

An overview of the current status, challenges and prospects of the child justice system in Kenya focusing on **challenges and good practices in dealing with young offenders including those involved in terrorism.**

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Where we have been...Mwangolo Kiguzo v Republic [2017] eKLR

It is alleged that the Applicant was arrested by the Anti-Terror Police Unit on 24th May, 2016 and was presented to court on the 25th May, 2016 when orders for his continued detention for 30 days were granted.

The detention period was extended for another 40 days , expired on 18th August, 2016 the Applicant was released after it had been certified that he had been counselled by the Anti-terror Police Unit to de-radicalize him.

On 8th December, 2016 he was rearrested for failing to attend the counselling on 3rd November, 2016. Apparently, his father had excused him from the investigating officer as he was engaged in taking care of his sick sibling.

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- **On 10th January, 2017, the Applicant was charged in Nairobi Children's Court . On taking plea, he was granted a bond of Kshs. 1,000,000/= with one surety of a similar amount.** Apparently, the surety was his father.
- Although the **release of the Applicant on bail was challenged by the prosecution in the High Court, the High Court upheld the magistrate's order.** After a successful approval of the bond, the Applicant was **released from custody on 27th April, 2017.**
- The Police conceded that the Applicant was indeed arrested on 25th May, 2016 after investigations revealed that he was involved in terrorist's activities.

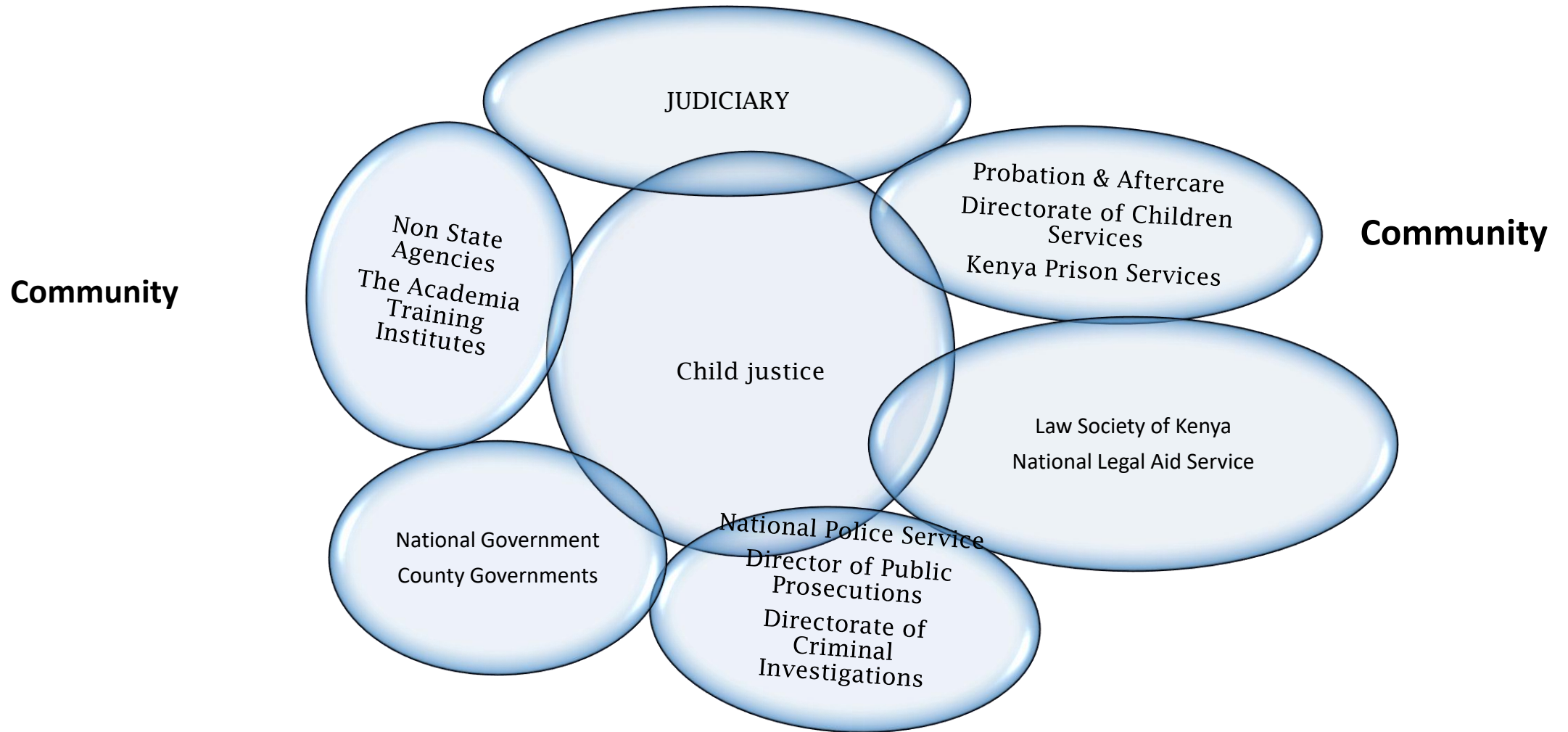
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- They said a search in his house led to the recovery of one life grenade, one electric fuse, electronic wires, two cameras, three screw drivers, batteries, three remote controls, three mobile phones, elastic rubbers and nails. This led to him be charged in the children's court.
- Unfortunately, after his release on bond, **he continued to engage in terrorist's activities and did not continue to attend the counselling sessions as recommended.**
- In contrast, counsel submitted that at the time the Applicant **disappeared, he was not in any way in custody of the police. He literally walked out of his house and never returned.**
- At that time, he was **under police supervision having been ordered to report twice a week at the Anti-terror Police Unit for monitoring and de-radicalization program.** He failed this test which **informed the police to charge him before the Children's Court.**

