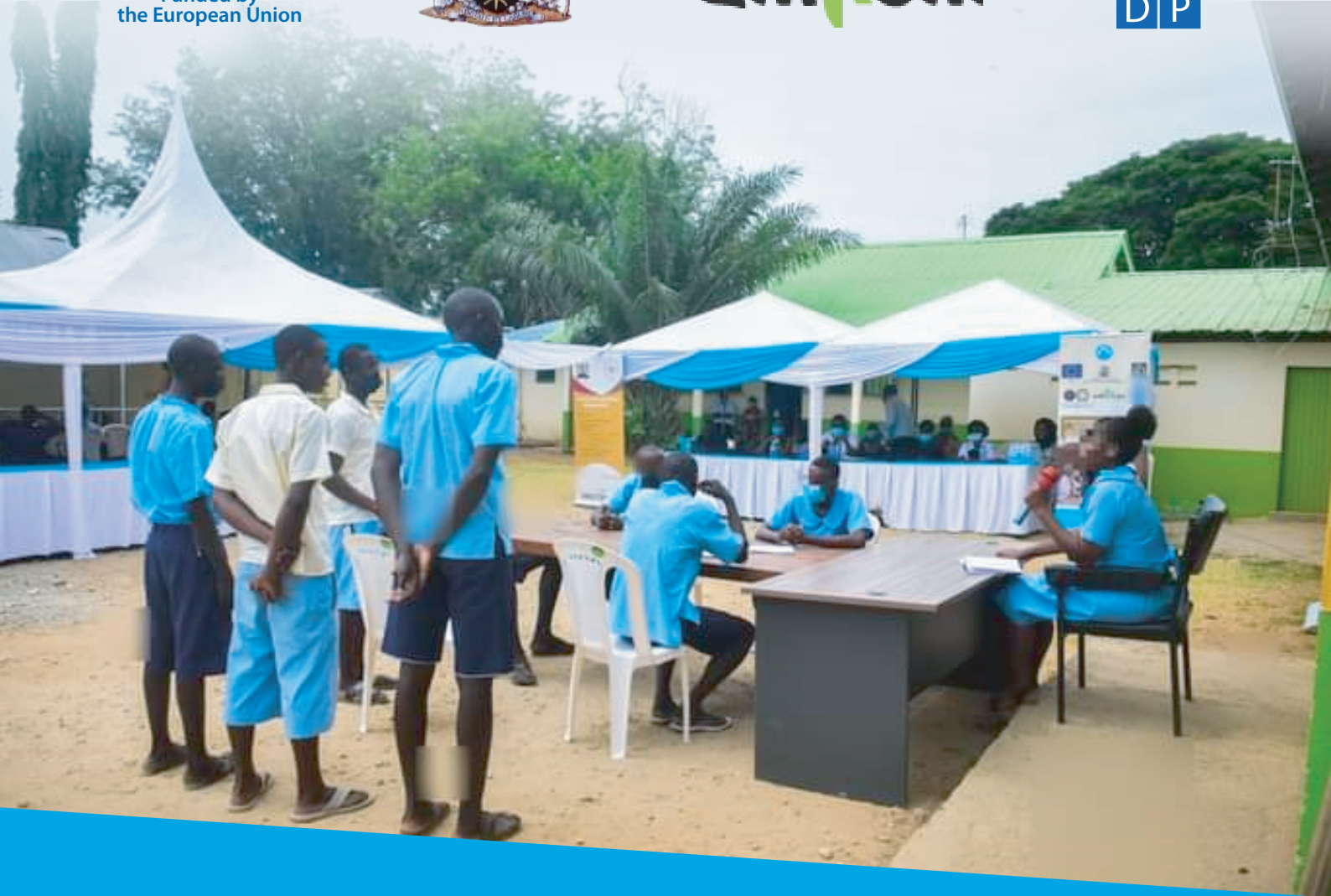




Funded by
the European Union



ENHANCING CHILD JUSTICE IN KENYA: COURT USERS COMMITTEES AND COMMUNITY LEADERS TRAINING

TOT Training Manual 2024



ENHANCING CHILD JUSTICE IN KENYA: **COURT USERS COMMITTEES AND COMMUNITY LEADERS**

TOT Training Manual 2024

This Training Manual was developed with the financial support of the European Union through UNDP and Amkeni Wakenya. The contents of this Manual do not necessarily reflect those of UNDP, Amkeni Wakenya or the European Union.

