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THE JUDICIARY

**GUIDEBOOK ON THE OPERATIONS OF
CHILDREN'S COURT**

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ACRONYMS

ACRWC:	African Charter on the Rights and Welfare of the Child
ADR:	Alternative Dispute Resolution
AIDS:	Acquired Immune deficiency Syndrome
CRC:	Convention on the Rights of the Child
HIV:	Human Immunodeficiency Virus
IFCE:	International Framework for Court Excellence
KMJA:	Kenya Magistrates and Judges Association
NCAJ:	National Commission on Administration of Justice
NGO:	Non-Governmental Organization
NIMES:	National Integrated Monitoring and Evaluation System
UN:	United Nations
UNCRC:	United Nations Conventions on the Rights of the Child
UNDP:	United Nations Development Programme

DEFINITION OF TERMS

For the purposes of this guidebook, the following terms will be used as defined.

1. **Age Assessment:** the process of ascertaining the age of a child..
2. **Best Interest of the Child:** When determining whether a decision or action is in the child's best interests, there are a number of needs that must always be considered. They comprise of:
 - The need to protect the child from harm
 - The need to protect the child's rights
 - The need to promote the child's development (taking into account his or her age, stage of development, culture and gender)
3. **Child:** any person who has not attained the age of eighteen years .
4. **Child-friendly:** attributes, attitudes and behaviours which take into account the need for justice systems to be sensitive to the evolving capacity and developing maturity of the child;
5. **Child in Conflict with Law:** a child who has been suspected of or infringed the law.
6. **Child in Contact with the Law:** where a child is involved in a judicial process.
7. **Child Victim:** a child whose rights have been violated by another person.
8. **Deprivation of Liberty:** Any form of custody or placement of a person in a public or private custodial setting from which this child is not permitted to leave at will, by order of any judicial, administrative or other public authority.
9. **Diversion:** means taking a child away from the formal trial process.
10. **Infrastructure;** to include but not limited to safe transport, toilets, desks, court rooms, sanitary bins, food courts, playing areas nursing areas, interviewing rooms etc.
11. **Justice Systems:** includes formal and informal systems including administrative systems, for the reporting, investigation, and resolution of disputes in criminal and other matters, for the allocation of legal responsibilities, for conferring and determining of legal status or the allocation of care-giving responsibilities, and for the social and economic protection of the child in legally recognized ways.
12. **Legal Aid:** legal assistance provided by a specially established organization for those who cannot afford legal representation.

13. **National Authorities:** A body in government mandated with implementation of government policies.
14. **Re-integration:** This is the process aimed at disengaging children from institutions and reuniting them with their families and communities through interventions, programmes and services designed to assist them resettle into their families and communities.
15. **Restorative Justice:** restorative justice is an approach to justice which seeks to involve the parties, their families and communities in addressing the causes and consequences of a dispute to promote a reconciliatory solution aimed at enhancing accountability and fostering reintegration.
16. **Risk Assessment Tool:** is an instrument containing medical, psycho-social and social background information relevant to a reported instance of child abuse, child neglect or sexual abuse; used to determine the level of risk posed to the child so as to enable informed decision-making about the progress of the case in the justice system; and to guide decisions about the appropriate measures to be taken to protect the child.
17. **Social Workforce:** includes social workers, allied professionals, child and youth workers, community workers, volunteers and civil society participants who contribute to the functioning of child protection and justice systems.
18. **Traditional Justice Systems:** traditional justice systems and other similar structures include structures for the resolution of disputes in criminal and other matters that derive their legitimacy and status from customary norms.
19. **Transitional Justice:** refers to specific measures, judicial and non-judicial, adopted via national legislation in the aftermath of widespread conflict for the prosecution of perpetrators, the pursuit of reconciliation and the determination of reparations. Transitional justice is informed by a society's desire to rebuild social trust, repair a fractured justice system, and build a democratic system of governance.

INTRODUCTION

The child occupies a unique and privileged position in the society and for the full and harmonious development of the child's personality; the child should grow up in a family environment and, to this end, families and communities bear a primary responsibility for the child's development and fulfilment of their rights.

Human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated. The promotion and protection of child friendly justice systems implies the performance of duties on the part of everyone, and particularly the Kenyan state.

The African Charter on the Rights and Welfare of the Child (ACRWC) and the African Youth Charter recognise the responsibilities of the child towards the State, the continent and the international community, which include the duty to become the custodians of their own development; to protect and work for family life and cohesion; to have full respect for parents and elders and assist them anytime in cases of need in the context of positive African values; to engage in peer-to-peer education; to promote youth development in areas of violence prevention and peace building; to work towards a society free from substance abuse, violence, coercion, crime, degradation, exploitation and intimidation; to promote tolerance, understanding, dialogue, consultation and respect for others regardless of age, race, ethnicity, colour, gender, ability, religion, status or political affiliation; and to promote, preserve and respect African traditions and cultural heritage and pass on this legacy to future generations.

