Interdisciplinary Journal on the African Child
Special edition 2019 Vol. 01, Issue 01

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

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Abstract

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

Key words: Sexual Offences, Criminal, Juvenile, emergence

Introduction and Background of the Study

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

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

affect children; the 2010 Constitution of Kenya, the United Nations Convention on the Rights of Children, African Charter on the Rights and Welfare of Children, Children Act (2001) and some parts of the Sexual Offences Act (2006).

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

This surge is best summarized by the Principal Magistrate at the Malindi Law Court who stated that most laws do not reflect the 21st Century situation as most children become sexually active at an early age with the community's cultural background playing a role. The court procedures which are technical in nature and mostly centered on the guilt or innocence of the accused persons do not help in the achievement of the best interests of children (Abrams & Ramsey, 2000). Also, C. Tapper (2010) noted in *Cross and Tapper on Evidence* that the Criminal Justice System assumes that children are mature enough and carry the same capacity as adults to argue out their cases before an impartial judicial officer who makes decisions based on the arguments brought forward by the respective parties. In essence, there is no specific law that provides procedural mechanism for the protection of children involved in sexual offences during the trial process of a criminal court, leaving the judicial officer to use their discretion to safeguard the best interests of the child.

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

Methodology

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

The study also interviewed a number of key informants who were studiously selected. The study purposively sampled 2 prosecutors, 2 magistrates and 1 lawyer who

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

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

The majority of the cases which were used in this research brought about the contentious issues of the best interest of the child in regard to defilement and sexual abuse where either the child was the victim or the principal offender. These cases were gauged against certain elements deemed crucial, especially in a trial process. The parameters were used to assess the merits of each case in the determination of whether the principle was achieved and they also acted as guidelines during the interviews. These

parameters were used to gauge whether the welfare of children was taken into consideration during the whole trial process of the courts from the investigation stage till the sentencing stage (of the Criminal Justice System). The data collected was analysed and assessed against the stated parameters and was then presented in a narrative format.

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

Findings and Discussion

There was little information on the various factors that courts should uphold in criminal trials as a way of safeguarding the best interests of the children involved. The question to be answered by this study therefore was; Within the context of procedural

justice in the Criminal Justice System in regard to sexual offences cases, what elements of the "Best interests of the child" principle should be upheld in order to guarantee fairness to children in trials?

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

Case 2: In Criminal Appeal Number 73 of 2004 (*Ceretta Medardo v Republic*), the accused had been set free after the parents withdrew the charges in a case before a Senior Resident Magistrate after he had been charged with having carnal knowledge of a 10-year-old boy against the order of nature. The appeal was brought forward to tackle the

issue of who can withdraw a complaint and whether parental responsibility includes the right to withdraw complaints on behalf of their children. Section 204 of the Criminal Procedure Code clearly states that before a court can permit a withdrawal then the complainant has to be the one who withdraws it and that the court has to be satisfied that there exist sufficient grounds for permitting such a withdrawal. In this case, we looked into the consistency with established laws as through this we could see that the reasons for withdrawal were not set out to enable the trial court to exercise its discretion. An interview with one of the lawyers based in Malindi where the matter originated from stated that this was a common occurrence especially at the coastal region where sexual offences are on a surge. The attorney stated that most parents of assaulted children usually withdraw the charges prematurely after discussion with the accused person, making it a worrisome habit that is cropping up. The appeal nevertheless set the matter right by stating that the justice system would not facilitate reconciliation where the offence amounts to a felony and that the reasons have to be sufficient enough to persuade the court to withdraw the charges and the reasons have to be documented in case one would seek to appeal the decision.

Case 3: In Criminal Appeal Number 252 of 2011 (*Lazarus Ocharo Kieya v Republic*), the justice system was faced with a dilemma on what interest to consider more; the accused's innocent presumption which is found in Article 50(2)(a) or the best interest of the child which is enshrined also in Article 53(2) of the 2010 Constitution. The court was inclined in examining a child's sexual history as it stated that the clinical officer that examined the minor that had been abused had not indicated whether the hymen was freshly broken or was an 'old tear'. This brings out one of the most contested

implied presumption on whether cases that involve sexual abuse of children should factor in if the minor was sexually active or should presume that they had not. In this case we sought to examine the emotional interest of a child and the issue of the evidence of a child. The questions to be answered are whether a child being a victim of abuse would lie about such a matter as defilement and whether she would have a motive to do so in court. The role of a voire dire examination is to check whether a child possessed sufficient intelligence to appreciate the need to tell the truth as per Section 19 of the Oaths and Statutory Declarations Act. Hence if the voire dire examination has been conducted and the child has been sworn in then why doubt the evidence and refute it based on the omission of a fact. It is hardly appropriate to drag a child to narrate the horrific events that had occurred to her after establishing that she has the capacity to tell the truth and after swearing her in then later on term her a liar after a third party omits to state whether the hymen was freshly broken or was an old tear. All these matters would have been tackled at the voire dire examination to put to rest the matter whether the child can lie to the court.

