the convention is not known by the majority of its citizens due to lack of education and public sensitization of the instrument. Non-governmental organizations have expended considerable efforts on behalf of the rights of children and have campaigned for the Convention to be strongly supported, in Kenya such organizations includes, Save the Children, UNICEF, Child Fund Kenya, Plan International, World Vision, The Cradle among others. In countries such as Gambia, Pakistan and Peru child protection bodies have used the convention to justify calls for greater state investment in child protection and for increased governmental and non-governmental involvement in preventing child abuse (WHO, 2014).

In Kenya, another important instrument was enacted after the Children's Acts 2001. The Sexual Offence Act was enacted in 2006, which harmonized sexual violence legislations into a single law and provided a comprehensive definition of rape, minimum sentences, it criminalized sexual harassment and expanded sexual offences to include gang rape, aiding rape, deliberate infection with sexually transmitted diseases and child pornography (The National Plan of Action Against Sexual Exploitation of Children in Kenya, 2013-2017). The Government of Kenya also developed the 2008-2012 National Plan of Action for Children, which provided a wide variety of activities that aims at safe guarding the rights of children while providing a conducive environment for learning, development, protection and participation. The African Charter on the Rights and Welfare of the Child (ACRWC) which Kenya is a signatory is an umbrella Charter that safe guards the rights of the child. Despite all these legal provisions to protect and safeguard the child from abuse including physical and sexual abuse, child intra-familial abuse is still wide spread, and perpetrators are hidden within the home, which acts as a protection cover for them.

The Bill of Rights also provided in the Constitution of Kenya is an instrumental legal tool, it gives rights to access justice to all and the right to fair trial, provided within article 48 of the Kenyan constitution (Ndeche, 2013). However, the Constitution does not lay open the rights of the victims, which creates a gap within the instrument as a tool to offer legal direction.

### *Intra-Familial Child Sexual Abuse*

Intra-familial child sexual abuse has been defined as the use of a child for sexual satisfaction by family members, that is, blood relatives that are too close to marry (Deche, 2013). Usually, sexual abuse occurs when adults use their power, authority or position on children to gratify their own needs. This might affect children of all gender and ages. Most of the acts of sexual abuse occur in private and the abuser struggle to prevent discovery. The child is often threatened to keep silent and many children feel such a strong sense of guilt and shame that they are reluctant to speak about what has happened to them. Examples of sexual abuse activities include enticing or forcing a child to engage in fondling, masturbation, oral or anal intercourse or full sexual intercourse; making a child observe inappropriate sexual behavior; and showing a child pornographic books, videos or photographs or engaging them in inappropriate discussion about sexual matters (CLAN, 2003).

When child sexual abuse occurs within the home, it has the effect of breaching the child's legally recognized safety net from within and creates a complex state of affairs. First, the perpetrator is often a male relative in a position of trust and vested with a duty to protect the child as a caregiver or benefactor. Any action taken against them has implications for the victim's livelihood and that of the family at large. Secondly, the other family members too, often have to play a role when the criminal justice process is set in motion. They may be called upon as witnesses either for the prosecution or for the accused, this situation creates a dilemma. The family also has to deal with breach of their privacy and negative public exposure which most often results to a feeling of stigmatization from the society (Mbugua, 2006; Deche, 2013). Follow up on legal actions against such cases most often leads to family breakups and loss of relationships.

A particularly egregious incident of intra-familial child sex abuse, was the rape of 9 month old baby Tshepang raped by a group of relatives including her great grandfather and other relatives in South Africa (Bowman and Brandige, 2014). This incident drew a lot of media attention which led to the establishment of a parliamentary task group on Sexual Abuse of Children and a wide spread sensitization of children's rights. While in Ethiopia, a national study carried out on high school based students revealed that 68.7 % of female students were sexually abused but surprisingly, 16.7 % of the perpetrators were family members (UNICEF et al., 2010).

In Kenya, statistics indicate that 43% of sexual abuse takes place at home and is perpetrated by family members (Committee on the Rights of the Child 2006). Furthermore, the World Health Organization (WHO) estimated that 150 million girls and 73 million boys under the age of 18 have experienced sexual abuse by people known to them including family members (UN Secretary General's Report on Violence against Children 2006). With these facts on intra-familial child sexual abuse, it qualifies the abuse to be considered as a complex global health and human rights concern that requires a concerted effort in addressing it.

### *Child Physical Abuse by Caregivers*

Physical abuse by caregivers on children is mostly in the form of hitting the child with an object, other than on the buttocks; kicking the child; beating the child; and threatening the child with a knife or gun (WHO, 2014).

In a cross-sectional survey of children in Egypt, 37% reported being beaten or tied up by their parents and 26% reported physical injuries such as fractures, loss of consciousness or permanent disability as a result of being beaten or tied up (Youssef 1998). Further, studies in the Republic of Korea, parents were questioned about their behavior towards their children. Two-thirds of the parents reported whipping their children and 45% confirmed that they had hit, kicked or beaten them (Hahm, 2001). Also in Ethiopia, 21% of urban school children and 64% of rural school children reported bruises or swellings on their bodies resulting from parental punishment (Ketsela, 1997). The prevalence of physical abuse including corporal punishment in the East African region is reducing as indicated by a research carried out in Ethiopia, Kenya, South Sudan, Rwanda, Tanzania and Uganda (Save the children, 2012). Ethiopia, which in 2006 showed a prevalence of 84%, registered a prevalence of 84% in 2010 (Save the children, 2012). In Kenya, the prevalence in 2006 was 99% (Stavropoulos, 2006) while in 2012, was 61% for girls and 62% for boys (Save the children, 2012). Uganda registered 98.3% prevalence in 2005 (Naker, 2005), 94.2% in 2006 for girls and 85.8% for boys, while in 2010, the prevalence stood at 81% for girls and 87% for boys (Anppcan Uganda Chapter, 2011). This indicates that, corporal and physical punishment is widely carried out in homes as a form of instilling morals; countries such as Sweden have outlawed such punishment (Save the Children, 2012) and have enforced laws that criminalize the activities.

Although Kenya and South Sudan have achieved a legal ban on corporal punishment on children, there are still many instances of non-compliance with the ban, for example, in Kenya; a primary school teacher beat a student to death in January 2012 (The Standard March, 2012). Existing gaps in the effort to end individual and corporal punishment include: conceptual problems, absence of clear positive discipline guidelines, unclear benefits of alternative punishment and legal barriers (Save the Children, 2012). This gaps play a big role in creating an environment that challenges total ban on Individual and corporal punishment on children. There is also notable gap of lack of reporting of physical and intra-sexual abuse as indicated in figure 1 below.

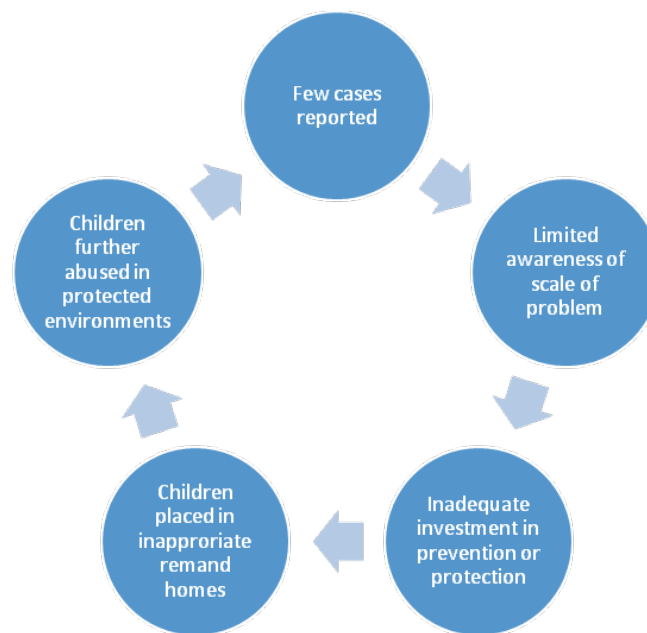


Figure 1: Shows the cycle of low level of reporting of children physical abuse, adapted from Save the Children handbook 2012.

### Risk Factors for Child Sex Abuse Within the Family

#### *A. Socio-Economic Risk Factors*

With globalization, there has been rapid urbanization especially in developing countries, where population growth has continued to grow more rapidly in urban areas but also steadily in rural areas as a result of better lifestyles. However, economic strain has led to negative impacts that results to perpetual sexual abuse within households. In addition, there has been increased number of dysfunctional families due to high unemployment, violence, poverty, lack of physical and social infrastructure (Bowman and Brundige, 2014). It becomes more complicated in cases where because of poverty, victims are unable to seek for help or their mother's to offer protection because the perpetrator is a person responsible for economic survival for the household. Further, living conditions may be overcrowded forcing adults to share the same room with children. In other cases, the house is too small leaving no privacy for or from sex (Ndeche, 2013; Bowman and Brundige, 2014).

#### *B. Sex Inequality*

The discussion of sex and incest especially in an African context always reflects an integral connection in the disparity of power between men and women (AnnLevett, 1991). There is an assumption that men have to sexually take advantage of women and children which is a patriarchal myth. Thus violence becomes a strategy used by men to forcefully exert control over women and children to have sexual intercourse (Bowman and Brundige, 2014). In Kilgoris Kenya, a man was alleged to have slept with his daughter who was in class six and fathered a child, during the same time his wife, the mother to the child fell pregnant, although Samson Momposh, the perpetrator denied the allegation until a DNA test was carried out that confirmed the allegation (Ndeche, 2013). Spousal battering exacerbated the situation as mothers who are physically and sexually abused are not able to protect their daughters, yet if they leave their marriage, their daughters would be further exposed to the abuse. Such situation leaves no choice to the mothers other than persevering with the condition.

#### *C. Status and Socialization of the African Children*

Looking at the African context, women and children are regarded as property and such cultural values that allow women to be treated as possession give way for easy sexual assaults to women and children in the family by the men (Bowen and Brundige, 2014). Socialization of children also demands utmost respect to older individuals and parents in the society. With such relationships, children are required to be obedient and not question their elders, perpetrators take advantage of their position and power to sexually abuse children under the cover of being elders in the family, and furthermore a father requires passivity and acquaintance rather than resistance.



Bowman and Brundige through their research in South Africa noted that,

*The African girl is born into a culture of male supremacy. . . . Daughters, in particular, dare not disobey the fathers' wishes . . . . . Disobedience, which is very rare, results in physical reprisal, denial of material support, and ostracism by the family or visitation of an unseen evil force because such disobedience is regarded as a taboo.*

Perpetrators reinforcing their unaccepted acts using socialization parameters instill fear on the sexually abused children thus making reporting and seeking legal help difficult.

## Findings and Discussion

The study carried out in Nairobi County in July 2016, to explore the prevalent causes and consequences of child abuse by parents and care givers, justice system available to the victim and challenges hindering its full exploitation, showed that the prevalence of children sexual and physical abuse within the family is high yet majority of the cases go un-noticed or either unreported.

In the study, 27% of the respondents acknowledged that children are physically abused in the family, while 23% were of the opinion that children are sexually abused within the family. Despite this figures, 43% of the respondents admitted that parents do their best to protect their children from sexual and physical abuse. Although the research also revealed that among the respondents, 83% of the parents have delegated their children's care giving services to house helps.

As argued earlier by Ndeche (2013) and Bowman and Brundige (2014), privacy in the home is a major contributor to child sexual and physical abuse at the family level. Among the correspondence 20% and 40% strongly agreed and agreed respectfully that family space is a major contributor to sexual and physical abuse. 72% of the respondents admitted that majority of physical and sexual abuse within the family are perpetrated by relatives within the household. The research further revealed a poor response on issue of reported cases. Only 8% of the respondents reported that cases of sexual and physical abuse are reported to legal authorities for action while 37% of the respondents were of the opinion that physical and sexual child intra-familial cases go unreported. Reasons for poor reporting of such abuse included; victims being threatened, denied basic needs and victimized, fear of being punished and abandoned, other victims lack knowledge on available reporting procedures and institutions and fear of family exposure and shame. Bribery, was also indicated as a contributing factor, as perpetrators bribe their way out of the case. The issue of fear played itself when respondents were asked if they had ever been physically or sexually abused, as only 16% (8% female and 8% male) acknowledged that they had been abused previously. Such low response reflected the fear of victims reporting their ordeal to legal institutions. It was however evident, that legal institutions that handle children's rights issues face challenges that slow their progress in resolving cases reported to them. Some of the challenges include; victim's laxity in pressing charges while others are not willing to testify in a court of law, eventually the case is withdrawn and the perpetrators go scot free. Such circumstances reflect intimidation through threats, bribery, and fear of humiliation and the shame the family will suffer in the society. Victims also fail to report on time which most often leads to loss of evidence that weakens the case. Due to economic conditions of the victims who are usually minors, with no sufficient support from relevant legal institutions, there is no conclusive follow up of the perpetrators. Other victims fail to report about the abuse, while some cases taken to authorities such as the police are not followed up because the police are bribed not to press for charges. In other circumstances, the community becomes a hindrance as they frustrate the justice system by not cooperating. Other reported challenges included, laxity in legal structures to ensure that perpetrators are punished, while at the same time legal procedures always take time to be concluded coupled by change of those entrusted to rule over the case. Such reasons discourage the victims and they end up dropping the case.

Ignorance by victims about the institutions to report to and the help they can receive in case of such abuse, may be contributed by the poor campaigns and sensitization by local leaders in the community about intra-familial children's sexual and physical abuse. 40% of the respondents were of the opinion that frequent sensitization and education on children's sexual and physical abuse is not carried out in their community, yet in other families talking about issues relating to sex is a taboo. Cultural practices that encourage continued perpetuation of intra-familial child sexual abuse included; watching pornographic movies, indecent dress codes, abusive relationships, early circumcision in boy-child, media, polygamy, gender based violence and early girl child marriage.

### Disclosure Experiences

Disclosure of intra-familial child sexual abuse is hard and a sensitive issue for the victims. From the research, 55% of the responded reported that sexual and physical abuse within the family go unreported. This is attributed, among others, to; fear of exposing close family members, being punished, losing assistance and relationships or fear of ridicule that come with such abuse. This corroborates the findings of a study conducted by Wager (2015) which indicated that 75% of the respondents did not disclose their ordeal, while 14% reported to their mothers and only 7% reported to their fathers. Intra-familial child sexual abuse is the hardest to report compared to sexual or physical abuse by a stranger and the possibility of continued abuse once abused is high (Ndeche, 2013; Bowman and Brundige, 2014). This again is because of the relationships involved and the care and assistance provided by the perpetrators. Some of the reasons for poor disclosure and reporting by the victims hindering utilization of existing legal systems included:



### *Lack of Opportunity*

This is where the victims feel reporting the abuse is inappropriate as a result of shame and lack of knowledge of how to go about the issues. They are also naive as to who to report the sensitive issue as sex topic within the family is not an openly discussed topic. This also reveals lack of education and sensitization about children's intra-familial abuse that has kept the topic private and confidential.

### *Relationships Concerns*

The fear of peer rejection is particularly evident for those in middle childhood since relationships with peers become an increasing preoccupation and are developmentally important at this stage (Buhrmester and Furman, 1986). Other relationship includes concern for family and perpetrators. Victims fear about the welfare of the perpetrators as they are also close family relations, and yet they may be the ones depended upon economically within the households.

### *Embarrassment*

Embarrassment flows together with the sub-themes of self-pity, self-blame and it strongly delays or prevents disclosure. The victims fear being stigmatized within the family, by peer group and in the society, they therefore feel physically spoiled, the sense of shame goes hand in hand with perception of self-blame:

I WAS TOO EMBARRASSED to tell anybody (emphasis in the original) (Wager, 2015).

Self-blame and self-peaty are also deliberate tactics used by perpetrators to silence the victims.

### *Hopelessness*

Respondents had the notion that their state of powerlessness that ultimately resulted to hopelessness hindered them from disclosing. Such hopelessness is fueled by the thoughts that by disclosing no one might believe them:

I did not honestly feel that I could do anything about it, every day was the same and with hindsight I only had the strength to get through each day as best as I could.

Feared no one could believe me [...].

It has also been found that intra as opposed to extra-familial offenders are more likely to engage in grooming strategies that instill a sense of powerlessness and hopelessness among their victims (LeClerc et al., 2009).

## **Conclusion**

Kenya has made tremendous strides in addressing child intra-familial sexual and physical abuse cases through formal legal instruments that are operational and are used by victims to seek justice. These include, the Children's Act 2001, Sexual Offence Act 2006, and the Constitution of Kenya among others. In Kenya, corporal punishment was banned in 2002 by the Ministry of Education. Despite these legal instruments child intra-familial sexual and physical abuse is still rampant in many families.

However, intra-familial child sexual abuse are sensitive cases to be handle as the perpetrators are trusted respected individuals within the family and in many cases they are individuals who provide financial stability and are looked upon in providing guidance within the family. Reporting of such cases through the formal justice system does not always bear fruits because of threats, shame, fear of stigmatization, intimidation, preservation of relationships and benefits from the perpetrator, among other reasons. Some families decide to settle these cases through the informal justice system, but the cases end up being swept under the carpet and the victims do not get any justice, abuse continues as a norm with threats used against the victims. It is worse when the victims are minors and are silenced not to speak about the issues. This research has revealed that there is limited sensitization on the happenings as well as the instruments available to settle intra-familial child sexual and physical abuse. There should be more sensitization campaigns by relevant bodies against such abuse within the family. Considering the complexity, sensitivity being a private issue and that touches the family, a multidisciplinary approach, which is a grass root based should be initiated and reinforced among communities to ensure that the perpetrators of intra-familial and physical abuse among children are efficiently and effectively punished and justice restored.

## **Recommendations**

### *Multidisciplinary Approach*

Arising from the research, the most effective way of addressing intra-familial child sexual and abuse cases is to have an interagency collaborative planning and coordinated strategy where all stakeholders involved in child protections such as social workers, therapists, prosecutors, judges, doctors and police officers have a joint forum to actively participate, with mutual respect, a common goal and well stipulated mechanism to be followed. The ultimate aim should be to help the victim get justice in an economical way, and within the shortest timeframe and privacy possible.

### *Placing a Child in Emergency Protective Custody*

A decision should be made to move the affected child to an emergency protective custody if the protective officer feels that the child may suffer further physical or emotional harm or trauma or be hidden or abducted before a court order is obtained. The affected child should stay at placement homes until a final determination regarding custody is made by the courts. In such situations, the responsible officers should be clear of the law and be clear of their mandated roles and responsibilities.

### *Specialized Courts*

Children's courts should be strengthened and judges and magistrates in the courts be continuously empowered to handle all forms and emerging tactics of children abusers especially the intra-familial sexual abuse that always presents complexity in its nature and ways of solving them. Selected Judges and magistrates should be trained on handling children's issues and their offices be opened in every county. The courts should be empowered financially and materially to adequately handle the cases. More research in the area and reporting should also be encouraged.

### *Empowerment*

Empowerment of women as well as men is key in addressing intra-familial sexual and physical abuse. This is because gender in equality and power relation is linked to such abuse. Men should be sensitized on their roles and boundaries within the family, for until when male sexuality and women autonomy is transformed especially in the African context such abuse will continue.

### **Areas for Further Research**

More research should be carried out on how to incorporate a multidisciplinary approach to the current legal system in addressing intra-familial sexual and physical abuse in the society. In addition, a research on training modalities of all the stakeholders should be carried out geared on improving mutual performance. Further, a research should be carried out on how a selected team of qualified lawyers and magistrates should be selected and be empowered to work with families in addressing children's sexual and physical abuse.

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## **Parenting Children with Disabilities: Dilemma on Right to Education versus Best Interest of a Child, Kenya**

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### **Abstract**

Kenya has made great strides in implementing various legislations and policy frameworks for the attainment of the rights of children with disabilities. However, parenting a child with a disability remains daunting to many families. Parents, the primary duty bearers have the sole duty of ensuring holistic development of their children. They find themselves making decisions on behalf of their children from time to time. The legal frameworks require that those making decisions on behalf of children do so in the best interest of the child, yet the needs of a child with a disability are far more than those of a child without a disability. Parents have to maintain a balance between the educational needs of the child with a disability versus for other child/ren. It is here that the dilemma emerges, the right to education versus an inclusive education provision, since most schools are ill-prepared for children with disabilities. This paper examined the dilemma parents experience as they seek inclusive education provisions. A descriptive survey was used to examine the gaps existing within the various legal frameworks and parent's awareness of the rights to education of children with disabilities. The results reveal that the rights of the children with disabilities in Kenya are aligned to the UN Convention on the Rights of Children; the parents of children with disabilities are least informed on the rights of their children to quality education, but most importantly, are unaware of the existence of key legal frameworks. As a result, parents experience varying degrees of the dilemma when seeking inclusive education. The paper recommends an extensive study on parents' awareness of the rights of children with disabilities as duty bearers.

**Key Words:** Children With Disabilities; Legal Frameworks, Parents, Rights To Education

### **Introduction and Background**

Over one billion people (15% of the world population) experience some form of disabilities. It is estimated that the number of children (0-14 years) living with disabilities range between 93 million and 150 million globally. Even though this is an estimate, it paints a picture of the number of children with disabilities in the world, according to the World Bank Report (World Bank, 2011). This report estimates that there are about 5.1 million children with disabilities in Africa. The majority of these children are not registered or are hidden from the public. According to the Kenya National Survey on Persons with Disabilities, 4.6% of the population in Kenya experiences some form of disability with the majority of these residing in the rural areas rather than in the urban areas (KNSPWD, 2008). Most of these children are born in very poor families, as a result, of which, 60% of them are abandoned and are in institutional care.

Children with disability in the African context continue to experience discrimination and outright violation of their rights (Munyi, 2015). Attitudes displayed by the community around children with disabilities are considered to be a bigger problem (Graham, 2014). Most parents of children with disabilities are uninformed of the causes of the disabilities and are unaware of the rights of the children. As a result, the children receive low-level care, poor education, no participation opportunities and remain isolated from the society and community. Parents know too well the agony of bearing and rearing children with disabilities. This is in the backdrop of tremendous development achieved through various international frameworks enacted to provide hope to parents with children with disabilities.