A number of significant achievements have been made in Kenya in the promotion of child survival, protection, development and participation, although progress has been slow. Therefore, there is a need to strengthen the mechanisms for accountability to ensure more consistent and comprehensive progress. Children face persistent barriers to the fulfilment of their rights in the justice system, such as non-existing or partial access to justice, diversity in and complexity of procedures, possible discrimination on various grounds, and lack of access to services.

Additionally, it is evident that there is the risk of secondary victimisation of children by the justice system in procedures that involve or affect them. Justice systems often fail to take into account the needs of children with special vulnerability, including abandoned children; children living and working on the street; migrant, refugee and displaced children; children with disabilities; the girl child and, more recently, the boy child.

This guidebook takes account of the difficult situation of Kenyan children and youth, many of whom are marginalized from mainstream society through inequalities in income, wealth and power, unemployment and under-employment. Some are infected and affected by HIV/AIDS, others are living in situations of poverty and hunger, grappling with illiteracy and poor quality educational systems, have restricted access to health services and to information. Others still, risk exposure to violence including gender violence, are engaged in armed conflict and experience various forms of discrimination, suffer the effects of migration and the disintegration of family structures, are liable to experience the negative effects of urbanization, and are exposed to justice systems which do not take account of their needs.

There is need to adopt this guidebook in order to fully effect the provisions of the Children' Act, 2001.

OBJECTIVES

This guidebook has been developed to achieve the following specific objectives:

- (a) To work as a guide to achieve full implementation of the Children Act, 2001 and related international instruments such as are outlined in the Preamble above;
- (b) To provide co-ordination and direction of actions by various role-players in the children justice chain in Kenya;
- (c) To foster international co-operation and technical assistance to all actors in the achievement of child friendly justice for children in Kenya;
- (d) To enhance understanding amongst the public in general and children in particular of the spirit, aims and principles of child friendly justice systems as provided for in this guidebook;
- (e) To provide structures to safeguard and preserve the best interest of the child.

The guidebook shall be implemented with due regard to:-

- (a) A holistic approach to the implementation of the rights of the child through the maximisation of resources and efforts;
- (b) Proper definition and understanding of the duties and responsibilities of every player involved in the justice chain;
- (c) The need for continued specialisation and training for all actors involved with children in the justice system;
- (d) The need to reduce secondary victimisation and re-victimisation through contact with the justice system by children, and to fully respect the rights of the child to

rehabilitation, social reintegration and the full and harmonious development of the child's personality;

- (e) The consideration of special needs of children, children living with disabilities, children separated from their families, children living with HIV/AIDs, displaced children as a result of armed conflict, refugee and displaced children, and other most vulnerable groups of children;
- (f) The need for legal representation where necessary for children whenever they come into contact with the justice system.
- (g) The need for proper infrastructure for children in the courts and other institutions involved in the justice chain.
- (h) The recognition and adoption of diversion and other ADR mechanisms to ensure children's optimal access to justice with due respect for their rights and the avoidance of harm.

SCOPE OF APPLICATION

This guidebook shall apply to:

- (a) All proceedings of an administrative or judicial nature involving children, whether formal or informal, where applicable, where children are brought into contact with, or are involved in, civil, criminal or administrative law matters, whether as victims or witnesses, alleged offenders, children, where there has been a finding of guilt or admitted responsibility for an offence or offences, or as subjects in care and protection proceedings or family law or succession and inheritance disputes where applicable.
- (b) All children (below 18 years) living or found in Kenya.

GENERAL PRINCIPLES

1. Information and Advice

1.1. As soon as children are involved in the justice system or other administrative system, and throughout their cases, children and their parents/caregivers should be provided with information and advice. This information should cover:

- Their rights and responsibilities.
- The system and procedural steps - i.e. what role the child will play
- Alternatives to justice processes and the consequences
- On-going information for victims about progress in investigations - i.e. whether charges are brought or arrests made, times and dates for court proceedings, and other relevant information and events
- What protective measures and/or services are available
- Any compensation the child may be entitled to, and how to access it

1.2. Information and advice should be given to children in a manner adapted to their age and maturity, in a language that they can understand and which is gender and culture sensitive.

The Children's Act of Kenya requires that every child accused of having infringed any law be informed promptly and directly of the charges against them¹.

The Children's Act cap 141 goes further and states in Section 38(o) that:

The Director of Children's Services must provide care, guidance and other assistance for children who have been arrested or remanded in police custody or children's remand homes, and assist the children through court proceedings and children's hearings.

2. Protection of Privacy

2.1 The privacy and personal information of children who are or have been involved in court proceedings or administrative proceedings should be protected in accordance with national and international laws. This generally means that no information may be made available or published, particularly in the media, which reveals or could reveal the child's identity.

2.2 There should be limited access to all court records or documents containing personal and

¹ Section 186(a) Children's Act cap 141

sensitive information about children, in particular in proceedings involving them.