...what we see

- Arrest and detention
- Release to Police for de-radicalization- no evidence of any form of assessment
- Police Supervision- Report to the Anti Terror Unit Police every fortnight
- Bond terms
- Charged
- Disappeared

The Child Justice System: Community to Community



Background....to the current status

- National Council on the Administration of Justice (NCAJ)
- NCAJ Special Task Force on Children Matters
- NCAJ Standing Committee on the Administration of, and Access to Justice for Children (SCAAJC)
- Court User Committees
- Children Courts
- Children Court Court User Committees
- Annual Child Justice Conference
- Annual Children Matters Service Month

NCAJ.....

- Established the Judicial Service Act as a high-level policy making, implementation and oversight coordinating mechanism whose membership comprising State and Non-State Actors from the justice sector. Chaired by the Chief Justice of the Republic of Kenya
- Its mandate: ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.
- It is multi-sectoral in design, and works through various Task Forces, Committees and working groups to perform the following functions:
 - Formulate policies relating to the administration of justice;
 - Implement, monitor, evaluate and review strategies on the administration of justice;
 - Facilitate the establishment of Court Users Committees at the County Level; and
 - Mobilise resources for purposes of the efficient administration of justice.

Special Task Force on Children Matters

Gazette Notice No. 369 of 29th January 2016 (2019)

- 1. To review and report on the status of children in the Administration of Justice.
- 2. Examine the operative policy and legal regimes as well as the emerging case law to identify the challenges and make appropriate recommendations.
- 3. Assess, review, report and recommend on the service standards of each of the justice sector institutions with respect to children matters.
- 4. Prepare draft rules of procedure for enforcement of fundamental rights of children.
- 5. Conduct a situation analysis of the existing infrastructure and equipment in the criminal justice system in regard to children matters and develop guidelines for the monitoring, supervision and inspections for holding facilities.
- 6. Develop guidelines for Child Protection Units and propose mechanisms for the establishment of Child Police Unit in the National Police Service.
- 7. Develop the Court Practice Directions on children cases.
- 8. Develop the Diversion Regulations.
- 9. Develop a Policy on Mandatory Continuous Professional Development program on child rights for Justice and examine, review the training curricula on children.
- 10. Develop policies on re-integration of children accompanying imprisoned mothers.
- 11. Develop policies on separated cells for children.
- 12. Development of the guidelines for children with special needs.
- 13. Develop guidelines for inclusion of children with special needs in the Juvenile Justice Actors procedure to be included in the practice guidelines.
- 14. Develop a coordinated sensitisation and awareness strategy.
- 15. Develop a form for presenting the P&C cases in court.
- 16. Improve coordination of the Juvenile Justice Actors at the National and County level.