### **Inclusive Education**

The Salamanca Declaration (1994) on inclusive education states that every child should be given a genuine chance to achieve meaningful learning in schools. However, UNICEF Report (2013) stated that an estimated 5.1 million children with disabilities in the region have their education status largely unknown. This report further stated that out of the total 1.5 million children registered with disabilities; only 14.5% attend what is referred to as special schools. This implies that the majority of disabled children (approximately 85.5%) may or do not attend school in spite of the Salamanca Declaration and Education For All (EFA).

According to the UNICEF Report (2007), there is a conflict between rights to education and provision of sustainable disability-friendly schools. The Human Rights model advocates for entitlement to an education facility that removes barriers and discrimination in the mainstream schools. As a result, parents of children with disabilities are caught up in this conflict between

rights and education for all in an inclusive education setting. Parents seek school environment that will protect the children from any harm, that will meet the rights to education and that will promote the children's holistic development. This presents conflicting dilemmas to a parent.

According to Graham (2014) the lack of disability data, disaggregated by the degree and the type of disability, makes it difficult to fully understand the barriers that lead to exclusion from schools and to plan interventions targeting specific disabilities. In Kenya, the exact number of children with disabilities remains unclear (The National Policy Framework on Special Education, 2009).

In addition, the UNICEF Report (2012) attributed the perception of disability to the social barriers that prevent children access to schools in various parts of the world. Other issues highlighted in the report were inclusive education not clearly defined policies not implemented, lack of accessible amenities such as toilet facilities, inadequate light; noisy environments that prevent children with visual or hearing impairments from learning, transport problems that prevent children with disabilities from accessing school, insufficient funding by the Government, and inflexible curriculum and exam systems combined with non-inclusive teaching methods.

According to World Health Report (2012), to promote inclusive education for children with disabilities at all levels, reviewing national policies in relevant sectors is necessary to be aligned with international conventions and commitments; and inclusive of children with disabilities is important. The UNICEF Report (2013) argued that children with disabilities remain exposed to increased vulnerability. Discrimination based on disability continues to be manifested through marginalized resourcing of schools and decision-making that is exclusive in nature. Children with disabilities continue to be invisible in policy development but visible in the eyes of parents who are the duty bearers.

Many studies in Kenya reveal that hindrances to attaining rights to education are evident by closely examining the provisions in the mainstream schools. The gaps that exist include facilities that are inaccessible, national and international policies that exclude the basic needs of the children with disabilities, limited access to supportive devices, poorly trained manpower and retrogressive attitudes and behaviors towards children with disabilities. Where these hindrances exist, inclusive education cannot take place. Even though the Convention on the Rights of Children prohibits discrimination for children with disabilities, inability to enforce this clause makes children in "inclusive schools" in our setting impede their development (survival), participation and protection needs. This is because there is a gap between realities in implementing the law, even though the intentions are good.

### **Children's Rights: The Legal Frameworks**

With the 1959 Declaration of the Rights of the Child, Article 3 of the UN Convention on the Rights of the Child requires member states to observe the "best interests of the child as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". This implies that the executive authorities, the lawmakers, judicial bodies and private institutions are obligated to ensure that all decisions affecting children are in their best interest.

So, really, what is the "best interest" of a child in the realm of disabilities? Best interest literally speaking means that whoever is making a decision on behalf of the child with a disability in this context, demonstrates a clear understanding of both the medical and social definition of a disability. It is noteworthy that the Convention of the Rights of Children does not elaborate what "in the best interest of the child" means. It provides a normative framework for which the member states are required to make their own interpretations. For this reason, the African Charter on the Rights of Children (1999) clearly states that the best interest of the child shall be "the" primary consideration not just "a" consideration in all actions concerning the child in Article 4(1). In article 20, parents or other persons responsible for the child should always act in the best interest of the child. The African Charter clearly states in Article (13) that every child who is mentally or physically disabled has the right to special protection to ensure his or her dignity, promote his or her self-reliance and active participation in the community.

The Constitution of Kenya (2010) speaks to issues of disabilities. Under Article 53, (2) the "child's best interest is of paramount importance in every matter concerning the child". Article 54(1b, 1c, 1d and 1e) states that a child with a disability is expected under the law:-

- b). to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interest of the persons;
- c). to reasonable access to all places, public transport, and information;
- d). to use sign language, braille or other appropriate means of communication
- e). to access materials and devices to overcome constraints arising from the person disability.

The Persons with Disabilities Act 2003: Rights to Education, Article 39 in sections 1,2, and 5 states that,

- 1) every child and person with disability has a right to admission to any institution of learning and access to an inclusive, quality and free primary and secondary education on an equal basis;



- 2) no child or another person with a disability shall be excluded from the education system on the basis of disability;
- 3) children with disabilities shall not be excluded from free and compulsory early childhood, primary or secondary education, on the basis of disability.

#### *The Nature of Parenting Dilemmas*

Kenya's National Policy Framework Special Education (2009) has very well articulated the challenges faced by children with disabilities in accessing quality education. Parents of children with disabilities know too well that educational and social inclusion requires one to make adjustments in both attitude and environment as stipulated in the law. The majority of these parents, however, bear testimonies of how difficult it is for society to become inclusive. The parents consciously or unconsciously develop protective mechanisms in the best interest of the children, which can have both positive and negative effects in the life of the children. Such protective measures help them as individuals cope with the children's disabilities. The individual families make adjustments to support the children grow and thrive. Parents concern for their children is primarily the provision of the basic and essential needs.

In pursuant of the law, the parents begin to search for a school when the children attain school-going age. For most parents, this is a difficult time. It is important to note that parents have an idea of the kind of environment where their children's growth and development will be supported. The parents are aware of the physical, emotional, social and cognitive needs of the children. Their concern is whether these needs will be met adequately within a school environment.

In the school setting, a parent in the best of interest of the child wrestles with these issues: "Where will my child sit?", "How will my child access the classroom?", "Where are the toilets located?", "Where are meals served?", "Who will change my child if they mess themselves?", "Will my child make friends?", "How will the teachers and other children interact with my child?". These concerns, are so basic yet so important to a parent. The journey to search for a school environment that will meet these concerns becomes paramount. The parent at this time is not too worried about the curriculum, but with the safety of the child physically, emotionally, socially and spiritually. The parent is confronted with the reality that schools are ill-prepared to meet the child's needs; they undergo an approach-avoidance moment. The right of the child to access an education facility, be transported with ease to school, access an accommodating curriculum and to be included in all school activities present dilemma to the parent.

The dilemma the parent faces is cited in the Kenya's National Framework Special Education Policy (2009), which identifies several challenges that make achieving inclusive education a dream in Kenya. There is the lack of basic infrastructure and trained teachers to accommodate children's needs. This makes parents struggle with the decision of enrolling their children in school just to fulfill the legal requirement of a "child's right to education" and in avoidance of discrimination that states "no children will be denied admission on basis of disability". While the Ministry of Education's policy on inclusion has been emphasized, the reality is that children are excluded within the inclusive environment in many ways. For instance, disabled children will hardly take part in most co-curricular activities. In a classroom situation, disabled children will hardly participate because the classes have too many children and the teacher lacks skills to help children with a disability. For parents, the question that lingers in the mind is whether enrolling their children in such a school is acting in the best interest of the children.

#### *Parent's Dilemmas in Fulfilling the Legal Requirement*

In an attempt to examine parents' dilemma in fulfilling the legal requirement, it was necessary to find out if parents were aware of the existence of the clause in the law that states that "the best interest of the child is paramount and the right to education must be upheld for children with disabilities". Parents of children with disabilities desire that the dignity of their children is respected and taken seriously, but they are confronted with harsh realities. Their children are indulgently tolerated and are less valued (Korczak, 2009). Parents know too well what it means to be stigmatized and isolated by the unforgiving cultural beliefs and attitudes and the law that is not implemented, flawed by the same Government.

The UN committee on the Rights of Children identified three conflicts that could interfere with achieving the best interest of the child. These conflicts affect the parents with children with disabilities too. A parent will need to consider the interest of the disabled child relative to the other children in the family. A parent will have to deal with balancing the wishes of the other children in the family, immediate family members, and the larger community. A parent in considering the best interest of the child with a disability will still need to bear the interest of the society in mind. For parents, achieving the correct balance can be a daunting task in ensuring that the best interest of the child is achieved in schools, the home, and the larger community. This is because a disabled child requires far much more from the parents than a child without a disability. The disabled child needs more physical, emotional, social, spiritual and intellectual support.

It is important to note that the legal frameworks are silent on the rights of the parents. This begs the question; how does a parent meet the needs of the child in the best interest when the same law does not address the parent's rights? The question that lingers is whether the legal frameworks operate in the best interest of the parent who has a child with a disability.

Parents' lack of awareness of the rights of their children impacts on their ability to identify where their children's rights are violated. In this paper, the author examined the parents' awareness of the legal framework that addresses the rights of children with disabilities and access to quality education and the dilemma of acting in the best interest of their children.

## Methodology

Desktop literature analysis was carried out to examine the provisions of the legal frameworks that address the needs of children with disabilities. A survey was carried out to determine parents' awareness of the provisions of law in Kenya that address the rights of children with disabilities. Data was collected using in-depth interviews of a sample of 20 parents drawn from a Whatsapp® support group. The parent support group has over 500 members drawn from Nairobi County. Each of the members of the support group has a child aged between 2 and 33 years with Autism Spectrum Disorder

## Findings and Discussion

### *Gaps in Attaining Various Rights for Children with Disabilities*

A desktop review of the legal framework was carried out. The subsequent information is an analysis of articles that address rights to education and areas where there are gaps leading to violation of the rights of children with disabilities.

The Constitution of Kenya (2010), Part 4, Section 20 (5b) stated that in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals. It is evident that minimal resources are allocated to support the special unit, and parents with children with disabilities are left to bear the cost of providing an appropriate education in addition to other essential services that children require.

Secondly, the Constitution of Kenya (2010), Section 27(6) stated that "To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination." What is apparent is that parents' rights are not articulated even though they are best placed to advocate for their children. In other words, parents' rights are not provided for in the law. Children with disabilities are not in a position to advocate for themselves, rather, parents are their advocates and caregivers.

Thirdly, the Constitution of Kenya (2010), Section 28 stated that: "Every person has inherent dignity and the right to have that dignity respected and protected. Dignity can be upheld only when government policies are aligned to the unique needs of children with disabilities." There is no accurate data on the number of children with disabilities, and types of disabilities. In the absence of accurate data, planning and investing in systems that can support social change and become accommodating is difficult. Even though the effort has been made in providing for an inclusive environment, mainstreaming disabilities in the light of the needs of children is yet to be achieved. Affirmative action targets adults with disabilities and all policies on mainstreaming target adults with disabilities, not the children.

Fourth, the Constitution of Kenya (2010) stated in Article 35(1) the right to access information, and in Article 43(1a) the right to the highest attainable standard of health (which includes the right to healthcare services, including reproductive health care). Parents with children with disabilities know too well that there is no systematic system of sharing information regarding their children. Where there is a lack of information, accessing the rights is impossible. Parents need to know the available support services and government responsibilities. Parenting a child with a disability can be draining physically, emotionally and spiritually.

Fifth, The Constitution of Kenya (2010), Article 54(1b) stated that, ...to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person:

- (1c) to reasonable access to all places, public transport, and information;
- (1d) to use sign language, braille or other appropriate means of communication;
- (1e) to access materials and devices to overcome constraints arising from the person's disability.

Even the government has made effort to ensure the above has been implemented. However, the National Policy Framework for Special Education (2009) cited lack of appropriate transport, lack of information, lack of appropriate means of communication and general lack of materials and devices to overcome constraints arising from the disability.

Sixth, The Persons with Disabilities Act (2003): Rights to Education, Article 39 in sections 1, 2, and 5 stated that:

1. every child and person with a disability has a right to admission to any institution of learning and access to an inclusive, quality and free primary and secondary education on an equal basis;
2. no child or another person with a disability shall be excluded from the education system on the basis of disability;

3. children with disabilities shall not be excluded from free and compulsory early childhood, primary or secondary education, on the basis of disability.

While this part of the law clearly indicated what the expectations are as far as the government's obligations are concerned, it falls short in outlining the rights of the parents of children with disabilities. The question is, where does a parent whose child is denied admission go for help? For children with disability, what is free and compulsory education when such a child needs other critical services to support them, access to quality education such as physiotherapy, speech therapy and other forms of support services that are provided for in the free primary education?

In addition, the Persons with Disability Act (2003), in Article 39, Sections 4, 6 and 7 (b) and 7 (c) stated that National and County Governments shall:

4. ensure that persons with disabilities have access to inclusive education, without discrimination and on an equal basis at all levels;
6. every child with disabilities has a right to equal access to play, recreation and leisure and sporting activities, including those activities in the school system;
- 7 (b) the learning institutions under the Ministry of Education should provide individualized support measures, appropriate equipment, assistive devices, adaptive technologies and other supportive services in environments that maximize academic and social development, consistent with the goal of full inclusion of students with disabilities. Section (7c) stated that the Ministry of Education will enforce the recruitment and retention of special education teachers in all schools and institutions.

Parents are aware that the Ministry of Education has acknowledged that schools lack appropriate infrastructure and facilities to support the call for inclusion, there is a high cost of educating a child with a disability and there is a lack of teachers with skills to handle children with disabilities. Even though the Ministry of Education has policies with emphasis on "inclusive education", the law requirements have not been met and children with disabilities have remained violated. Parents are therefore left with special education programs that cannot adequately meet the needs of the children. The question that needs to be answered is: The interpretation of "best interest" Article 3 "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration". This is open to various interpretations. The "best interest" is not necessarily the primary consideration in the education setting as implied in the article.

Parents, as the duty bearers, are therefore left with the burden of finding alternative education opportunities for their children. Few parents are able to enroll their children in costly private schools. The majority of parents are therefore forced to enroll their children in the poorly equipped "special units" within mainstream schools, leading to exclusion in what is referred to as inclusive school environments. Yet other parents keep their children at home. All of these parents are acting in the best interest of their children.

In the United States of America, the Individual with Disabilities Education Act (IDEA) outlined the rights of parents of children with disabilities. It stated that parents are entitled to have their children access education that is fully funded by the Federal States (Cortiella, C. (2006). There is a comprehensive explanation of all procedures to safeguard children. Confidentiality is assured in respect to children's records. Also included are participation in identification, evaluation and placement of their children, right to receive information, right to independent educational evaluation and right to disagree, among others.

In Kenya, there is no legislation on the rights of parents with children with disabilities. As a result, parents are not empowered in the law to advocate for their children's rights. Even if it is implied in the Bill of Rights in the Constitution of Kenya (2010), the interpretation of the law is left to individuals and institutions. In addition to the above gaps in enforcing the law. it is not clear if the parents know what is provided in the law. It is obvious that the rights of children with disabilities are well articulated in various legislations in the law, but it is not clear if parents are aware.

#### *Parents' Awareness of the Legal Provisions on Rights of Children with Disabilities*

Various legal frameworks in Kenya outline the rights of children with disabilities. These rights include right to the provision of appropriate infrastructure that meets the needs of the children with disabilities, right to the provision of qualified teachers for special needs in schools, right to curriculum modifications, right to participation and right to health care, among others. Parents' awareness of these rights will enhance the quality of their children. However, if the parents are not aware of these rights, then their dilemmas cannot be addressed adequately. A total of 20 parents drawn from parent support group of children with Autism Spectrum Disorder were asked if they were aware of the legal framework that addressed the rights of their children.

Of the 20 parents in the study, there were 18 (90%) mothers and 2 (10%) fathers, indicating that women are more involved in helping children with disability. However, there is a general awakening in fathers who struggle to accept the disability in a child and a good number are getting involved in seeking help.

The results show that only 6(28%) of the parents were aware of the constitutional rights enshrined in the Constitution of Kenya. However, these were not aware which specific legal framework addressed their children's needs specifically. A total of 14(72%) were not aware of constitutional rights of their children. This finding has serious implications since parents are the main actors in the lives of their children. They all stated that they always acted in the best interest of their children but did not know it was a legal issue.

Only 2(10%) of the parents were aware of the existence of the Disabilities Act (2003) with a number of them stating that they were unaware of the existence of this Act. At the time of this survey, the Disabilities Act (2003) was undergoing amendments and these parents were not aware and were not involved. This has serious implications because even though ignorance to the law has no defense, parents with children with disabilities remain uninformed. Even the 2(10%) who stated that they were aware, were not sure if the parents had any rights stipulated in the Act. This finding raises a number of questions. Who is obligated to educate the parents of children with disabilities on the basic children's rights? What mechanisms are put in place to enhance the access to information by these parents?

Parents were asked to rate the schools' readiness for the inclusion of their children. The result revealed that 14(70%) of the parents felt that schools lacked the appropriate infrastructure for inclusion. These parents had their children in special units in public schools for children with Autism Spectrum Disorder. It is notable that 6(30%) of the parents in this sample had their children enrolled in private schools who indicated that these schools had appropriate infrastructure that met the needs of their children. It is important to note that these parents felt that the cost of having their children in private schools was quite high since they had also to make extra payments for other important services such as sensory integration, physiotherapy and speech therapy.

Most of the parents felt that the specific teachers in whose classes their children were enrolled into had some knowledge of Autism Spectrum Disorder. This constituted 8(40%) of the parents, with 12(60%) stating that the teachers did not have knowledge of Autism Spectrum Disorder. This finding is consistent with the Ministry of Education report (2008) that most schools lack qualified special education personnel. In addition, 12(60%) of the parents stated that due to lack of knowledge of the needs of a child with Autism Spectrum Disorder, the curriculum was rarely modified, and where small modifications were made, this was not sustained. In this study, 8(40%) of the parents whose children were enrolled in the private schools stated that their children were exposed to curriculum content that was modified significantly and that these children were making progress in their cognitive domain. As a result, 16(80%) of the parents felt that their children were not accessing equal, free and quality education as enshrined in the constitution, with a small group 4 (20%) stating that they felt their children were accessing quality education at their cost.

All the legal frameworks provide for the right to participate for children with disabilities. In this study, 9(45%) of the parents felt that their children were given room to participate in regular school activities in private schools, while 11(55%) stated that their children were excluded from regular school activities because the presence of autism makes it difficult for the children to integrate with other children. The general consensus was that the teachers' lack of knowledge made it difficult to have these children integrate with others. The parents stated that some of their children were excluded from school trips, sports, and drama and school leadership positions.

Parents' awareness of organizations that advocate for the rights of children with disabilities was measured. The results revealed that 14(70%) of the parents had no idea if there were/are Non-Governmental Organizations (NGOs) that advocate for the rights of children with disabilities in Kenya. The 6(30%) of the parents who stated they had an idea felt that some of NGOs were offering services to persons with disabilities in rural areas. It is notable that even though most of the participants were aware of the National Council of Person with Disabilities as an organization that advocates for the rights of persons with disabilities, only 2(10%) had visited the council for any services, even the most crucial ones such as registration of their children.

## Conclusion and Recommendations

Parenting a child with a disability is a daunting task. Parents have to deal with the shock of having a disabled child. They spend a significant period of the early years of the child struggling with accepting the reality that the child has a disability. The society does not make it easier for them, in the sense that, the cultural and religious position offers no positive support to the realities of parenting a child with a disability. By the time the parents are making adjustments to these realities, the child is ready for school and all parents desire that their children will live an independent and happy life.

Searching for schools that will help the parents realize this goal is not only difficult for the parents who know the needs of their children too well, but it is also psychologically and emotionally draining. The parents find schools that are ill-prepared, lacking the very basic infrastructure; poorly trained teachers; and lack of information. The parents have to make a hard decision, whether or not to enroll the children. In the best interest of the child, the parents may enroll the children or keep the children at home a little longer waiting for the situations to improve in schools.

On the other hand, the government enacts legislations with the hope that the minority groups will not face any discrimination and will be supported to integrate with the larger society. It is for this reason that Kenya is a signatory to Article 3 of the UN

Convention on the Rights of the Child which requires member states to observe the “best interests of the child as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” In meeting this United Nations Convention on the Rights of Children, the Kenya Government has enacted several legal frameworks to cushion children with disabilities. These include the Constitution of Kenya, the Persons with Disabilities Act, 2003 and The Children’s Act 2003. In addition, the government has provided a framework that is envisaged to support all persons with disabilities including children, through the establishment of the National Council for Persons with Disabilities and other state departments.

In all these legal frameworks, the rights of parents with children with disabilities are not explicitly stated. Even though they are implied in the Bill of Rights in the Constitution of Kenya, how the parents of children with disabilities are supposed to apply them is not clear. As a result, these provisions in the law are not implemented leading to the violation of the rights of children with disabilities. This is because parents who are the duty bearers are considered as important agents of ensuring each section is fully implemented. As a result, parents’ rights to parent a child with a disability are completely left out.

This study reveals that parents lack awareness on the rights of their children, a key item in all legal frameworks in Kenya. Consequently, they cannot advocate for these rights. They are helpless because these rights especially rights to accessing free and equal education is violated. Schools lack infrastructure. They have no structured assessment programs and no qualified personnel. They have very low budgetary allocations. They have inflexible curricula and they lack well-designed transitioning programs. The services offered by the National Council of Persons with Disabilities are limited to the provision of assistive devices as opposed to holistic supportive programs that empower parents as the duty bearers. As a result, parents in the best interest of the child with a disability do what they know is best for their children. Parents interpretation of best interest of the child with a disability becomes their best interest as the duty bearer.

This paper recommends an extensive study to determine the number of children in Early Childhood Development Education schools to inform the policy on interventions. Secondly, there is need to carry out campaigns to empower parents with disabled children to enhance their ability to advocate for the rights of their children.