TABLE OF CONTENT

ACKNOWLEDGEMENTS.....	iii
USER GUIDE.....	iv
SESSION 1: PREPARING FOR THE TRAINING: UNPACKING ADULT LEARNING.....	1
1.1 INTRODUCTION.....	1
1.2 LEARNING OUTCOMES.....	2
1.3 ATTRIBUTES OF AN ADULT LEARNER.....	2
1.4 THE LEARNING PYRAMID.....	3
1.5 TRAINING OPTIONS.....	5
SESSION TWO: INTRODUCTION TO CHILD JUSTICE IN KENYA.....	6
2.1 LEARNING OUTCOMES.....	6
2.2 STATUS OF CHILD OFFENDING IN KENYA.....	7
2.3 INTRODUCTION TO KEY TERMS.....	7
2.4 TRANSFORMATION OF THE CHILD JUSTICE SYSTEM IN KENYA.....	8
2.5 SUMMARY.....	9
2.6 USEFUL REFERENCES.....	9
SESSION THREE: INTRODUCTION TO PRINCIPLES UNDERPINNING CHILD JUSTICE.....	10
3.1 LEARNING OUTCOMES.....	10
3.2 GUIDING PRINCIPLES UNDERPINNING CHILD JUSTICE IN KENYA.....	11
3.3 SUMMARY.....	12
3.4 USEFUL REFERENCES.....	12
SESSION FOUR: ENHANCING CHILD JUSTICE BEFORE TRIAL.....	13
4.1 LEARNING OUTCOMES.....	13
4.2 EARLY INTERVENTION.....	14
4.3 ASSESSMENT OF A CHILD UPON ARREST.....	14
4.4 PRELIMINARY INQUIRY/FIRST APPEARANCE IN COURT.....	15
4.5 DIVERSION.....	15
4.6 SUMMARY.....	17
4.7 USEFUL REFERENCES.....	17
SESSION FIVE: ENHANCING CHILD JUSTICE DURING TRIAL.....	18
5.1 LEARNING OUTCOMES.....	18
5.2 BAIL.....	19
5.3 LEGAL REPRESENTATION.....	19
5.4 OTHER CHILDREN'S RIGHTS.....	19
5.5 PARTICIPATION OF CHILDREN AND SIGNIFICANT OTHERS.....	19
5.6 ORDERS UPON A FINDING OF GUILT.....	20
5.7 SUMMATIVE ACTIVITY: ROLE-PLAY - FIRST ARRAIGNMENT.....	21
5.8 SUMMARY.....	22
KEY DOMESTIC LEGAL INSTRUMENTS, POLICY AND STRATEGY DOCUMENTS RELATING TO CHILD JUSTICE.....	23

ACKNOWLEDGEMENTS

This Training Manual, designed to enhance child justice in Kenya, was developed through pilot stakeholder workshops under the University of Nairobi, Faculty of Law's Child Justice Project, funded by the European Union through UNDP and Amkeni Wakenya.

During the project, various stakeholders were sensitised on the provisions of the Children Act 2022 and the Legal Aid Act 2016 relating to children in conflict with the law. The Manual, therefore, focuses on training needs identified by stakeholders.

This Manual was developed by the Tononoka Children's Court Court Users Committee representatives in conjunction with the University of Nairobi staff and students. The contributors include Prof. Sarah Kinyanjui (University of Nairobi), Dr. Mercy Deche (University of Nairobi), Hon. Nelly Chepchirchir (Tononoka Children's Court), Gabriel Kitili (Directorate of Children's Services), Rozette Kusimba (National Police Service), Kernaël Nyawinda (Office of the Director of Public Prosecutions), Maina Kuria (Directorate of Children's Services), Irene Rukaria (DCS), Njeri Mwangi (Directorate of Children's Services), Joyce Vidzo (Directorate of Children's Services), Antonette Wambani (Mombasa Law Society), Ben Omondi (CLEAR), Jabu Athman Ali (Kashani Secondary School), Jedidah Juma (Maweni Secondary School), Nayfeen Najim (University of Nairobi), Mohamed Jeilani (University of Nairobi), Ahmed Nasser (University of Nairobi), Chelsea Owino (University of Nairobi), Thomas Mlanda (University of Nairobi).

USER GUIDE

This Training Manual on Enhancing Child Justice in Kenya provides an overview of the child justice system. It introduces the key tenets underpinning the child justice system to participants. The Manual articulates the fundamental requirements for delivering justice for children in conflict with the law. Notably, it highlights changes in the child justice process introduced by the Children Act 2022.

The Manual is a simple guide intended to equip Court Users Committees, and community leaders to engage in child justice matters effectively. It also provides a foundation that can be developed for more advanced training. The Manual is divided into five sessions.

The first session's goal is to equip participants to train others effectively. This session introduces them to effective adult training methods. It offers essential lessons and considerations for effectively training adults. The Facilitator is expected to package the lessons appropriately for different groups of participants.

Session two sets out the context in which the child justice system in Kenya operates to illuminate the organically adopted approaches. Against the contextual background, Session Three introduces the principles that underpin child justice. Participants are introduced to provisions of the law in which these principles are embedded.