Special Task Force....

- (i) Legislative and policy reforms;
- (ii) Quality of care, infrastructure and data;
- (iii) Coordination and sensitisation of all child justice actors.
- seek ways of achieving a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.
- Culminated in the **Status Report on Children in the Justice System in Kenya 2019** and “**the Big 7 call to action**”,

Special Task Recommendations....Big 7 Agenda

- Immediate enactment of the **Children Bill 2018**.
- **Establishment of a Child Justice Policy Implementation and Quality Control Committee** by NCAJ with a 3-year term of service to ensure implementation of the recommendations of the Task Force on Children's Matters. Membership of the Committee to be **expanded to include the education and health sector, local administration, community leaders, Nyumba Kumi Initiative and the academia**.
- Adoption of the annual National November **service month** and service week protocols in all courts in Kenya by the Registrars of the Judiciary, and provision of the necessary budgetary allocation for hearing cases.
- Provision of **primary and secondary school education and second teachers to statutory children's institutions (rehabilitation schools, borstal institutions, remand homes)** by the Ministry of Education in coordination with the Department of Children's Services in compliance with the constitutional right of every child right to education
- **Use of ADR (alternative dispute resolution)**
- mechanisms, court-annexed mediation, diversion and plea bargaining as critical tools for expediting access to justice for children in Kenya, in order to ensure that detention of the child is a measure of last resort.
- **Strengthening of child rights institutions through adequate budgetary allocation, resources and oversight mechanisms in order to improve the conditions of detention in children's holding facilities and institutions.**
- **We call all public and private sector institutions and agencies at the national and county government level to report abuse of children to the Police, Courts and relevant authorities, and to create safe spaces for children to report abuse, in accordance with their constitutional duty to safeguard child rights.**

The Standing Committee...

- The Committee was gazetted on the *22nd of July, 2022* under *Gazette Notice Number 8776* with the mandate to implement the recommendations of the Task Force.
- Membership: All the State Child Justice Agencies, and some non state child Justice agencies: Judiciary, Probation and After care, Directorate of Children Services, National Council on Children Services, Director of Public Prosecutions, National Police Service, Directorate of Criminal Investigation Anti-Human Trafficking & Child Protection Unit, Kenya Prison Service, Law Society of Kenya, National Legal Aid Service, Kenya National Commission on Human Rights, Council of Governors, Psychologists and Counsellors Board, Academia, NGOs (

the Committee's TORs

- Formulate and review laws and policies relating to the efficient administration of justice for children;
- Implement, monitor, evaluate and review strategies for the administration of justice for children matters;
- Establish and promote inter-agency collaboration and cooperation on efficient administration of child justice;
- Identify legal, institutional, administrative, and financial barriers that impede the efficient administration of child justice and make recommendations to the Council;
- Promote social transformation through access to justice for children;
- Initiate and oversee the implementation of standards on the quality of child care and infrastructure;
- Mobilize resources for the efficient administration of justice for children;
- Organize and engage stakeholders on emerging issues relating to child justice;
- Oversee the implementation of the recommendations of various strategic publications by NCAJ on issues relating to child justice;
- Oversee the undertaking of studies to deepen, expand and advice the efficient administration of justice for children; and
- Carry out such other functions as may be assigned by the Council

Where we want to go...

- There is an elaborate work plan
- The Children Act was passed in July 2022
- Enhanced collaboration- the development of the rules and regulation for the implementation of the Children Act
- The various agencies have developed strategies, guidelines, protocols to improve the administration of justice and access to justice for children. The Common one – the NCAJ Justice Strategy for Children 2023-2028

The Strategy....