2.3 Authorization of documents should be granted through an order of court.

2.4 Whenever appropriate, the hearing or giving of evidence by children in judicial or administrative proceedings should be done in *camera*. As a rule, only those directly involved shall be present, provided that they do not obstruct children in giving evidence.

2.5 Professionals working with and for children shall abide by the strict rules of confidentiality, unless it is in the best interest of the child.

In Kenya, Section 76(5) of the Children's Act states that:

In any proceedings concerning a child, whether instituted under this Act, or under any written law, a child's name, identity, home or last place of residence or school, shall not, nor shall the particulars of the child's parents or relative, any photograph or any depiction of caricature of the child, be published or revealed whether in any publication or report (including any law report) or otherwise.

Example from case law

In South Africa the Constitutional Court dealt with a case where a media company wanted to have a section of the Divorce Act struck down as unconstitutional, because it did not allow the media to report any information at all about divorce cases. The Constitutional Court found that it was very important to protect the children of divorcing parents, and ordered that²: Subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceedings before any court is prohibited.

3. Safety (special preventive measures)

3.1 In all judicial and non-judicial proceedings and other interventions children should be protected from harm, especially secondary victimization. Professionals working with children should be properly screened to ensure their suitability to work with children. Special precautionary measures should apply to children when the alleged perpetrator is a parent or family member/caregiver.

Guideline 13 of the Guidelines on Justice for Child Victims and Witnesses provides that in order to avoid further hardship to the child, interviews, examinations and other forms of investigation

² Johnson Media Investment Limited v M (Media Monitoring Project as Amicus Curiae) Para [45]

should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner. Guideline 14 continues in the same vein, stating that all interactions should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child.

4. Training of Professionals

4.1 All professionals working with and for children should receive continuous training on the rights and needs of children of different age groups, and on proceedings that are adapted to them. Professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability.

The Beijing Rules provide several references to the need for special training of professionals - Rule 6 requires the use of discretion by officials, and the commentary emphasizes professional qualifications and expert training as a way of ensuring that discretion is used judiciously.

Rule 12 requires specialization in the police, and the commentary requires specialized training for police, especially as they are the point of first contact with the system for the child offender. Rule 22 encapsulates the need for professionalism and training in the entire system, stating that³

...professional education, in-service training, refresher courses and other appropriate models of instruction shall be utilised to establish and maintain the necessary professional competence of all personnel dealing with children cases.

In Kenya every magistrate who is to handle children matters has to be gazetted. Every magistrate in Kenya is gazetted to handle children matters.

The Children's Act cap 141 has several provisions in relation to training of professionals who are to work with children.

Section 32(2) (g) states that the National Council for Children's Services is responsible for training, and shall prescribe the requirements and qualifications for authorized officers.
Section 72(e) states that the Minister may make regulations for the training and remuneration of persons employed in children's remand homes and rehabilitation schools.
Section 20 of the Children's (Charitable Children's Institutions) Regulations of 2005 list the requirements that should be checked to confirm if the persons being employed to work with children are fit and of good standing.

5. Multidisciplinary Approach

5.1 A common assessment framework should be established for professionals working with or for

³ The commentary to the Beijing Rules is part of the body of the rules and is a detailed guide to interpretation

children in proceedings or interventions that involve or affect children, to provide any necessary support to those taking decisions, enabling them to serve children's interests as best as they can in any given case.

The Guidelines for Action on Children in the Criminal Justice System ⁴(with regard to both child offenders and child victims) emphasize a holistic approach to implementation through maximization of resources and efforts, as well as the integration of services on an interdisciplinary basis.

The Guidelines on Justice in Matters involving Child Victims and Witnesses provide very clearly that:

*Professionals should make every effort to adopt an interdisciplinary and cooperative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counseling, education, health, and legal and social services. This approach may include protocols for different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.*⁵

According to the Guidelines on Children in Alternative Care, decisions on placement should be made by suitably qualified professionals in a multidisciplinary team⁶.

6. Deprivation of Liberty

6.1 When deprivation of liberty is imposed, children should, as a rule, be detained separately from adults. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.

6.2 The deprivation of liberty of unaccompanied minors (including those seeking asylum) and separated children should never be motivated by or based solely on the absence of residence status

Article 37(b) of the United Nations Convention on the Rights of the Child sets a high standard:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention and imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

⁴ The Guidelines for Action on Children in the Criminal Justice System 2011

⁵ Guidelines on Justice for Child Victims and witnesses of crime, Guideline 43

⁶ Guideline on Children in Alternative care, Guideline 56

The Beijing Rules differentiate between detention at the pre-trial stage and at the sentencing stage. Chapter 13 of the Rules deal with detention of children pending trial, and require that such detention:

- *Should be used only as a measure of last resort and for the shortest possible period of time.*
- *Should, wherever possible, be replaced with alternative measures*
- *Must be separate from adults.*
- *Must allow for necessary individual assistance – e.g. social, educational, psychological and medical help.*

With regard to detention as a sentence, the Beijing Rules state that institutionalization should be avoided to the greatest extent possible. Rule 19 states:

The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum period of time.

