

74F 18

THE CONCEPT OF DIVERSION AND THE RIGHT TO A FAIR HEARING IN THE ADMINISTRATION OF CHILDREN'S JUSTICE: IS THE PREVAILING LEGAL REGIME IN KENYA ADEQUATE?

Elisha Z Ongoya*

A. Background.

Societal approaches to various phenomena that are of concern to the society have been changing with time. This is intended to make the approaches to be responsive to changing circumstances and changing realities. Where the existing laws are found to be inadequate or superfluous in handling a particular phenomenon, alterations to the law are inevitable. In extreme cases, the existing law has to be overhauled and either a totally new regime of law put in place or the phenomenon removed from any regime of law completely.

Speaking of yesteryears, in many societal settings globally and particularly in Africa, children were not usually subjected to formal judicial institutions whenever their conduct ran contrary to the law. In many African societies, where children "belonged" to the society, every adult member of the community had a duty to reprimand any child in the community who breached the societal normative and ethical/moral standards. It was not one of the available options to subject a child to the stigma associated with formal institutions of justice. The idea was to discipline and not to retributively punish the child. Towards this end, members of society who felt offended by the child's conduct would be more inclined to report the child to the parents and guardians for disciplinary measures as opposed to reporting the child to the police or other state law enforcement agencies.

The foregoing African notions on treatment of children were part of what inspired the African Charter on the Rights and Welfare of the Child where the African state parties in formulating the Charter claimed to take into consideration the virtues of their cultural heritage, historical background and the values of the African civilization which should

* LLM (Law, Governance and Democracy) – University of Nairobi; LLB -University of Nairobi; Dip Law- Kenya School of Law; Advocate of the High Court of Kenya – Asiema and Company Advocates; Part Time Lecturer of Civil Litigation - Kenya School of Law, Consultant in Law, Governance and Democracy.,

31

inspire and characterize their reflection on the concept of the rights and welfare of the child¹

With the breakdown of the many hitherto informal social regulatory mechanisms that were prevalent in traditional African societies, and the advent of formal institutions, recourse to formal institutions in dealing with children is becoming more common place. Even then, the desire to avoid formal judicial institutions will attest to the number of children who are reported to school authorities and local administrators (village/clan elders and chiefs) as an alternative to reporting them to the more formal law enforcement agencies like police and courts. Perhaps this practice is a remnant of the positive past practices in society, or perhaps, it is an attempt at reversion to the positive past upon discovery of the pitfalls of the otherwise progressive present.

The mechanism of re-directing children in conflict with the law from formal law enforcement agencies and institutions to rather informal agencies of dealing with the children is, in broad terms, what is known as diversion. The inclination is to, as far as possible, remove children from formal law enforcement institutions while ensuring at the same time that the children so diverted enjoy guarantees of fairness in the treatment that they receive.

Diversion, involving removal of children from criminal justice processing and, frequently, redirection them to community support services, is commonly practiced on a formal and informal basis in a number of legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control

¹ See Preamble to the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

institutions have already reacted, or are likely to react, in an appropriate and constructive manner.²

The advisable character of diversion as a method of dealing with children in conflict with the law can be attested to by the number of concluding comments by the Committee on the Rights of the Child in its consideration of various country reports. The Committee on the Rights of the Child has consistently called upon member states to the Convention on the Rights of the Child to embrace diversion in dealing with children in conflict with the law.³

² See commentary to Rule 11 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985) at the University of Minnesota online Human Rights Library.

³ See the Concluding Observations of the Committee on the Rights of the Child, in respect of Chile, U.N. Doc. CRC/C/MLI/CO/2 (2007) where the Committee recommended that Chile ought to develop and implement alternative measures such as diversion and restorative justice in order to strengthen the possibilities of dealing with children in conflict with the law without resorting to judicial proceedings; Further, the Committee on the Rights of the Child in its General Comment No. 10 on Children's rights in juvenile justice (Forty-fourth session, 2007), U.N. Doc. CRC/C/GC/10 (2007) recommended that States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected; In its Concluding Observations upon considering the Ireland country report, U.N. Doc. CRC/C/IRL/CO/2 (2006), the Committee noted with appreciation the establishment of the Garda Diversion Programme provided for by law in the Children Act 2001, brought into force in 2002; In its Concluding Observations after considering the Country Report from Libyan Arab Jamahiriya, U.N. Doc. CRC/C/15/Add.209 (2003) the Committee expressed its concern that the holistic approach to addressing the problem of juvenile crime (e.g. addressing underlying social factors) advocated in the Convention, including prevention, special procedures, and diversion, has not been sufficiently taken into consideration by the State party; The Committee welcomes the introduction of a programme aiming at avoiding the penal procedure for a number of minor offences and establishing an educational intervention as an alternative measure. In the Concluding Observations of the Committee on the Rights of the Child, in respect of Liechtenstein, U.N. Doc. CRC/C/LIE/CO/2 (2006), the Committee noted the positive evaluation of this method. The Committee encourages the State party to go further with the programme, promoting the use of extrajudiciary means as often as possible, as provided for in article 40 (3) (b) of the Convention and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) on article 11 (2). It was also a recommendation of the Committee on the Rights of the Child to Malawi to Strengthen diversion programmes and alternative measures to punishment, such as community service and family group conferences to involve families in the process {Concluding Observations of the Committee on the Rights of the Child, Malawi, U.N. Doc. CRC/C/15/Add.174 (2002)}. In the Concluding Observations of the Committee on the Rights of the Child, in respect of Thailand, U.N. Doc. CRC/C/THA/CO/2 (2006), the Committee also welcomed the use of shelter houses, as well as diversion programmes for juvenile offenders and the Family Group Conferencing programme, which promote the concept of restorative justice. The Committee on the Rights of the Child also recommended to Tanzania to implement alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services [Concluding Observations of the Committee on the Rights of the Child, Tanzania, U.N. Doc. CRC/C/TZA/CO/2 (2006)]. See also the Concluding Observations of the Committee on the Rights of the Child, in respect of Mongolia, U.N. Doc. CRC/C/MNG/CO/3-4 (2010) where the committee recommended that the state Takes a holistic approach to addressing the problem of juvenile crime (e.g.

The fact of diverting children from the formal law enforcement institutions and agencies, as highlighted above, is no justification for subjecting children to injustices. The informal law enforcement institutions, it is always hoped, will avail the child the necessary guarantees so that the child entertains the feeling of having been treated justly and fairly. This is tandem with according the child his/her best interests.