- Aim of the Justice for Children Strategy is to ensure a coordinated approach to reforms for children across the justice sector and to provide:
 - Five year “vision” for strengthening the child justice system;
 - Strategies and key activities to achieve that vision;
 - M&E framework for monitoring progress.

Vision: A child-centric justice system that is responsive and accessible to all children.

MISSION: To achieve a specialised child justice system that respects, protects, upholds, and safeguards children's rights and best interests.

Outline of the Strategy

1. Introduction (background, scope, legal framework, methodology)
2. Situation of children in the justice system
3. Child Justice Vision, Mission and Principles
4. Strategic Areas, Strategies and Key Activities
5. Implementation arrangements
6. M&E Plan

Annex 1: Implementation Matrix

Annex 2: Monitoring and evaluation framework

Scope of the Strategy

All Categories of Children in the Justice System

Children in conflict with the law

Child victims and witnesses in criminal proceedings

Children before the courts in care and protection, family and other civil proceedings (from justice perspective)

All Justice Sector Actors (State and Non-State)

NPS

PACS

DCS

KPS

NCCS

KNCHR

ODPP

WPS

Law Society of Kenya

Office of the AG & Department of Justice

NLAS

Justice

The Judiciary

CSOs

Legal Framework

- The Strategy has been designed to support implementation of the reforms introduced by the *Children Act, 2022*, as well as other laws relating to the administration of justice.
- Informed by the Strategic Plans of the Justice Agencies
- Also informed by international and regional child rights instruments and Kenya's obligations under the SDG's, CRC, ACRWC, and the Guidelines on Action for Children in the Justice System in Africa, 2012.

Situation of the Child Justice System

- Under the leadership of the NCAJ, significant progress has been made in strengthening the child justice system.
- But the NCAJ *Report on the Status of Children in the Justice System 2019* revealed there continues to be a wide disconnect between children's rights as reflected in laws and policies, and the reality on the ground.
- At all stages, the justice system is not child-friendly, lacks adequate specialisation, and is under-resourced.

Guiding Principles

- Best interest of the child
 - Child-centred and rights-based approach:
 - Child participation
 - Inclusivity and gender-sensitivity
 - Involvement of parents / guardians at all stages
- Deprivation of liberty as a last resort
 - Maximum use of alternative justice systems and diversion.
 - Protection of privacy
 - Right to legal representation

Approaches to Child Justice Reform

- Enhanced specialisation
- Separation of justice and care systems
- Family and community involvement
- Sector-wide and multi-disciplinary approaches
- Sustainable, targeted and incremental reforms
- Evidence-based planning
- Using technology to enhance access to justice

Strategic Areas



The Child Justice system

- Children enter the justice system through various entries
- Child Offender(child in conflict with the law)
- Child in need of care and protection :a child who lives in difficult circumstances and needs to be protected from all kinds of neglect, abuse or exploitation;
- Child victim of a criminal offence
- Child subject of civil proceedings(e.g family/ other disputes)
- Child witness

The Current Status of the Child Justice System: Children Act, 2022

- The Children Act 2022 defines child in conflict with the law to be a person who is above the age of twelve years, but below the age of eighteen years, who has been dealt with or punished in accordance with the Act or **any other written law for contravention of the law;**
- **Age of criminal liability is 12 years and a child who commits an offence while under the age of fourteen years shall be presumed not to be capable of differentiating between right and wrong, unless the Court is satisfied on evidence to the contrary.**
- There is no differentiation between the child charged with any other offence with the child who may face a terrorism related charge. For as long as it is a person below the age of 18. Should the child turn 18 when proceedings are ongoing, the court is required to consider the age at which the offence was committed

The Constitution in the Bill of Rights Article 53 sets out the rights of the child including the child in conflict with the law

- a name and nationality ,
- to free and compulsory basic education;
- to basic nutrition, shelter and health care;
- protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
- to parental care and protection, and the equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;
- not to be detained, except as a measure of last resort, when detained, to be held for the shortest appropriate period of time; and separate from adults and in conditions that take account of the child's sex and age.