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## **Investigating Female Children's Rights to Family Property and Its Implication on Children's Justice in Kisii County, Kenya**

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### **Abstract**

This study sought to establish respondents' perceptions on female children's rights to access, control, inherit and own property and their implications on children's justice in Kisii County-Kenya. The constitution of Kenya (2010) equally provides for male and female children's rights to property inheritance which automatically culminates in legitimate ownership. This is in tandem with international and regional instruments and treaties that require male and female children to be treated equally in all spheres of life. However, in practice this has been a mirage as cultural and customary beliefs and practices override existing legal provisions that equally cushion male and female children. This realization informed this study whose objectives were to identify respondents' perceptions on female children's rights to access, control, inherit and own family properties and proffer strategies that could be adopted to mitigate the vulnerability of female children's rights to property inheritance and ownership. Cross-sectional descriptive survey was used in the study with a population and target population of 1,152,282 and 292,837 people respectively. A sample of 408 respondents and 30 key informants were selected using purposive and stratified random sampling procedures. Semi-structured interview schedules and in-depth interview guides were used to collect data. Generated data was quantitatively and qualitatively analyzed and the findings were that both male and female children were allowed considerable access to family property. However, as far as control, inheritance and ownership of property were concerned, male children were favoured over females. Secondly, as power and authority associated with property rights and status increased, the rights of female children to exercise and benefit from these powers and authority have diminished. The study recommends awareness creation of constitutional and other legal frameworks that promote female children's property rights, their effective implementation and severe penalties for those who violate these provisions aimed at promoting children's justice.

**Key words:** Rights, Access, Female Children, Vulnerability

### **Introduction and Background**

In most patriarchal societies, and more especially in the developing countries, property ownership and inheritance has been and is still the domain reserved for men as observed by (Doss, Kovarik, Peterman, Quisumbing & Bold, 2013; FAO, 2013). This leaves women and children out as far as control, inheritance and ownership of key resources are concerned. Traditionally, male dominance on property ownership and inheritance did not pose serious challenges since extended families and other social support systems provided social safety nets that cushioned widows and children in the absence of male household heads, whose primary responsibility was to take care of the members of the household. These systems defined patterns of property access, control, inheritance and ownership. Collective property management was exercised and this ensured that the interests of each family member, young and old, male and female, were taken care of. However, it was categorical that property control inheritance and ownership remained in the hands of men as inheritance ran through the male gender: from father to son (Doss et al., 2013; ICRW, 2004; Kamari-Mbote, 2006).

This notwithstanding, Lastarria-Cornhiel (2005) observed that wives, daughters and minor sons indirectly benefited and depended on family properties owned by men for their livelihoods. Though minor sons outgrew this dependency when they became of age and were granted property inheritance and ownership rights, female children did not. It was therefore the responsibility of men to take care of the needs of female children and women within their households (Doss et al., 2013). Similarly, male household heads allowed unmarried daughters or sisters user rights to family properties for the sustenance of their livelihoods (Kamari-Mbote, 2006). For married women, this obligation was transferred to husbands. In this way, communities were able to take care of all their members regardless of age or gender.

With time, these social safety nets that ensured protection of all members of society have relatively weakened and this has brought about changes on how properties are managed (Kamari-Mbote, 2007). Male household heads still dominate property control, ownership and inheritance, but they are legally under no obligation to ensure that members of their households; especially, females who are over 18 years, married or unmarried are taken care of. Family systems now concentrate on taking care of members of the nuclear families who are minors. Even so, inheritance and ownership of property is still skewed to the males who are often bequeathed property by male household heads (O'Connor, 2014).

While in some communities, culture dictates that male heirs are given a share of ancestral land as inheritance, female

children are not given any consideration (KHRC, 2006). Unmarried female adults must find a way of fending for themselves and their children if they have any. In the same manner, orphaned male and female minors, often lose their right to family property as their relatives who are property administrators or trustees end up either distributing the said properties amongst themselves or sell the properties for personal monetary gains leading to violation of children's rights to inherit property from their biological parents, as documented by Brown (2005).

The culture of violating property rights of defenseless widows and orphaned children is on the increase (Brown, 2005). Property loss leads to feelings of a myriad of psycho-social effects such as lack of love, attention, affection and isolation, factors deemed basic for healthy development of children (Berger, 2011). Consequently, this increases the risks of vulnerable children. It is worth noting that though both male and female children are affected by property disfranchisement, the effects are worse for female children who are culturally not considered in property inheritance and ownership in most patriarchal societies (Lastarria-Cornhiel, 2005).

Children's property rights disfranchisement is worsened by the devastating effects of HIV/AIDS pandemic (KHRC, 2006). As documented in a study by Kessy, Kweka, Makaramba, and Kiria (2008), children who are partially or totally orphaned by losing one or both parents become more vulnerable as they do not have anyone to protect their fundamental rights to a home, property and education among other things. Rose (2007) argued that in some cases guardians of orphaned children violate orphaned children's inheritance and ownership rights of their deceased parents' properties. This is worsened because extended family support systems that used to cushion vulnerable children no longer undertake this as a serious role. As a result of this, orphaned children become more vulnerable (UNICEF, 2010).

Existing legal international, regional and national legal frameworks guarantee legal protection for vulnerable children as provided by international and regional instruments on human rights such as; the Universal Declaration of Human Rights (1948), International Covenant on Economic, Social and Cultural Rights (1966), and the African (Banjul) Charter on Human Rights (1989) prohibit child discrimination based on socio-cultural beliefs and practices. The African Charter on the Rights and Welfare of the Child (1989) provided for the best interests of the child with regard to non-discrimination on all grounds, freedom from harmful cultural practices, deprivation of parental care and education; protection from child labour, torture, sexual abuse and other forms of ill-treatment (The African Union Commission, 1989).

Similarly, the Constitution of Kenya (2010) in Section 53(2) stated that the best interest of children is of paramount importance and upholds parental care and protection of children. Section 53(1) (d) gave emphasis to the right of every child to protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. Likewise, Section 5 of the Children's Act (2001) also affirmed that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. To further protect children, the Succession Act (1981) stated that, when a person dies without making a will, the surviving spouse is entitled to a life interest of the estate while the ultimate heirs are children (section 35(5)). Where an intestate person has left a surviving child or children but no spouse, the estate devolves upon the surviving child, if one, or is equally divided among surviving children.

Despite these statutory provisions, customary laws and statutory laws impede property rights of children because they often contain contradictory provisions (Kameri-Mbote, 2006). Although statutory provisions are expected to override customary laws in case of contradictions, in practice the opposite is true as statutory laws are poorly implemented or ignored all together (Kameri-Mbote, 2006; Rose, 2007). This poses serious challenges in ensuring legal protection of vulnerable children's rights to; a home, food, clothing, properties, health care, education and other psycho-social needs such as affection, love, care and support (Rose, 2007). This situation is fuelled by gender discriminatory practices against female children who are not culturally considered for property inheritance by virtue of their sex in most patriarchal societies, existence of statutory legal provisions notwithstanding (Aziza, 2011).

It is critical to point out that culture, as observed by Giddens and Sutton (2013), influences people's way of life and practices in society. It determines people's values, work, interaction patterns, marriage customs, family life and the way people treat their children. Culture determines what is valuable and not valuable in society. Culture is regarded as a "design for living" or "tool kit" of norms, knowledge and practices acquired through learning and the socialization processes. It is very instrumental in how people perceive and practice children property inheritance and ownership. Therefore, culture forms the basis on which most societies prescribe family properties inheritance patterns by male heirs while female children are literally locked out (FAO, 2009). This trend perpetuates gender disparity with regard to property rights (Giddens & Sutton, 2013).

Due to modernization, globalization, digitalization and awareness of human rights, especially children's rights, cultural norms and values on property inheritance and ownership are fast changing, forcing society to confront deeply held cultural beliefs and practices about children's property ownership and inheritance rights (Rose, 2007). In view of this background, it was imperative for this study to investigate the vulnerability of female children's property inheritance and ownership rights and its implication for children's justice. The ultimate purpose of this paper was to investigate the prevailing perceptions on female children's rights

to family property with regard to access, control, inheritance and ownership in Kisii County. The objectives of this study were to: identify respondents' perceptions on female children's rights to access family properties in Kisii County; assess respondents' perceptions on female children's rights to control family properties in Kisii County; appraise respondents' perceptions on female children's rights to own family property in Kisii County and determine respondents' perceptions on female children's rights to inherit family properties in Kisii County.

Informed by the findings of this study, suitable and contextualized recommendations are proffered for adoption to promote female children's rights to property access, control, inheritance and ownership as a way of ensuring sustainable children's justice as far as property is concerned. Since no similar study has been done in Kisii and indeed in Kenya as a country, the study will fill this scholarly gap and contribute to global data in this field. It is hoped that knowledge generated will enhance socio-economic-legal protection of vulnerable and at risk children in society as a way of enhancing their justice.

## Methodology

Cross-sectional descriptive survey design was used in this study. The population of the study was 1,152,282 inhabitants of Kisii County and the target population was 292,837 people who hailed from two sampled divisions - Keumbu and Township in the County (Kisii County, 2013). Stratified random sampling technique was utilized to select a sample size of 408 respondents from the two divisions while purposive sampling was used to select 30 key informants and participants of four focus group discussions; two from each division representing males and females respectively.

Both quantitative and qualitative techniques were utilized to collect and analyze data. Semi-structured interview schedules were used to conduct face to face interviews with the 408 respondents while in-depth interview guides facilitated interviews with 30 key informants. The researcher facilitated four focus group discussions comprising of eight to twelve participants from the two sampled divisions but not included in the main sample to solicit more information. Desk review was also done to collect secondary data. Quantitative data was processed and analyzed using Statistical Package for Social Sciences (SPSS) version 20. The study utilized descriptive statistics and qualitative analysis to facilitate interpretation of data. Study findings were presented in tables, frequencies, percentages, narrative descriptions and quotes.

## Findings and Discussions of the Study

The findings will be presented in cognizance of the objectives that guided the study. They are presented and discussed in details under the subsequent sub-headings.

### *Respondents' perceptions on children's access to family property*

Objective one of this study sought to identify respondents' perceptions on female children's access to family properties and the findings are presented in Table 1.

Table 1: *Children's Access Rights to Family Property*

Gender	A lot	Some	None	Total
Male	196 (49.6)	153 (38.7)	46 (11.6)	395 (88.4%)
Female	102 (27)	126 (33.3)	150 (39.7)	378 (60.3%)

From Table 1, it is evident that almost half 196(49.6%) of the respondents allowed their male children a lot of access to family properties and assets, while 153(38.7%) allowed male children some access and the remaining 46(11.6%) did not allow male children access to family property. In total, 349(88.4%) respondents allowed their male children access to family property. Only 46(11.6%) of the respondents reported that they did not allow male children access to family properties and assets.

On the other hand, 102(27%) of the respondents reported that they would allow female children a lot of access to family property, 126(33.3%) revealed that they could allow them some access, while 150(39.7%) reported that they could not allow female children any access to family properties and assets. Overall, 228(60.3%) respondents reported that they could allow female children access to family properties and assets while 150(39.7%) could not.

Comparatively, there were more (88.4%) respondents who were inclined to allowing male children access to family properties and assets compared to (60.3%) those who reported that they would allow female children access to family properties and assets. This finding was reinforced by the remarks of a senior government official and KII who stated that;



*Though male children are preferred over female ones in this community, there is no structured gender discrimination as far as access to family property by children is concerned. Both male and female children are allowed access, as long as they remain obedient and respectful to parents.*

Even though the respondents were inclined to allow male children more access to family property as compared to female children, the difference between male and female children's access to property was not threatening as depicted by (88.4%) and (60.3%) for males and females respectively. This finding exposes mild gender disparity with regard to children's access to family properties and assets. However, since the gap was not very wide, it was not as worrying as when it came to property control, inheritance and ownership. This finding corroborates the findings of previous studies (FAO, 2009; Kessy, 2008; Silberschmidt, 1999) that depicted deep-seated cultural beliefs and practices that favoured male children over females with regard to family property rights. This perception and its subsequent practices contradict existing legal provisions enshrined in Section 53(1) of the Kenyan Constitution (2010) which stipulated equal treatment for male and female children in the family.

#### *Perceptions on Children's Control Over Family Property*

In line with objective two of this study, respondents' perceptions with regard to their children's control over family properties and assets on the basis of gender were investigated. The findings are as shown in Table 2.

*Table 2: Children's Control Rights over Family Property*

Gender	A lot	Some	None	Total
Male	103 (26.1)	175 (44.7)	115 (29.2)	393 (70.8%)
Female	14 (3.7)	94 (24.9)	269 (71.4)	377 (28.6%)

As illustrated in Table 2, the findings of this study show that 103(26.1%) of the respondents stated that they would allow male children a lot of control over family properties and assets, 175(44.7%) revealed that they would allow them some control while the remaining 115(29.2%) reported that they would not allow male children any control over family properties and resources. This finding shows that a majority (70.8%) of the respondents would allow male children to control family resources with differing degrees.

On the other hand, and as far as female children were concerned, out of 377(92.4%) of the respondents who responded to this question, only a minority 14(3.7%) would allow female children a lot of control over family properties and assets while 94(24.9%) would allow them some control. The remaining majority 269(71.4%) would not allow female children any control over family properties and assets. These findings show significant gender disparity with regard to male and female children control over family properties and assets. A majority (70.8%) of the respondents reported that they could allow male children control over property while only (28.6%) revealed that they would allow female children control over family properties. This finding exposes serious gender gap (42.2%) that cannot be wished away or ignored. This finding was emphasized by the views of a key informant and civic leader in Keumbu division who revealed that:

*Most parents in this community allow male children some control over family land to plant trees, napier grass, and other small scale activities like keeping rabbits and poultry but this is not common with girls who are seen as passive and less concerned with issues of control over any form of property.*

Ensuing from these findings, it is evident that there was glaring discrimination against female children's control over family properties and assets. Though this practice is culturally endorsed in most patriarchal societies as reported by (Brown, 2005; FAO, 2009; Kessy, 2008; Silberschmidt, 1999), it is contrary to statutory, especially constitutional provisions that require male and female children to be treated equally with regard to property inheritance and ownership (The Kenyan Constitution, 2010). Likewise, this practice goes against the principles of justice for all children as stimulated in most international, regional and national statutory frameworks (Howard, 2014; The Republic of Kenya 2010; UNICEF, 2014). Consequently, these perceptions and resultant practices increase the vulnerability of female children and amplify their risks of social injustice and marginalization in society. Disfranchisement of female children with regard to property rights has serious implications on ensuring justice for these children.

#### *Perceptions on Children's Ownership of Property*

Similarly, this study investigated the respondents' perceptions with regard to children's rights to property ownership in the family. The household heads interviewed were asked to indicate their propensity to transfer ownership and register family properties and assets in their children's names.



The findings show that only a minority 18(4.5%) of the respondents had a strong disposition towards transferring family property ownership to male children. Another 34(8.6%) indicated that they would transfer some of their family properties to male children. On the contrary, a majority at 345(86.9%) categorically revealed their unwillingness to do so. Similar sentiments were reported for female children as only 6(1.5%) strongly supported transferring of family property to female children. Another 12(3.0%) would transfer some family properties to female children and the remaining majority 379(95.5%) strongly disagreed.

Furthermore, 52(13.1%) and 18(4.5%) of the respondents demonstrated inclinations to transfer ownership of family property to male and female children respectively. The majority at 345(86.9%) and 379(95.5%) categorically expressed reservations with regard to transferring ownership of family property to male and female children respectively. This implies that the interviewed household heads did not perceive transfer of ownership of family properties and assets to either male or female children appropriate. Similar sentiments were echoed by a male key informant and opinion leader in the township division who argued that:

*Whatever properties I have are mine. I have worked hard to get them. Let my children work hard in school so that they can also develop their own capacity to buy properties of their own. Giving them property on a silver platter will make them lazy and irresponsible.*

Similar views were reported by a senior public administrator who revealed that:

*Instead of transferring property to my children, I can write a will on who should get what in case I am not there. Transferring property to them when they are still young will make them less ambitious, contended with what I have given them and stop working hard in school.*

Contrary to the views of many, a key informant and faith-based leader revealed inclination to transfer family properties and assets to children and justified this position by arguing that:

*Transferring ownership of family properties and assets by registering them in the name(s) of children cushions them against common socio-cultural property violations experienced by most orphaned children. Formal property ownership rights by children will protect them from selfish guardians/trustees who are likely grab orphaned children's properties and assets for selfish gains in the absence of their parents. This practice, common in our community, makes orphaned children destitute while hard earned properties of their parents goes to undeserving relatives.*

Another female key informant and leader of a women's group in Keumbu division stated that;

*I am considering registering some of my acquired properties under the names of my two children. In case I die and my husband marries another wife, my properties will be in the hands of my children and my husband will not use these properties on his newly found wife and children.*

Similar views were shared by a middle aged male key informant and civic leader in the Township division who argued that:

*It is important not to carry all your eggs in the same basket. In case of anything, one is likely to lose everything. For this reason, I have registered some of my plots under the names of my three boys, since I am a father of only boys. I won't want my children to be empty handed in case I die. Each one of them should have at least something they got from their father. However, I have not told them that I have properties registered in their names else they become lazy and stop working hard in school.*

Generally, from these findings, it is evident that not many respondents were ready to transfer and register their properties in the names of their children. They argued that such a move could distract children from taking their studies seriously. Besides, the respondents argued that since they were giving children education, they expected them to work hard, get well paying jobs, invest and acquire property of their own at a later time. Hence, it can be deduced from all these findings that transfer of property ownership to children was not fully embraced by the interviewed household heads. This indicates that despite existing legal and statutory provisions available to guide parents on matters of children's property ownership and inheritance, most people are still controlled by socio-cultural practices. They are confronted with legal pluralism contradictions that provide them with a window to make choices between culture and law as documented by Brown, (2005); and Silberschmidt, (1999) hindering effective implementation of legal provisions meant to protect and promote children's rights. This finding corroborates with the findings by Gebeye (2013) which states that existence of contradictions between customary laws and constitutional provisions in relation to women's rights to property dilute the sovereignty of constitutions and jeopardize efforts intended to enhance gender-balanced rights to property inheritance and ownership.

#### *Perceptions on Children's Rights to Property Inheritance*

Objective four of this study sought to determine the respondents' perceptions on children's rights to property inheritance. The findings pointed out that 373(93.7%) of the household heads interviewed would grant male children family property inheritance. On the other hand, only 60(15.1%) household heads interviewed indicated readiness to grant family property inheritance to female children. It is worth noting that 338(84.9%) of the respondents categorically reported that they would not grant inheritance to female

children as compared to only 25(6.3%) who stated that they would not bequeath their property to their male children. This exposes a glaring gender gap in property inheritance by male and female children. This finding was confirmed by the sentiments of a key informant and public opinion leader and in Keumbu division who remarked that:

*In this community, property inheritance runs through members of the male gender; that is from father to son. Female children are not considered for inheritance. This is the way things have always being and they have so far worked well for us. Including female children in property inheritance will bring confusion, chaos and family disintegration. In this community, this move is not welcome.*

This voice represents respondents who were against family property inheritance by female children. They were mainly influenced by socio-cultural beliefs that govern day to day practices in this community. Such beliefs and practices have contributed to widening the gender gap in perceptions held by members of this society with regard to female children's rights to property inheritance. Though provided for in the Constitution of Kenya (2010) and other international and regional instruments that give a lot of emphasis to children's equal treatment gender notwithstanding, in practice, this is still a mirage in this community under investigation and indeed other communities with similar beliefs and practices (FAO, 2009; Gebeye, 2009; Silberschmidt, 1999). These communities demonstrate lack of enthusiasm in embracing female property inheritance rights. People are torn between contradictory cultural and customary beliefs and practices and legal provisions (Gebeye, 2013). More often than not, entrenched cultural beliefs and practices override legal provisions (Kameri-Mbote, 2006). This results in serious implications on justice for female children with regard to their fundamental rights to property.

Respondents who indicated willingness to grant inheritance to male children justified their views by arguing that it is cultural for male children to inherit family property. Male children are perceived as legitimate family heirs entitled to family inheritance. Further, these household heads argued that male children in turn offer social security to parents at their old age. On the other hand, those respondents who reported that they would not offer inheritance to female children argued that female children are in their families of birth only until they transition into another family through marriage.

As a result, they do not qualify for inheritance from their parents. However, it is assumed that established socio-cultural structures in patriarchal societies accommodate them and ensure that their needs are taken care of (Kimani, 2012; Silberschmidt, 1999). As minors, female children's property user rights are controlled by their fathers or brothers; when married, women's property user rights are controlled by their husbands or adult sons in case of widowhood (Kimani, 2012; Oduyoye 1999; Silberschmidt, 1999). These perceptions fit well into culturally constructed moulds of what is ideal and acceptable behaviour in society, as reported by ICRW (2004) and Oduyoye (1999). These perceptions are given further emphasis by Cruea (2005) who recorded that women are perceived as emotional and physically frail, as a result they need protection from male family members throughout their lives. This implies that women have no justifiable reasons that necessitate independent property inheritance because they are consistently under the protection of their male relatives who are culturally rightful heirs of family estates.

A serious challenge to this reasoning comes when for some reason the parents of female children die while they are still minors and they have no one to take care of them. Such children are tossed from one relative to the next, are faced with diverse types of abuse, drop out of school and are often left to fend for themselves (Brown, 2005; KHRC, 2006). This adds to their vulnerability as they indulge in risky and socially unacceptable lifestyles such as child labour, child prostitution, alcohol, drug and substance abuse among others. The effects of such behaviour are manifested later in the lives of these children when they attain womanhood. These observations inform the position taken by a minority (15.1%) of household heads and a number of key informants in this study, who would grant female property inheritance as a way of cushioning them from diverse negative implications alluded to in the preceding discussions.

## Conclusion and Recommendations

In conclusion, this study established that as power to control and authority associated with property rights increased, the rights of female children to exercise and benefit from these powers and authority diminished. Since Kenya is a signatory to a number of international and regional treaties, has constitutional provisions and other legislations that promote equal rights of male and female children, in practice, one would expect that both male and female children had reasonable access to family properties and assets. However, this study found there were glaring gender disparities in the perceptions held by the respondents in areas of property control, inheritance and ownership where male children were preferred over females. Therefore, there is need to promote equitable treatment of male and female children not only in matters pertaining to property rights but all other spheres of life to enhance children's justice.