B. The Legal Foundations for diversion and fair hearing in international law

i. *Diversion in International Law*

As early as 1924, the Geneva Declaration on the Rights of the Child of that year had recognized, in respect of children that “the delinquent child must be reclaimed”.⁴ That presupposed that the traditional notions of retributive justice and crude principles of punishment had no application as far as children were concerned. The subsequent 1959 Declaration of the Rights of the Child recognized in its preamble that every child needs “special safeguards and care, including appropriate legal protection, before as well as after birth”. The foregoing dictate presupposes that whereas the criminal justice infrastructure demands fair standard safeguards for every person charged with a criminal offences “special safeguards and care” need to be formulated in respect of children in conflict with the law.⁵ It is noteworthy that the foregoing normative frameworks did not use the term “diversion” in their prescriptions.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)⁶ is the first and most detailed international instrument albeit of a “soft law” nature that precisely and expressly made provision for the principle of diversion. Among the general principles in the Beijing Rules, state parties to the United Nations are required to give attention to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other

addressing underlying social factors) advocated in the Convention, using alternative measures to detention such as diversion, probation, counselling, community service or suspended sentences, wherever possible

⁴ See Declaration Number 2 to the Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924)

⁵ Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

⁶ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).

community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law

In its specific guidelines on diversion, Rule 11 of the Rules provides thus;

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

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

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

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

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

The Rules stress the important requirement of securing the consent of the young offender (or the parent or guardian) to the recommended diversionary measure(s).⁷ However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application".

Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).

The United Nations Convention on the Rights of the Child under its fair trial standards in respect of the Child reinforces the foregoing prescriptions by providing that state parties should ensure certain guarantees in respect of a child alleged as, accused of or recognized as having infringed the penal law. First it is required of state parties to the CRC to ensure that the child is treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. In more specific terms, the CRC prescribes, whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, provided that human rights and legal safeguards should be fully respected.⁸

⁷ Diversion to community service without such consent would contradict the Abolition of Forced Labour Convention

⁸ Article 40 to the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990

Taking cue, the Riyadh Guidelines, that is the United Nations Guidelines for the Prevention of Juvenile Delinquency, demand that Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system.⁹

At the regional level, the key instruments that have a bearing on the rights of the child are; the African Charter on the Rights and Welfare of the Child, European Convention on the Exercise of Children's Rights¹⁰, League of Arab States, Arab Charter on Human Rights¹¹, and American Convention on Human Rights. Among the foregoing regional instruments, only the African Charter and the European Convention are child specific human rights instruments which exist in addition to the regional human rights instruments of universal application to state parties in those regions. The American and Arab League instruments are instrument of universal applications to all human beings.

The African Charter on the Rights and Welfare of the Child does not expressly advert to the concept of diversion in its prescription of treatment of children in conflict with the law. Equally the European Convention on the Exercise of Children's Rights has no express advertence to the principle of diversion. Nonetheless, the European Convention provides that “nothing in this Convention shall prevent Parties from applying rules more favourable to the promotion and the exercise of children's rights”. This leaves room for state parties to consider diversion in their municipal jurisdictions as a method of dealing with children in conflict with the law.

ii. *Fair Hearing in International Law*

Children, it need not be emphasized, are human beings. It follows, therefore, that the fair trial standards that are to be found in universal and regional human rights instruments that are of universal application also apply to children. Some of the human rights instruments

⁹ Guideline Number 58 of the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (1990)

¹⁰ (ETS No. 160), *entered into force* January 7, 2000

¹¹ *Reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008

of universal application with fair trial standards include the Universal Declaration of Human Rights of 1948 which, though not hard law in the same context as a treaty, has been argued to constitute customary international law considering the level of acceptability of the principles it covers within the community of states. There is also the United National Covenant on Civil and Political Rights.

There are also regional human rights instruments that apply to all persons with prescribed fair trial standards. These include the African Charter on Human and Peoples Rights, the European Convention on Human Rights, the American Convention on Human Rights and the League of Arab States, Arab Charter on Human Rights.

In addition to the instruments of universal application, there are instruments of specific application to children but which also make provision for fair trial standards. At an international level the most notable instruments are; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")¹² United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)¹³, United Nations Rules for the Protection of Juveniles Deprived of their Liberty¹⁴, and the United Nations Convention on the Rights of the Child. At the regional level some of the instruments are the African Charter on the Rights and Welfare of the Child and the European Convention on the Exercise of Children's Rights. The instruments highlighted above are not exhaustive.

Whichever way one looks at it, a child participates in judicial proceedings under different conditions from those of an adult. To argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings.

¹² G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985)

¹³ G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (1990).

¹⁴ G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

As recognized by the Inter-American Court of Human Rights in the advisory opinion on the *Juridical status and human rights of the child*,¹⁵

[t]o accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages

From the totality of the foregoing instruments, the discernible fair trial guarantees applicable to all children are in the following principles and best practices:

- a) Principle of jurisdictionality, that is, administration of justice must be entrusted to a competent, independent and impartial judge, likewise, when deciding about controversies or situations that involve children and adolescents, efforts must be made to preserve specialization by the bodies entrusted with this task. authorities in charge of solving conflicts that involve minors must also receive training, as a fundamental requirement for their functions.
- b) Presence of both parties, that is, it is crucial to establish the parties involved in the proceedings, as well as to guarantee the rights protected by law. For this, it is necessary to “grant equal opportunities to the parties to argue and defend their claims” and to provide “due balance among the parties to the proceedings.” Efforts must also be made for “the proceedings to include an actor, plaintiff or claimant party who is clearly distinct from the judicial function in charge of reaching a decision.” Adequate legal advice and participation of parents or guardians during the proceedings enables protection required by the child due to his or her special condition.
- c) Principle of inviolability of defense: This principle means that every person must effectively enjoy the right to adequately prepare his or her defense, which requires being informed of the charges and of the evidence against him or her, as well as the right to suitable legal representation throughout the proceedings,

¹⁵ Advisory Opinion OC-17/02, August 28, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002)

- which “cannot be substituted by parents, psychologists, social assistants.” Furthermore, this right involves not submitting the detainee to tortures to obtain an admission that he or she committed the criminal act.
- d) Principle of the public nature of the proceedings: In accordance with this principle, all parties to the proceedings must be informed of and have access to the procedural actions as “a means to control the development of the proceedings and to avoid placing any of them in a position of defenselessness.” Likewise, when minors are involved, publicity must be limited to benefit their dignity or privacy, as well as in situations where debate of the case may have negative consequences or lead to stigmatization.
 - e) Principle of appeal or review: All persons, including children, have the right to enjoy the possibility of review of a decision to determine whether the law was adequately applied and to assess the facts and evidence, in all proceedings where decisions are reached regarding some of their fundamental rights. Also, “this right is always expanded with the possibility of resorting to expedite remedies (habeas corpus or similar actions) against decisions that involve deprivation of liberty or prolonging it.”

C. The Legal Provisions for Treatment of Children in Conflict with the Law in Kenya with Particular Emphasis on the Concept of Diversion and the Right to a Fair Hearing.

The most fundamental law in Kenya’s legal system is the Constitution of the Republic of Kenya. The Constitution of the Republic of Kenya at chapter 5 guarantees fundamental rights and freedoms of every person. Among the fundamental rights and freedoms of the individual are the rights to the secure protection of the law for every person charged with a criminal offence. Children, as human beings, are part and parcel of the subject protected by section 77 of the Constitution. The guarantees where someone is facing a criminal charge under the said section are:

- a) Every person is entitled to a fair hearing within a reasonable time.
- b) Every person is entitled to a hearing by an independent and impartial court established by law.