Rule 26.4 highlights the needs of girls:

Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.

It is also significant that the Beijing Rules provide that children should have ‘frequent and early recourse to conditional release.’

Cap 141 (Children's Act) ⁷ goes further, and limits the period of detention for child offenders, both in remand and when being sentenced after a conviction.

7. Children and the Police

7.1 The police official must explain to the child what his or her rights are and what the next steps of the legal process will be. This must be done in child-friendly language, and, as far as possible, in the child's vernacular⁸.

7.2 The parents of the child must be notified without delay that the child is in police custody, and must be asked to come to the police station.

⁷ Section 190 of the Children's Act and Rules 4(1), 4(4) and 6(1) of the Child Offenders Rules in the Fifth schedule to the Children's Act.

⁸ Article 49 of the Constitution of Kenya

- 7.3 In cases where parents are not readily found, children officers should be involved and informed.
- 7.4 There should be a mechanism at the police station for the release of the child into the care of the parent or guardian, or the children officers at least in the case of minor offences or where the child poses no risk to the community.
- 7.5 A child who has been taken into custody should not be questioned in respect of the crime or asked to sign a statement about the crime except in the presence of the child's lawyer or parent, or, if no parent is available, a suitable adult whom the child trusts.⁹

8. Criminal responsibility

- 8.1 The minimum age below which children shall be presumed not to have the capacity to infringe penal law shall be observed at all times.

The Beijing Rules add to this principle by stating that the beginning of the age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.¹⁰ The United Nations Committee on the Rights of the Child (the body responsible for monitoring the implementation of the UNCRC) has continuously expressed its concern with regard to the vast international differences in setting a minimum age for penal responsibility.¹¹ As a result of these concerns, the definitive guide to implementing effective child justice was released by the Committee on the Rights of the Child in the form of General Comment No. 10 of 2007: Children's Rights in Juvenile Justice ('General Comment No 10'). General Comment No. 10 elaborates on the nature of the obligations of States Parties as expressed in Article 37 and Article 40 of the UNCRC, and the implementation of these obligations at national level. It also addresses the minimum age of criminal responsibility. In this particular regard, the obligation is clearly stated and based on universal wisdom: a fixed minimum age of criminal responsibility of not lower than 12 years is established and it is recommended that States Parties should progressively raise the minimum age where possible.¹² General Comment No. 10 provides that any age below 12 years is unacceptably low. The inference can therefore be made that such a low age is also in contravention of the CRC. This aspect of the General Comment was an important milestone, as it put an end to the question of an international standard for an

⁹ Section 23(5) of Children's Act Cap 141

¹⁰ Rule 4.1

¹¹ An assessment of the many Reports and concluding Observations of the committee on the rights of the child makes the foundation of this submission plain

¹² General comment No. 10 at paragraph 32

*appropriate minimum age of criminal responsibility.*¹³

8.2 The provision in Kenya as to minimum age is 8 years.

9. Child friendly Justice before Judicial Proceedings (pre- trial)

9.1 Alternatives to judicial proceedings, such as mediation, diversion and alternative dispute resolution, should be encouraged where these may best serve the child's best interests, and must not be an obstacle to access justice. Where there is a choice between these options and the formal system, children should be assisted in making an informed choice.

9.2 Traditional and customary law options may also be considered, provided children's rights are protected in such processes. All alternatives to court proceedings should guarantee basic legal safeguards except where the law is clear. Eg Sexual Offences Act.

Article 40(3)(b) of the CRC provides that whenever appropriate and desirable, measures for dealing with children in conflict with the law without resorting to judicial proceedings should be used, provided that human rights and legal safeguards are fully respected in doing so.

*More detail about diversion of child offenders is provided for in Rule 11 of the Beijing Rules, including the fact that 'efforts shall be made to provide for community programmes' for diversion. The Guidelines for Action on Children in the Criminal Justice System recommend that states undertake a review of existing procedures and, where possible, that the alternatives to the criminal justice process should be introduced.*¹⁴

Article 159 of the Constitution of Kenya 2010 provides for alternative dispute resolution mechanisms.

10. Child Friendly Justice during Judicial Proceeding (Trial Process)

10.1 Any obstacles to access to court, such as the child's lack of capacity to litigate or the cost of the proceedings or the lack of legal counsel, should as far as possible be made easy by the law.

The 2008 UN Guidance Note of the Secretary-General: UN Approach to Justice for Children observes that:

¹³ Skelton A and Badenhorst C, The criminal capacity of children in South Africa: International developments and consideration of a review, (2011) Child Justice Alliance

¹⁴ Guidelines for Action for Children in Criminal Justice, Guideline 15

Access to justice, though increasingly recognized as an important strategy for protection the rights of vulnerable groups, and thus for fighting poverty, rarely takes children into account.