In Session Four, participants are introduced to the requirements of the pre-trial processes aligned to the principles set out in Session Three. Notably, it introduces participants to the preliminary inquiries outlined in the Children Act 2022. Session Five addresses court processes, focusing on diversion, now formally recognised under the Children Act 2022.

The Manual contains sample practical exercises while allowing the Facilitator the flexibility to enhance the presentation of the material creatively.



SESSION 1

PREPARING FOR THE TRAINING: UNPACKING ADULT LEARNING

1.1 INTRODUCTION

Effective adult training requires meticulous planning and knowledge of appropriate delivery methods for adult learners (andragogy).

This section is designed to introduce the facilitator to the fundamentals of adult learning. Trainer of Trainers workshops should include this section to equip TOTs to train others.



1.2 Learning Outcomes



At the end of this session, participants should be able to:

- a) Appreciate the needs and attitudes of adult learners;
- b) Recognise suitable methods of communication for adult learners;
- c) Design and facilitate appropriate training sessions for adult learners;

1.3 Attributes of An Adult Learner

WHAT DO YOU SEE?



Source: www.the-sun.com

Some will see a fish, birds, a gorilla, a lion or a tree first. This reflects participants' differences. Approach the training with an open mind knowing that the views will be as many as the participants

1.4 The Learning Pyramid

(Source: <https://ntl.org/>)

There are many different methods of sharing knowledge. The appropriateness of each method is determined by the group dynamics such as age, literacy, experience etc. However, research suggests that the knowledge retention rate differs for different methods. The learning pyramid below, developed by the NTL Institute for Applied Behavioral Science, for instance, illustrates how learners are likely retain information when different methods are used. While the accuracy of the pyramid is not devoid of criticism, it provides insights to be considered when designing the training method.



Some methods of teaching and learning are much more effective than others. The most effective methods combine auditory, visual, and kinesthetic (involving movement e.g. dancing) aspects. Variety in training methods is therefore key.

Consider:

In which instances are the following teaching methods appropriate:

a) *Listening/Reading*



Brain scans show that listening memory is one of the smallest and therefore weakest memory centres in the brain. How did you like the lecturer who came to class to read notes?

b) *Seeing/Visual*



Visual memory gives much better results than audio memory. How many names can you remember? Compare with facial recognition. The visual centre is much larger and therefore stronger than the auditory centre.

c) *Demonstration*



Demonstration is said to cause better recall. The ability to see the instructor can be as important as seeing the actual physical process, because when we watch someone we interpret huge amounts of added information.

d) *Group Discussion*



This involves the student becoming active in discussing the items learned. It is believed that the amount of the physical brain involved and the number of places in the brain that is engaged, are greater causing the interconnections from centre to centre to be heightened.

e) *Practice*



It keeps the student engaged without letting them get to a place of boredom and active disinterest.

f) *Teach Others*



Teaching requires both memory of the data and learning of what it means or how it happens. One must know an item well in order to explain it to another. The better it is known and understood, the better it can be taught.



1.5 TRAINING OPTIONS

A facilitator should make use of different modes of sharing knowledge.

Training options include:

Brainstorm

Generation of ideas, involves all persons, allows people to participate without fear;

Discussion

Follow up for deeper conversation when an important point has been made, getting different opinions;

Small group

Can assign roles such as reporter, observer, facilitator, questioner. The facilitator should circulate during a group, don't passively sit up front. The purpose is to encourage participation especially from those not comfortable to speak in large groups, to promote "ownership" of the issue, to develop practical solutions;

Socratic

Question and Answer, ask participants to vote on answers or issues especially with a large group for more participation. The facilitator doesn't need to answer the question but can ask another participant to do so or ask how many agree with this position or that;

Case study

Participants work on a hypothetical case related to the learning necessary for the real world i.e. ensure relevance to local circumstances and develop alternative approaches and new ideas during the discussion;

Roleplay

Theatre, a dramatization of a common problem that lets participants relate to the performers and step out of their own egos so they can discuss it with less emotion. E.g. what transpires in court;

Exercise

An activity in which the participants take charge and produce the result;

Activity

An action in which the participants are involved, but do not direct it. Usually it is done to get a reaction afterwards to stimulate discussion and new ideas;

Quizzes

These can be short and non-graded to reinforce learning and to ascertain skill and knowledge level;

Debates

A structured and timed argument presenting different sides of an issue. Encourages participants to critically look at their own position and that of the opposition;

Assignment

Tasks for the participants to do overnight or out of class to keep them focused, especially to use auxiliary material.



Activity

1. Who was your best teacher in school? What did you like about them?
2. Which is the most memorable training you have attended as an adult? What made it memorable?
3. From the responses above, distinguish the needs of an adult learner from those of a child.
4. What kind of trainer would you like to be?