- c) Every person is presumed innocent until he is proved or has pleaded guilty.
- d) Every person should be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence with which he is charged.
- e) Every person should be given adequate time and facilities for the preparation of his defence
- f) Every person should be permitted to defend himself before the court in person or through a legal representative of his own choice.
- g) The right to facilities to examine witnesses called by the prosecution
- h) The right to obtain the attendance and to carry out the examinations of witnesses to testify on his behalf under the same conditions as those applying to prosecution witnesses
- i) The right to an interpreter free of charge if the person does not understand the language used at the trial.
- j) The right to be present at his own trial
- k) The right to a copy of the proceedings made by the court or on behalf of the court upon payment of reasonable fees.
- l) The right not to be convicted on account of an act or omission that did not constitute an offence at the time it took place.
- m) The right not to be subject to a penalty that is severer in degree or description than the maximum penalty that might have been imposed at the time the offence took place.
- n) Freedom from double jeopardy, that is, not to be tried for the same offence or on the same circumstances for which one has already been tried and either acquitted or convicted.
- o) The right not to be tried for an offence in respect of which one has been pardoned
- p) Freedom from self incrimination at one's trial.
- q) The right not to be convicted of any offence that is not defined and the penalty prescribed by a written law – with the exception on cases of contempt of court.
- r) It is expressly recognized as one of the exceptions to a right to a trial in public that in the interest of the welfare of persons under the age of eighteen years the court

may by law be empowered to exclude from proceedings persons other than parties to the proceedings.

It is important to note that the entire constitutional text of the Republic of Kenya as currently structured has no body of rights specifically dedicated to children. The only exception to this is the recognition of the need to conduct a trial involving a child without the full glare of the public. The constitution of the Republic of Kenya has no provision on the concept of diversion.

In addition to the universal guarantees provided for under Section 77 of the Constitution, the Children Act has additional guarantees specifically fashioned for children in conflict with the law. The Act provides for these guarantees in the body of the statute as well as in the Rules made under the authority of the statute popularly known as the Child Offender Rules or the fifth schedule rules.

There is no express provision on the principle of diversion in dealing with children in conflict with the law under the Children Act of Kenya. It is, however, arguable that the “best interest of the child” principle under the children Act and the importation of international conventions into the children’s Act could be construed to be a collateral importation of the principle of diversion in Kenya’s children law regime. In its long title, the Children Act is expressed as an Act of Parliament to “...give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child”. It is critical to note that Article 40 to the Convention on the Rights of the Child provides for the principle of diversion in dealing with children in conflict with the law. Section 4(3) of the Children Act requires all judicial and administrative institutions, and all persons acting in the name of these institutions, while exercising powers conferred by the Act to treat the interest of the child as the first and paramount consideration. Treatment of the best interest of the child and the first and paramount consideration is permissible to the extent that it is consistent with adopting a course of action calculated to –

- a) Safeguard and promote the rights and welfare of the child;

and the court of appeal has declared them unconstitutional and null and void. The said decisions are discussed in the section below.

D. Land Mark Judicial Decisions on the Concept of diversion and the Right to a Fair Hearing in Kenya

There is no single jurisprudential pronouncement from the Kenyan precedent setting courts, the Court of Appeal and the High Court, on the question of diversion. Indeed, this research did not discover any decision of any court in Kenya on the question of diversion. Be that as it may, a number of court decisions have been made regarding the issue of fair trial standards some of which have not necessarily involved children but whose application extends to children in conflict with the law. The issues covered by these decisions include:

i. The Rights not to be confronted with an overloaded charge sheet

In the case of **Eliphaz Riungu Vs Republic**¹⁹ the accused person brought an application under Section 84 of the Constitution of the Republic of Kenya for enforcement of, among others, his rights to a fair trial under Section 77(1) and 77(2) of the Constitution. The applicant contended that as a result of the 93 charges against him, the charge sheet was likely to severely limit or contravene his rights to a fair and expedient hearing. His first ground was that due to the nature and number of charges against him, the case could not be heard in less than two years thus denying him a fair hearing in a reasonable time. Secondly, he contended that due to the number of charges against all the accused persons, there would undoubtedly be created an overwhelming prejudice against the applicant. The High Court, relying on the cases of **Peter Ochieng Vs Republic**²⁰ and **Reg Vs Ludlow**²¹ stated that even though an overloaded indictment was not illegal in law, it would lead to embarrassment and prejudice of the defence and that 93 counts were too many to be determined in a fair trial within a reasonable time. The charge sheet thus contravened section 77 of the constitution.

¹⁹ High Court Criminal Application Number 472 of 1996

²⁰ (1982 – 8) 1 KAR 832

²¹ (1971) AC 29.

ii. The Right to be prosecuted by a competent prosecutor

The seminal case is the one of **Roy Richard Elirema & Another Vs Republic**²². The applicants had been convicted of Robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. They preferred appeals all the way to the Court of Appeal. One of the grounds raised at the Court of Appeal was that the officer who prosecuted them before the trial court was not a competent prosecutor within the meaning of Section 85 of the Criminal Procedure Code. The Court of Appeal held that where the prosecution had been conducted by an incompetent prosecutor, the accused person could not be said to have been afforded a secure protection of the law since in such a case, the trial court had acted both as a trial court and a prosecutor, which is contrary to section 77(1) of the Constitution.

iii. The Right to Pre-trial disclosure by the Prosecution and the guiding principles/elements to a fair hearing

The defining case on this requirement is the case of **George Ngodhe Juma & 2 Others Vs The Attorney General**²³. The applicant in this case sought a declaration that where an accused person was charged with a criminal offence, he has a right to access the prosecution's information relating to the charge especially the witness statements so that he can prepare properly for his/her defence. The court granted the declaration stating that such disclosure was an important part of the fair trial standards expected under Section 77 of the Constitution of the Republic of Kenya. The court went further to enunciate the elements of a fair hearing as follows:

- a) Where the accused's legal rights are safeguarded and respected by law;
- b) Where a lawyer of the accused person's choice looks after his defence unhindered;
- c) Where there is compulsory attendance of witnesses, if need be;
- d) Where allowance is made of a reasonable time in the light of all prevailing circumstances to investigate, properly prepare and present one's defence;
- e) Where an accused person's witnesses are not intimidated or obstructed in any improper manner

²² Nairobi, Court of Appeal, Criminal Appeal Number 67 of 2002.

²³ Nairobi High Court Misc Application Number 34 of 2001.