Thus the Secretary-General states that work on justice for children is to be integrated into the framework for strengthening the rule of law, and specifies the following:

*A public and civil society that contributes to strengthening the rule of law and holds public officials and institutions accountable, should target children's participation in such efforts in order to ensure that children are involved from the onset in identifying legal matters that are important to them*¹⁵

11. Legal Representation

11.1 Children facing court proceedings as offenders or in civil proceedings should have access to legal aid. Children should have the right to their own, separate legal assistance where there is, or could be, a conflict of interest with their parents. This could be through a curator/guardian ad *litem*, or through an independent legal representative for the child.

11.2 Children should be considered to be fully-fledged clients, and lawyers representing their interests must ascertain the views and wishes of the child, provide the child with appropriate legal advice regarding the possible impact of those views and wishes, and thereafter make the views and wishes known to the court

The Beijing Rules (1985) (Rule 15.1) provide that:

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

With regard to children in the care and protection system, Guideline 56 of the Guidelines for Children in Alternative Care provides as follows:

Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceeding.

In Kenya, section 186(b) of the Children's Act requires that if a child accused of having infringed any law is unable to obtain legal assistance, he or she must be

¹⁵ UN Guidance note of the Secretary-General (2008) Guideline B.4

provided with government assistance in preparation and presentation of his or her defence. Furthermore, the Children (Practices and Procedure Parental Responsibility) Regulations of 2002 state that a child shall be afforded legal representation out of public funds for a matter concerning contested parental responsibility¹⁶

Section 77 of the Children's Act of Kenya states that 'where a child is brought before a court in proceedings under the Children's Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation'.

Furthermore, Section 79 states that, where a child is not represented by an advocate, a court may appoint a guardian ad litem for the purposes of the proceedings and to safeguard the interest of the child.

Section 160 of the Children's Act states that;

In matters concerning adoption, the court shall appoint a guardian ad litem for the child pending the hearing and determination of the application.

12. Right to be Heard and Express Views

- 12.1 Courts and other forums should respect the right of children to be heard. The means used for this purpose should be adapted to the child's level of understanding and ability to communicate, and should take into account the circumstances of the case.
- 12.2 Due weight should be given to the child's views and wishes, in accordance with his or her age and maturity.
- 12.3 A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the court or forum should not, unless it is in the child's best interests, refuse to hear the child, and the court or forum should listen to his or her views and wishes on matters concerning him or her in the case.
- 12.4 Children should be provided with all necessary information on how to use the right to be heard effectively. However, it should be explained to them that their right to be heard and to

¹⁶ Regulation 17.

have their views taken into consideration will not necessarily determine the final decision of the court or forum.

- 12.5 Judgments and court rulings affecting children should be explained to them in the language that they can understand.

Article 12(2) of the CRC explicitly provides for the child to be given the opportunity to be heard in any judicial or administrative proceedings that affect them, either directly or through a legal representative or an appropriate body. Article 4.2 of the ACRWC contains similar wording, but adds that the child may be heard as a party to the proceedings.

In Kenya, Section 4(4) of the Children's Act states that:

...in any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion and the opinion shall be taken into account as may be appropriate, taking into account the child's age and the degree of maturity.

Section 76(3) (a) requires the court to have particular regard to the ascertainable feelings and wishes of the child concerned, with reference to the child's age and understanding, before making an order in relation to a child.

13. Avoiding Undue Delay

- 13.1 In all proceedings involving children, there shall be due regard to the general principle that any delay will be prejudicial to the process.

- 13.2 In family law cases (example custody or parental abduction), courts should exercise exceptional diligence to avoid any risk of adverse consequences on the family relations.

- 13.3 When necessary, judicial authorities should consider the possibility of taking provisional decisions, to be monitored for a certain period of time, for later review in any case of non-compliance. Matters of children should be heard regardless of interests of parties.

- 13.4 In criminal matters,

(1) Every case involving a child shall be handled expeditiously and without unnecessary delay.

(2) Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

(3) 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.¹⁷

- 13.1 In accordance with the law, judicial authorities should have the possibility to take decisions which are immediately enforceable in cases where this would be in the best interests of the child.

The ACRWC, article 17, states that children will be informed promptly of charges against them, and 'shall have the matter determined as speedily as possible'.

The Beijing Rules, Rule 10.2, emphasize that when a child has been apprehended, the issue of release will be considered without delay.

The Guidelines on Justice in Matters involving Child Victims and Witnesses, in Guideline 30(c), directs that professionals should:

...ensure that the trial take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited.