The Children Act: Social , economic factors that may lead to commission of crime considered..

- The law recognises that a child who is in need of care and protection can easily end up as a child in conflict with the law
- It sets out 37 categories of circumstances (not exhaustive) in which a child can be said to be in need of care and protection. S. 144
- It includes **a child who is in conflict with the law or is a witness to, or a victim of, a crime; and a child who is recruited or is at risk of being recruited into unlawful gangs, or is exposed to or in imminent danger of being exposed to radicalization or other repugnant teachings**
- "radicalization" is defined as **a process by which a person comes to adopt extreme political, social, or religious ideals and aspirations that are aimed at inciting the person to violence or into any behavior and belief that is harmful to the child;**

Factors....

- For other categories the court (meaning the court and the other relevant agencies is directed on what to do: eg
- Make guardianship order(cannot be done without involving a children officer and the community),
- For child whose parent has been arrested/ imprisoned- order care under fit person- court may know through police, PACS , DCS

The law sets out in greater details the manner in which the suspected to have committed an offence is to be dealt with

- The court is empowered to issue **a protection order directing care and protection of a child involved in drug abuse or who has been a victim of ideological radicalization or criminal gangs;**
- The emphasis on the welfare of the child in conflict with the law stands out in this law. It is the duty of the court to not only consider but to provide for the welfare of the child **by removing the child from any undesirable surroundings, and to ensuring that proper provision has been made for the child's maintenance, education and training.**
- **If held in custody** the officer in charge is obligated to ensure both the physical and mental health of the child through proper examination and treatment.

Prevention of Terrorism Act Cap 59B of the Laws of Kenya

- Essentially An Act of Parliament to provide measures for the detection and prevention of terrorist activities... and for connected purposes
- It defines terrorist acts, creates offences and provides stiff penalties including fines and terms of imprisonment that include life imprisonment.
- The offence of Radicalisation is defined as where **adopts or promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change and the offender is liable on conviction, to imprisonment for a term not exceeding thirty years.**
- The terms 'child' or 'youth' does not appear in the Act. It is evidence that there was no consideration of the implication of the involvement of children or youth in these offences and any special attitude in preventing or responding to them

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- Recruitment and training are also offences carrying up to 30 years imprisonment. This is relevant as children become victims
- It is also relevant that the person **A person who receives training or instruction referred to in subsection (1) for the purpose of engaging or preparing to engage in the commission of a terrorist act commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years (s. 14)**
- The Children Act provides that such a child will be considered a victim a child in need of care and protection.
- However a child charged with any of the terrorism related offences will be tried in accordance with the Children Act, 2022.

Prospects...Procedure in cases of children in conflict with the law.

- S.224 A child in conflict with the law may be subjected to either of the following processes—
 - (a) **diversion** in accordance with this Act; or
 - (b) **judicial process in accordance with the Criminal Procedure Code, subject to the provisions of part XV – 15 of the Children Act S. 217 to 243**
- **S228 The Preliminary Inquiry: Mandatory Procedure to be held in respect of every child prior to plea.**
- **Exceptions: child below 12 years , charge withdrawn**

Prospects...The Preliminary Inquiry(Rules have been made but still pending gazettelement)

- Held by a magistrate, to consider the assessment report of the children's officer, probation officer and the Director of Public Prosecutions
- The report(s) will be in reference to the **age of the child**, if between 12-14 years, **the criminal responsibility**, whether **further detailed assessment is necessary**, whether upon consideration of all the relevant information , the circumstances of the child and the offence matter can be diverted, if so what is the suitable diversion placement option, and whether matter should be transferred to a Children's court(for plea and determination)
- The PI must ensure that the participation of the child, parents/guardian, and any others(counsel, victim....)
- Whether the child should be released/placed pending the conclusion of the PI, appearance before a court or referral to the children's court

Prospects...Guarantees to any child accused of an offence: Every child accused of having violated any rule of law shall