- f) Where no undue advantage is taken by the prosecutor or anyone else or by reason of technicality or employment of a state as an engine of injustice;
- g) Where witnesses are permitted to testify under rules of court within proper bounds of judicial discretion, and under the law governing testimony of witnesses;
- h) Where litigation is open, justice done and justice seen to be done by those who have eyes to see free from secrecy, mystery and mystique.

iv. The Right to be tried within a statutorily limited time frame

The judicial attitude towards this procedural guarantee has been dealt with in my earlier paper published elsewhere.²⁴ The details provided here are in the same terms as the said earlier publication.

As has been detailed above, this aspect of safeguarding the interests of the child in conflict with the law was introduced in Kenyan Laws by the Child Offender Rules at the Fifth Schedule to the Children's Act. The rules require, in their material respects that every case involving a child should be handled expeditiously and without unnecessary delay. In this regard, Rule 12 requires that in cases where the child is being tried before the Children's Court, and the case is not completed within 3 months after the taking of plea, the case should be dismissed and the child acquitted. In circumstances where owing to the seriousness of the offence the same is being handled a court superior to the Children's Court, the rules require that the maximum period of remand for the child is six months after which the child should be released on bail and in any event, such a case must be completed within 12 months after plea has been taken failing which the case should be dismissed and the child discharged without liability to any further proceedings for the same offence.

The judicial approach to these rules has been as follows:

²⁴ See Ongoya Z Elisha, The Emerging Jurisprudence on the Provisions of Act No. 8 of 2001 - Children Act, The Kenya Law Review, 2006.

In the case of *Victor Lumbasi Vs Republic*²⁵ the applicant made an application under Section 22(1) and (2) of the Children Act, Rules 9(1), and 10(4) of the Child Offender Rules and Sections 123(3) and 124 of the Criminal Procedure Code.²⁶ The applicant sought among other orders, that the Honourable Court be pleased to admit the accused, being a child aged 16 years on bail on terms as may be just. The material facts were that the applicant had been arrested and charged with a non-bailable offence, to wit murder, on January 24, 2006. At that point in time, the applicant was not only a minor but also a pupil at a local primary school. The minor was then remanded at Bungoma GK prison. According to the fifth schedule to the Act, the maximum period of remand for a child is six months. The state conceded the application and urged the court to order that the case be tried on priority basis in light of the fact that the Act enjoined that such trial be completed within 12 months. The prosecution, however, added a rider that the release of the minor be conditional upon the parents standing surety to secure his attendance at the hearing. The court made a holding that:

In effect, when a child is charged with the offence of murder, unless there are militating circumstances, bail should ordinarily be granted. Where bail is not granted the reason for the refusal ought to be recorded. Where a child is not released on bail the court may make an order for his/her detention in a children's remand home until his case is heard and determined which in any event must be within 12 months from the date of plea.

A curious question from this jurisprudence is where the court imported the reasoning that it could fail to release a child on bail and instead make an order for his/her detention in a children's remand home until his case is heard and determine within the dictates of the child offender rules. As shall be highlighted further below, such discretion was ultra vires the powers of the court under the child offender rules.

The case of *Republic Vs Wambua Musyoka*²⁷ involved a subject who was a minor. The subject was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. When the case came up for further hearing the child had not been produced. Counsel for the child urged the court to release the child on bail since

²⁵ Bungoma High Court Criminal Case No. 57 of 2006

²⁶ Chapter 75 of the Laws of Kenya.

²⁷ Machakos High Court Criminal Case No. 24 of 2003.

the trial had already lasted for 8 months. Counsel cited Rule 12(1) and (3) of the Child Offenders Rules. The state opposed the application citing section 123 of the Criminal Procedure Code and the Constitution. The state urged the court to find the provisions of the Children Act to be contrary to the constitution which was the supreme law of the land. The court seized the occasion to interrogate the question whether the Children Act contravened the provisions of section 72 of the Children Act. The court came to the following conclusion:

I have not seen any other provision relating to bail. That provision in the constitution, (section 72), does not in any way take away or limit the court's jurisdiction in grant of bail. There is no conflict between the constitution and the Criminal Procedure Code or the Children Act. The provisions of the Children Act having been enacted after those of the Criminal Procedure Code will be deemed to supersede those of the Criminal Procedure Code regarding grant of bail. I therefore, find that since the trial is taking too long and is unlikely to finish today, the child should be admitted to bail...

This we submit was sound jurisprudence on the part of the court. It shall later in this analysis be distinguished with the position of the court of appeal on the same question of bail for children charged with what would, but for the offenders being children, constitute capital offence.

A question arose in the case in the case of *Republic Vs S.A.O*²⁸ whether a child who was 13 years of age and who had allegedly committed the offence of murder while 12 years of age was entitled to bail. Before delving into the merits of the application, the court restated the following matters of principle:

The act was enacted to make specific provisions in respect of children who, in my humble view, must be considered a special class of the society. In addition, they are undisputedly vulnerable members of the society. The legislature to give effect to the principles in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, enacted this Act. It has vested the High Court with special powers to safeguard those rights under Part II of the Act and has empowered the High Court under Section 22(2) which provides...

Section 4(3) further specifically enjoins all judicial institutions to take the interest of the child as the first and paramount consideration and to safeguard and promote the rights and welfare of the child. Section 18(2) of the Act, further more, provides that : "no child shall be subjected to capital punishment or life imprisonment." Section 190(2) repeats the

²⁸ Nairobi High Court Criminal Case No. 236 of 2003

above by providing that the child shall not be sentenced to death. To pronounce clearly and put in effect the spirit of the Act, the legislature has provided for specific rules in the schedules of the Act. The relevant rules for this case is the Child Offender Rules which is in the fifth schedule of the Act.

Having committed itself to the “spirit” of the relevant parts of the Children Act as such, the court asserted that:

In view of the above mentioned provisions as well as those in Section 4(2) and 4(3) of the Act, the submission that the provisions of the Act do not apply to murder trials falls by the way and has to be firmly rejected.

Up and until this point, I am persuaded that the court had struck a blow for the rights of the child as encapsulated in the Act. Blazing the trail of child law jurisprudence the court held further that:

The Act makes special provisions in respect of children as has been mentioned hereinbefore. The Penal Code is a general Act dealing with all offenders. Furthermore, the Act is enacted on a later date than the Penal Code. With these two factors before the court, the well ingrained principles of interpretation, that is, the specific overrides the general and the latter Act is presumed to have amended an earlier one unless specifically stated must take effect.

In this case, in my view, it is irrelevant who is responsible for the delay occasioned. What matters is that the accused has been in remand for longer time than prescribed by law. Her rights have been violated are violated and the same should be redressed. The child in this case has been charged with serious offence (sic) and hence looking at all circumstances of this case I shall not deem it right to discharge her even though very passionately urged by Mr. Onyango. I may add here that in an appropriate case this court would not have hesitated to do so. I also find that rule 12(4) of the Child Offender Rules which is relied on by Mr. Onyango is not applicable to the case just yet as twelve months have not elapsed since plea was taken. ... I direct that the accused be released on free bond with two sureties.