SESSION TWO

INTRODUCTION TO CHILD JUSTICE IN KENYA

2.1 LEARNING OUTCOMES



At the end of this session, participants should be able to:

- a) Describe the child justice system and articulate the key terms related to child justice;
- b) Discuss child offending as a community dysfunction;
- c) Articulate restorative justice and a community-based approach as a desirable response to child offending.

2.2 STATUS OF CHILD OFFENDING IN KENYA

The number of children committing offences in Kenya, has been rising steadily. This trend encompasses not only an increase in the overall number of cases but also a greater involvement of minors in serious crimes. Consequently, more children are being charged and subjected to trial.

Research reveals that subjecting children to the justice system does not guarantee rehabilitation and is often linked to recidivism. Of particular concern is that a significant number of children commit petty offences, which are occasioned by the abdication of societal obligations to ensure the well-being of children.

It is, therefore, critical for the child justice system and the community to work collaboratively to reduce child offending and foster rehabilitation of children who are already engaging in crime.



Activity

Discuss the state of child offending in your county:

- Which are the most common offences committed by children in your county?
- Which are key driving factors to child offending in your county?

2.3 INTRODUCTION TO KEY TERMS

Child – a person who has not attained the age of eighteen years.(Children Act 2022, s.2.)

Child Justice System: This encompasses the legislation, norms, standards, procedures, mechanisms, and provisions specifically related to children in conflict with the law, as well as the institutions and bodies established to address their cases. In line with international standards emphasising rehabilitation, the term “child justice system” is gradually replacing “juvenile justice system” (Committee on the Rights of the Child General Comment No. 24 (2019), para 8)). In Kenya, the key agencies within the child justice system include the Judiciary, the Directorate of Children’s Services (DCS), the Office of the Director of Public Prosecutions (ODPP), the National Police Service (NPS), the Probation and After Care Service (PACS), and the Kenya Prisons Service (KPS).

Child in Conflict with the Law: A child over the age of twelve who is accused of committing an offense and is undergoing the justice system.


Children’s Court: A court designated under the Children Act to adjudicate matters related to children. In criminal cases, Children’s Courts handle charges against minors, excluding those involving murder (Children Act 2022, s. 91(1)(b)).

Children in Need of Care and Protection: Refers to children living in difficult circumstances who require protection from neglect, abuse, or exploitation (Children Act 2022, s.144).

Children’s Officer: An officer appointed within the Directorate of Children’s Services, responsible for the well-being of children. In criminal cases, the children’s officer provides the court with assessment reports on the child’s background and welfare. They ensure the child’s best interests are considered throughout the trial. Remand homes and rehabilitation schools are managed by children’s officers.

Probation Officer: An officer appointed under the Probation of Offenders Act to serve in the Probation and After Care Service. Probation officers prepare pre-bail and other social inquiry reports to aid in diversion and sentencing decisions. They also supervise probation orders and community service orders.

Restorative justice – any process in which the victim, the offender and/or any other individual or community member affected by a crime actively participates together in resolving matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative processes include mediation, conferencing, conciliation and sentencing circles. These processes seek to foster interventions that address the impact of the wrongdoing and develop a sense of responsibility for the offender.



Who else/which other agencies/institutions are involved in/ or support the child justice system in Kenya ?


2.4 Transformation of the Child Justice System in Kenya

In response to the increased child offending and the ineffectiveness of the retributive interventions, Kenya’s child justice system is gradually shifting from a retributive approach to one focused on restorative and rehabilitative goals.

This shift is reflected in child laws and policies governing the relevant agencies. The Probation and After Care Service developed the Child and Youth Justice Policy 2022 to guide its work with child offenders. Additionally, the Criminal Procedure Bench Book 2018 and the Sentencing Policy Guidelines guide judges and magistrates dealing with children. The ODPP Guidelines on the Decision to Charge 2019 and the Diversion Policy 2019 outline specific considerations for prosecutors handling cases involving minors. This comprehensive policy framework has been further strengthened by the enactment of the Children Act in 2022.



Activity
In groups, peruse Part XV of the Children Act 2022 and briefly discuss how its approach differs from pre-2022 interventions for children in conflict with the law.



Which other reforms in the child justice system signal the shift from a retributive to restorative and rehabilitative focus?

Which practices in the child justice system are still retributive?