The Hague Convention on the Civil Aspects of International Child Abduction is based on the notion of 'prompt return' of a child who has been unlawfully taken to or retained in a country that is not the child's habitual residence. The proceedings should commence within one year of the unlawful abduction. Expeditionness is a key principle and all Hague Convention matters should be considered urgent.¹⁸

Rule 12(1) of the Child offender Rules¹⁹ of Kenya states that matters concerning children in conflict with the law should be handled expeditiously. Furthermore, matters in the Children's Courts must be finalised within three (3) months of plea, failing which they will be dismissed and the child will not be liable. In relation to serious cases before courts superior to the Children's Court, the maximum period for remand is six (6) months, after which the child shall be released on bail. In the event that the matter is not completed within twelve (12) months from date of plea, the case will be dismissed and the child shall be discharged without any further proceedings.

¹⁷ Fifth Schedule to the Children's Act of Kenya ,109

¹⁸ Du Toit C, 'The Hague Convention on the Civil Aspects of International Child Abduction', in T Boezaart (ed), Child Law in South Africa (2009), Juta: Claremont

¹⁹ Fifth Schedule to the Children's Act of Kenya

Section 63(2) of the Children's Act of Kenya emphasises that a child shall be brought before court without delay. However, it does not indicate a specific time frame within which this must take place.

Section 76(2) of the Children's Act, which is one of the general principles with regard to proceedings in the Children's Court, states that a court shall have regard to the general principle that any delay in determining the question before it is likely to be prejudicial to the child. In relation to children in need of care and protection,

Section 120 of the Children's Act states that the authorised officer must bring the matter before the Children's Court without delay.

Section 186(c) of the Children's Act also requires that a matter concerning a child accused of having infringed any law be determined without delay.

14. Organisation of the Proceedings and Child-Friendly Environment

- 14.1 In all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have.
- 14.2 Cases involving children should be dealt with in non-intimidating and child-sensitive settings.
- 14.3 Before proceedings begin, children should be familiarized with the layout of the court or other facilities and the roles and identities of the officials involved.
- 14.4 Language appropriate to children's age and level of understanding should be used.
- 14.5 When children are heard or interviewed in judicial and non judicial proceedings and during other interventions, players and other professionals should interact with them with respect and sensitivity.
- 14.6 Children should be allowed to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person.
- 14.7 Child-friendly interview methods, such as video or audio recording or pre-trial hearings in camera, should be used, and laws should be reviewed from time to time to allow these to be considered admissible evidence.
- 14.8 Children should be protected, as far as possible, against images or information that could be harmful to their welfare. In deciding on disclosure to the child of images or information that

could possibly be harmful to them, the players should seek advice from other professionals, such as psychologists and social workers.

14.9 Visits to remand homes should be done by court officials and magistrates from time to time in fourth nights for efficient administration of justice to children.

14.10 Court sessions involving children should be adapted to the child's pace and attention span; regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.

14.11 As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment.

14.12 As far as possible, specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law, for care and protection proceedings, and for cases involving child victims and witnesses. Special measures and necessary adaptations should be made for children with disabilities.

The UNCRC provides that, as a general rule, the parents of child offenders must be permitted to be present at their court appearances.²⁰ The Beijing Rules state that:

...the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express himself or herself freely.²¹

The Guidelines on Justice in Matters involving Child Victims and Witnesses provide detailed procedures for how children can be protected from hardship during the justice process, including court preparation and continuity planning, avoidance of delay, child-sensitive procedures such as modified court rooms, and recesses during testimony.²² Where possible within the domestic law, children should testify out of sight of the perpetrator, and should be protected during cross-examination.

²⁰ CRC Article 40(2)(b)(iii).

²¹ Beijing Rules, Rule 14.2.

²² Guidelines on Justice for Child Victims and Witnesses, Guideline 30.

The Children (Charitable Children's Institutions) Regulations of 2005 to the Children's Act of Kenya state in Regulation 25 that institutions must be child-friendly. In particular, section 74 states that:

A Children's Court shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children's Courts are held, and no person shall be present at any sitting of a Children's Court except –

- a) members and officers of the court;*
- b) parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;*
- c) parents or guardians of any child brought before the court;*
- d) bona fide registered representatives of newspapers or news agencies; such other persons as the court may specially authorize to be present.*

Section 188 of the Children's Act states that the Children's Court shall have a setting that is child-friendly.

15. Evidence /Statements by Children

- 15.1 Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals and, as far as possible, in a child friendly environment..
- 15.2 When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.
- 15.3 The number of interviews should be as limited as possible, and their length should be adapted to the child's age and attention span.
- 15.4 Every effort should be made for children to give evidence in the most favorable settings and under the most suitable conditions, with regard to their age, maturity and level of understanding and any communication difficulties they may have.
- 15.5 Audio-visual statements from children who are victims or witnesses should be

encouraged, while respecting the right of other parties to contest the content of such statements.