The essence of this study was not just to facilitate female children to inherit and own property like their male counterparts, but to empower and position them in an equitable platform where they can favorably participate in improving their own as well as societies' livelihoods while facilitating them to cope with emerging challenges of modern life devoid of protective safety nets that traditionally cushioned vulnerable groups in society. Contravening female children's property rights has far reaching implications that could incapacitate them as children and later as adults to become independent actors in the general processes of development.

It further slows down the realization of the Sustainable Development Goals (SDGs) deemed critical for any meaningful growth of communities and the world in general.

Consequently, the following recommendations emerged from this study. First, there is need for the government, NGOs, CBOs, church or para-church organizations to strategically position themselves to create awareness and sensitization about legal provisions of children's property rights in Kenya and beyond with specific focus to female children. Secondly, the government through its legal enforcement machineries should ensure strict and effective enforcement of laws that support children's property rights and apply severe penalties to those who violate these rights. Thirdly, law formulators and enforcers, professionals, practitioners and children's rights activists who champion gender equality in property rights should utilize contextualized socio-cultural-economic mitigation strategies to counter society based factors that stand as key impediments to the realization of female children's property rights. They can also develop plans for NGOs and Churches to address the cultural mindset in the light of contemporary realities and the appropriate need for "gender-sensitive property ownership and inheritance paradigmas. Finally, all stakeholders who care for children's protection and welfare should consistently champion female children's rights to property as a way of achieving equitable gender inclusiveness to access, control, ownership and inheritance.

The suggested strategies will ultimately encourage development and entrenchment anticipated gender-sensitive property ownership and inheritance paradigms that could facilitate promotion of female children's rights to property in communities where control, ownership and inheritance of property is a reserve of the male gender, this is the ultimate objective of this study.

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## **The Role of the Church in Promoting Justice for Children: Best Practices from Compassion International in Partnership with Local Churches in Kenya**

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### **Abstract**

Justice has become a major concern in the world today. As nations implement the United Nations Convention on the Rights of the Child, concern continues to rise on the role of various sectors and institutions in promoting justice for children. The Church plays an important role in communities as it is locally based and represents a major developmental institution, more so in Kenya where more than 82% of the population is Christian. This paper located theoretical frameworks that explain justice for children, documented best practices of Compassion's work with the church highlighting gains in social justice and advocacy, networking, community mobilization, restorative justice and provision of safe havens for children. It also highlighted challenges the Church has faced in pursuit of justice for vulnerable children in abuse and exploitation and recommended actions towards building the capacity of the church in ensuring social and restorative justice for children.

**Key words:** Church, Justice, Children, Exploitation, Capacity Building

### **Introduction and Background**

Crime has had a major impact not only on economies but on individuals within those societies, "Children especially are exposed to violent crimes in their communities, in their families, and in the media" (Osofsky, 1999). In recent times, children have continuously become victims of crime. They have also endured victimization for being abused and exploited as they engage with the different stakeholders in the justice system. When justice is not provided, children become even more vulnerable. "This lack of legal power can threaten children and expose them to further unintended vulnerabilities" (Compassion International, 2016). It also raises concerns on how the Church, community and the nation can support the children and their families especially where promotion of justice is a valuable aspect in the mission and the mandate of the church to the people to whom it is reaching out.

The Great Commission embodies the mission of the Church: to make disciples (Mathew 28:19) (International Bible Society, 1984). Children are among those who need discipleship. But child discipleship is only possible when children are protected and nurtured. Considering the tremendous value and importance of children, there are strong statements in Scripture commanding the protection of children. The bible depicts God as the defender of the fatherless and the vulnerable. Not only are we to defend children from intentional acts of harm, we are also instructed to cry out for the children who are vulnerable in Psalms 82:3 (International Bible Society, 1984). The biblical view of justice for children is therefore holistic: promotion of societal structures that ensure child safety, defending children from and in cases of exploitation, abuse and deprivation as well as restoration of the broken person and relationships. This paper locates the role of the Church in promoting justice for children. The Church referenced herein is the universal body of Christ represented by Christians who come together to form the local assemblies. It discusses best practices by Compassion International in its work with the Church. Compassion International is a Christian development organization that works in partnership with local churches in rising awareness of and implementing programs aimed at holistic development and protection of children and youth.

### **Prevalence of Child Injustice**

Child injustice has become a major issue in the world. Today, more than 1 million children are deprived of their liberty worldwide, and countless children face violent and degrading treatment throughout the criminal justice process (UNICEF, 2013). According to research, "more than 25% of children witness or are victims of abuse and exploitation" (Finkelhor, 2009). Recent findings from the United Nations Children's Fund survey (2010) on violence against children in Kenya showed that during childhood, 32% of females and 18% of males experience sexual violence. The persons that are likely to abuse children are those closest to them or those that children trust the most, for example parents, relatives, teachers and police. The findings also revealed that the most common perpetrators of sexual violence for females and males were found to be the victim's romantic partners comprising 47% and 43% respectively followed by neighbors, 27% and 21% respectively. Mothers and fathers were the most common perpetrators of physical violence by family members. For males, teachers followed by police were the most common perpetrators of physical violence by an authority figure. Emotional violence for both females and males was most often inflicted by parents. In light of this dramatic situation, it is imperative to promote strategies that provide an alternative to detention and custodial sentences for children.

## Methodology

This paper presents a review of literature on child abuse and access to justice for children in Kenya; review of theoretical frameworks on social and restorative justice; case studies from Compassion International best practices and challenges in working with the Church in promoting justice for children. Two case studies which are discussed in this paper were randomly selected based on ability inform discussions in this paper. The researchers have observed ethical consideration by making cases confidential to protect the dignity of the children and churches in the cases. The paper highlights insights, interventions and approaches that can be helpful in preventing and responding to child injustice in Kenya.

## Objectives

The aim of this paper was to locate the role of the church in promoting justice for children. This was achieved through the following specific objectives:-

- 1) Discuss theoretical frameworks on social and restorative justice
- 2) Document Compassion's best practices in working with the church in promoting justice for children
- 3) Identify challenges and offer recommendations in promoting justice for children by the church

## Findings and Discussions

### *Child Abuse and Access to Justice for Children in Kenya: A Review of Children in the Justice Systems*

It is in the best interest of all children that justice is pursued if they are to be safeguarded from further abuse. Justice for children can be considered to include children in conflict with the law (that is, alleged as, accused of, or recognized as having infringed the penal law), children who are victims or witnesses of crime, and children who may be in contact with the justice system for other reasons such as custody, protection and inheritance (child parties to a justice process) (Panel Reform International, 2013). Justice for children is also an impartial and responsive system that upholds the basic principles of the best interest of the child including development, survival, participation and protection through its approaches, processes and outcomes. Such a system should be able to deliver justice in a child-friendly manner while maintaining awareness in public and through its system.

Children, particularly girls, are exposed to psychological, physical and sexual violence during arrest and interrogation, or while being held in police custody; they are likewise vulnerable to violence at the hands of staff and adult detainees in detention centers. They also endure violence as a form of punishment or sentencing (UNICEF, 2013). Despite of this, less than one out of three of the children who experienced the above forms of violence knew where to seek professional help, while only 10% found professional help (United Nations Children's Fund, Kenya, 2010). The lack of access to justice by children is as a result of lack of public awareness or more possibly lack of means to effectively access the justice system. In appearance, it may seem that the child victims, their families and witnesses are unwilling to pursue justice, but in essence the processes, time, lack of clarity on processes, long procedures required could be a hindrance to access to justice by victims and their families. Unavailability of resources by low to moderate income households to pursue justice may further compound the challenges leading to loss in cases and opportunities for rehabilitation, future prevention, provision of required services and protection of victims and the public from the effects and consequences of the cycle of abuse.

Traditional approaches to promoting justice for children where the criminal justice system takes sole responsibility for prevention, provision of service and protection of victims have also had major limitations and can be understated. Through collaborative pursuit of justice for children, various stakeholders can help to overcome the above limitations. The Church being community based, centered on family interventions and understanding the needs at local levels can play a major role in jointly promoting the best interest of the child in the justice system.

### *Theoretical Perspectives*

Rawls (1999) proposed a theory of justice that seeks to assist in the establishment of just arrangements where they do not exist. He argued that where the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do what is required of him. The theory highlights the obligation of every individual to support just institutions. Rawls (1999) argued that each individual has a duty and obligation to promote the principles of justice. Where individuals adopt utilitarian principles, the consequences are incoherent conception of the right. This is because individuals belong to a well-ordered society and to further justice, they should combine both institutional and utilitarian principles to support the rights of individuals. The theory also describes a society that the public have an effective sense of justice. This becomes an asset in stabilizing a just social arrangement. But where there is a no well-ordered society, individuals exist to follow self-interested point of views that may cause instability. In this society, citizens are bound by a just constitution and acknowledge a natural duty of justice. Rawls further noted that the principles of justice should define the appropriate distribution of the benefits and burdens of social co-operation. Where duties and obligations are clear, it also reduces instability of just arrangements. On the other hand, unjust social arrangements are themselves a kind of extortion, even violence (Rawls, 1999).

The theory of justice has implications at all levels of justice including institutions such as the church. While justice is a difficult issue, the theory suggests that institutional interventions have value to the society. The institutions also have capacity to promote justice and define conception of justice by the society. The church, with its role in the society and can create social arrangements that are just and fair for children. Through its messages and adoption of their duties and obligations they can reduce violence and extortion of children and promote a society that naturally desires to support children. Reken and Mullen (1998) added that institutional church should speak out on the general goals that a society should pursue. It should speak out when the social goals being pursued are evil, as with so-called ethnic cleansing. It should speak out against clearly immoral policies even when they are intended to achieve morally acceptable ends.

### ***The Role of the Church***

The Church and faith-based organizations have shown commitment over the recent years on child protection through care and support of children and families. In 2010, thousands of Church leaders from around the world gathered in Cape Town, South Africa, for the Third Lausanne Congress. Together they created "The Cape Town Commitment" of the Lausanne Movement which highlighted the need of the Church to seek to train people and provide resources to meet the needs of children worldwide, wherever possible working with their families and communities, in the conviction that holistic ministry to and through each next generation of children and young people is a vital component of world mission.

The Church also committed to expose, resist, and take action against all abuse of children, including violence, exploitation, slavery, trafficking, prostitution, gender and ethnic discrimination, commercial targeting, and willful neglect (Lausanne Movement, 2011). Since then a lot of efforts have been made by churches especially on preventive efforts such as training and development of children and the family institution as a whole. The Church has also interacted and collaborated with various agencies within their locality to ensure healthy development of children. However, a lot more churches are yet to join in these efforts. An example is the case of Jane, a child who was abused while under the support of the Church in Partnership with Compassion International.

#### **Case Study 1:**

*Jane\* a 12 year old youth sponsored by Compassion has been sexually molested by her step-father, infected with HIV and is now 6 months pregnant. The mother did not inform the church child development staff. Instead, she decided to settle matters out of court for purposes of protecting her marriage and family; furthermore her husband is the chairman of the church and has been faithfully providing for Jane. She therefore accepts a cow from her husband's family as compensation according to local traditions and the matter is now "settled".*

*The senior pastor is made aware of the matter and concludes '...we need to protect the image of our church at all costs.' Meanwhile, Jane who is now out of school has been sent away to live with her maternal grandmother in the rural areas.*

The following were the proceedings and steps/actions taken by the local Church in Partnership with Compassion International in response to the matter and in the best interest of the child: 1) Church leaders approached the senior pastor and requested him to report the matter to the police as soon as possible, failure to which Compassion International would take action; 2) the pastor declined therefore one of the Compassion staff reported the case to authorities and Jane's step-father was immediately arrested; 3) the pastor began to threaten Jane that he would de-register her from the sponsorship program; 4) all the church elders as well as Jane's mother, upon persuasion decided to side with Jane and assigned one of them to testify against the step-father after two other children from the church complained of being defiled by the same man and sufficient evidence was gathered; 5) elders approached a local child rights NGO who availed a lawyer at no cost; 6) Jane's step-father was found guilty and jailed for life; 7) no disciplinary action was taken against the senior pastor by the denominational leaders; 8) however, Jane was re-united with her mother and underwent psychosocial counseling in addition to medical care. The church continued to support her through primary school, secondary school and tertiary education.

The church and Compassion International experienced various challenges to be able to support Jane. This included uncooperative church leadership (senior pastor and denominational church leaders). The pastor did not involve himself in pursuit of justice and wanted to isolate the church from the situation. Instead of protecting the child, preference was made by the pastoral team to protect the image of the church. Despite such actions, no disciplinary action was taken by his supervisors. The church seemed to lack appropriate structures to handle such cases. When a case of injustice was reported to the church, there seemed to be no accountability structures available to ensure that appropriate action was taken by the right leadership. Jane continued to suffer until members of the church other than the pastoral team took up the matter. They were able to resolve the issue to appropriate church leadership, the local church elders networking with local NGOs and creating awareness on the issue. Various actions and people emerged that helped to bring justice to Jane. The church elders were able to mobilize witnesses including Jane's mother, who were uncooperative at first, but after conviction agreed to be witnesses in the case. The other children who were victims of defilement by the same offender agreed to provide further evidence alongside the victim and the local chief and therefore promoted the justice for the child.

At a foundational level the Church recognizes the dignity of the human person as a prime concern for every Christian. The Church can play a fundamental role in justice as in the case above; because it also recognizes that every human being has been made in the image and likeness of God (Psalm 139) and sees it as its obligation to exercise the greatest possible care from conception to death (International Bible Society, 1984). Further to this, the Church in Africa has in recent years become increasingly aware of the need to establish policies and practices for safeguarding children and the whole community, but very specifically for the sake of those least able to protect themselves. It is also necessary to be clear about how to act when things go wrong and abuses of various kinds occur.

The implementation of policies, guidelines and procedures by Compassion International among its implementing church partners (ICP) helped to maintain the highest standards and provide necessary protection not only for those who may be vulnerable but also for everyone working with them. The involvement of local communities and leaders in its programs ensures that interventions are sustainable. In scenarios where the pastoral team wants to protect its image, trained communities come into play and put the church in check to ensure that justice is pursued. The recognition still goes to the church, playing its role within the community.

### ***The Role of the Church in Social Justice and Child Advocacy: Informed Rights and Plight of the Children***

Social justice can be defined as providing all people with equal basic rights, entitlements and privileges. It is about providing access to social, political and economic opportunities to all people especially those who are underprivileged and would otherwise not be able to access their rights and privileges. Jost and Kay (2010) defined social justice “as a state of affairs (either actual or idea) in which benefits and burdens in society are dispersed in accordance with some allocation principle.” It is also “procedures, norms and rules that govern political and other forms of decision-making that preserve the basic rights, liberties and entitlement of individuals and groups”. A just society is therefore a product of social systems. A just social system can be contrasted with systems that foster arbitrary or unnecessary suffering, exploitation, abuse and discrimination.

Social justice can be reflected in how God dealt with his people. In Amos 5:24 the Bible exalts “But let justice roll on like a river, righteousness like a never-failing stream” (International Bible Society, 1984). Our Lord God is a just God and so should those that belong to His kingdom. To understand how to uphold justice towards children, we first need to comprehend the battle of injustice towards children. Injustice towards children comes in all forms, including retrogressive cultures that are demeaning to children. To win the battle, the Church has to gather data on the plight of children within the community as well as learn from the experiences of other stakeholders in upholding the rights of children. As children go through the justice system either as victims of abuse or juvenile, the need for justice is important if the relationship between the abuser and the child is to be addressed with rightful measures to curb future child maltreatment.

The pulpit is an ideal avenue through which teachings about the afore-mentioned can be broadcasted to parents, caregivers, children’s ministry workers and community members. Children too need to be trained about their rights and responsibilities in addition to action to take when their rights have been violated. Additional recommended mode of broadcasting and teaching about the afore-mentioned include the use of Bible study materials, digital media and through seminars. Furthermore, churches need to develop and implement Church Child Protection Policies as well as promote biblical values that ensure that children are raised in holistically safe environments, for example, biblical morals, ethics and the sanctity of marriage to reduce divorce and separation.

The Church Child Protection Policies could include: Church council responsibilities, child protection training requirement, procedure for safe recruitment of church staff, how to create a child-friendly church environment, procedures for handling cases of abuse, how to raise concern for abuse, procedure for ministering to people who pose a risk to children, working safely with children - a checklist for ‘best practice’, protecting children and young people with special needs and confidentiality and information sharing. Through working with various churches in Kenya, Compassion has been able to handle more than 115 major cases of abuse. Cases reported were handled by the church of which 50% were successfully resolved and perpetrators are serving sentences in court (Compassion International, 2016).

Awareness facilitates implementation of justice. The churches should also make use of law experts to create awareness through seminars and parenting classes. There are a number of resources and legal instruments that churches can make use of in creating awareness. Internationally and nationally, resources and legal instruments have been developed that inform about rights of children, prevention of abuse and measures to take in case of injustice. Examples include the Children’s Act 2016, Africa Charter of the Rights of Children and UN Convention on the Rights of Children. These tools are a recommended basis for formulating localized Church Child Protection Policies and commitments that ought to be upheld by children’s ministry workers.

### ***Active Pursuit of Justice***

Churches are made of persons that originate from families and communities. Church leaders ought to ensure the rights of children are upheld beyond the church boundaries – as in the Case Study 1 cited in this paper. Compassion International through the church ensures that the church exposes offenders, provides legal and material resources for poor victims to be able to pursue legal cases as well as provide witnesses as necessary.



### ***Networking and Community Mobilization***

Networking with child-focused agencies to mobilize community members and resources is one sure way of ensuring that efforts are not duplicated. Like the analogy of the body of Christ, each member will bring in his expertise. It is also an avenue in which referrals can be made among agencies in victim identification and support to make it easier for support of victims for quick access to services. The Bible exhorts us to work together in Ecclesiastes 4:12; “though one may be overpowered, two can defend themselves; a cord of three strands is not quickly broken” including defending the course of children in need of justice (International Bible Society, 1984).

### ***The Role of the Church in Restorative Justice***

The mission of Jesus on earth was to restore the broken relationship between God and man. In Luke 4: 18, the Bible highlights the mission of Jesus as to preach good news to the poor, proclaim freedom to the captives, recovery of sight for the blind, release the oppressed and proclaim the year of restoration. In the same way, the mission of the church ought to be about restoring the sinner as well as the broken relationships. Studies on restorative justice have shown that “restorative justice can prevent crime by making offenders feel more sympathy for their victims” (Strang, 2007).

In restorative justice, the focus is on establishing reconciliation between offenders and those affected by the offence in order to restore social harmony, as well as problem solving and crime prevention by rehabilitating the victim and the offender. By contrast, retributive justice focuses on establishing blame and guilt and the offender accountability is defined as taking a punishment. Restorative justice therefore offers reconciliation, rehabilitation and community integration and can be considered as a positive form of punishment unlike the traditional methods. It may be used to solve the current problems in the criminal justice system (Jost, 2010). It can be a supplement to the system and applied to convicted children and children deprived of liberty thus increasing potential to reducing rate of recidivism. The Church, considered as a societal authority of morality (at least among Christians) should take the lead in implementing the process of restorative justice. As the justice system struggles on how to rehabilitate and restore child offenders back to the community, the Church can take responsibility of ensuring that the perpetrators of injustice are apprehended, disciplined and benefit from a discipleship program.

In their most developed form, restorative justice programs for children are holistic and include the provision of necessary services and support, such as access to education and health services, psycho-social support, vocational training and the provision of alternative activities and interests to avoid children falling back into previous risky behavioral patterns as reflected in various highlighting the challenges of young people resolving to difficult behaviors when not support (Featherstone, 2009). Opportunities for reconciliation between the aggressor and the abused ought to be explored especially in cases where parole is the desired option. For the abused, there are several opportunities for facilitating healing. Examples are counseling and care groups within the church.

### ***Role of the Church in Provision of Safe Havens***

One of the areas in which some churches have successfully participated in promoting justice for children is in providing safe havens or safe homes for children whose lives may be in danger of attack by their abusers and where children lack caregivers while their parents serve jail sentences.

### ***Challenges in Promoting the Best Interest of Children by the Church***

Conventionally, the Church has not been recognized to have a stake in legislation, justice and protection. The reason is that the Church has been known foremost to warn people of divine justice. By involving in social justice, many believe that the Church will compromise this presumed primary work by diverting its energy and resources from it. This could create an association between the institutional Church and some political agenda. Such views undermine the role of the Church and the benefits that it can provide to the best interest of the child. The Church is in an advantaged position in knowing what is clearly morally acceptable and what is morally unacceptable. It has the potential to protect the voice of the weak and restore justice where other sectors have failed. The case below highlights how the Church can overcome different challenges to support children who experience different forms of injustices.

#### **Case Study 2:**

*Lucy\*, 8 years, had gone to visit her friends in the neighborhood. It was in the evening after school and while in the company of her four friends playing together, the perpetrator lured them into his car and drove off to a residential house. While there, the stranger locked them in and defiled Lucy and Maria and sodomized the two boys who were with Lucy. After the ordeal, Lucy and her friends were afraid to go back home for fear of facing punishment from parents because they blamed themselves for what had happened to them. They crept into a nearby bush and spent the night there. In the morning, Lucy's parents raised an alarm to the police and neighbors. With the support of neighbors, they searched the nearby bushes and soon found the children eating wild fruits. The children seemed to be in deep shock. It took a while of both probing and threats alongside a beating for the children to disclose what had happened. The parents then reported the case to the church, where they are sponsored by Compassion International.*



Actions by the church included the church leaders together with the parents taking the children to the nearest hospital where it was proved that indeed they had been defiled. The children were put on medication and regular check-up. The church also acquired P3 forms and the reports were sent to the nearest police station. The offender was immediately arrested. The first hearing was on 16th January 2014. Child Helpline also assisted to ensure that the case was inclusive of all the charges. Initially, the police had denied receiving any evidence due to threats by the offender's relatives. The children's parents also felt that the distance to court was too long and people kept asking about the case which made them feel embarrassed. Furthermore, they felt they were wasting the time during which they did casual labor to provide for their families. But the church took charge and paid for all the transport expenses to and from court. They also provided basic needs for the victims' families and paid for costs for professional counseling.