The issue of the evidence of a child is also greatly hampered by the delay caused in a majority of cases as most of them testify on the events that occurred almost 5 months down the line from the day of the occurrence. This delay causes most of them not to recall the precise details of the abuse and this may lead to contradictions between their testimony and the statements recorded by the police. These contradictions create doubts in their evidence as they happen to be the key witnesses in their trials (Saywitz, 1990). This is seen in Criminal Appeal 515 of 2007 (*David Jairo and Ann Achieng v Republic*) where the court allowed the appeal alluding to the fact that the child who had allegedly

been defiled did not conduct herself like a person who had been defiled as she did not complain immediately or report to the police. Her silence throughout the aftermath of the incident and the night raised more questions than answers. This was clearly stated by Ollando (2013) that the courts need to understand the nature of the commission of sexual offences involving children and the inability of children to report directly to the police. This is as they are dependent upon adults who make the decision whether to report to the police or not and when. She also mentioned the aspect of social stigma that may hamper the reporting of the cases to the police or for a child to genuinely express what had occurred to them (Ollando, 2013).

This then illuminates the heated debate on whether minors can consent to sexual intercourse regardless of the fact that the law states that consent can only be given by adults. Different cases have tackled this sensitive issue differently bringing out the divergent opinions of various judges. Defilement is a strict liability offence which only needs proof of the penetration and age of the minor but has provisions of defences in regard to false representation of the minor's age through Section 8(1) and 5 of the Sexual Offences Act 2006. The remaining cases that were reviewed by the author sought to tackle the place of consent among minors and what elements of consent should be demonstrated for it be taken into account by the court. The main issue that arises is how the best interests of the child can be safeguarded and for the law not to turn a blind eye to the accused causing any injustice.

Case 4: In Petition 6 of 2013*(C K W v Attorney General & another*), this case involved two minors who had been dating and the accused had been charged when he was 16. The appellant sought a declaration that Sections 8(1) and 11(1) of the Sexual

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

Case 5: This is contrary to the ruling that was in Criminal Appeal Number 32 of 2015 (*Martin Charo v Republic)* in which the court ruled that the offence of defilement should not be limited to age and penetration but also the conduct of the complainant

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

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

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

In most of the cases, the children involved in the cases were subjected to administrative shortcomings in the case of the tight schedule of the court dragging the

cases longer than required. This was due to the criminal justice agencies that included the Office of the Director of Public Prosecutions, Judiciary, Children's Department, Probation Department and the Police not working together as a team but independently of each other.

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

Conclusion and Recommendations

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

path in safeguarding the rights and welfare of the child and should be heralded and defined clearly as justice is and will always be the conscience of the whole of humanity.

1. Legislative Reforms;

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

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

There should be guidelines on how to investigate and handle sexual offences cases involving children by the police. These guidelines will enable the police to know how to treat child offenders and also child victims, keeping in mind that their best interests should be upheld. This should also include how long child offenders should be

in custody, how long an investigation should last before the matter is forwarded to the courts, and lastly how they should take statements from children.

2. Judicial reforms;

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

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

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

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

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

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

The judicial discretion that encompasses this principle should be founded on the rule of law and should be defined to be of use in legal decisions, hence there should be a consensus of what is "best" to the child. The court can also come up with a manner of

balancing the rights and interests of the accused and the child victim in order not to cause a miscarriage of justice.

Acknowledgements

Special gratitude and appreciation to Honourable Ms Sylvia Wewa (Principal Magistrate, Malindi Law Courts) and Mr John Mwebi for their intellectual input during the various stages of this study. I am grateful to Mrs Jennifer Kaberi who supervised me during this whole period and also for her amazing moral support and encouragement. I wish to also appreciate my family in special mention my sister Mercy Njoki, Miss Michelle Kelly and the whole fraternity of St Phillips Gosford for always believing in me.

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