- be promptly and directly informed of the charges against him or her;
- be provided by the state with legal assistance in the preparation and presentation of his or her defence;
- have the matter determined without delay;
- not be compelled to testify or make a confession in respect of the alleged offence;
- have free assistance of an interpreter if the child cannot understand or speak the language in which the proceedings are conducted;
- if found guilty of the offence, have the right to apply for review of decisions and any punitive measures imposed by the trial Court;
- have his or her privacy respected at all stages of the proceedings;
- if the child has a disability, be accorded reasonable accommodation in respect of his or her special needs and respect for his or her personal dignity on an equal basis with others; and
- if the child is not released on bond, he or she shall be placed in a Children Remand Home or Child Protection Unit.

On Prosecution...The Decision to charge

- the younger the suspect, the less likely a prosecution is required.
- there may be circumstances in which the prosecution of a child offender is in the public interest. i.e the offence committed is serious; the child offender's past record suggests there are no suitable alternatives to prosecution and; the child offender does not admit to committing the offence limiting the application of out of court disposal mechanisms.

Prosecution

- Will be guided by:
- The best interests and welfare of the child
- whether a prosecution is likely to have an adverse impact on their future prospects that is disproportionate to the seriousness of the offence.
- the obligations arising under the Children's Act

Prosecution

- Diversion Policy and Diversion Guidelines as a framework for diverting criminal cases that qualify under its eligibility criteria with well-defined schedule of diversion programs, actors, processes, and procedures to rehabilitate a child using therapeutic methods.
- Plea Bargaining Guidelines.
- Prosecution Practice Directions on children's rights to privacy and legal representation.
- Established child-friendly interview rooms in 8 counties across Kenya, complete with teleconferencing equipment to reduce secondary victimization of children.
- Institutionalized specialized division to handle children cases and trained focal persons.

Punishment, Rehabilitation and reintegration

- No court shall order the imprisonment of a child.
- **Notwithstanding the nature of any offence punishable by death**, no court shall impose the death penalty on a child on a finding of guilty for such an offence. (No Capital punishment)
- No institutionalisation in a rehabilitation school for a child under the age of twelve years.
- Non Custodial options encouraged
- The words **conviction** and **sentence** not to be used. Finding of guilt (no previous records)(Orders – hence reviewable by the court that made them)

After the finding of guilt...

- The emphasis is on rehabilitation , reintegration with the involvement of the family and the community. A combination of methods can be used;
- Conditional discharge with or without sureties/Supervision order
- Probation/Community Service Order(max 50 hours within 6 months)
- Committal to the care of a fit person, CCI, qualified counsellor or psychologist
- Restorative justice order/ fine, compensation
- Placement in an educational institution or vocational training programme;
- Depending on age and best interests committal to rehabilitation school, borstal institution or Probation hostel
- Orders of Diversion

Diversion....

- We piloted Diversion before the law came but now
- In the Act "**diversion**" means **the intervention** and **programmes** designed to **divert children** from the **criminal justice system**;
- Recognition of **Criminal justice system** and the **child justice system**
- The Big question for us now, and learning point: interventions & Programs;; why, what, where, by whom, how?
- **children at risk? support services ? appropriate programs .We learnt some things when my committee was invited here on a study focusing on delinquency prevention and community-based rehabilitation of children in conflict with the law. The NCAJ Published the study tour, and the recommendation.**

Diversion & other alternatives... a fresh breath of life into the child justice system

- **Social transformation through access to justice** thro involvement family & community in rehabilitation, reintegration and reconciliation, **Restoration** of relations, thro compensation et al, respect for the dignity /of the **UTU** of the child, the victim, the community
- Reduce the stigma
- **Rehabilitation of those who have engaged in offending conduct through providing programmes support**
- **Reducing recidivism through programs, interventions to prevent them progressing further into the criminal justice system**
- **Prevention of offending: identify children at risk and connecting them with appropriate support services , to reduce their engagement in antisocial behaviour;**