This case presents jurisprudential benefits as well as set backs. The benefits are that the court managed to uphold the grant of bail to a child alleged to have committed what would otherwise, but for her status as a child, be an offence punishable by death. The court further upheld the provisions of the Children Act and the Rules made thereunder as against the provisions of the Penal Code that are ‘much lesser child friendly’

The major set back emerges from the reason advanced by the court for its failure to discharge the child, namely; that the child had been charged with a serious offence and

in the circumstances of the case, she ought not be discharged. The basis of this position in law, coming just after the same court had committed itself to the validity of the Child Offender Rules, is suspect. The court took on and purported to wield a discretion that it did not have.

In its closing remarks, the court advised the Hon. Attorney General and the Chairman to the Law Reform Commission to look into the apparent conflict between Section 18(2) and 190(2) of the Children Act on the one hand and Section 204 of the Penal Code on the other hand make appropriate amendments. There is no evidence that this advice has been taken seriously by the two public officials.

In the case of *Republic Vs S.T. (a child)*²⁹ the subject was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on October 12, 2003 at Ngorongoro village, Narok District, the subject murdered Johanna Arap Mutai. At the close of the prosecution case the subject was put on his defence. Before the placement of the subject on his defence, counsel for the subject had made submissions urging the court to find that the proceedings conducted against the subject were illegal and further that the prosecution had not established its case on the charge of murder against the subject. On the question of the legality of the proceedings, the court made the following findings:

If I followed Miss Magana's argument correctly, it is her submission that since the proceedings in this case took more than twelve months from the date that the subject took plea on November 17, 2003, this court should, therefore, dismiss the case against the subject.

With the greatest respect to Miss Magana, I will humbly beg to disagree. The above rules were promulgated so that cases involving children in conflict with the law should be expeditiously disposed of. That is an ideal that is laudable and this court has tried its best to abide by the requirements of the said rule by fast tracking cases involving in conflict with the law. However, even with the best intention, the court cannot deal with the said cases within the stipulated period due to the overwhelming numbers of cases which are still pending. As it were the court has enabled the cases involving children to jump the queue to enable them to be speedily disposed of. I think courts should always use a common sense approach in interpreting laws that stipulate that courts should undertake certain proceedings within a certain period. This would only be applicable in a situation whereby the courts are adequately manned. To dismiss a case, as the present one, where the subject had been charged with the serious offence of murder, just because twelve months had expired since plea was taken as stipulated by the rules, irrespective of whether the guilt or innocence of the subject has been established, in my view would be a travesty of justice. My interpretation of the said rule is that courts should strive to

²⁹ Nakuru High Court Criminal Case No. 144 of 2003

expeditiously dispose of cases involving children in conflict with the law. It does not mean that children in conflict with the law should not face justice just because of the technicality of time limits. The rules provide a safeguard for the delay in the hearing of such cases by granting courts jurisdiction to grant bail pending the hearing and disposal of such cases.

To ascertain the soundness or otherwise of the reasoning of the court in this case ,it is imperative to put into consideration the fact that the court did not impugn the validity of the relevant Child Offender Rules. By necessary implication, as far as the court was concerned, the said rules were valid. Having left the rules intact, the court proceeded to attach meaning to them by saying that they meant that courts should strive to expeditiously dispose of cases involving children in conflict with the law.

Where was the court deriving this discretion from? The Rules³⁰ provide that where a case to which paragraph 3 of the rule applies³¹ is not completed within twelve months after plea has been taken, the case shall be dismissed and the child shall be discharged and the child shall not be liable to any further proceedings for the same offence. The rule leaves to aspect of the matter to the court's discretion. The court appears to have acted *per incuriam* of the well known rule of statutory interpretation as spelt out in the celebrated case of *Stock Vs Frank Jones (Tipton) Ltd*³² where Lord Edmund immortalized the following words:

But dislike for the effect of a statute has never been an accepted reason for departing its plain language. 'It is a strong thing to read into an Act of parliament words, which are not there, and in the absence of clear necessity it is a wrong thing to do' said Lord Marsey in Thompson Vs Goold & CO. 'We are not entitled to read word into an Act of parliament unless clear reason for it is to be found within the four corners of the Act itself, said Lord Loreburn LC in Vickers, Sons & Maim Ltd Vs Evans.

It apparent disregard of the above guiding principles of statutory interpretation, the court simply decided to read a discretionary power in the plain, clear and unambiguous words of the Child Offender Rules without elaborating on the reasons for so doing.

³⁰ Specially rule 12(4)

³¹ The said paragraph 3 provides that where owing to its seriousness a case is heard by a court superior to the Children's Court, the maximum period of remand for a child shall be six months after which the child shall be released on bail.

³² [1978] 1 ALLER 948

The question regarding the validity of the Child Offender Rules has faced jurisprudential tests of the Kenyan judiciary most often. In the case of *Republic Vs Matano Katana*³³ got occasion to test the legal force of the Child Offender Rules on October 27,2004. it was a case where the defence counsel had applied for the release of a child in conflict with the law who had been accused of the offence of murder. In dealing with the question, the court commenced by interrogating the scheme of protection under the Children Act. It noted:

C

It will also be seen that while those convicted of murder have to be punished by death, in cases of child offenders, no punishment by death is permitted. The procedure of arrest and charge and provisions as to bail and remand arrangements of a child offender and the organization of court in certain cases to shield the children cases of death or morality is set out clearly. The period of remand are set out as six months in case of offences punishable by death. Under rule 12 in case of serious offences the trial must be completed within 12 months failing which the child offender shall be discharged and the case shall be dismissed and the child offender shall not be made liable again for the same offence. These provisions are at variance with the ordinary procedure of conducting criminal cases. The Penal Code at section 204 provides for the death penalty for the offence of murder.

C

The criminal Procedure Code provides for the procedure to be followed in a trial on a charge of murder. After plea of Not Guilty the arrangements for trial shall be made and the trial shall take its course until completion. There is no time limited for completing the trial. Except, however, it is a guarantee of human rights that the trial shall be conducted “within a reasonable time” - Section 77(1) of the Constitution. The Children Act, therefore, has changed the procedure drastically in favour of child offenders by saying that simply because time has expired the court must without examining the merits the charge of murder must be dismissed and the child offender walk away free. Is this what parliament intended? The state counsel says it cannot be. He submitted that the Act and the Rules are inconsistent with the Constitution – section 70 and 72, and the Criminal Procedure Code – section 123. He referred to a ruling made in this file by Justice Maraga regarding the question of bail under rule 12 where the judge expressed his view that such inconsistency exists. In the present case the court is being asked to terminate the case before hearing any witnesses. Counsel also submitted that it is against public policy to terminate the proceedings at this stage.