2.5 SUMMARY



In this session we discussed the paradigm shift in the child justice system in Kenya. We noted in particular:

1. Part XV of the Children Act 2022, which governs the treatment of children in conflict with the law, is premised on the endeavour to:
 - a. Restrict children's contact with the justice system to an intervention of last resort;
 - b. Identify the most appropriate intervention for each child who is alleged to have committed an offence;
 - c. Facilitate restorative justice and rehabilitate child offenders.
2. The realisation of this objectives requires:
 - a. An appreciation of the paradigm shift, by all the players in the child justice system;
 - b. Collaborative efforts and effective coordination of all the players in the child justice system

2.6 Useful References

[Blueprint for Rehabilitation and Social Reintegration Programmes for Children in Conflict with the Law in Kenya \(DCS, 2021\).](#)

[Criminal Justice System in Kenya: An Audit \(NCAJ, LRF and RODI 2016\).](#)

[Enhancing Child and Youth Justice: PACS Assessment of the Criminal Justice System in Kenya \(PACS, 2021\).](#)

[Probation and After Care Service Youth and Child Justice 2021-2025 \(PACS, 2021\).](#)

[Perspectives of Youth Criminality in Kenya \(NCRC 2018\).](#)

[Status Report on Children in the Justice System in Kenya \(NCAJ, 2019\).](#)

[Survey on Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya, \(DCS & UNODC 2020\).](#)



SESSION 3:

INTRODUCTION TO PRINCIPLES UNDERPINNING CHILD JUSTICE

3.1 Learning Outcomes



At the end of this session, participants should be able to:

- a) Articulate the key principles that underpin child justice;
- b) Understand and apply the guiding principles that must be considered when handling children in conflict with the law.

3.2 Guiding Principles Underpinning Child Justice in Kenya

3.2.1. Best interests of the child

All decisions, services rendered and operations in the child justice system must be geared towards achieving the best interests of a child (Constitution of Kenya 2010, Art. 53(2); Children Act 2022,; Convention on the Rights of the Child, Art. 3(1); African Charter on the Rights and the Welfare of the Child, Art. 4).

3.2.2 Duty of Care

Courts must consider the welfare of all children in conflict with the law appearing before them (Children Act 2022, s.236 (1)). All other players must also ensure that all children in the justice system are well taken care of.

3.2.3 Do No Harm

All officers in the child justice system must ensure children are protected from harm throughout the justice processes.

3.2.4 Respect for and Protection of Child Rights

All players in the child justice system must adhere to and protect the following rights:

a. Non-discrimination

All players in the child justice system must render the requisite services to all children without bias irrespective of their race, sex, pregnancy, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth (Constitution of Kenya, art. 27; Children Act 2022, s.9.).

b. Protection from inhuman and degrading treatment

All children in the justice system must be treated with dignity. (Constitution of Kenya, art.53 (1) (d).)

c. Institutionalisation as the last resort

Institutionalisation of children should only be considered when all other non-custodial interventions have been deemed inappropriate (Constitution of Kenya, art 53(1)(f)(i)). Therefore, all efforts must be made to avoid pre-trial custody and to divert children from the justice system (Children Act 2022, No.29 of 2022, s.227; ODPP Diversion Policy 2019, clause 2b; ODPP Diversion Policy Guidelines and Explanatory Notes 2019, clause 9 & 35; ODPP National Prosecution Policy 2015, clause 6b;) except when holding a child in custody and subjecting a child to trial are necessary.

d. Right to health

The health of children in the justice system must be taken into account. Thus, when assessing a child's wellbeing, courts must consider the child's health (Constitution of Kenya, art. 53(1)(c); Children Act 2022, s.16; s.9; Children Act 2022, No. 29 of 2022, s.236(2)).

e. Right to education

All efforts must be made to minimise disruptions to children's education while they are in the justice system (Constitution of Kenya, art.53 (1) (b); Children Act 2022, s.9.).

f. Right to participate

Children should be accorded opportunities to express their views on matters that affect them throughout the justice process (Children Act 2022, s.222). This resonates with the endeavour to determine the best interests of a child.

g. Right to privacy

Children offenders' identities should be protected to minimise labelling, which may prevent them from reaching their full potential (Children Act 2022, s.220). Section 220(3) of the Children Act criminalises any communication that discloses a child offender's identity.

Group Discussion



Amina has undoubtedly become a nuisance. She started off as a petty thief but has graduated to a 'professional thief'. In fact she is now referred to Dem wa Wakali owing to her open interactions with gang members.

Amina is seventeen years old. Being an orphan, Amina lives with her grandmother, Bibi Mwanasiti. She dropped out of school just when she was about to join Standard Eight. Despite her unbecoming conduct, she is fond of reciting the Quran and often helps young girls to master their recitals.



Amina was recently arrested having stolen a mobile phone from mama Mohamed, the village green grocer. Kadzandani residents, fed-up with her conduct tied her up and were ready to burn her alive. The chief rescued her and handed her over to the police.

The police officer realised that Amina is pregnant.

Discuss how each of the principles would apply in Amina's case.

3.3 SUMMARY



In this session we discussed the principles underpinning the child justice system. We noted, in particular:

- A child in conflict with the law is still a child;
- A child in conflict with the law should not be stripped of their childhood because they have been accused of a crime.
- All actors in the child justice system should act in the child's best interests throughout the justice process.
- The child justice principles must inform all decisions and services rendered by all actors.