- 15.6 Direct contact, confrontation or interaction between a child victim or witness and alleged perpetrators should, as a general rule, be avoided unless it is prejudicial to the child victim or witness.
- 15.7 Children should have the opportunity to give evidence in criminal matters without coming face to face with the perpetrator.²³
- 15.8 Rules on children giving evidence should be made less strict, such as through removing the requirement for oath or other similar declarations, or instituting other child-friendly procedural measures. A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age.
- 15.9 Interview and evidence protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.
- 15.10 With regard to the best interests and wellbeing of children, it should be possible for a judge to allow a child not to testify.

The CRC, in Article 2(b)(iv), declares that a child alleged as or accused of having infringed the penal law shall not be compelled to give testimony or to confess guilt, and shall have the right to examine or have examined adverse witnesses, and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.

16. Child-Friendly Justice after Judicial Proceedings (Post Trial)

- 16.1 The child's lawyer, guardian *ad litem* or legal representative and the court (or other suitable professional in the case of child victim or witness) should communicate and explain the decision or judgment to the child in a language adapted to the child's level of understanding, and should give the necessary information on possible measures that could be taken, such as appeals.
- 16.2 National authorities should take all necessary steps to facilitate the execution of judicial decisions/rulings involving and affecting children without delay.

²³ Article 50 of the Constitution of Kenya

- 16.3 When a decision has not been enforced, the court should be informed and children informed possibly through their lawyers, guardian ad litem or legal representative, of available remedies.
- 16.4 Implementation of judgments by force should be a measure of last resort in family cases when children are involved.
- 16.5 After judgments in highly contentious proceedings, guidance and support from specialized service (psychosocial, counseling, etc) should be offered, ideally free of charge, to children and their families.
- 16.6 Particular health care and appropriate social and therapeutic intervention programmes or measures for child victims of abuse should be provided, ideally free of charge, and children and their caregivers should be promptly and adequately informed of the availability of such services.
- 16.7 The child's lawyer, guardian or legal representative should have a mandate to take all necessary steps to claim for damages during or after criminal proceedings in which the child was a victim. Where appropriate, the costs could be covered by the state and recovered from the perpetrator. Victim compensation schemes should be considered.
- 16.8 Measures and sanctions for children in conflict with the law should always be constructive and individualized responses to the committed acts, bearing in mind the principle of proportionality, the child's age, physical and mental wellbeing and development, and the circumstances of the case.
- 16.9 If committed to a custodial sentence, which should be a last resort and for the shortest possible period of time, the conditions of children aged below 18 years must take account of their age.
- 16.10 Their right to education, vocational training, employment, rehabilitation and reintegration should also be guaranteed.
- 16.11 In order to promote reintegration into society, and in accordance with national law, criminal records of children should not be disclosable on reaching the age of majority.

Rule 21.1 of the Beijing Rules states that the records of child offenders shall be kept strictly confidential and closed to third parties. Rule 21.3 provides that records of child offenders shall not be used in adult proceedings in subsequent cases.

When it comes to sentencing, Article 37 of the CRC is clear that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years. The UN Committee on the Rights of the Child General Comment No 10 has extended this to include all forms of life imprisonment, and clearly includes corporal punishment (as a sentence or in detention facilities) as cruel, inhuman or degrading treatment.

With regard to child victims and witnesses, the right to be informed includes, at Guideline 20 of the Guideline on Justice for Child Victims and Witnesses of Crime, the right to be informed about prosecutorial decisions and about any post-trial development and the outcome of the case.

In Kenya, the Children's Act states in Section 191(2) that no child offender shall be subjected to corporal punishment.

17. Promoting other Child-Friendly Actions

- 17.1 Set up, or maintain and reinforce where necessary, information offices for children's rights, possibly linked to bar associations, welfare services, ombudsman, non-governmental organizations (NGO's), etc.
- 17.2 Facilitate children's access to courts and complaint mechanisms, and further recognize and facilitate the role of NGO's and other independent bodies or institutions in supporting children's effective access to courts and independent complaint mechanisms, both at national and international level.

The ACRWC includes, in Article 44, a 'communications' mechanism. This declares that the African Committee of Experts may receive communication from any person, group or non governmental organization recognized by the AU, by a member state, or by the UN. Any such communication can relate to any aspect of the ACRWC. The Committee also has the power to investigate matters. This communications mechanism sets a good example. Recent efforts to establish a communications mechanism as an optional protocol to the CRC, though broadly successful, failed to measure up to the standard set by the ACRWC mechanism, because the mechanism established does not include means by which to make collective complaints.

18. Principle of Participation

- 18.1 Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to express their own views as well as the circumstances of the case.

18.2 The right of children to participate shall be fully respected. Sufficient information on how the child may exercise his or her right should be provided by the competent authority, and views expressed by the child should be given due consideration. All decisions or rulings of the court should be read and explained in a language that the child will understand.

