

Towards the Establishment of Child Friendly Benches



Lady Justice Martha Koome

Objectives

- This paper will address how the Children Act 2001 has been interpreted to address the concerns of children in relation to their interaction with the judicial system
- A brief description of the Children's Act 2001
- How the Act Protects the Child in Court procedures
- Protection of Children's Human Rights in the Act
- Law in Relation to Adoption
- Recommendations



Background

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”



Background

- A child is defined as any human being below the age of the 18 yrs and the state should take full responsibility of ensuring the welfare and survival of the child.
- The welfare of a child can be secured by ensuring that the child is provided with the basic needs such as shelter, education, health and other interests
- These Rights are protected in the Convention for Rights of the Child and the African Charter on the Rights and Welfare of the Child.
- In Kenya the Children Act 2001 is the domestic legislation that seeks to protect the child

The Children Act 2001



- The Children Act is supposed to give effect to both the CRC and ACRWC

‘An Act of Parliament to make provisions for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children’s institutions; 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 and connected purposes’

- The Act further provides that the Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of children’s rights

Children Act 2001



- The most important section is found in Section 4[1] which provides for the survival and best interest of the child:

“Every child shall have an inherent right to life and it shall be the responsibility of the Government and family to ensure the survival and development of the child

1. *In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration.*
2. *All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-*
 1. *Safeguards and promotes the rights and welfare of the child;*
 2. *Conserve and promote the welfare of the child;*
 3. *Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”*

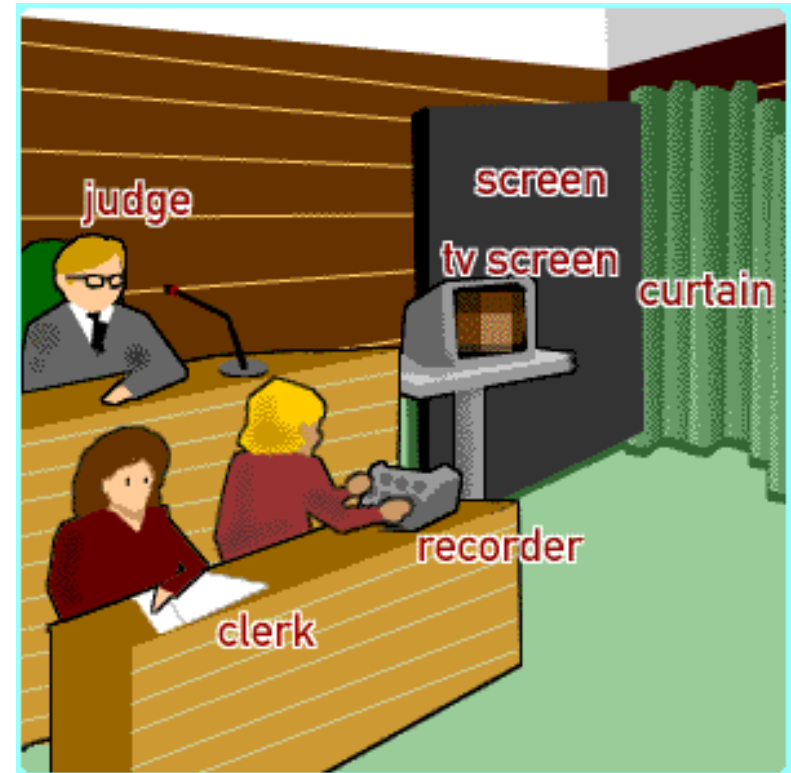
Children's Court

- The Act establishes a children's court and what is envisaged is a child friendly bench
- The Bench should ensure that the child is dealt with in an informal setting that is not intimidating

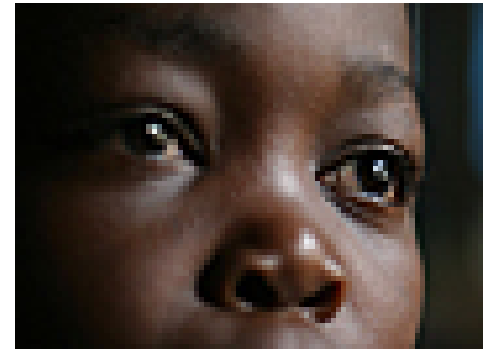


Children's Court

- The Act provides that a children's court shall sit in a different building or room or at different times from the normal court sessions
- In all proceedings involving a child, the identity, home, last place of residence or school of the child is not to be published
- In all decisions regarding the upbringing of the child the court must avoid delay that may prejudice the welfare of the child this is important in cases involving child custody and maintenance



Legal Aid



- Provision of Legal aid is provided in the Act in Section
- However the Government has not set up the Public Defenders Office to set aside funds
- NGOs have been crucial in providing these services