Memorable Quotes

There can be no keener revelation of a society's soul than the way in which it treats its children.



*History will judge us by the difference we make in the everyday lives of children.
(Nelson Mandela)*

3.4 Useful References

[Blueprint for Rehabilitation and Social Reintegration Programmes for Children in Conflict with the Law in Kenya \(DCS, 2021\).](#)

[National Strategy on Justice for Children 2023 - 2028 \(NCAJ, 2023\).](#)

[Probation and After Care Service Youth and Child Justice 2021-2025 \(PACS, 2021\).](#)

[Throughcare and Aftercare Procedures for Statutory Children Institutions in Kenya \(NCAJ, 2023\).](#)



SESSION 4:

ENHANCING CHILD JUSTICE BEFORE TRIAL

4.1 Learning Outcomes

At the end of this session, participants should be able to:



- Describe the pre-trial processes as envisaged under the Children Act 2022;
- Discuss the early intervention models resonating with the philosophy of the Children Act 2022;
- Comprehend the pre-trial processes as a sieving mechanism to determine the appropriate cause of action for a child alleged to have committed an offence;
- Explain the inter-agency and multi-agency coordination required at this level;
- Appreciate the need for early parental and community involvement for children in conflict with the law.

4.2 Early Intervention

Research reveals that a significant number of child offending in Kenya is occasioned by family and community circumstances. Thus, early detection of children at risk of offending and early intervention would reduce child offending.

Focusing on early intervention and rehabilitation programs is crucial in addressing the root causes of children's vulnerabilities. This approach involves identifying at-risk children and families and providing targeted interventions to address issues such as poverty, substance abuse, or domestic violence. Addressing these underlying factors may diminish the likelihood of children needing institutional care. Early intervention programs could involve collaboration with local authorities, educational institutions, and healthcare providers to create a comprehensive support system for families.

Activity



Strengthening support systems within schools can be an effective way to identify and address issues affecting children. School counsellors and teachers can be trained to recognize signs of distress or abuse, providing early intervention and support. Collaborating with educational institutions to create a nurturing environment can contribute significantly to a child's academically and emotionally well-being.

Discuss other ways to detect children at risk of offending and possible early interventions to prevent offending.

4.3 Assessment of a Child Upon Arrest

Part XV of the Children Act 2022, which deals with children in conflict with the law, adopts the principles discussed in Session Three.

Departing from the retributive approach in the past, the Children Act 2022 envisages a process through which:

1. Children in conflict with the law are considered to be and are treated as children in need of care and protection (Children Act 2022, s. 144(bb));
2. The underlying causes of criminality are identified;
3. In light of underlying causes, the most appropriate interventions are identified;
4. Ideally, interventions should be provided without subjecting children through trial. However, where trial is necessary, it should be conducted in a manner that upholds the goal of rehabilitation and the appropriate interventions are invoked when trial is concluded.

Thus, upon arrest of a child (Children Act 2022, s.218):

1. The police officer is required to notify the child's parent and the children's officer;
2. A Protection and Care file should be opened (Through care and Aftercare Procedures for Statutory Children Institutions in Kenya (NCAJ 2023));
3. The children's officer must submit an assessment to the police officer. This assessment is intended to provide background information on the child to determine the best cause of action.



While the requirement to contact the children's officer and to have an assessment report is progressive, discuss the challenges that are likely to occur and possible solutions to address these challenges.

4.4 Preliminary Inquiry/First Appearance in Court

The ultimate decision on whether a child will be charged and whether to proceed with prosecution rests with the Office of the Director of Public Prosecutions.

However, the Children Act 2022 envisages informed decision-making by the ODPP. The Act introduces a preliminary inquiry, at the first court appearance, that must be undertaken before a child takes plea (Children Act 2022, s. 228).



Why a preliminary inquiry...

It provides an opportunity for the assessment reports to be considered and ensures that all the necessary information regarding a child is considered;

Who is involved in the preliminary inquiry...

The judicial officer
The prosecutor
The children's officer
The probation officer
The parent/guardian

What happens at the preliminary inquiry...

1. Formal consideration of the assessment reports;
2. Confirmation of age;
3. Consideration of the criminal responsibility of the child if the child is between the age of twelve and fourteen;
4. Confirmation whether a further assessment is needed;
5. Consideration whether the child can be diverted and what would be a suitable diversion option

Discussion



Determination of the age of the child is an important exercise during the preliminary enquiry. Referring to previous experiences and s.229 of the Children Act discuss:

1. Challenges experienced in determining the age of the child and how these challenges can be/have been navigated;
2. The link between age determination and delivery of child justice.