The child's right to participation is one of the guiding principles of the CRC and it is established in several of the treaty's provisions (articles 12, 13, 14, 15). In particular, Article 12 recognizes that children have the right to participate in decision-making processes that pertain to their lives and influence those decisions taken within the family, the school or the community. Children have the right to express their views in all matters that affect them and their views are to be heard and given due weight in accordance with the child's age and maturity. Thus, children's right to participate must be considered in all matters that affect them. The right to participation is also recognized in the African Charter on the Rights and Welfare of the Child (ACRWC). In its General Comment 13, (issued in 2011) the CRC Committee stated: "Children's rights to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child care-giving and protection strategies and programmes".

19. Best Interest of the Child

19.1 Children's right to have their best interests be the primary consideration in all matters concerning them should be guaranteed through effective implementation. In assessing the best interests of the child, their views must be given due weight and the child's other rights should be respected at all times. If more than one child is involved in a matter, the best interests of each child should be separately assessed and balanced with a view to reconciling possible conflicting interests of children.

19.2 The best interests of the child shall be the primary consideration in the implementation of actions and decisions concerning children in the justice system.

19.3 The children courts should be as child friendly as possible with introduction of child friendly colors within and outside the courts, toys, child friendly furniture and adequate holding areas for the children, sanitation, transport to and from court and interview rooms.

19.4 The children court should be able to handle children with any form of disability and with the dignity they deserve by ensuring all the necessary facilities and equipment necessary are made available to them.

- 19.5 The children's court premise and facilities should be totally separated from other facilities of the general public.
- 19.6 The children registry should be totally different from other registries with separate criminal case and civil case registries and registers.
- 19.7 There is need for clear exit strategy for children who have been involved in the judicial system so that all actors are aware of their roles hence ensure smooth transition is achieved to the best interest of the child.

TIMELINES WITHIN THE JUSTICE CHAIN

Appropriate timeline for various activities within the justice chain.

SN	Activity	Duration
1	Enquires	1 day
2	Filing under certificate of urgency	1 day
3	Filing of any case/documentation at the registry	15 minutes
4	First mention of the case	5 days
5	Subsequent mention	Civil - 2 months
		Criminal – 14 days
6	Attendance at the registry	15 minutes
7	Collection of evidence	15 days
8	Access to money deposited through the court in civil cases	7 days
9	Completion of a case involving a child in conflict with the law	Max 3 months
10	Care and protection orders	Max 2 months
11	Accessing court orders/ rulings	2 days
12	Hearing and determination of an application	30 days
13	Hearing of and determination of main suit	90 days
14	Processing bond for minors	1 day
15	Plea taking	1 day
16	Case hearing	Criminal 3 months
17	Case review	1 month
18	Receipt of Children Officer report	Within 1 week

MONITORING AND IMPLEMENTATION PLAN

1. The Constitution of Kenya 2010 articles 10, 53, 56, 174, 195, 201, 203, 225, 226 and 227 stipulate that monitoring and evaluation is an important part of operationalizing government activities. This is to ensure transparency, integrity, and information access and accountability principles.
2. The government has in place a National Integrated Monitoring and Evaluation System (NIMES) which is the reporting system from National, County and sub-County levels. These structures are in place to ensure conformity with best reporting standards. One of the flagship projects under the Kenya Vision 2030 is the development of an integrated data management system for children, which will collect sex disaggregated data that will guide policy, planning, budgeting, programming and reporting.
3. In order to strengthen child friendly justice on a national level, the judiciary should consider drawing from regional and international best practice approaches in children justice matters. These efforts should be directed towards research, disseminating information, strengthening infrastructure and information systems, including birth registration systems; training and capacity building; the development of alternative measures (diversion) and services aimed at social reintegration and psychological recovery; appointment of judicial officers with best interest of the child at heart and implementing this guidebook.
4. A proper follow up structure to be made to monitor the children placed and committed to the rehabilitation and other committal centres to ensure the probation officers and director of children present the necessary reports to the court and relevant authorities on the progress of the committed child.
5. There should be established child protection units in every police station and guidelines to ensure their full utilization.
6. The county governments should fully participate in child protection including establishing rehabs and children remand centers at county level.
7. The government shall provide funds to meet the needs of the children in the justice chain so that all the necessary requirement in the courts and in the police station are met for the best interest of the child.
8. A clear and transparent transition procedure for the children from one actor to another in the justice chain should be clearly defined, including proper timelines.
9. There is need for enhanced stakeholder involvement in the child justice system.

10. The judiciary should recognize the desirability of developing specialised children courts to support child friendly justice principles and practices, and the necessity of a well trained social workforce to ensure the full implementation of this guidebook.
11. A monitoring framework, including independent mechanisms as appropriate, shall be established to oversee the implementation of this guidebook, in accordance with national judicial, administrative, social protection and traditional justice systems.
12. A proper data management system that captures cases regarding children both in need of care and protection and in criminal cases should be set up in all the courts.
13. There should be improved infrastructure through having more rehabilitation and rescue centres to meet the needs of the children in the justice chain.
14. Implementation reports should be done periodically to monitor the progress in children matters.

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