Legal Aid for Children

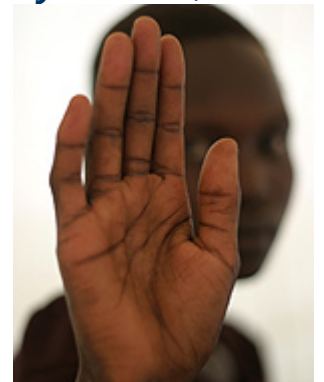
- Rift Valley Law Society lawyers have an excellent model to secure legal aid for all the children in conflict or contact with the law
- The initiative is sustainable as the entire membership takes up a pro-bono case for a child within the Juvenile justice Programme
- Trail of a child is very difficult without proper legal representation and miscarriage of justice can occur without proper representation

Children's Rights in Court Proceedings

*Kazungu Kasiwa Mkunzo V Republic Criminal Appeal No 239 of 2004
[Mombasa]*

- In this case the Court of Appeal found that the Legal Counsel, who was representing an accused person who was a minor for that matter, was not even aware of the provisions of the Children Act or the child Offenders Rules.
- The court of Appeal proceeded to consider the provisions of the child offender's rules regarding the period within which a child can be kept remand. The rules provide that a child should be released on bail or if remanded in custody shall not exceed a period of;

*[A] six months in the case of an offence punishable by death; or
[B] three months in the case of any other offence.*



Children's Rights In Court Proceedings

- The court of appeal made a finding that the child offenders rules contravened the provisions of the penal code and the Constitution.
- These rules are meant to safeguard the best interest of the child. Those rules are to be read with the entire Act, the CRC and ACRWC and Courts are supposed to take regard in all judicial decisions, *the best interest of the child should prevail and that cannot be achieved if the child is to be held in custody for long period.*

Protection of Rights of The Child In Court Proceedings

- When dealing with a child under the child offenders section of the law, words such as “conviction” and “sentence” shall not be used in relation to a child. A conviction or a sentence in a case of a child is a reference to the subject being found guilty of an offence.
- The methods of dealing with the offenders are provided for under section 191 of the Act and they include;

[a] Complete discharge or discharge by entering recognizance with or without sororities.

[b] By making a probation order against the offender.

[c] If the offender is above the age of ten and under 15 years by ordering him to be sent to a rehabilitation school suitable to his needs and attainments

Protection of The Rights of The Child in Court Proceedings

- The Act outlaws death sentence as well as corporal punishment of child offenders. In addition, a child of less than ten years can not be sent to a rehabilitation school.
- The diversionary program is designed for first-time offenders. These are the offenders who are accused of, or they admit having committed a committed a non serious offence may be dwelt with by another body other than a court.
- The overarching principal in invoking all these methods is to try and rehabilitate the child for their own welfare and survival.

Fundamental Rights of The Child

- The High court is also vested with jurisdiction over matters concerning the contravention of the fundamental rights of a child.
- A decision was made recently by a constitutional court regarding the interpretation of the provisions of section 24[3] of the Act on the issue of parental responsibility of a child born out of wed-lock to a single mother. In the case of *Rose Morra V the Attorney General HCCC No. 1351 of 2002 [OS][1]*
- The constitutional court was called upon to determine whether the provisions of section 24[3] of the Act were discriminatory of a child born out of wedlock. The applicant expected the court to pronounce that the father, mother, or child can be allowed to apply before a court of law for the determination of parental responsibility. The applicant further expected the court to declare that the provisions of section 24[3] discriminates against children whose parents were not married to each other at the birth of the child.

Children Act and Children's Rights



- In another court case involving the determination of the extension of parental responsibility for a child beyond the age of 18 years the court held that the high court was vested with original jurisdiction to make such determination. See the of; *Diana Ndele Wambua V Dr Paul Makau Wambua HCCC No 30 of 2003*
- In that case, the High Court held that it is vested with the requisite jurisdiction to determine all matters of the welfare of children covered under part 11 of the Children's Act. The welfare and education of the child falls within the Act. Basic education is more than just learning how to read and write. It encompasses the broadest possible sense of learning at any stage of life and it is not confined to childhood and formative years. It is the responsibility of the Government and parents to provide education to their children.
- Reference was made to the provisions of section 28[c] of the CRC and the applicant was granted leave to seek an order compelling her father to pay her University fees

Law in Relation to Adoption

- Adoption of children is a very intricate complex and challenging jurisdiction that requires several actors to work together to enable the court determine the best interests of the child.
- All matters involving international Adoptions be filed at the Family Division of the high court in Nairobi. It is significant to note that the family division is specialized in this area of law and has established clear procedures and a check list to follow.
- With the ever increasing challenges of sophisticated crimes such as trafficking in children, the courts have to remain very vigilant



Adoption is when you are unable to live with your own family and another family wants you to become part of their family.

Recommendations

- Children will always come into contact or conflict with the law, it is therefore important to establish child friendly benches in all the courts including the highest courts.
- In order to secure their best interest Judicial Officers, the Police, Probation department, Prosecution and Legal Counsels must all strive to deepen their knowledge and understanding of the guiding principals of promoting the best interest of a child.
- They should also familiarize themselves perhaps through short courses with the provisions of the Children Act, the CRC and the ACRWC.

The End