Support from the prosecution ensured that evidence was found and the case continued in court. The children were required to go to church every Saturday morning for two months for spiritual counseling by the children's pastor. Lucy requested to be taken to a boarding school for fear that she would meet the offender who lived nearby and who had been given a bond. She, together with the other children and their parents, had to undergo professional counseling as the trauma they experienced was very vivid in their lives. On 10th October 2015, the doctor testified in court. The judge made a ruling based on evidence, in favor of the victims and Lucy together with her friends were able to receive justice. The offender was jailed for life. Initially, Lucy had frequently complained of abdominal pains but she is currently stable and continuing with her education.

Just in the case of Jane, the church can overcome challenges to support the needs of children in similar situations. Challenges such as training, legal reference, psychosocial support can be addressed through networking and working with other locally based agencies.

### **Conclusion and Recommendations**

Pervasiveness of child maltreatment and abuse and its cost on children and the society makes child protection a great concern at both national and international levels. The Bible calls us to: "Defend the cause of the weak and the fatherless; uphold the cause of the poor and the oppressed" (Psalm 82:3) and to "Speak up and judge fairly; defend the rights of the poor and needy" (Proverbs 31:9) (International Bible Society, 1984). Justice cannot be achieved on its own. The Church is placed in an important position in the society at a time when its presence is most required. That is to support the cause with the available resources to promote justice.

The following recommendations should be put into consideration:

1. The Church can play a role in advocating for the rights of the child so that they can receive the desired rights, entitlements and privileges in the justice system. This may include providing homes for rehabilitation of children, guidance and counseling of parents, trauma and crisis counseling for child victims in ensuring restorative justice for children. The Bible confirms that children have rights and responsibilities too. In Mathew 18:10 it notes, "See that you do not despise one of these little ones. For I tell you that their angels in heaven always see the face of my Father in heaven." Similarly, Ex 20:12 says "Honor thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee" (International Bible Society, 1984). This can be enhanced if the church works with the governments and other agencies to implement restorative justice processes for children and/or introduce legislation to this end.
2. Where the justice system fails to provide justice, the Church can be consulted to provide a way out and alternatives that can build and promote morality and reconciliation where this is desired.
3. The justice systems should continue to include teams that should be comprised of the criminal justice agencies, Church and community organizations that impact, or are impacted by, decisions made in court to ensure shared vision.
4. The Church should seek to be active participants in pursuit for the best interest of children by collaboration in order for it to effectively address the complex social issues that the justice system may not be able to. This is part of the responsibilities of Christians including the need to exercise compassion and love for others in tangible ways (Meulen, 1998).

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## **In whose Best Interest? Tracking Reforms and Culture Changes in Criminalizing Women in Conflict with the Law in Kakamega, Kenya**

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### **Abstract**

Escalating incarceration rates among women suggest an increasing number of children whose rights of parental care are grossly violated and needs deprived. Precisely, there is no data showing the exact numbers of children of imprisoned women in Kenya. However, by law, the Best Interests of the Child remains a primary consideration in all actions affecting children whose parents are in conflict with the law, at all stages of criminal justice and alternative care decision-making process. Children of women in some form of criminal justice control are at the highest scale of vulnerability yet, the least visible populations for policy makers, penal institutions, and international and local communities in Kenya. Very little is documented on the circumstances of imprisoned mothers' children and their needs are largely ignored by penal institutions and prison regimes. This article delved into the situation of Children Accompanying their Mothers to Prison (CAMP) and those left under alternative care due to mothers' incarceration. It attempted to provide a voice for this population whose feelings, opinions, and personal experiences are rarely explored, yet greatly affected by policies and procedures that were not designed with their needs in mind. Based on qualitative interviews with 48 women, the paper documented subtle nuances and parenting concerns of imprisoned mothers. Specifically, it looked into how their imprisonment has affected the life of their children and what has worked for them. The paper suggests policy recommendations, action plans and programs that can be considered to ensure that Kenya effectively implements Article 30 of the African Charter on the Rights and Welfare of the Child.

**Key words:** Children, Incarceration Mothers.

### **Introduction and Background of the Study**

For imprisoned mothers, one of the greatest punishments incarceration carries with it is separation from their children and loss of motherhood. This is exemplified in narratives and counter narratives of two women inmates in a Kakamega-based correctional facility. Rael (not real name) a 39-year-old single mother of three, who worked as a fruit vendor in the Uganda-Kenya border prior to her first sentence, was a convict taken in for brewing *changaa* (an illicit brew). Rael, accompanied by a 10-month-old baby boy, has served in jail for 7 months. She is also a mother of three others (4, 8 and 16-year-olds). Rael's other children stay with her old mother, a widow who depends on coffee proceeds. According to Rael,

*I feel so much pain when I think of my children at home. I cannot tell how my children are doing. I come from far (345 km away) and no one visits me. My siblings say that agreeing to charges that I never committed was quite stupid of me. But I was cheated. So, they never visit me. I ask my God to preserve me to complete my jail term ending in October (two months from now) so that I can join my children. I do not even know whether my children are going to school. The last time I was in court (six months back), I met my ailing mum (with a kidney problem) who told me that my eldest daughter (16 years old and a KCPE candidate) had disappeared from home and was spotted in Nairobi. To date, no one knows her whereabouts. I pray for God to keep me safe and also days to rush quickly so that I can go and search for my only daughter and take care of my other children. (Interview Summary, 2016).*

Willy (nick name) 39-year-old mother of three who had been in detention for two years (since May 2014) awaiting trial on allegations of conspiracy together with the husband to murder (a younger brother-in-law). The husband was also awaiting trial (in the men's wing of the same compound). Willy had been married for 21 years and had three sons (19, 14 & 9 years). Willy was currently disturbed that her case had stalled and failed to understand whether she should be referred to as a detainee or a prisoner. She failed to understand why other cases were progressing while hers was not. On the situation of her children, this is what Willy had to say:

*At the moment I'm just trusting on God to take control. There are lots of issues surrounding me. The last time I was in court when the witnesses did not turn up (nine months ago), I was told my second born son (who was in form one) left school and disappeared from home. After some time Madam (welfare officer) told me that someone called to say that my last born got burnt severely. The same messenger mentioned to her that neighbors burnt my house, sold all my properties including our "shamba" (land). I am worried really how life has turned to be. My children have nowhere to call home. Since then, no one has visited or called again so I am just in darkness. I have told Madam (Welfare Officer) to tell my eldest son to come and*

*visit me so that I know the fate of my small children. I hope one day someone will consider either my husband or I to serve on probation. Personally, I would really appreciate to reunite with my children. If freed or made to serve on probation. I would engage in my small businesses and definitely we would move on with life. I would also visit and give hope to their father. A mother is the 'msingi' (foundation) of 'boma' (home) (Interview Summary, 2016).*

More and more women in conflict with the law are spending time behind bars in many world states (Bureau of Justice Statistics 2003; Council for European Affairs, 2007). Over the last decade, female prison population has soared dramatically with the rate of increase approximated to be much greater than that of their male counterparts in some countries (Incarcerated Women, 2012; Institute for Criminal Policy Research, 2014). At the moment in eleven countries, women comprise more than one in every ten prisoners, that is approximately 2 to 8 per cent of the prison population (Incarcerated Women, 2012). It suffices then to say that women are a small minority of the prison population, but a minority that is growing at a disproportionate rate (Incarcerated Women, 2012).

In the US, the number of women serving sentences of more than a year grew by 757 per cent between 1977 and 2004. This was nearly twice 388 per cent increase in the male prison population. In England and Wales, the number of women in prison has more than doubled over the past decade, while the number of men has increased by half (ICPR, 2014). Between 1984 and 2003, Australia hit a 75 per cent increase in the imprisonment of men while women soared by 209 per cent. Similar trends were reported between 1994 and 2004 in Mexico, Bolivia, Colombia, Kenya, Kyrgyzstan, New Zealand and other parts of Europe. The most recent publication from Argentina revealed that female prisoners within the federal system increased by 193 per cent, while the male population grew by 111 per cent between 1990 and 2012 (ICPR, 2014; Incarcerated Women, 2012). According to scholars (Carson. & Golinelli, 2013; Chui, 2010), the upsurge stems from “get tough” criminal justice policies worldwide, increased use of imprisonment to punish offences that were previously punished by non-custodial sentences (e.g drug offences and nonviolent theft) as well as mandatory minimum sentences applied to a range of felonies.

In the glare of these soaring numbers, correctional center policies are not yet cognizant of the fact that women offenders are a unique segment in any prison population, not only based on their economic and social disadvantage, but also reproductive and caregiving responsibilities. (LaVigne, Davies, & Brazzell, 2008). Women in conflict with the law, world over, continue to bump into regimes, invariably designed for their male counterparts. By all standards and in all manner of definitions, from the architecture of prisons, to security procedures, to facilities for healthcare, family contact, work and training, prisons can simply be described an “inappropriate setting” for a woman (Tompkin, 2009). Prisons do not often meet the needs of women prisoners. All too often, human rights and basic dignity of women in prison and their dependents are systematically violated (Levy-Pounds, 2006).

In our zeal to make women offenders pay by forfeiting their freedom, the main victim is the innocent child facing hardship and developmental risks. The UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders commonly known as the Bangkok Rules is a powerful provision that has not only outlined non-custodial measures ideal for a pregnant woman or a child's sole or primary caretaker, but also the responsibility of state parties (UN Commission on Crime Prevention and Criminal Justice, 2015). The revised UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), covering minimum standards in all prisons, equally stipulates relevant provisions regarding birth registration of children born in prison and issues of parent-child contact among others (United Nations Standard Minimum Rules for the Treatment of Prisoners, 2015)

The UN Committee on the Rights of the Child, during the Day of General Discussion on children of incarcerated parents in 2011, considered the prisoners' children issue during States' reporting processes. Among the key issues was the inadequacy of conditions for children living in prisons. This Committee recommended that where the defendant has child-caring responsibilities, the principle of BIC should be “carefully and independently” considered by independent professionals and taken into account in all decisions related to detention (i.e. pre-trial detention to sentencing) and in decisions concerning alternative placement of the child. (UNCCPJ, 2015; UNSMRTP, 2015). The Committee also made it clear that alternative care for children who are separated from their imprisoned mothers should be sought. Importantly, children are to maintain personal and direct contact with their mothers who remain in prison.

Article 30 of the African Charter on the Rights and Welfare of the Child (ACRWC) is yet another unique tool within the canon of regional and international human rights law. This article highlights directly how the rights of children are affected when their primary caregivers are caught up in conflict with the Law. It lays out a number of provisions ensuring “special treatment” for pregnant women and mothers who are accused or convicted of criminal offences. Specifically, ACRWC's provision requires that non-custodial sentences should always be considered first and that alternatives to detention be established and promoted. In part, it states “States' essential aim of the penitentiary system will be reformation, the integration of the mother to the family and social rehabilitation” (ACRWC, 1989).

The most recent bold move was the adoption of the General Comment No. 1 on Article 30 of the African Charter entitled ‘Children of Incarcerated and Imprisoned Parents and Primary Caregivers’ (ACRWC, 2013). Although not legally binding, it is a persuasive, authoritative and practical tool which defines States Parties' obligations to respect, protect and fulfill the rights of this often overlooked and invisible group of children. Its provisions do not only apply to mothers, but also to fathers, foster parent or



another family member. The GC sets out obligations for State Parties. States must ensure no death sentence on pregnant women or mothers of young children. States must also seek non-custodial sentence, appropriate alternative care or special institutions for children of prisoners, alternative measures to pre-trial detention and regular contact between primary caregivers and children (ACERWC, 2013).

Undoubtedly, well-meaning laws, policies and provisions safeguarding the rights of this group of children are clearly stipulated. In Kenya, the Children's Act (2001) and Kenyan Constitution (2010) echo the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, with clear measures to be practiced within the "Best Interests Principle". In part, the Children's Act (2001) states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the BIC shall be a primary consideration.

Unfortunately, children of prisoners still fall through the cracks created by lack of commitment in response to their needs (Tompkin, 2009). There is inadequate social welfare provision and generally lack of concern by state agencies regarding the plight of this group of children. In Africa for example, the rights and welfare of these "secondary victims of crime" have often been violated, needs either deprived or gravely affected at every stage of their parents' criminal proceedings and during the term of imprisonment (ICPS, 2013; Tompkin, 2009). The impact of parental arrest and imprisonment on children goes beyond affecting the relationship between the child and imprisoned parent, into all aspects of a child's life (ICPS, 2013).

### ***Women in Conflict with the Law in Africa***

Women offending and imprisonment in Africa and beyond is closely associated with women's poverty. Recent statistics show that most women face drug-related charges, minor and non-violent offences that do not pose a risk to the public. An investigation by UN Development Program and Open Society Justice Initiative (2013) conducted in Sierra Leone revealed that women on remand or pre-trial detention constitute a large percentage of the women's prison population. In Kenya's Shimo-La-Tewa Women's Prison, approximately 47.3% of such offenders were in pre-trial detention according to World Health Organization (2011) report. In close scrutiny two questions emerge: Why these huge numbers at the pre-trial detention, and where they rightly belong- the prison, police cells or detention camps.

According to World Health Organization (2011), women in sub-Saharan Africa fall within the economically and socially disadvantaged segments of society, a vulnerability (inability to afford bail or the services of a lawyer) that leads them into detention. Typically, most women convicts are young, unemployed, uneducated and had lived with four or more children of dependent age (Christian, Mellow & Thomas, 2006; UN-DPOSJI, 2013). A high proportion of the women detainees have a history of alcohol and substance abuse; an indicator, that women prisoners are more in need of treatment for mental disabilities or substance dependence rather than isolation from society. In countries where legislation derives from certain interpretations of religious laws, women are often discriminated against and imprisoned for so-called moral crimes (UN-DPOSJI, 2013). As such the proportion and the rate at which women are held in pre-trial detention is growing faster than that of male pre-trial detainees in many African countries. Typically, African states have not lived up to the expectation of the principle that states that "pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim" (UNCCPJ 2015; UNSMRTP 2015).

### ***Women Incarceration: A Developmental Risk for Young Children***

We do not know with precision how many children in Africa have primary caregivers who are in conflict with the law. This is because jails, corrections departments, schools, child welfare departments, and other systems do not have accurate statistics for this vulnerable population. However, according to estimates by ICPS (2013), there were just over one million prisoners in Africa (excluding Eritrea and Somalia) in October 2013. In about half of these countries, large proportion of prisoners, that is, more than 40 per cent who were in pre-trial detention reported to have had three and more dependent children. Indeed, Wildeman (2009) reported that rights of a large number of children are affected by imprisonment of over a million adults in Africa, the vast majority of whom are likely to be primary caregivers of at least one child and most likely more.

Reyes (2001) referred to children having caregivers in contact with the law as "hidden", "secondary" victims of crime or collateral convicts serving sentences of their own. Certainly, at all stages of criminal proceedings, before a primary caregiver's incarceration, from arrest to trial to detention and at imprisonment, children experience a range of challenges. Children affected by the incarceration of their fathers are far more numerous, but it is the incarceration of mothers that is more destabilizing and disproportionately devastating (Dallaire, 2007; Wildeman, 2009). As such, Dallaire (2007) and Myers and colleagues (1999) referred to them as "the riskiest of the high-risk children" in societies. This worsens when mothers are imprisoned more frequently or for longer periods of time or in more punitive conditions. In principle, the scholars underscore that a mother's imprisonment extends beyond and affects families already challenged by poverty, inadequate housing, abusive or exploitative partners, mental illness, substance abuse and legacies of child abuse.



The impact of mothers' incarceration on developmental outcomes of a child extends well beyond the imprisonment period (Murray & Farrington, 2008). It has an impact on the child's internal world (thoughts and feelings), an impact on the family world of the child and an impact on the child in the outside world (at school, in the neighborhood, with peers, etc.) (Murray & Farrington, 2008). It disrupts positive, nurturing relationships, leads to economic strain and instability, elevates the likelihood of recidivism for women, destabilizes an already vulnerable family situation, and causes job and housing losses (Hairston, 2007; Murray & Farrington, 2008). In the words of Christian, Mellow, and Thomas (2006, p. 87) "... families are important to prisoners and to the achievement of major social goals, including the prevention of recidivism and delinquency."

According to Byrne, Goshin, and Joestl (2010) and Shlafer and Poehlmann (2010), mother's incarceration has an independent effect on a child's emotional and behavioral well-being, family stability and financial circumstances academic performance and mental health (Hairston, 2007; Murray & Farrington, 2008). Furthermore, there is the danger of family criminalization whereby a child who matures to a parent in prison may believe that to be norm. When a mother engages in criminal behavior, becomes involved with the justice system (e.g. arrest, pending court proceedings), is under restrictions in the community, a child is the most affected. Undoubtedly, the impact of the separation caused by incarceration of the mother is most salient for a child (Hairston, 2003; Murray & Farrington, 2008; Wildeman, 2009).

A study by Myers, Marsh, Amlund-Hagen, and Kennon (1999) which sampled children of imprisoned mothers identified a great many risk factors besides mothers' incarceration, including poverty, drug and alcohol problems in their families, community violence, and multiple changes in caregivers. These scholars noted that lives of children are profoundly disrupted when mothers are arrested. Such children experience internalizing (fear, withdrawal, depression, emotional disturbance) and externalizing (anger, fighting, stealing, substance abuse) problems, as well as heightened rates of school failure and eventual criminal activity and incarceration. To date, such children live in every city, every town, and every rural setting such as Kakamega County, but despite their high degree of trauma, amount of trouble they are likely to cause later, they are oddly ignored and no state agency provides for their services in a coordinated way.

Empirical evidence suggests that children may be protected from harmful effects of mother's imprisonment by having stable caregiving arrangements, by their families receiving social and economic support, and by living in places with more sympathetic public attitudes toward crime and punishment (Shlafer, & Poehlmann, 2010). As a result, world states are increasingly initiating programs that might prevent adverse outcomes for children of women prisoners namely: provision of financial assistance, social support, parenting programs, improved prison visiting procedures, and alternative forms of punishment such as community service and day fines (Owen & Deegan, 2013). None of these initiatives is documented in Kenya. This grounds this paper which not only illuminates the circumstance of children of imprisoned women, but perhaps stimulates some vibrant dialogue on the need for genuine penal reforms and culture change in criminalizing women in Kenya in order to minimize harm and to provide proactively support for children.

### Theoretical Perspectives Guiding the Study

This study was anchored on the assumptions of three theories, namely developmental, life span and **risk-resiliency theory**. From a developmental perspective, Bowlby's (1973) attachment theory helps in understanding the importance of parent-child relationship. For Bowlby, lack of opportunity for regular and sustained contact between a child and parent prevents development of a child's attachment and can generate a set of adverse emotional reactions. This interferes with optimal development of the child. It therefore underscores the crucial need for a secure attachment relationship with an alternative caregiver. Better still, there is need for parenting and visitation programs that maintain this contact even as women offenders are held accountable for their offenses (Parke, 2002).

Elder (1998) an advocate of the life-span theory described development as a process that continues throughout the life cycle into adulthood. The childhood period is critical in shaping later stages of development. Two tenets of this theory stand out: development and adjustment. Adjustment during parental incarceration, vary greatly depending on the age of the parent and developmental level of the child. Young children are overly dependent on primary caregivers, meaning that their developmental stage must be considered during such eventualities.

Finally, risk and resilience theory explains that successful adaptation in the face of stressful life events like the incarceration of a parent varies as a function of two things: the form and frequency of the risks and, the protective or resilience factors that buffer the child from the adverse events. Specifically, protective factors are found in a supportive family environment. The presence of a supportive parent can help buffer the adverse effects of incarceration (Luthar et al., 2000). The environment extends to people outside the family, in the school system, peer groups, or churches, who support children's and parents' coping efforts. The three theories explain clearly that children of incarcerated women are at high risk of various developmental problems if policies guiding incarceration of women are not designed with them in mind.

## Methodology

This study adopted a developmental lens in describing the experiences and struggles of this often-overlooked group of people. Based on a small scale qualitative case study, six Focused Group Discussions (eight women per group) were conducted with 48 women in conflict with the law (22 non-convicts and 26 convicts, age ranges 22-79 years) in Kakamega Women's Correctional Facility in Western Kenya. Purposive and stratified sampling techniques were adopted in selecting women convicts with dependent children. Women serving long and short sentences were selected for the study. In-depth interviewing was conducted with 2 Women Prison Welfare Officers, placing the total numbers of participants at 50. On receiving ethical approval and research clearance, FGDs and in depth personal interviews were held within the women prison premises. The instruments were specifically designed for purposes of understanding the impact of mother's imprisonment on children's wellbeing. Interviews (group and personal) permitted adequate capturing of all the subtle nuances of children and inmates' experiences and in documenting any changes that were viewed by the participants as having derived from incarceration. In-depth analysis of women's voices provided rigor in getting deeper sense the situation of their children. Participant observation allowed the researcher to get a feel of the environment with regard to facilities and programs for Children Accompanying Mothers into Prison (CAMP). Data analysis was accomplished by thematic categorization and reports were done in qualitative (verbatim) inform of excerpts.

## Findings and Discussions

The discussion of the findings focuses on childcare arrangement before imprisonment, type of offence, occupation and economic situation before incarceration, challenges during the period of imprisonment and the situation of their dependent children accompanying them and those left at home. The results revealed that 32, that is 67 % of the women who participated in the study had children of dependent age. Twelve (24%) lived with their daughters and grandchildren. At the time of their imprisonment, their younger children sought refuge outside the home such as neighbors' homes while older children were left to fend for themselves. Three of the six younger children had since been taken to a children's home since no one was ready to take care of them.

Thirty-nine (81%) of the women were serving or detained for the first time. A majority 36 (75%) of them had been charged or waiting to be charged for petty and non-violent offences such as brewing *changaa*, stealing property, fights, child neglect, child abuse, lack of documents, conspiracy to rob and roaming at night. This agrees with reports by Christian et al. (2006) and UN-DPOSJI, (2013) which linked economic disadvantage to crime and detention of women in sub-Saharan Africa.