Prompted by the submissions by the state counsel on the question of the congruence between Children Act and the Child Offender Rules on the one hand and the Constitution, the Criminal Procedure Code and public policy on the other, the court interrogated legal force of the Child Offender Rules (whether they were subsidiary legislation on an integral part of the Children Act). To this issue the court observed:

³³ Mombasa High Court Criminal Case No. 33 of 2004

(on) the issue of the rules being subsidiary legislation it will be observed that section 194(1) of the Act simply says that:

Proceedings in respect of a child accused of having infringed any law shall be conducted in accordance with the rules set out in the fifth schedule

Upon examination of the scheme of the whole Act it does appear to me that the fifth schedule is to be read as part of the statute (and) not a subsidiary made after the enactment which has to be laid before parliament for approval ... With regard to Section 194(1) the rules set out under the 5th schedule were before the legislature at the material time but the power to amend the regulations was given to the Minister. It is, therefore, correct to say that the rules contained in the fifth schedule are as much part of the statute and as much enactment as any other part. Considering what I have stated above, I am convinced that the intention of parliament in enacting Section 194 and the fifth schedule "Child Offender Rules" parliament intended to make law just as they are written. The meaning of the section is clear and unambiguous. No amendments appear to have been by the Minister yet. Parliament intended Kenya to stand shoulder to shoulder with other nations of the world to protect the rights of children of the world. And this is in keeping with modern international law.

It is clear to me that parliament intended just as they stated that a child offender trials shall not be unduly delayed beyond the period of twelve months. This is also in keeping with the Constitution...From the record, the twelve months shall expire on October 30, 2004. I allow this application and order that if the accused's trial shall not have been completed on that day he shall be discharged and set at liberty immediately.

The court might appear to have been inaccurate in its placement of the Child Offender Rules shoulder to shoulder with the statute itself. The reason for this contention is not hard to come by. Subject to Section 33 of the Interpretations and General Provisions Act (Chapter 2 Laws of Kenya), if the lawmaker intended that the rules be part of the statute itself, the draftsman would have included them in the body of the statute. To this end, the rules remain just what they are, subsidiary legislation. Further more, if the rules were to be an integral part of the statute in the manner insinuated by the court, the procedure of amendment would not have been the one prescribed under the statute (by the Minister).

Be that as it may, the court was quite correct in its construction of the "spirit" of the rules and the statute and on its finding on the question whether the said rules were inconsistent with the constitution of the republic of Kenya and public policy.

The court of appeal appeared to throw a spanner in the works on the already fledgling jurisprudence on the constitutionality of the Child Offender Rules. This was in the case of *Kazungu Kasiwa Mkunzo & Another Vs Republic*³⁴. This is a case that has

³⁴ Mombasa, Court of Appeal, Criminal Appeal No. 239 of 2004

shaken the terrain in the realm of children law in a mighty and, probably, unprecedented way. Due to the jurisprudential significance of this case, I will endeavour to set out its material facts and the reasoning of the court in fairly great detail.

The appellants were tried and convicted by a Chief Magistrate at Malindi on one joint count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars contained in the charge were that on December 14, 2000 at Shauri Moyo trading centre in Magarini location, Malindi district, Coast Province, the two appellants jointly with others not before the court and while armed with dangerous weapons, namely, a G3 rifle and knives, they robbed Josephat Karis Kazungu of one camera, 11 sufurias, one radio cassette, 6 bed sheets, 21 costumes, one lesso, a tin of ball gums, a tin of koo cooking fat and Ksh. 4,000, all valued at Ksh.20,000 and that during the said robbery, the appellants threatened to use actual violence to the said Josephat Karisa Kazungu. Both appellants were convicted on this count and were each sentenced to death as mandatorily required by the law under which they were charged. The first appellant was alone charged on two other counts of possessing a firearm and ammunition contrary to section 4(2)(a) of the Firearms Act.³⁵ Upon conviction on the two other counts, the 1st Appellant was sentenced to fourteen years imprisonment on each of the two counts, the sentence being orders to run concurrently.

Both appellants appealed to the High Court against their respective convictions and sentences but judgment delivered on November 23, 2004 the High Court³⁶ dismissed their appeals against the conviction and the sentence of death imposed on count one was confirmed in respect of each appellant. However, the High Court ordered that the sentence of imprisonment imposed on the 1st appellant be suspended in view of the sentence of death in count one. The two appellants preferred a second appeal to the Court of Appeal. By virtue of Section 361 of the Criminal Procedure Code, only matters of law stood to be raised at this second appeal.

The first point of law raised by counsel for both appellants concerned the second appellant and the same regarded the age of the said appellant at the time of commission of the offence. This ground was contained in a supplementary memorandum of appeal

³⁵ Chapter 114 of the Laws of Kenya.

³⁶ Khaminwa and Maraga JJ

and it stated that the High Court erred in law in failing to consider the issue of the age of the 2nd appellant at the time of the alleged offence.

By order of court, the 2nd appellant's age was medically examined whereupon the doctor ascertained the approximate age of the second appellant at the time of examination to be 21 years. It followed that at the time of commission of the offence the second appellant was approximately 15 years old. Counsel submitted that the trial of the second appellant was a nullity because the 2nd appellant had been held in prison custody pending trial for more than twelve months.³⁷

On this submission, the court took into account the following:

- a) It is only section 186 of the Children Act that sets out the rights of a child who is alleged to have infringed any law and paragraph (c) of that section provides that the child "shall have the matter determined without delay".
- b) There is no provision in the Act with regard to what is to happen if the matter is not determined without delay.
- c) The Child Offender Rules contained in the 5th schedule to the Act and specifically rule 10(4) provides that remand in custody shall not exceed; six months in the case of an offence punishable by death, or three months in the case of any other offence;
- d) Rule 12 of the Child Offender Rules whose side note reads "duration of cases" and specifically paragraph 4 of the said rules provides that where a case to which paragraph (3) of the rule applies is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child shall be discharged and the child shall not be liable to any further proceedings for the same offence.
- e) The rule was made by the Minister pursuant to section 197 of the Act which is in the terms that "subject to the provisions of this Act, the Minister may make regulations (a) for prescribing anything that may be prescribed under this Act, or (b) generally for the better carrying out of the provisions of this Act.

³⁷ It is imperative to note that at the time of the said submission, counsel for the appellants did not have the Children Act with him in court and the court did lament this fact since the said counsel did not refer the court to the exact provision of the Act that required the second appellant to be tried within 12 months from the date of taking the plea.

Armed with the above considerations, the court³⁸ held thus:

We have anxiously gone through the Act and we do not find any provision authorizing the Minister to set time limits within which trials are to be held. The power to “generally make regulations for the better carrying out of the provisions of this Act” does not appear to us to give the Minister the power to set time limits within which trials are to be held. Such power would fly in the face of various laws including the constitution itself. Section 77(1) of the Constitution merely provides that:-

If a person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent court established by law.