4.5 Diversion

Diversion is not a new concept in Kenya's child justice system. It was practised informally for decades, particularly for petty cases with the concurrence of victims. The formalisation of diversion began with the ODDP Diversion Policy 2019, with greater impetus emanating from the Children Act 2022.

The Children Act 2022(Section 2) defines diversion as:

“the intervention and programmes designed to divert children from the criminal justice system with the aim of—

- (a) Reducing stigmatization of children in conflict with the law;
- (b) Identifying children at risk and connecting them with appropriate support services in an attempt to reduce the likelihood of the children engaging in antisocial behaviour; and
- (c) Providing programmes and support to children who have engaged in offending conduct, prevent them progressing further into the system; and
- (d) Reducing recidivism by children in conflict with the law.”

Note:



1. Diversion is not merely opting not to charge and prosecute children in conflict with the law.
2. Diversion is not a 'soft' response to crime. Instead, grounded in restorative justice, it provides an opportunity for all those with a stake in a child's offending, such as the parents, guardians and the community, to identify the most suitable response to the offence collaboratively.
3. The prerequisite to admit having committed an offence is informed by the goal for the child to take responsibility for offending and make amends.
4. Diversion from the formal system provides an opportunity for the underlying causes of offending, which would ordinarily not be addressed through the formal trial process, to be addressed.

4.5.1 Diversion: The Process

During the preliminary inquiry, the court considers a child's diversion from trial.



When can a child be diverted (Children Act 2022, s. 227(2))?

- (a) If there is compelling evidence that the child committed the alleged offence;
- (b) If the child freely and voluntarily admits responsibility, and no intimidation or pressure has been used to induce that admission;
- (c) If the offence which he or she is suspected to have committed or charged with is not a capital offence (murder and robbery with violence);
- (d) The child and his or her parent or guardian, or other person exercising parental responsibility over the child, consent to diversion;
- (e) The concerns of the victim or the victim's next of kin have been considered; and

Once a decision has been made to divert a child, the most suitable diversion option is imposed. The Children Act 2022 provides three levels of diversion:

Level one (lowest intervention) → Level Three (highest intervention)



Discussion

Kantai, a 15-year-old Form One student at Ole Nkarai High School, has been charged with grievous harm. The assessment report indicates that he has been previously reported to the police for having assaulted a neighbour but was not charged.

The report further indicates that his father regularly becomes violent towards his mother and on this instance, he attacked his father in a bid to rescue his mother from the hands of his father

Consider:

- a) The suitability of diversion in this case.
- b) If diversion is considered, reflect on s.230 of the Children Act and suggest the level of diversion under which the case should fall and the most appropriate orders that should be imposed.



4.6

SUMMARY



In this session we discussed the pre-trial procedures provided by the Children Act 2022. We noted, in particular:

- a) The Children Act 2022 envisages consideration of diversion as the first cause of action in all cases;
- b) Trials should be restricted to cases whose circumstances render them unsuitable for diversion;
- c) The essence of diversion is considering all relevant information regarding a child, identifying the obligations that arise to address offending, and determining the most suitable diversion option that will facilitate making amends and rehabilitating the child.
- d) Collection of extensive information and identification of the most suitable diversion option, envisaged by the Children Act 2022, requires utmost collaboration between all child justice agencies.

4.7 Useful References

[Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya \(DCS, 2021\).](#)

[Enhancing Child and Youth Justice: An Assessment of the Criminal Justice System in Kenya \(PACS, 2021\).](#)



SESSION 5:

ENHANCING CHILD JUSTICE DURING TRIAL

5.1 Learning Outcomes



At the end of this session, participants should be able to:

- a) Outline the criminal trial procedures for children.
- b) Understand the different forms of orders amenable to children in conflict with the law.
- c) Assess the extent to which child offender rights are upheld during the trial process.

5.2 Bail

The release of children on bail pending hearing is a critical component of the principle of non-institutionalisation of children in conflict with the law. Holding children in remand is concerning for various reasons:

Firstly, research reveals that children's education is disrupted when held in remand. This is particularly problematic when cases are not concluded expeditiously. There are instances where children have been in remand for over two years (Assessment of Rehabilitation and Social Reintegration Programmes, Services and Practices for Children in Conflict with the Law in Kenya (DCS, 2021) 15). While there have been concerted efforts by Children's Courts to conclude matters expeditiously, there are instances, particularly where children are charged jointly with adults, are held in custody for unduly extended periods of time.

Secondly, the trauma experienced by children when held in remand, particularly for petty, first-time offenders, impacts them negatively.

Bail is a right under Article 49 of the Constitution of Kenya. The court sets bail or bond terms (decides whether to release the child on bail) or remand them in custody until the next hearing depending on the circumstances outlined in the preliminary report prepared by the children's officer.