As highlighted by ICPS (2012), significant portion of women prisoners at 12 (25%) were waiting to be charged or were charged with capital offences such as robbery, conspiracy to kill, murder, and manslaughter. In-depth interview with the women revealed that some of the offences appeared to be based on malice while other seemed to have been unintentionally committed.

Thirty-six (75%) women prisoners reported to have suffered social and economic challenges before incarceration. Among these challenges which led them to crime were lack of financial support from spouses, failure to give birth, abusive relationship, irresponsible relationships, social alienation and stigma associated with their HIV/AIDS status, wrangles within polygamous marriages, malice from close relatives, marital conflicts and poverty.

Similar to earlier report by UN-DPOSJI (2013), the largest proportion at 41(85%) of women who participated in this study reported to be doing small businesses such as vegetable and fruit vending, *changaa* brewing, selling clothes, charcoal, engagement in casual labor on farms in an attempt to either supplement family income or as the bread winners of their children and grandchildren.

On the issue of childcare arrangement, 28(58%) had their children being supported by relatives such as aunties, grandmothers, co- wives, step-sisters, or cousins. One woman had her child taken care of by a neighbor. This corroborates Murray and Farrington (2008) and Hairston (2007) who reported on childcare disruptions in the event of mother's imprisonment. Twenty-four (50%), of the women lived with their spouses up to the time of their imprisonment. A significant proportion at 6(13%) mentioned that their spouses had since remarried.

Similar to reports by Krisberg and Temin, (2001), 31(64%) respondents reported that their children faced a host of problems and numerous life stressors, including caregiver changes, increased poverty, and involvement with the child welfare system, in addition to the pain of parental separation. Some of the common reports were children disappearing from home, child marriages, child trafficking, residential disruptions, child abuse, drug abuse, sexual abuse, child labour, poor access to medical services (e.g. ARVs for children living with HIV/AIDS), poor school attendance, school disruptions and transfers, childhood accidents and injuries, as well as behavioral and developmental disorders. They received most of the reports through welfare officers, who received calls on their behalf and alerted them or when they went to courts. The challenges the women listed were found to result from increased rates of anxiety, depression, learning problems and lack of adequate care of the children. Only 7(15%) of the women reported that their children were doing well in the hands of responsible spouses and relatives. 8(17%) reported to be unaware of where their children were, while 2(4) had no children left at home.

### ***Status of Children Accompanying their Parents to Prison***

The study wanted to know about the welfare of the women prisoners with young children and found that the children stayed with their mothers until their third birthday after which alternative childcare arrangement was sought. More often than not, mothers were encouraged to prepare for children's exit at age 3 by identifying relatives that would offer custodial care upon the children's exit. For a few of the children who lacked kinship networks, chances or spaces would be sought in various charitable children's institutions which were often packed to capacity.

In an interview, one of the inmates serving a one-year sentence and facing charges of possession of illicit brew and accompanied by a seven-month-old baby boy had this to say;

*Allowing mothers to come with young children here is quite good. My only boy 'Baraka' (meaning blessings) gives me hope to live. I am really anxious about the life of my other children but when I look at him, I see reason to live tomorrow. If I was not allowed to have him here, I would have died of stress because he was barely three weeks when I was arrested. I had expected that I was going to be released on the basis that I had a young child but when I realized that it was not forthcoming, I accepted the situation. Most of us accompanied by young children have successfully served their jail terms and they have always encouraged me to take heart. (Interview Summary, 2016)*

### ***Basic Services and Facilities for Children Accompanying Mothers in Prison***

A total of twenty-four (24) children aged between six months to two and a half years lived with their mothers in the correctional facility. None of the inmates was expectant. The facility seemed overstretched since it is primarily meant to cater for about 100 inmates and 10 children. Observation showed that most of the children appeared to be in good health. They had access to good nutrition (e.g special diet in form of milk and eggs). Both mothers and children received appropriate medical treatment and had access to specialist child health and mother services with the Provincial General Hospital. Health services for both mothers and children were in place offering immunization, growth monitoring and family planning services for mothers. Well-wishers and charitable organization provided clothes, mattresses, blankets, foodstuff and toys. With regard to moth- child contact and child care, the correctional facility had a schedule where mothers had the opportunity to do manual work and at specific time have chance to be with their children. During manual work, an inmate in charge (commonly referred to as mother of children) of childcare remained with the children in the children's units and took care of all the 24 children's needs.

The childcare unit doubled up as an educational unit where the "mother" interacted with the children as they played and learnt some concepts in number work, letter identification, poetry, games and songs. The child unit had a few charts and materials for children's play donated by well-wishers, and a few play and recreational facilities in the outdoor environment. It is worth noting that the young children had lots of opportunities and were not restricted indoors during the day.

In an interview with the "house mother" about the situation of these children, she said:

*Here we are provided with blankets, clothes, toys, shoes, mattresses for our children. When our children are sick they are taken to the clinic and can be referred to PGH. This happens to all of us including pregnant women who also get some special treatment such as getting packets of milk just as our children. There is nutritious diet. Our children also get all forms of post-natal care facilities. I am in charge of nursery and we allow children to play and there is some form of stimulation in the nursery class. We have drawings on the wall and we teach them some letters and numbers. For all children who are in need of immunization parents are encouraged to mark their clinic days and alert the welfare officer through our leader about the same. When this is communicated, transport is organized and children are taken for these services on time. (Interview Summary, 2016).*

The study showed the children (0-3 years) permitted by Kenyan Law to accompany their mothers to prison seemed to enjoy better services (safety, custodial, security, nutrition health and education) and emotional support. This was not the case with their siblings left at home probably with ailing guardians, aged grandparents or irresponsible caregivers.

### **Conclusion and Recommendations**

This study has shown that a majority of women who were serving sentences in Kakamega Women Correctional Facility were primary caregivers at the time of their imprisonment and lived with children of dependent age, more than half of whom were under the care of relatives.

A majority of the women convicts were serving or were detained for the first time charged or waiting charges for petty and non-violent offences

The largest proportion of the women convicts lived in poverty before incarceration. They either operated small businesses or engaged in casual labor to supplement family income or as the bread winners of their children and grandchildren. A majority

reported to have experienced economic hardship due to death of spouse or divorce, marital conflicts, lack of financial support from spouses, abusive relationship, irresponsible relationships, social alienation, and stigma associated with their HIV/AIDS and problems associated with multiple partner marriages.

With regard to the situation of the largest proportion of children left at home, women prisoners reported that incarceration ripped their children off parental love and care but also placed the children in a very vulnerable and deprived state.

Young children (0-3years olds) who accompanied their mothers into prison seemed to have access to better nutrition and health care services, which was made possible through philanthropy.

Most of the women went into crime due to factors beyond their control and some mainly due to childcare responsibility.

Even though some positive initiatives were in place in legislation and in individual prisons when dealing with children whose mothers were in conflict with the law, most of these were not mainstreamed in the justice systems, penal institutions, police services and beyond. Change in this area is therefore urgently needed so that the rights of children with imprisoned mothers are fulfilled across Kenya. In addition, there is need for the following:

A reevaluation of “get tough policies” that have led to criminalization of all offences and felonies committed by women. This could lead to provision of some form of community-based sentencing, instead of prison-based incarceration. The culture and mission of the correctional system could also be expanded to include reducing recidivism and improving public safety by facilitating maintenance of mother-child relationships during mothers’ imprisonment when it is in the children’s best interest.

Programs that allow women prisoners to maintain their caregiving roles as they serve sentences should be encouraged in every correctional facility. This could include monthly child-centered visitations within a child-friendly environment. This is likely to enhance mother-child bond and connectedness. Parenting classes should be availed to women prisoners to help them deal with parenting issues that come with incarceration.

There is need for dialogue about changing the cultures of disparate systems that will ensure that the needs of children of incarcerated mothers are addressed. In this case, the justice system, penal institutions, family courts and child welfare agencies should be held accountable in designing legislation and seeing to it that services for maintaining connections between a child and an incarcerated mother are in place. Advocacy and attention of well-wishers, donors, state and county legislators could be stimulated to promote change of attitudes that have so far hindered better results in caring for such children. This may lead to establishment of social support policies and services that are likely to help children navigate the period during their mothers’ incarceration.

Alternative caregivers, school counselors, teachers and all those who work with children of incarcerated mothers should be supported (materially and morally) and trained in giving voice to issues concerning these children. They should also be empowered in counselling using a variety of interventions such as individual counseling or therapy, family therapy, or group therapy can be located in schools, clinics, or prisons.



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## Application of the Best Interest Principle to the Criminal Justice Juvenile System: A Review of Emerging Case Law

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### Abstract

This paper sought to highlight specific instances of sexual offences cases that led to the failure of the realization of the best interest of the child due to the judicial ambivalence that encompasses this principle. The paper accentuated the predominantly sensitive issue in the criminal process on the dilemma of upholding the welfare of the child and giving due justice to an accused person. This issue is heightened due to the absence of what exactly constitutes the best interests of children who are involved in the Criminal Court Trial procedure due to the silence that envelopes this internationally recognized principle. The study used data from already decided court cases and purposively sampled children's courts in Malindi and Nairobi. The key informants comprised magistrates and lawyers with data collected through interviews and observations. The study examined various sexual offences cases in the Criminal Justice System against certain parameters that were used in scoring the best interest of the child, whereby children were either juvenile delinquents or the victims. It found the whole court trial procedures to be inadequate in providing for the best interests of the children involved. The study makes policy, administrative and legislative recommendations and provides a draft of the guidelines that can be stated to cater for the best interests of the child in the Criminal Justice side. Its overarching emphasis is to signal practices that are embedded in the criminal justice system that need to be reconsidered and to call for the establishment of better laws.

**Key words:** Sexual Offences, Criminal, Juvenile, Emergence

### Introduction and Background of the Study

The Best Interest of the Child principle is the main principle that governs the justice system in regard to matters that affect children nationally and globally. Even though there is no standard definition of "best interests of the child", the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child with the child's ultimate safety and well-being the paramount concern (Child Welfare Information Gateway, 2016). Hence the rules concerning the Best Interest of the Child are regarded by the goal of maximizing the child's developmental outcomes, with the assumption being that a child whose "best interests" are protected stands a better chance to become a socially well-adjusted, productive and prosperous citizen (Herring, 2002).

It is one of the four principles that form the backbone of the United Nations Conventions on the Rights of a Child (which entered into force in September 1990) as it is espoused in its Article 3. In the Kenyan context, it is a constitutional requirement to protect the best interest of the child and any failure to implement any relevant laws aimed at protecting children will amount to an infringement or violation of the constitutional rights (Article 53(2) of the 2010 Constitution). This principle is at the most distinguished as it is; proclaimed as it embraces the best and highest standard, mocked as it can be highly subjective and is relied upon as there is nothing better than it (Kohn, 2008). The principle which can generally be termed as a principle deriving from the Anglo-American family law has had an impact on the legal evolution of the jurisprudence regarding matters affecting children leading to the creation of a new area of law, that of "children's rights" as written by Breen (2002). This can be seen in the creation of various laws that affect children; the 2010 Constitution of Kenya, the United Nations Convention on the Rights of Children, African Charter on the Rights and Welfare of Children, Children Act (2001) and some parts of the Sexual Offences Act (2006).

According to UNICEF, approximately 1.2 million children worldwide are subjected to various forms of sexual abuse while a child is sexually abused every two minutes. In Kenya, it is difficult to estimate the number of children who are sexually abused due to lack of systemized reporting of abuse cases (UNICEF & ANNPCAN, 2005). This study focused on sexual offence cases involving children either as perpetrators or victims due to the increase of such cases especially at the coastal region of the country with Malindi town being one of the research sites.

This surge is best summarized by the Principal Magistrate at the Malindi Law Court who stated that most laws do not reflect the 21<sup>st</sup> Century situation as most children become sexually active at an early age with the community's cultural background playing a role. The court procedures which are technical in nature and mostly centered on the guilt or innocence of the accused persons do not help in the achievement of the best interests of children (Abrams & Ramsey, 2000). Also, C. Tapper (2010) noted in *Cross and Tapper on Evidence* that the Criminal Justice System assumes that children are mature enough and carry the same capacity as adults

to argue out their cases before an impartial judicial officer who makes decisions based on the arguments brought forward by the respective parties. In essence, there is no specific law that provides procedural mechanism for the protection of children involved in sexual offences during the trial process of a criminal court, leaving the judicial officer to use their discretion to safeguard the best interests of the child.

The Children's Act (2001) which is the main legislation that governs matters concerning children emphasizes the principle of the best interest of the child in its section 4. It seeks to caution both public and private institutions in safeguarding and promoting the rights and welfare of children and that their interests should take precedence in all matters concerning them. This principle has been criticized by scholars and legal practitioners who term it as being too undefined to be of assistance in legal issues as there is no consensus on what is "best" in various instances that are brought in court (Mnookin, 1985). Hence, it is surrounded by judicial confusion over just how to determine what the best really is and occasionally induces the judges to rely on their own values and biases to decide the case therefore being scoffed at for being subjective (Kohn, 2008). Nevertheless, it is the main standard that is taken into account as the welfare of the child takes paramount importance in the justice system.

### **Methodology**

The study involved both a desk review and field study. The former comprised the review of statutes, journals, periodicals, books, selected cases and internet searches as secondary sources of data. The study was conducted in two purposively selected children's courts located in Nairobi and Malindi in Kenya. The courts are a creation of the Children's Act (2001) and have special jurisdiction on children's matters. The study sampled cases of children from both genders who were either victims/complainants or were the perpetrators in the sexual offences cases.

The study also interviewed a number of key informants who were studiously selected. The study purposively sampled 2 prosecutors, 2 magistrates and 1 lawyer who had been involved in such matters as defence attorneys. The magistrates presided over the trials where the children were involved and were therefore in direct contact with them in court. Their roles included summoning witnesses, listening to the tendered evidence and ensuring that the laid-down court procedures were adhered to. Under the legal system in the Criminal Procedure Code (Section 125) they are required to be impartial, non-partisan and passive throughout the process. The lawyers interviewed came into contact with the children either by defending them or by representing the other party.

Data collection instruments included records review and interviews. The first technique involved the review of 30 randomly selected completed criminal files involving children from both the Kenya Law Reports and the registries of the Malindi and Nairobi law courts. The perusal of the court records enabled the author to understand the basis for the courts' acquittal or conviction of accused persons as the author was able to analyse the court procedures as recorded in the files. There was also a review of other secondary sources of data including books, journals and internet sources. The second technique involved conducting interviews with key informants, done through a series of open-ended questions which enabled the author to obtain in-depth information from the interviewers. Recording of the data was done through note taking.

The majority of the cases which were used in this research brought about the contentious issues of the best interest of the child in regard to defilement and sexual abuse where either the child was the victim or the principal offender. These cases were gauged against certain elements deemed crucial, especially in a trial process. The parameters were used to assess the merits of each case in the determination of whether the principle was achieved and they also acted as guidelines during the interviews. These parameters were used to gauge whether the welfare of children was taken into consideration during the whole trial process of the courts from the investigation stage till the sentencing stage (of the Criminal Justice System). The data collected was analysed and assessed against the stated parameters and was then presented in a narrative format.

The first element was the treatment of children by the police which focused on gender sensitivity and on who exactly should question and take statements, with the last issue being on how long they should be in custody. The second element was the custody of children during the trial process; the issues were how long they should be in custody, availability of bail/bond to child offenders and placement of children in age-appropriate remand homes. The third element was determining whether courts were consistent with established laws which had been promulgated in order to safeguard the best interest principle. The fourth element was the priority and interest of the child in the criminal proceedings; the issues were whether the matter was being heard expeditiously, priority in court cases, whether the proceedings were made in a friendly environment such as the use of the Children's Court, and presence of legal representation. The fifth element was the issue of evidence of a child; the factors being examined were the significance and procedure for conducting a *voire dire*, and elements of consent in their evidence.

### **Findings and Discussion**

There was little information on the various factors that courts should uphold in criminal trials as a way of safeguarding the best interests of the children involved. The question to be answered by this study therefore was; Within the context of procedural justice in the Criminal Justice System in regard to sexual offences cases, what elements of the "Best interests of the child" principle should be upheld in order to guarantee fairness to children in trials?

Case 1: In Criminal Appeal Number 10 of 2013 (*Joel Omino Ngutu v Republic*), the accused was charged with the defilement of a minor as per the charge sheet but the court established that the definition given to genital organs under Section 2 of the Sexual Offences Act (2006) was scientifically and socially wrong. Under the Sexual Offences Act 2006, Section 2(1) penetration is defined as partial or complete insertion of the genital organs of a person into the genital organs of another person and it includes the anus. In this case, we sought to evaluate the consistency with established laws, as through this ruling, a question was raised on how to establish that young boys have been defiled and the process to be taken while prosecuting such a case. To deny that the anus is not part of the genital organs is reaffirming that it is only young girls that can be taken advantage of and that boys cannot be defiled. This being an appeal decision also means that it can be used as an authority to bind lower courts' decisions. In this case, the interests and emotional welfare of the child were put aside, as we observed a level of judicial discretion that was difficult to reconcile with the established laws of the land. The issue of consistency with established laws is a very tentative issue which has become problematic due to the wide and unchecked judicial discretion, as observed in Case 1.

Case 2: In Criminal Appeal Number 73 of 2004 (*Ceretta Medardo v Republic*), the accused had been set free after the parents withdrew the charges in a case before a Senior Resident Magistrate after he had been charged with having carnal knowledge of a 10-year-old boy against the order of nature. The appeal was brought forward to tackle the issue of who can withdraw a complaint and whether parental responsibility includes the right to withdraw complaints on behalf of their children. Section 204 of the Criminal Procedure Code clearly states that before a court can permit a withdrawal then the complainant has to be the one who withdraws it and that the court has to be satisfied that there exist sufficient grounds for permitting such a withdrawal. In this case, we looked into the consistency with established laws as through this we could see that the reasons for withdrawal were not set out to enable the trial court to exercise its discretion. An interview with one of the lawyers based in Malindi where the matter originated from stated that this was a common occurrence especially at the coastal region where sexual offences are on a surge. The attorney stated that most parents of assaulted children usually withdraw the charges prematurely after discussion with the accused person, making it a worrisome habit that is cropping up. The appeal nevertheless set the matter right by stating that the justice system would not facilitate reconciliation where the offence amounts to a felony and that the reasons have to be sufficient enough to persuade the court to withdraw the charges and the reasons have to be documented in case one would seek to appeal the decision.

Case 3: In Criminal Appeal Number 252 of 2011 (*Lazarus Ocharo Kieya v Republic*), the justice system was faced with a dilemma on what interest to consider more; the accused's innocent presumption which is found in Article 50(2)(a) or the best interest of the child which is enshrined also in Article 53(2) of the 2010 Constitution. The court was inclined in examining a child's sexual history as it stated that the clinical officer that examined the minor that had been abused had not indicated whether the hymen was freshly broken or was an 'old tear'. This brings out one of the most contested implied presumption on whether cases that involve sexual abuse of children should factor in if the minor was sexually active or should presume that they had not. In this case we sought to examine the emotional interest of a child and the issue of the evidence of a child. The questions to be answered are whether a child being a victim of abuse would lie about such a matter as defilement and whether she would have a motive to do so in court. The role of a *voire dire* examination is to check whether a child possessed sufficient intelligence to appreciate the need to tell the truth as per Section 19 of the Oaths and Statutory Declarations Act. Hence if the *voire dire* examination has been conducted and the child has been sworn in then why doubt the evidence and refute it based on the omission of a fact. It is hardly appropriate to drag a child to narrate the horrific events that had occurred to her after establishing that she has the capacity to tell the truth and after swearing her in then later on term her a liar after a third party omits to state whether the hymen was freshly broken or was an old tear. All these matters would have been tackled at the *voire dire* examination to put to rest the matter whether the child can lie to the court.

The issue of the evidence of a child is also greatly hampered by the delay caused in a majority of cases as most of them testify on the events that occurred almost 5 months down the line from the day of the occurrence. This delay causes most of them not to recall the precise details of the abuse and this may lead to contradictions between their testimony and the statements recorded by the police. These contradictions create doubts in their evidence as they happen to be the key witnesses in their trials (Saywitz, 1990). This is seen in Criminal Appeal 515 of 2007 (*David Jairo and Ann Achieng v Republic*) where the court allowed the appeal alluding to the fact that the child who had allegedly been defiled did not conduct herself like a person who had been defiled as she did not complain immediately or report to the police. Her silence throughout the aftermath of the incident and the night raised more questions than answers. This was clearly stated by Ollando (2013) that the courts need to understand the nature of the commission of sexual offences involving children and the inability of children to report directly to the police. This is as they are dependent upon adults who make the decision whether to report to the police or not and when. She also mentioned the aspect of social stigma that may hamper the reporting of the cases to the police or for a child to genuinely express what had occurred to them (Ollando, 2013).

This then illuminates the heated debate on whether minors can consent to sexual intercourse regardless of the fact that the law states that consent can only be given by adults. Different cases have tackled this sensitive issue differently bringing out the divergent opinions of various judges. Defilement is a strict liability offence which only needs proof of the penetration and age of the minor but has provisions of defences in regard to false representation of the minor's age through Section 8(1) and 5 of the Sexual Offences Act 2006. The remaining cases that were reviewed by the author sought to tackle the place of consent among minors and



what elements of consent should be demonstrated for it be taken into account by the court. The main issue that arises is how the best interests of the child can be safeguarded and for the law not to turn a blind eye to the accused causing any injustice.