The Constitution wisely does not set out what is a reasonable time because in determining that issue, the court would have to take into account, a whole lot of factors such as the diary of the court, the number of judicial officers available to hear such cases and such like factors. Then there are provisions dealing with bail with regard to offences carrying the death penalty. Section 72(5) of the constitution provides:-

If a person arrested or detained a mentioned subsection 3(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either conditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

So that under the Constitution of Kenya a person charged with an offence punishable by death is not entitled to be released on bail and the constitution itself does not draw a distinction between children and adults, where a charge is punishable by death. This constitutional provision is amplified by section 123 of the Criminal Procedure Code which states:- ...

It is clear to us that the Criminal Procedure Code does not authorize the release on bail of persons charged with three offences punishable by death namely; murder treason, robbery with violence and attempted robbery with violence. The 2nd appellant in this case was charged with the offence of robbery with violence. Under the constitution, he was not entitled to be released on bail; nor was he entitled to be released on bail under the Criminal Procedure Code. Nor do these laws set out any time limits within which he was to be tried. As we have seen, the Children Act itself did not purport to define any period which would qualify as amounting to “without delay”. It is the Child Offender Rules which purport to set time limits within which trial must be held or else the case be dismissed....

Section 186(c) of the Children Act does not set any time limits within which trials must be completed. In any case even if the Act had made such a provision, that would be contrary to section 77(1) of the Constitution, which does not define what a “reasonable time” would be. Again the rules under consideration purport to allow the release on bail of children charged with offences punishable by death. Both the Constitution and the Criminal Procedure Code prohibit that. In the event we have come to the conclusion that **rules 10(4) and Rules 12(2)(3) and (4)** are *ultra vires* section 186(c) of the Children Act and are also contrary to **sections 72(5) and 77(1)** of the Constitution. Those rules being *ultra vires* the provisions we have set out, they are null and void and are of no effect. We so declare.

³⁸ Omollo, Bosire and Githinji JJA

The court then proceeded to consider the remaining grounds of appeal and dismissed them. Finally, the court did make a finding to the effect that:

As respects the 1st appellant he was about fifteen years old when he committed these offences. He was, therefore, not liable to be sentenced to death on count one. That being so, we set aside the sentence of death and substitute it with an order that the 1st appellant shall be detained at the pleasure of His Excellency the president.

As acknowledged earlier, this decision has been received as a major upset of the progress that had so far been made by child welfare and child right practitioners. I will endeavour to demonstrate shortly that the reasoning of the appellate law lords in the course of disturbing the benefits made in the child rights movement was at best inconsistent and unpersuasive. The reasoning of the court of appeal in this matter raises more questions than it does offer answers on the issue of interpretation of statutes an the tests applicable to determine when ordinary law is consistent or otherwise with the constitution. The shortcomings in the line of thought taken by the court of appeal can be notice through the following questions:

Question 1 –In light of the last finding by the court of appeal that a child convicted of what would otherwise be a capital offence cannot, in law, be sentenced to death, are the said offences “punishable by death” within the meaning of section 72(5) of the Constitution so far as the same relate to children?

It is important here to note that the constitution of Kenya does not define the offences that are punishable by death. It follows, therefore, that one has to resort to penal statutes to ascertain offences that are punishable by death. Under the Children Act and the Penal Code, children cannot be sentenced to death, and, therefore, no offence committed by a child is, in law punishable by death. In the premises, it would appear the court was wrong in faulting the Child Offender Rules so far as the same provided for bail for children that were subjects of trials relating to what would otherwise be capital offences.

Question 2 – Considering that the objective of the Children Act is to, among other things give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and, that these two Conventions make provisions relating to child offenders, which as far as possible try to exclude detention of

children in custody, could the said rules be termed as being outside the scope of rules “generally for the better carrying out of the provisions of this Act” as anticipated by section 197 of the Act?

Question 3 – Section 186(c) of the Children Act guarantees children in conflict with the law the right to have their cases determined “without delay”. The Minister, in promulgating the impugned Child Offenders Rules set out a time limit of twelve months within which trial of child offenders has to take place. The move by the Minister was to provide an objective, scientific and standard criteria of avoiding delay. How then does such a move on the part of the Minister conflict with the said section of the law? Isn’t such a move on the part of the Minister intended, on the face of it, for the better carrying out of the provisions of the Act requiring cases relating to children in conflict with the law to be determined “without delay”?

Question 4- The Constitution at Section 77(1) guarantees every accused person the right to be afforded a fair trial “within a reasonable time”. The Constitution, it would follow, proscribes a trial within “unreasonable time.” Indeed, the prescription by the constitution guarantees every accused person a speedy trial. Does the prescription by the Minister of twelve months in relation to trials in respect of children constitute unreasonable time or does it impede speedy trials. If it, as I submit, does not, how then is such a rule inconsistent with section 77 of the Constitution?

Question 5 – By asserting that “in determining that issue (whether the trial has been undertaken within a reasonable time) the court would have to take into account a whole lot of factors such as the diary of the court, the number of judicial officers available to hear such cases and such like factors, was the court of appeal effectively suspending the provisions of section 4(3) of the Children Act which demands that the best interest of the child be treated as the first and paramount consideration by all instructions dealing with children matters? Was the court subjecting the best interest of the child to such administrative shortcomings as “the diary of the court, the number of judicial officers available to hear such cases and such like factors?”³⁹ Was the court failing to be pro-reformist by allowing the administrative crisis precipitated by the relevant child Offender

³⁹ This concern was raised by Mr. Alubala Ibrahim during his discussion with author of the jurisprudential soundness of the case under scrutiny.

Rules be a catalyst for administrative reform that would culminate into employment of more judicial officers and proper management of the court's diary?

Question 6 – Why exactly was the court silent on the provisions of section 33 of the Interpretation and General Provisions Act⁴⁰ which provides that “an act shall be deemed to be done by an Act or in pursuance or execution of the powers of or under the authority of the Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act?”

Question 7 – Did the court bother to gather any inspiration from developments on the international plane relating to the rights of the child?

What are the effects of this position taken by highest court in Kenya's judicial hierarchy? To this question we hold the view that the response if clear. For the time being, the impugned rules are not law within the coterminous boundaries of the Republic of Kenya.

It is important to note that save for the issue of the right to be tried within a fixed time frame that involved child-specific rights, all the other issues above arose from cases involving trial of adults. Nonetheless, the principles annunciated therein apply with similar force with respect to children.

E. Legislative Lessons on the Issue of Diversion from Other Jurisdictions – a case study of Ghana and Uganda

Uganda and Ghana are some of the countries that have express legal provisions on the use of diversion in respect of children in conflict with the law.