Diversion ..Which child is SUITABLE

- **CHILD SUSPECT / CHILD CHARGED**
- Evidence of commission or omission
- Has admitted the offence
- It is not a capital offence ?????
- Consent of parent/guardian DIVERSION
- Views of victim taken into account
- 1st or 2nd offender

Diversion ...Further Consideration

- We have three levels of diversion 3 to 6 months
- Children do not acquire records: 1st or second offender must be interpreted knowing the we have delinquency, we have omissions, we have offences.
- Apply the principles of **constitutional interpretation**; No competing provisions all in the BIC; Welfare & Safeguards
- S. 231 The monitoring – the court appoints the supervisor: a children's officer, a probation officer, or any other suitable person to monitor the child's compliance with the identified diversion option.

Prospects ...Family Group Conference S. 232 : AJS for CIL/the big circle

- The Magistrate conducting the preliminary inquiry under section 228 may apply any of the diversion options under this section to a child who is eligible for diversion.
- The FGC is an option in level 2 of diversion whose primary function **shall be to discuss the offence committed by a child in conflict with the law, get the child to understand the impact of their offence, acknowledge it** so that we can **give support** for the **reform the child's behaviour**
- Convener: the Children Officer: very broad role in acknowledging that the child is firstly a child in need of care and protection.(welfare issues)

...FGC: who attends

- the **child and his or her parent, guardian, or other fit person** exercising parental responsibility over the child; **children officer; probation officer; the Director of Public Prosecution; the victim of the alleged offence any person requested by the child; the legal representative of the child; member of the community** in which the child ordinarily resides; a **counsellor or psychologist**
- Decide the **procedure and the plan for the child/ must participation of the child**
- Plan must contain inter alia the objectives, the needs of the child, the assistance and support to be offered and by who(individual/organisation), the duties and responsibilities of the child and the parents/guardians
- **May recommend diversion or any other plan in default back to court**

Alternative Justice Systems (AJS Policy) (so much to say but so little time)

- This is the Judiciary's interpretation of Article 159(2) (c) of the Constitution. *A link to the policy will be supplied.*
- The Constitution states ***alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...***
- With respect to children **AJS is being recognized as a preventive mechanism: where the root causes of delinquency/ risk factors** can be identified and appropriately addressed provides: an important opportunity to deal with ALL justice issues.
- The challenge is that when the policy was made the question of children as justice seekers was not addressed directly. However...

The Child Justice System can be that village required to raise a child

- The Protection and care file: Every child who appears in our courts is first and foremost a child in need of care and protection: We have an elaborate assessment procedure
- The Court Users Committee- the Children Court Users Committee
- The Children Service Month held every year in November to not only deal with back log of children cases but stop and reflect on how we have handled children matters in the past and come up with innovative ways of doing so.
- The Children of the CCPO Project supported by UNAFEI and JICA: the Curriculum Professional Development of officers who handle children, Through Care Procedures and Guidelines for Institutions
- The Kenya Children Assembly- Child Participation
- Wakili wa Watoto Clubs- Law Students
- Mtoto na Sheria -

Challenge

- Budgetary allocations to the child Justice system
- Gaps in knowledge, skill and attitudes – Need for dissemination of all the strategies, policies, and above all the Children Act through Mandatory Continuous Professional Development Curriculum for Child Care and Protection Officers (CCPOs) .
- On 28th January 2025 hosted over 650 officers from across the country on an online platform to Disseminate through care guidelines and procedures .

Challenge

- The Directorate of Children Services has a curriculum and training manual for children officers on Preventing and Countering Violent Extremism. Training has been ongoing
- Kenya has participated in IIJ Workshops on Initiative to Address the Life Cycle of Radicalization to Violence Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context
- The IIJ developed the IIJ Juvenile Justice Notes for Practitioners, a set of five practice guides – one each for investigators, prosecutors, judges, defence counsel, and detention personnel to provide practical guidance on how to implement the [GCTF Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context](#) and to provide examples of how countries have already implemented some of its principles.

Haki ya mtoto ni jukumu
letu sote pamoja na
mtoto