Case 4: In Petition 6 of 2013 (*C K W v Attorney General & another*), this case involved two minors who had been dating and the accused had been charged when he was 16. The appellant sought a declaration that Sections 8(1) and 11(1) of the Sexual Offences Act (2006) were invalid as they criminalized consensual sexual relationships between adolescents. He further stated that the law was applied in a discriminatory manner as it was only the boy who was charged which was contrary to Article 5 of the Children's Act (2001) which prohibited any form of discrimination against children. The appeal was dismissed as the court stated that minors cannot give any consent. The issue being investigated was whose best interest of the two minors involved in the case should be safeguarded. In the first place, the appellant stated that the treatment he received from the police was dismal as he had been held in custody a long while and the investigation that had been done by them was insufficient as it did not contain the correct account of what had transpired. The other issue that arose and was brought forward at the appeal stage was that his education had been discontinued during the period of the trial leading to the main issue of whether children who were in remand homes continued with their education or had to wait until the trial concluded. The final issue was whether there could be consensual sexual acts between minors and if so how consent could be determined. In *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013], the court stated that if one's consensual sexual choices were not respected by society but were criminalized then one's sense of self-worth would inevitably be diminished. The judges in the case stated that if two teens engaged in sexual penetration with one another, each would be guilty of having statutorily raped the other.

Case 5: This is contrary to the ruling that was in Criminal Appeal Number 32 of 2015 (*Martin Charo v Republic*) in which the court ruled that the offence of defilement should not be limited to age and penetration but also the conduct of the complainant should play a fundamental role in a defilement case. Here the judge allowed the issue of consent as the complainant stated in court that she had sneaked into the appellant's house with the intention of having sexual intercourse with the appellant and had been doing so for a while. The court stated that the appellant should not be condemned for the voluntary acts of the complainant as the complainant seemed to be enjoying the relationship. Here in order to preserve the best interests of the child, the law should clarify on how consensual sexual intercourse between a minor and an adult or between minors should be treated. When a minor has a sexual history, should the law treat the minor as an adult and change the charges from defilement to rape or should the issue of consent need some corroboration? If consent should be regarded, what parameters should be used? As the court in the *Martin Charo* case stated that if the behaviour exuded by the minor is likened to that of an adult then the consent hence becomes a factor in the case. The Honourable Court of Appeal Judge Fred Ochieng in Petition 6 of 2013 was right when he stated that;

*"To this end, I send out a challenge to professionals in matters of children psychology and in the overall wellness of children to conduct appropriate studies in Kenya, with a view to ascertaining if there were mechanisms and procedures which could be put in place, to offer protection to children whilst simultaneously being proportionate to both the circumstances of the child and the offence."*

The author was able to establish that in all the assessed cases apart from a few, the Children's Court was never used and the children were subjected to the same rigid and tense environment of the main court room. The situation was even worse for those who were in conflict with the law as they were subjected to the open court and some lacked legal representation.

In most of the cases, the children involved in the cases were subjected to administrative shortcomings in the case of the tight schedule of the court dragging the cases longer than required. This was due to the criminal justice agencies that included the Office of the Director of Public Prosecutions, Judiciary, Children's Department, Probation Department and the Police not working together as a team but independently of each other.

The principle has not been fully expanded to state the standards that could lead to the realization of the best interests of the child. The major principles also that surround this principle are in collision with modern day children. It is quite hard to reconcile the modern day habits and behaviour to a principle that is best suited for another era and time. Breen (2002) craftily expounded on this when she stated that the principle which is based on utilitarian law which espouses the common good is forced upon a society that focuses on ethical egoism that is the most good for oneself.

## Conclusion and Recommendations

The cases examined show that much needs to be done in order to entrench the principle of the best interest of the child in the justice system. The greatest concern with the use of this standard is that the application of the principle rests on case law, early precedents and loose statutory guidance which are not that substantive and are in collision with the current state of children. The standards that have been codified need to be defined further or the guidelines and factors to be considered when dealing with the best interests of the child are listed. The law is defined as a dynamic living entity which either conforms to social change or leads the path towards societal change. Should the principle be revised to accommodate the rapidly progressing way of life or should it hold firm

to values that are being considered obsolete? Nonetheless, this principle leads the path in safeguarding the rights and welfare of the child and should be heralded and defined clearly as justice is and will always be the conscience of the whole of humanity.

## 1. Legislative Reforms;

The cases examined highlight the need for law makers to rethink the standards that make up the principle of the best interests of the child. The law should state what elements of the “best interests of the child” principle should be regarded by the courts and what should not. The elements should then be aligned to the various aspects of social life that have progressed; in particular the issue of consent in regard to sexual relationships with and among minors should be examined further. Can minors of a particular age give consent and if so should that consent be corroborated? In light of the recent case laws (*Martin Charo case*), the law should clearly state where it lies in this matter. The law should be unequivocal on how consent can be demonstrated in cases where a minor behaves like an adult.

The Children’s Act 2001 regards Children’s Courts as subordinate courts which are not independent but fall under the management of the Chief Magistrate’s Courts in whose jurisdiction they are located. The policy makers can rethink whether it is time the courts were made independent with their own magistrates and judges who will hear cases with no undue delay and prioritize them before any other cases.

There should be guidelines on how to investigate and handle sexual offences cases involving children by the police. These guidelines will enable the police to know how to treat child offenders and also child victims, keeping in mind that their best interests should be upheld. This should also include how long child offenders should be in custody, how long an investigation should last before the matter is forwarded to the courts, and lastly how they should take statements from children.

## 2. Judicial reforms;

The study makes the following recommendations in order to address the inadequacies of the trial procedures:

Use of the Children’s Courts: This will be to the best interests of children, and also as a way of safeguarding their dignity and privacy. These courts should be used on a daily basis as they will prioritize children’s matters and avoid delay in the disposal of the cases. The courts should also seek assistance from child experts in terms of how to deal with both children in conflict with the law and children who are victims of crimes. The experts should be sourced from various fields that are from social work, psychiatry, psychology and many more. There should exist friendly court arrangements where the victims are not face-to-face with the accused persons as it may have an overpowering effect on them and hence make them vulnerable and afraid to give their evidence. The courts can use protective screens to separate the victims from the accused.

In terms of case management, the judiciary should strive to set a time limit period in which sexual offences cases involving children should be finalized. In regard to that, child victims of sexual abuse should be made to testify immediately after the abuse has occurred so as to ensure that they don’t forget the details of the abuse during their testimony. The hearing of such cases should be made continuously without irrelevant adjournments.

In regard to the Criminal Justice Agencies, they should strive to work as a team to ensure that there is a just and expeditious trial to both parties. If they do work together they will be able to address some of the administrative shortcomings that are faced in trials.

In the case of Priority and Interest of the Child, the Judiciary can create some brochures detailing the steps in the trial process. This would enable children to know what to expect in court and what is exactly expected of them in court as this removes anxiety which arises from lack of information. Children’s access to information about the justice process is mainly dependent on family members who may also not be properly dispensed to have the full knowledge of how the law works. In England, Wales and Scotland, the judiciary has developed special procedures to prepare child witnesses and victims of crime of their court appearance. In Scotland, all CVSA receive an explanatory leaflet “Going to Court” to inform them about the court before the court orientation visit. This has led to an increased number of CVSA willing to testify in CSA cases in Scotland (Spencer & Flin, 1990). As they do this, they should also provide psycho-social services to the children so that the children are emotionally and psychologically prepared to testify.

The Judicial Training Institute should develop a course for magistrates and judges who will handle children’s matters so that they may know how to handle such trials and be sensitive to the issues that arise from them.

The judicial discretion that encompasses this principle should be founded on the rule of law and should be defined to be of use in legal decisions, hence there should be a consensus of what is “best” to the child. The court can also come up with a manner of balancing the rights and interests of the accused and the child victim in order not to cause a miscarriage of justice.

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## **The Forgotten Victims of our Correction System: The Case of Children of imprisoned parents in Kenya**

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### **Abstract**

Imprisonment has been used as a means of punishment and correction since the 18th Century. Different professionals have discussed the role of imprisonment as punishment and how it has reduced crime and rehabilitated offenders, but criminologists have paid little attention to the effects of imprisonment on the children of imprisoned parents despite their magnitude. These children, whose number and condition are not well known, are referred to as “the forgotten victims of the system of punishment”. The purpose of this paper is to discuss the plight of these millions of children. Using Kenya as an example, the paper assessed the effects of imprisonment of parent offenders on the life of their children, and the readiness of the justice system and child welfare agencies to protect them. The data for this paper was collected from three government departments and an ex-prisoner, and was supplemented by secondary data from a review of relevant literature relevant. The study found that imprisonment of parents deprived children of their primary caregiver and had social, economic and psychological effects on them. The study affirmed other studies that suggested that the number and status of these children is not known and that government departments responsible for the welfare of children intervene only when the courts involve them. It further established that the departments lacked policy and capacity to attend to the plight of these children and policies to guide any needed intervention. The study recommended that, since it is hard to reconcile the punishment of offenders and the welfare of their children, legislation should be reviewed to make provision for the care of these children. There is a great need for collaborative efforts by different child welfare agencies to address gaps in services provided to prisoners’ children and for more research to expose the plight of parent offenders’ children.

**Key words:** Imprisonment, Offender, Justice System, Child Welfare

### **Introduction and Background**

The family is a universal social institution that is constituted of persons joined to each other by kin relationship, and in which the adult members have the responsibility of caring for the children (Parke & Clarke-Stewart, 2001). As the backbone of society, it is charged with various responsibilities that include reproduction for the perpetuation of human race, and provision of basic needs to its members to ensure their sustenance and security (NCPFCE, n.d.). The family also provides love and affection to create a suitable environment for personality development of children, without which children would be socially and mentally mal-functional. Parke and Clarke-Stewart (2014) noted that the family remains an important institution in the life of the individual.

As the primary socialization agent, the family is mandated to guide individuals to become cultural and social beings who can fit in their society. It provides the initial human behaviour patterns in an orientation and interpersonal relationship so that its members, especially to children, can acquire self-respect and social status. Individuals define themselves in relation to the family they belong to and this sense of belonging plays an important role in terms of assuming various roles within the family. In this sense, most of the prescribed statuses of a person are directly related to the family to which he or she belongs. For example, age, ethnicity, nationality, social class and religion are conferred to an individual because he or she was born into a particular family. It can therefore be said that people are what they are mainly because of the family they grew up in.

Children have a right to be raised in a family and to have access to quality health care, good nutrition, education, play and protection from all forms of harm, abuse and discrimination. They have a right to grow up in an environment that enables them to attain their full potential in life (Laws of Kenya, Cap 141). It is widely known that the growth of children is greatly influenced by the social environment in which they grow up in; that is, by parents, peers and the critical life experiences.

- a). The social context in which children live provides an opportunity for them to interact with others. This enables them to develop a strong emotional attachment to those who care for them, and this natural process promotes children’s motivation to stay close to those who care for them and it helps them to develop a sense of security, affirmation and warmth. The development of a sense of security in these attachments is dependent on how the caregivers relate to the children. Children become securely attached to parents if the parents respond to them in a way that reinforces their confidence and provides the assurance that the parents will provide support when needed ([eclkc.ohs.acf.hhs.gov/hslc/tta.../family/docs/rtp-series-families-as-lifelong-educators](http://eclkc.ohs.acf.hhs.gov/hslc/tta.../family/docs/rtp-series-families-as-lifelong-educators)). The affirmation that someone cares and is there for them gives them confidence and courage to explore and interact with their



environment. However, this favourable environment may be interrupted by factors that take away parents from their children for example death, divorce and imprisonment.

- b). The imprisonment of a parent, which is our focus here, takes away an important figure in the life of children and this is said to cause untold suffering in their life. Parental care is central in the development of a child both mentally and psychologically. Parental care also provides security and helps in building confidence in the child (Robertson, 2007). Children are an important part of a community and exposing them to suffering jeopardises their future. Identifying the conditions in which the children of imprisoned parents live in can attract the attention of the rest of the society and make it think of the necessary intervention. This study therefore focuses on the effect of parental imprisonment on children. It is organised into four sections: literature review on effects of parents' imprisonment on children; the methods used to collect data; the study findings; and the conclusion and recommendations.

### **Effects of Parent Imprisonment on Their Children**

Crime rate in many countries has increased in the recent past and hence it is expected that the number of people being sent to prison is also on the increase leading to an unprecedented number of children experiencing parental imprisonment. Murray and Farrington (2008) record that, an inmates' survey contacted every five years in the USA shows that in 1999 there were 1.5 million children of imprisoned parents. In the same year, the number of children with a mother in prison nearly doubled. Another study done in England and Wales in 1991 showed that 32% male and 42% female prisoners had dependent children living with them before they were imprisoned. In 2006, Murray and Farrington estimated that in both England and Wales there were 88,000 children under 18 years with a parent in prison. They further stated that they did not have any evidence-based statistics on children of imprisoned parents in the USA even though they estimated that between 125,000 and 150,000 children experienced parental imprisonment every year. In 2007 they estimated that close to 130,000 children under age 18 experienced parental imprisonment each year in England and Wales (Robertson, 2007).

At the time of this study, the researcher was not aware of any up-to-date estimate of children with parents in prison in Kenya, but as indicated above, where studies on this topic have been done, they confirm that the number of imprisoned children is very high. Murray and Farrington (2008) observed that in the USA, England and other areas where an attempt has been made to investigate the matter, the number of children with imprisoned parents is high. Given that many of these studies are estimates, research to expose the affected population and/or to discuss the effects of the imprisonment of parents on children is necessary.

Judicial systems focus on the offender only and this makes those around the offender to be forgotten or neglected right from the point of arrest to after the offenders are released. For example, the police may not consider the trauma children are likely to suffer from a night arrest of their parent and very often judges may not consider the caring responsibilities of a parent and give them a noncustodial sentence. Simmons (2000) argues that due to this invisibility in most jurisdictions and child welfare systems, no meaningful intervention can be done. Robertson (2007) argues that if the children are considered during the court process, many of the negative effects of parental imprisonment can be avoided. This is because the parents' absence has adverse social, economic and psychological effects on the life of a child. However, as the American Bar Association (ABA) has established, even though legal policies and procedures on how children of arrestees should be treated may not exist, arresting officers have a responsibility to ensure the safety of these children (Simmons, 2000). They can consider calling the Child Welfare Agencies take the child to a place of care and safety

According to Simmons (2000), separation of children from their parents by imprisonment can and does affect children in various ways and hence every effort should be made to maintain a meaningful relationship between them and their imprisoned parents through visits, and where possible telephone interactions. Allowing and maintaining contact enables the parent to continue to participate in the development and general well-being and self-esteem of their children. Simmons, however, noted that this is not always possible because of distance to the prison, rigid prison rules and regulations on visits, limited visiting time and expensive telephone contacts. These conditions drastically reduce the chances of the children maintaining contact with their parents and as a result they become very vulnerable. They are exposed to different forms of risks because in some cases, and depending on the caregiver, children are not told the truth about the absence of their parents. They are therefore likely to develop fear that their parent is dead or to have all manner of imaginations concerning the absence of their parent. It is, therefore, important to look at the effect of this separation in detail to understand its extent.

Murray and Farrington (2008) viewed that children of imprisoned parents were isolated and hence neglected in various ways. They were overlooked as a group with its own rights even before thinking of them as a special needs group. Scharff-Smith and Gampell (2011) observed that there is no government institution legally charged with the responsibility of taking care of such children despite many countries being signatories to the UN Committee on the rights of the Child. Scharff-Smith and Gampell (2011, p. 18) further argued that even though the United Kingdom (UK) recognises the children of prisoners as a vulnerable group, it does not recognise them as children in need or as a group that needs attention. As a result, children of prisoners are not ranked high in the priority list of vulnerable children and are not "likely to receive support or protection as required by the child-welfare legislation". According to Scharff-Smith and Gampell (2011), literature has raised concern on the services provided to this category of children

by the government and the fragmented and un-coordinated nature of the social, education, health and judicial services provided by government departments. Thus, the services necessary for addressing the needs of these children are basically unavailable.

Robertson (2007) and Scharff-Smith and Gampell (2011) raised concern that very little research has been done to expose the situation of the children of imprisoned parents. Even though there has been calls and recommendations for research on how imprisonment of parents affects children and how these effects can be addressed, there has not been much response thus denying the children an opportunity to tell their own stories to the world in order to allow for the formulation of policy and programmes that address their needs. Robertson (2007) concurred on this and says there is no agency or department with accurate information on the number, whereabouts and the condition of these children. This neglect of the child from the point of arrest of the parent to trial, imprisonment and release has made their rights, needs and best interest be overlooked and neglected by both society and its institutions.

The imprisonment of a parent greatly disrupts children's care, family ties and the financial support initially provided by the parent (Simmons, 2000). Change in caregiving can cause emotional stress because it may involve moving school, moving house and may mean placement with multiple caregivers. The disruption may even be worse when children are separated from the natural family and taken to a fostered or adopted care. The situation worsens if children have to take the responsibility of caring of their siblings and other house chores, a move that exerts pressure on them (Murray & Farrington, 2008).

Imprisonment of a mother is very disruptive to the children for they are likely to be taken to a foster care, have a step mother since the father may remarry or have a succession of caregivers and may never be reunited with the mother when she is out of prison. The situation also puts more strain on the extended family networks than the imprisonment a father. It makes grandparents and siblings to take up carer responsibilities with the former finding it a big challenge because of age, lack of income and inability to cope with problems associated with generational gap (Murray & Farrington, 2005).

Murray and Farrington (2005) found that the imprisonment of parents has economic effects on the family. While the criminal justice systems aims at punishing the offender, its effect is an economic punishment to the family especially the children. It destabilises the family and puts the children at the risk of poverty or enhances the pre-existing situation of poverty. It is argued that in some cases the imprisonment of parents amounts to punishing poverty since most of them tend to have experienced poverty before imprisonment (Mumola 2000; Robertson, 2007). It puts pressure on the expenditure of the family. For example, a family may do away with family holidays, reduce the number of visits to prison for children to see their parents, force the carer to look for employments or change employment in order to provide the needed care, and this reduces the amount of attention given to the children. This disruption of the family setup may force carers to do things they would not have liked to do thus causing much stress to a point of not providing the required support to the children despite their willingness.

Removal of a parent figure from the life a child may change or lead to a breakdown of parent/child relationship (Robertson, 2007). For example, imprisonment disrupts harmony that may not be easy to restore even after the parent is released from prison because it deprives the child of the opportunity for emotional and social bonding and this is worse if the child does not get an opportunity to have contacts with the parent while in prison. Research has shown that the number of children with an opportunity to visit their parents in prison has remained low. Scharff-Smith and Gampell's (2011) study established that two-thirds of imprisoned fathers in the USA had never received a visit from their children. They further reported that in a study done in the UK, 29% and 42% of imprisoned men and women, respectively, had challenges having contact with family and friends. This demonstrates how parents' imprisonment may disrupt parent-child relationship if no contact is maintained during the separation. Robertson (2007) commenting on the same argued that imprisonment of a parent impoverishes the family especially the children and its effects can be felt by future generations. Long period of separation between parents and their children without contact may make the children relate to their parent as a stranger after the imprisonment. Also, having been in prison for a long period of time, on release the parents come home to a new environment and operations to which they may not fit in. The interruption of parent-child relationship caused by imprisonment makes the released parents become intruders in the life of the children because the children had learned to live without the parents. The children may easily resist the parents' authority. Such a reaction adds pressure on the child-parent relationship and further stresses the parent and strains the relationship even the more. It is notable that very young children have the highest risk of relationship disruption when their mothers are incarcerated and the carers are not able to provide material and emotional support (Scharff-Smith & Gampell, 2011).

Concerning the health of children of imprisoned parents, Scharff-Smith and Gampell, (2011, p. 27) claimed that "children are traumatised by a parent's arrest, imprisonment and release with the severity of the damage increasing if the child experiences frequent arrests and separation". They further argued that separation deprives children of the emotional and psychological resource which may compromise growth and development. The common child reactions to this loss include sadness, confusion, fear and developmental regression. Other behaviours that result from separation according to Scharff-Smith and Gampell (2011) include attachment disorders, drug and alcohol addiction, delinquency and poor academic performance. The physical and mental health manifestation of these effects include truancy, running away from home, poor performance in school and self-blame guilt. In some cases the psychological problems may be worse especially when children may feel guilty or blame themselves for the arrest of their parent. This self-blame may come about in a situation of poverty where the children may think the parent stole to support them and

hence the reason for self-blame (Robertson, 2007).

Studies indicate that prisoners' children have a higher probability of suffering mental health and other health conditions than other children. They show that about 30% of children of imprisoned parents experience mental health problems compared to 10% of the rest of the population (Murray & Farrington, 2008). Witnessing the parent being arrested, and especially where force and violence is used, is painful and causes untold fear in the child. Studies associate children witnessing of the arrest of a parent to elevated symptoms of stress later in life. They are said to have a high risk of suffering mental ill health like anxiety and depression which may interfere with their growth and development and which may translate to anti-social behaviour and involvement in crime later in life and in future generation.

Children awareness of parents' imprisonment has remained a debatable issue. In many cases caregivers underrate children and assume they are too young to experience the absence of their parents. Other times they are lied to because of fear that letting them know the truth may have affect them negatively. However, telling them the truth helps them to know where their parents are and that they are secure. If they discover that they were lied to, they may distrust and lose confidence in their caregivers. Again, some families may not openly discuss a parent's imprisonment for fear of the social stigma associated with imprisonment (Scharff-Smith & Gampell, 2011). However, studies suggested that children have problems relating with their care givers when information about their parents' incarceration is concealed, distorted or presented in a way that can make them panic. They are better helped if the parent's absence is repeatedly explained to them and they are helped to share the grief with the rest of the family. This helps children cope with the situation and tap to the support available in their environment with ease.

### **Methodology**

This was a preliminary study that aimed to lay the foundation for more elaborate research later, on the effects of parents' imprisonment on children. The study chose a descriptive design because such a design presents the situation as it is. The choice was guided by the question the study focused on: what are the effects of parent imprisonment on their children? Being a preliminary study, exploratory in nature, data was collected from three government departments: National Police Service, Probation and Children departments and from one ex-prisoner parent. All the respondents were purposively sampled since they were deemed to have the information relevant to the study. The respondents were two police officers, two probation officers, one children officer, and an ex-prisoner parent. The six respondents were interviewed to establish what happens to children when their parent is arrested and finally confined in prison. The qualitative data collected was analysed by forming themes emerging from the responses given during interviews.