In the Ugandan case, cases concerning children are diverted from formal courts to an institution known as village executive committees. Under the Children's Act of Uganda⁴¹ all causes and matters of a civil nature concerning children are to be dealt with by the village executive committee where the child resides or where the cause of action arises.⁴² As regards criminal cases the jurisdiction in respect of offences spelt out in the Third Schedule to the Act. In terms of dealing with children found culpable of the charges

⁴⁰ Chapter 2 of the Laws of Kenya

⁴¹ Chapter 59 of the Laws of Uganda

⁴² Section 92(1) of the Children Act of Uganda, Chapter 59 of the Laws of Uganda.

facing them, the village executive committee is empowered to deal with such a child by making an order for any of the following:

- a) Reconciliation;
- b) Compensation;
- c) Restitution;
- d) Apology; or
- e) Caution

In addition to the foregoing orders, the village executive committee court is empowered to make an order for the child to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by the court. Such an order, known as a guidance order, should be for a maximum period of six months. A child who has been subjected to a village executive committee court cannot be ordered to be remanded. In order to guarantee fair trial standards, the village executive committee is expected to comply with the procedural guarantees set out under the Executive Committees (Judicial Powers) Act. To guarantee a friendly atmosphere for the child, the village executive committee is required to ensure that the following are guaranteed:

- a) Proceedings should be held in camera;
- b) Proceedings should be as informal as possible and by inquiry rather than by exposing the child to adversarial procedures;
- c) Parents or guardians of the child should be present whenever possible;
- d) The right to appeal should be explained to the child.⁴³

In Ghana, institutions known as Child Panels are established under the Children's Act of 1998. The purpose of the Child Panels is expressed as “non-judicial functions to mediate in criminal and civil matters which concern a child prescribed under the Act.”⁴⁴ In Civil matters, the Act mandates the Child Panel to mediate in any civil matter concerned with the rights of the child and parental duties.

In criminal cases it is the duty of the Child Panel to assist in victim-offender mediation in minor criminal matters involving a child where the circumstances of the offence are not

⁴³ See Section 92(8) as read with section 16(1)(b)(d)(d) and (f) of the Children Act of Uganda

⁴⁴ See Section 28 of the Children Act of Ghana, 1998.

aggravated. The Child panel is also mandated to seek to facilitate reconciliation between the child and any person offended by the action of the child.

Regarding fair standard guarantees in the operations of the Child Panels, it is required that a Child Panel should permit the child to express his/her opinion and to participate in any decision which affects the child's well being commensurate with the level of understanding of the child concerned.

In terms of dealing with a child found culpable of the alleged offence, the statute in Ghana requires that a child appearing before the Child Panel should be cautioned as to the implications of his/her action and that repeating the same behaviour may subject him to the juvenile justice system.

The statute also mandates the Child panel to impose a community guidance order on the child with the consent of the parties concerned in the matter. Such an order entails placing the child under the guidance and supervision of a person of good standing in the local community for a period not exceeding six months for purposes of reform. Other proposals that a Child Panel may make in the course of mediation are; apology, restitution to the offended person or service by the child to the offended person.

F. Conclusion.

Two questions deserve answers from this paper;

- (a) Is the present law on the right to a fair trial and the concept of diversion in the children's justice system in Kenya adequate?
- (b) Is there need for additional law on both or either of the two aspects of children's justice system in Kenya?

By and large, the fair trial standards prescribed by the Law in Kenya for children who have been subjected to formal institutions of justice is adequate. It conforms to the international standards and other best practices on paper. The reality in application may not be very desirable. This is of course subject to the need to fill the lacunae left by the rather retrogressive decision of the Court of Appeal in the case of *Kazungu Kasiwa*

*Mkunzo & Another Vs Republic.*⁴⁵ To deal with the *Kazungu Kasiwa Mkunzo & Another Vs Republic* jurisprudence, I have proposed elsewhere a number of options, namely;

“In the short term, it is advisable that an appropriate case raising precisely the same issues as those raised in the case under scrutiny be identified. The same be litigated all the way to the court of appeal. A larger bench be constituted for purposes of re-examining the jurisprudence oozing from this case.

In the long term, we propose that the debate on the rights of the child should remain an integral part of the constitutional review process (piecemeal or comprehensive). Insistence ought to be on ensuring that the impugned rules remain on the agenda of the proposed debate.”

Regarding the concept of diversion, I have already pointed out that a purposive, and perhaps activist, reading of the law on children in Kenya may discover the principle of diversion as among the best practice principles that govern the administration of justice for children in Kenya. Needless to say, such activism is rear to come by and it is therefore necessary for statutory intervention to make the issue beyond doubt. Statutory intervention can also serve the purpose of providing clear, detailed and guidelines on the application of the principle of diversion. Such guidelines may address issues such as; which are the institutions and who are the individuals to be involved in the process of diversion? What offences are subject to the application of diversion? What methods are used to dealing with the children found culpable of offences in the application of diversion? What are the standards of fairness that should be applied by every person involved in the diversion process?

Whereas it is necessary to provide for the principle of diversion in Kenya’s body of law on children, it is not necessary to create an entirely new law. Enactment of new laws has the inevitable consequence of creating legislative inflation – a state of having many, and sometimes conflicting pieces of legislation. Such a state is not desirable since it contributes to uncertainty rather than fostering certainty of the law. In the event that Parliament if pursued to enact a law on diversion, it is advisable that it takes the form of

⁴⁵ supra

an amendment to the Children's Act to make provision for diversion. Nonetheless, since law making through parliament is sometimes unnecessarily time consuming and requires a lot of lobbying, it may be necessary to promulgate rules by use of the delegated powers vested in the Minister under the Act.

In coming up with the legal framework, whether statutory – which is most efficacious – or by use of delegated legislation – which is expedient – the following broad principles, largely discernible from General Comment Number 10 of the Committee on the Rights of the Child, must be borne in mind⁴⁶:

- (a) Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- (b) The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
- (c) The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;

⁴⁶ See also Jeremiah Nyegenye, The Draft Children Law (Amendment) Bill: A Report On The Proposals On Diversion, A Paper Presented At The Children's Legal Action Network (CLAN) Advocacy And Lobbying Workshop For Members Of The National Diversion Core Team, Intercontinental Hotel, Nairobi – 15th August, 2008 (Unpublished)

- (d) The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;
- (e) The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as “criminal records” and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.
- (f) The diversion regime should offer viable community-based alternatives to the detention of children in custody;
- (g) Diversionary options should be available and should be used at any point of decision-making by the police, the prosecution or other agencies such as the courts or tribunals;
- (h) Diversion should be made an option 'whenever appropriate' and should not be restricted to some types of offences;
- (i) Access to diversionary options must be based on established criteria and must not be arbitrary;
- (j) The diversionary options offered must have the best interests of the child as a primary consideration and must respect the human rights of the child offender;
- (k) Persons involved in the administration of the diversion programmes must be properly trained and qualified in the juvenile justice system;
- (l) All diversionary options must be resorted to voluntarily and only on the basis of the informed consent of the child offender or his or her parent or guardian;
- (m) Diversionary options must abide by the traditional procedural safeguards associated with due process;
- (n) Discretionary decisions made at the various stages in the diversionary process should be subject to review; and

- (o) The diversion regime must have an in-built mechanism for monitoring and evaluation not only to safeguard the rights of child offenders but also to assess its impact and efficacy for the purposes of reform.