### **Findings and Discussion**

#### *Imprisonment of Offender Parents*

Interviews were carried out with the National Police service, Probation and Children Departments to establish their responsibility over children of arrested/imprisoned parents.

Interviews with the police department showed that their focus is mainly the offender and not those around him/her. A probation officer narrated a case where a mother was arrested and finally imprisoned. Her children were taken to the Children's Department and through the Children's Court were committed to an institution. This meant that they were removed from the extended family and community members to a new environment. On release, the mother had a difficult time getting them revert to her custody even when she was able to provide for them. In such a situation the mother and child suffer emotionally because of this forced separation. In a situation like this, the children can feel like they are the ones imprisoned and may not understand why they cannot be home with their mother. Another Probation Officer explained how a mother was imprisoned and her children brought to the Children Department then committed to a rescue centre. One of them, a 17-year old boy, went to live with an aunt for a while and later disappeared and up to the time of the interview, no one knew where he was.

The interview further revealed that some children drop out of school, others run away from home or in some very few cases they are taken by institutions when their parents are arrested or imprisoned. Cases in Kenya courts sometimes take a long time to be determined with the offender in remand prison. When the case is finally determined, even if the offender is released, the children will have suffered a lot and in some cases irreparable damage. The probation officers interviewed quoted a number of cases where children dropped out of school, and this concurs with what Robertson's (2007, p. 9) report that children of imprison parents can react to the separation in various ways including decline in performance or in class attendance.

The ex-prisoner who participated in this study was chosen through the probation department. She explained how after she was imprisoned her daughter had to be moved from a Boarding School to a Day School because her relatives could not afford the fees. She further reported that the daughter declined the offer by the relatives to visit her in prison. During the interview she did not explain why her daughter did not want to visit her, but is noteworthy that she confessed that she also did not want the daughter to visit. Robertson (2007, p. 9) said that arrest or imprisonment of a parent provokes strong reactions in children that may include anger, sadness, fear and stigma among others. The girl in question may have been angry with a system that took her mother away

from her; a separation that destabilized her in school and made her performance in class decline. Similarly, the mother may have been so disappointed either with herself or with the system that she did not want to have her daughter to visit and see her suffer in prison.

Studies on children of imprisoned parents show that children react differently to the absence of their parents. Robertson (2007, p. 9) reported that children's reaction to the imprisonment of their parents will "vary greatly" depending on a number of factors. These may range from the support they get from their carers to their age. Murray and Farrington (2008) commenting on the same said that imprisonment of a parent may lead to a child's poor performance in school. The respondent further opined that her absence affected her daughter so much that the girl cried frequently, lacked sleep and had poor appetite most of the time. This had health effects, but the mother was glad that her daughter's behaviour did not change to be negative.

#### *Readiness of Government Institutions to Protect Children of Prisoners*

The findings of this study indicated that police officers had no policy to guide when they arrested an offender who was the guardian of children, and police officers used their discretion as to what to do in such a situation. This can easily put them in a valley of indecision since their focus was the offender. Robertson (2007, p. 7) reporting on the same said that "the focus on the offender means that the people around them are regularly ignored from arrest to post-release". Thus, it is the offender who matters and anyone else is irrelevant. In the event the police choose to arrest the offender, there is no provision at the police station to indicate whether the arrestee had custody of children. The case of children can only arise if the offender brings it up in court during trial, and yet the trial might not follow immediately.

The study further found that none of the departments interviewed, even the Children Department which is mandated by the constitution to safeguard the rights of the child (Laws of Kenya, Cap 141), is mandated to attend to the children of imprisoned parents. The study established that the departments only got involved only when another agency (government or private) or individuals drew their attention to such cases. For example, if a matter comes before a court and the offender brings up the issue of his or her children, the court may request for a Children or Probation Officer's report to guide it in the determination of the case.

Interviews with respondents from the three departments showed that none of them had information on the number of children whose parents were imprisoned. The study established that there was no provision or system in the departments for capturing this information since other than the police department, the other two did not come into contact with the offender in their line of duty unless when invited to do so by the courts. This ties with what other studies carried out in other regions of the world have shown. Murray and Farrington (2008, p. 138) observed that, "The proportion of children who experience parental imprisonment at some stage between their birth and their eighteenth birthday is unknown". The absence of a government institution with responsibility over the children of imprisoned parents explains why their number is not known and why there are no services for them.

Further interviews with the departments showed that the Children's Department is the best placed to deal with children of imprisoned parents since it is the one mandated to implement the Children's Act that safeguards the welfare of the child. However, the study established that the department only steps in when the plight of the children has been brought to its attention by the community, and that the department is gravely incapacitated to reach out to the many vulnerable children in the country including those of prisoners.

Probation officers are also unable to attend to all the cases of children of imprisoned parents referred to them by the courts due to lack of capacity. Instead they invite relatives of the offender to come to their offices to provide the information needed by court reports, but such interviews in the offices may not capture everything about the children since and thus, this compromises the rights and interests of the child. Once again it is clear that the department responds only when the court requires a report.

#### **Conclusion and Recommendations**

Based on the findings of this study, the following conclusions can be made:

First, it is hard to reconcile the punishment of an offender and the caring of their dependent children. Even though crime must be dealt with, it becomes difficult when correction methods used negatively affect other family members, such as, children.

"Second, a big number of offenders are poor and the society ends up putting poverty on trial thus aggravating poverty. In many cases, arresting or imprisoning an offender has adverse effects on their children. Most of the children become delinquent, fall sick, play truancy or end up in poverty."

Third, there is no government institution responsible for the welfare of children whose parents are incarcerated. This makes the children who are left alone or in the hands of relatives or community vulnerable for they can easily be mistreated or neglected.

Police officers, who are the first to come into contact with these children, have no systems in place to ensure the safety of the children when the parent must be arrested. The children only come into the picture if the parent (mainly in mitigation) mentions them during trial.

Based on the foregoing, this study makes the following recommendations:

- There is need to review legislation to take care of children of imprisoned parents;
- The government needs to review its methods of correcting offenders to ensure its dependants particularly children are not made vulnerable;
- There is need for collaboration between government institutions and Child Welfare Agencies in addressing the needs of children of prisoners;
- More resources need to be availed to address the needs of children of imprisoned parents;
- There is need for a more comprehensive research on the effects of parental imprisonment on children.



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## **The Advancement of Justice for Institutionalised Children with Disabilities in Remand Homes in Kenya**

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### **Abstract**

This study examined the needs of children with disabilities in Nairobi Children's Remand Home (NCRH). Children with disabilities stay at the remand home for a longer period as compared to non-impaired children, and sometimes the period is beyond the limit permitted by law. The objectives of this study were to identify the types of special needs among institutionalised children at NCRH; establish the psychosocial needs of the children at NCRH; and explore challenges faced by NCRH caregivers. The study adopted a descriptive design and combined both qualitative and quantitative approaches in data collection and analysis. Data was collected through interviews, self-administered questionnaires and observation checklist from 15 children and 20 staff members in the home purposively selected. The data was analyzed using Statistical Package for Social Sciences (SPSS) version 16. The study revealed that children at the remand home had different types of needs, which included; hearing, lower limbs, and upper body impairments, speech and learning difficulties, emotional maladjustments and psychosocial needs. Most of these needs were found to be inadequately met due to challenges faced by the home, such as lack of financial and professional capacity. The study recommended that government should increase the material and personnel resources allocated to the remand home, and that the institutional staff should be equipped to build their capacity in handling children with special needs.

**Key words:** Institutionalised, Rescue, Disabilities, Home

### **Introduction and Background of the Study**

Children with special needs are those who have, or are at risk of developing chronic physical, developmental, behavioural or emotional conditions and require health and related services beyond what children generally require (cPherson et al., 1998). According to Dare and O'Donovan (2002), the term "special needs" is used by child care and educational professionals to refer to children whose development is atypical, that is, not following the recognised pattern seen in most children.

Children with special needs require specialized care in response to their specific needs, hence some of them end up in government children's facilities, where it is assumed that they will get better care. However, institutionalization of special needs children may, in reality, increase their vulnerability and deny them opportunity for wholesome growth and well-being because they may not fully enjoy their rights as children. For this reason, caring for children with special needs requires deliberate effort to ensure they access protection and holistic care.

Children with special needs have a wide range of disorders including congenital anomalies, severe physical disabilities, complex organ system diseases such as sickle cell anaemia, as well as, more common conditions, including depression and severe asthma (Oelhlmann, 2004). About half of children and adolescents with special needs are limited in their ability to function. The United Nations Convention on the Rights of Persons with Disability (2006) stated that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

There is limited empirical data on special needs children in the juvenile justice system in Kenya (Ottolini, Wambua, Kagwi, & Ndolo, 2011). This study therefore sought to make an addition to the knowledge in care of children with disability and inform policy making in the juvenile justice system concerning such children. The study highlighted gaps and best practices in providing holistic care to institutionalised children with disability in order to improve the effectiveness and quality of interventions for children with special needs. Therefore, the objectives of this study were the identification of the types of special needs, psychosocial needs of the children, and the interventions and challenges faced by institutional caregivers.

According to Disabled World (2013), disability affects many families in the developing countries and about 10% of the world's population live with disability. About 80% of the persons living with disability live in developing countries (Disabled World, 2013). Twenty percent of persons from low socio-economic backgrounds, which is with reference to most developing countries, have some kind of disability and are regarded by their communities as the most disadvantaged. Regrettably still, there is a projected

increase in number of children living with disability in the next 30 years in developing countries due to such factors as poor nutrition, armed conflict, diseases, and child labour (Disabled World, 2013).

World Health Organization (WHO, 2016) stated that about 40% of the population in Africa comprises persons living with disability and 10–15% of these are children of school-going age. Disabled World (2013) reported that many Africans living with disability are excluded from development opportunities such as education and employment, the implication being that they are left in a poor state of living. School enrolments for children with disability is estimated at no more than 5-10 % and between 70-80 % of employable adults living with disabilities are unemployed. Research has also revealed that social stigma associated with disability can lead to marginalization, discrimination and isolation of persons living with disability (PLWDs), predisposing them to begging as the only means to survive (African Studies Centre, 2013).

According to a preliminary report by the Kenya National Survey for Persons with Disabilities (KNSPWDs, 2008), 4.6% of Kenyans experience some form of disability and that most of them reside more in rural than urban areas. The survey report indicated that environmental factors are likely to affect 15% of PLWDs daily and 15% on a weekly basis. Furthermore, the survey revealed that about 65% of PLWDs perceive their environment as a major problem in their daily lives. This is because those who live around PLWDs tend to treat them differently because of their disabilities; sometimes exhibiting negative attitudes and behaviours towards PLWDs. KNSPWD (2008) stated that PLWDs find it easier to cope with the medical or physical disability than to cope with the people around them. The report also indicated that the number of children with disability is growing and their needs are not being comprehensively met due to the community's lack of awareness on care and protection of such children (KNSPWD, 2008).

In Kenya, some children with disability who are in need of care and protection are placed in remand homes. Remand homes were established Under Section 50 of the Children's Act (2001), for detention of children. The 5<sup>th</sup> Schedule, sub-Section 10(1), stated that children who have not been released on bail shall be remanded at a children's remand home, in line with Section 57 of the Act. Ideally then, it means that children placed at NCRH should be those who are in conflict with the law. Placing of children with special needs in remand homes goes against the Children's Act (2001) which clearly states that children in conflict with the law should be placed separately from children in need of care and protection. The UNCRC (1989) also stated that in all matters concerning the child, the best interests of the child shall be upheld. However, it is not in the best interests for children with special needs to be placed in a home where children who are in conflict with the law are placed.

Children living with mental and physical disability are placed in the NCRH for care and protection purposes (Children's Act, 2001). The legal document clearly stated that children in need of care and protection can be placed in rehabilitation schools or remand homes but they should have a separate section away from children in conflict with the law. However, this should be a short-term measure, as they should be reunited with their families. Children who have been abandoned, neglected or lost are also placed in the remand homes as a temporary measure until their caregivers are traced. They too fall in the category of children in need of care and protection. Unfortunately, the study observed that, for most of the children with disability, their parents do not claim them hence they end up staying in the remand home longer than is required.

It is well established that children who have spent a long time in institutions often have concomitant developmental delays or behavioural problems (Ottolini, Wambua, Kagwi, & Ndolo, 2011). Children without disability at the remand home often have a clearly set out exit plan. However, for children with disability, designing and implementing an exit strategy is usually a challenge as their parents/families are, in most cases, unknown to the institution, which makes it difficult for them to exit from the remand home. The long stay at the remand home tends to cause special needs children to develop behavioural and developmental problems, which hinder those children from achieving their potential, wholesome growth and development. This in turn impedes the holistic well-being of special needs children by inhibiting their emotional and social adjustment (Ottolini et al., 2011).

Children with special needs stay in the remand home as children in need of care and protection. During the study, the staff members working at the NCRH reported that reuniting the children with special needs with their families has proven difficult because their families are often not easily traced. This situation leads to over-institutionalization of special needs children and denies them the right to family love, care and protection (Ottolini et al., 2011).

## Methodology

The main objective of this descriptive study was to explore the physical, socio-emotional and cognitive needs of children with disability at the NCRH and the services provided to meet these needs. The study considered children with special needs to be those with physical and mental disability.

The population of children placed at NCRH is usually about 100 at any given moment, with about 10% of them having special needs (Ottolini et al., 2011). However, during the study, 60 children were admitted in the home, out of which only 15 had disability. The study employed questionnaire, observation checklist and semi-structured interviews to collect both quantitative and qualitative data. It used census technique to recruit all the 15 children. In addition, 20 institutional caregivers and staff working in the home were included in the study.

## Findings and Discussion

The findings indicated that the children living with disabilities in NCRH were in four age groups, namely 7-10 years were 4(27%), 11-14 years were 7(46%), 15-18 years were 3 (20%), while 18 years and above was 1(7%). These findings indicated that most of the children with disability admitted at the home were between 7–14 years old. The implication could be that younger children and pre-teens with disability are more prone to institutionalization than older children with disability. It could also mean that younger children and pre-teens with disability are prone to being abandoned more than teenage children with disability.

Children separated from their primary caregivers or parents are deprived of emotional connection and healthy attachment that is needed for their growth and development within their families (Dare & O'Donovan, 2002). When children lack close healthy relationship with caring adults, their ability to learn may be negatively affected, and this, in turn, can affect their whole development and influence their confidence, behaviour, and readiness to interact with the world (Werner, 1988).

The study also revealed that there were more male children (67%) with special needs than their female counterparts (33%) in the home. It thus can be argued that NCRH admitted more male children with disabilities. However, the study did not explore the underlying cause of the difference in number between male and female children.

In this study, psychosocial needs were conceptualised as physical, social, emotional and learning needs of children with disability. It was found that children with disability had psychosocial needs just like non-impaired children. The study identified the presence of basic physical needs among the children with disability as food, clothing, medical care and rest or sleep. These were in addition to some needs unique to their special conditions, such as special diet, disability aids, and specialized medical treatment that were unique to their specific conditions. This finding concurs with Oehlmann (2004) who stated that special needs children have generally more needs than non-impaired children.

The study noted that the needs of children with disability sometimes varied depending on the specific condition of each child, such as the need for disability aids or learning sign language to aid the child in mobility and communication. Oehlmann (2004) further cited the significance of paying attention to the specific and unique condition of each child with special needs in order to provide better care for the particular child based on the child's condition.

Another significant finding was the presence of socio-emotional needs among children with disability. All the children (100%) expressed the desire to be loved, 80% had the desire to play with other children and make friends, while 50% indicated that they preferred to be alone. These findings show that children with disability desire to be loved and accepted by persons around them. They desire to belong and feel part of their peers. Maslow's hierarchy of needs theory points out emotional needs as part of the basic human needs (McLeod, 2007).

The psychosocial stages of development mostly emphasizes the socialization of children and the importance of their being well-adjusted in the early stages of life in order to for them to develop well in later stages (Berk, 2007). Therefore, socio-emotional needs are present in all human beings, whether one has special needs or not. Brigham Young University (2009) emphasized on the importance of creating an inclusive social environment for a child with disability and enhancing the child's ability to engage with the social environment to foster development. The source stated that children with disability will adjust better to their environment if they are parented and equipped with social skills.

The study also found that children with disability had a desire to learn and practice what they had learnt. Through the observation checklist, the researcher noted that the children with special needs actively participated in class activities and had the desire to be involved in classroom activities together with their able-bodied classmates. All the children (100%) liked playing, which is in line with Freud (1974) who argued that play is the natural way of expression among children, contributing towards their learning.

In addition, 50% of the children at NCRH had a desire to learn and exhibited improved use of vocabulary. However, 15% did not pay attention during learning sessions and 40% did not exhibit retention of learnt material. Fuandai (2010) highlighted the importance of cognitive development in the nurture of special needs children.

This study conceptualized psychosocial services as the interventions offered at the remand home to meet physical, social, emotional and learning needs of the children with disability. The study showed that children with disability at the remand home received various services to meet their psychosocial needs. The special needs children (100%) all had access to a balanced diet, medical care and basic education. However, some very important aspects of wholesome development such as emotional fulfilment, cognitive stimulation and disability friendly environment were lacking.

Emotional needs were the least met needs among special needs children in NCRH, as only 5% of the respondents reported presence of nurturing healthy attachment between the children with disability and the staff. For instance, there was very little physical contact between the staff and special needs children. Berk (2007) highlighted the importance of physical contact in communicating care to children. Appropriate and caring touch helps children feel loved and supported, and to develop a healthy sense of emotional attachment with their caregivers (Werner, 1988).

The study also indicated that the physical environment lacked basic special needs conditions that could aid children with disability in their everyday life. For instance, there were no ramps, wide doors, or disability aids in the home. In addition, the social environment was not very friendly especially to children with hearing impairment. This is because such children lacked appropriate medium of communication as they could not use words, which affected their ability to mingle freely with the others, hence hampering their development of social ties.

Cognitive learning theory states that human beings learn through their environment and adaptation to the environment (Shaffer & Kipp, 2007). However, if children with disability do not understand the language spoken in their environment, they will not be able to function in such an environment. This phenomenon supports the social model of disability theory that states that the society has social barriers that are generated by the environment which is inaccessible through the use of languages and ways of communication, services provided and buildings that persons with disability cannot comprehend or make use of (Disabled World, 2013).

Werner (1988) and Dare and O'Donovan (2002) noted that children with special needs require a special kind of stimulation from their physical environment to enhance their cognitive development. Such stimulation can be received with the aid of toys, games, physical structures, and exercises, all of which were lacking at NCRH, neither did the staff members have special education training. The fact is that, as long as children with disability are put in the same class with non-impaired children, as reported by staff, little or no learning would take place largely because the children with special needs were not accorded special attention with regard to their unique educational needs.

Fuandai (2004) studied the challenges of special needs children in integrated classes and cited lack of capacity and resources as a major challenge. This challenge was evident too at NCRH. All the staff members involved in the study (100%) reported lack of resources as the major hindrance to providing quality care to the children with disability, while between 75–80% reported lack of human and skill capacity among them as the second major challenge.

Children with disability at NCRH had minimal cognitive stimulation. The class teachers had no special training and no teaching aids for special education. The study observed that only one staff member (25%) had training in sign language, and that facilities such as toys, the use of brail, songs, pictorials and games were lacking. This shows that the home was not addressing the need for cognitive development among special needs children.

The study went on to explore the challenges faced by staff in finding comprehensive and functional exit strategies for children with special needs. The low success rate in tracing the parents or families of children with disability created a major impediment in exiting children from the home. By law, according to the Children's Act (2001), a remand home should be a temporary measure. However, for some of the special needs children, the remand home has acted as their actual home because they had been there for a long period. One of the persons observed at the home was a female who had attained the age of 18 years and had lived in the home since she was about 9 years old. Despite having skills in tailoring and being able to support herself materially, she preferred to live in the home because that was the only home she knew. She traced her parents a few years ago but was unable to reintegrate well in to her community because she felt NCRH was more of a home to her than her parents' home was. She helped around the remand home when she was not at work and volunteered at the Nairobi Children's Home across the road from NCRH. The study however, did not investigate the present challenges in existing policies concerning exiting of children from the remand home.

Ottolini et al. (2011) described this phenomenon as the institutional dependency syndrome, where a child has grown to depend on institutional life and therefore finds it difficult to adjust to life outside the institution. This therefore means that, as much as some of the special needs children may successfully trace their homes, they may be unwilling to return depending on how many years they have spent at the remand home.

## **Conclusion and Recommendations**

The study concludes that NCRH had children with physical and mental disabilities who had needs just like other children. However, their needs were sometimes specific to their unique situation and condition. The vulnerability of children with disability is exacerbated by the fact that children with disabilities in Kenya face many challenges such as rejection or abandonment by family members, which could increase their pain and stigma.

The study also found that the remand home met the psychosocial needs of children with disability to a certain extent; however, the interventions at the home did not holistically cater to the needs of the children. NCRH has improved the well-being of special needs children by providing a place for them to stay and ensuring that their basic needs were met. Nonetheless, the emotional needs were minimally met and the physical environment was not disability friendly. This was made worse by inadequate and ill-equipped staff who were overwhelmed by their duties to provide care and nurturance to the children.

From the findings, it is evident that the children with disability at the NCRH did not have all their needs met adequately. In view of this, the study recommends that:



1. The government should allocate more funding to remand homes so as to enable them provide much-needed services to children with special needs.
2. The government in collaboration with the managements of remand homes should build the capacity of staff members in handling special needs concerns. The government should also employ more trained staff to help in caring for children with disability.
3. The Kenyan society and the government should work together in the long term to develop and implement policies that are geared towards care of special needs children in a family setting as opposed to institutional care, as the family care offers a more durable and holistic solution to special needs children.
4. In order to enhance the best interests of special needs children, the government should invest in physical facilities and make the environment disability friendly.
5. Further studies on the challenges faced by parents of children with disability in provision of comprehensive care and the findings to form a basis on raising awareness on best practices in care and protection of children with disability including prevention of abandonment and neglect of children with disability should be carried out.

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