The key principles relating to bail for children are:

1. Children charged with offences should not be held in custody unless there are compelling reasons for not releasing a child on bail (Constitution (Article 49(1)(h)).
2. When dealing with children, courts must consider alternatives to remand such as close supervision or placement with a fit person appointed by the court (Bail and Bond Guidelines, clause 4.28).

5.3 Legal Representation

The right to legal representation is fundamental (Children Act 2022, s. 222(2)). Court processes are technical, and many children cannot participate meaningfully during trial as they do not understand the proceedings. Therefore, a trial court should ensure that the child is represented at all stages of the proceedings.

As a best practice, various Children's Courts maintain databases of pro bono advocates representing children from families unable to afford legal representation.

5.4 Other Children's Rights

During trial, the following rights should be respected and protected (Constitution of Kenya, Art.50; Children Act 2022, s.222)



5.5 Participation of Children and Significant Others

A child on trial has the right to be heard in person or through a representative throughout the proceedings (Children Act 2022, s.222 (1)). The child is also entitled to the presence and participation of the child's parent(s) or guardian(s) during the proceedings (Children Act 2022, s. 222 (1), (2) & (3)).

This resonates with the spirit of restorative justice and rehabilitation. To identify the appropriate interventions children in conflict with the law and their parent(s) and guardian(s) must participate meaningfully.



Reflection

A 16-year-old boy is on trial for defiling a 4-year-old child. His parents are separated. Since his mother remarried, he lives with an aunt. His father has been convicted severally for other small offences. He also remarried and relocated.

Assuming that you are a magistrate, given that the law requires the offender's parents to be present, would you insist on the presence of the parents?

Why /why not?

5.6 Orders Upon A Finding of Guilt

Section 237(1) of the Children Act, 2022 prohibits the use of the words “Conviction” and “ Sentence” in relation to any child being dealt with by the Children’s Court.

When a finding of guilt is reached, the court must make an order that promotes their rehabilitation and reintegration into society.

When a finding of guilt is reached, the court may issue the following orders concerning the child (Children Act 2022, s. 239.):

Note:

Section 238 of the Children Act 2022 stipulates :

- *No court shall order the imprisonment of a child*
- *No court shall impose the death penalty on a child, even in a matter where the nature of the offence is punishable by death.*
- *Children under 12 years shall not be sent to a rehabilitation school.*
- *Performance of Community Service Orders under an order of the court shall be in accordance with the Community Service Act, 1998.*

A. Non-Custodial Orders:

- Discharge under Section 35 (1) of the Penal Code.
- Discharge upon entering a recognisance with or without sureties.
- Probation: A child can be committed to a probation officer’s supervision or a probation hostel under the Probation of Offenders Act. Before a probation order is made, the court must receive a probation officer’s report (Sentencing Policy Guidelines 2023, clause 2.5.7).
- Care and Protection: A child can be committed to the care of a fit person, (a relative or charitable children’s institution), care of a qualified psychologist or counsellor.
- Fines, compensation and costs: Financial penalties are imposed based on the child’s financial circumstances.
- Placement in an educational institution or a vocational training centre
- Community Service: The child performs unpaid work for the community, promoting accountability and reparation.
- Restorative justice order or supervision order.

B. Custodial Orders:

A court may make an order committing a child to:

- Rehabilitation School - if the child is between the ages of twelve and fifteen
- Borstal Institution – if the child has attained the age of 16 years

Did you know...



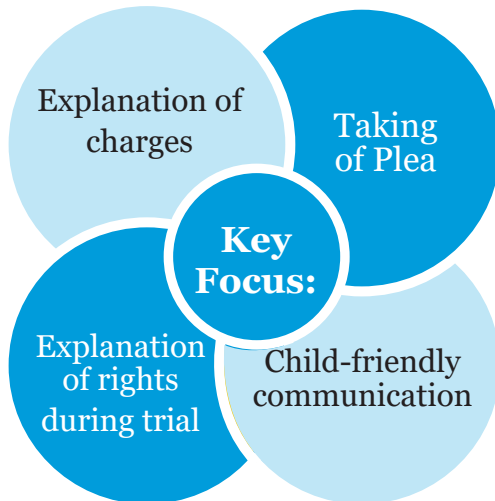
There are nine rehabilitation schools in Kenya –Kisumu, Dagoretti, Kabete, Kakamega, Kericho, Kirigiti (Reception Centre & Rehabilitation School), Likoni, Wamumu and Othaya

There are three borstal institutions and one youth corrective centre – Shikusa (boys), Shimo la Tewa (boys), Kamae (girls) and Kamiti Youth Corrective Centre

5.7 Summative Activity: Role-play - First Arraignment

Objective:

- Recap, internalise and analyse the key aspects of a simulated first arraignment.



Instructions:

1. Review the First Arraignment:

Briefly recap the key elements of a first arraignment for children, emphasising the importance of child-friendly procedures and adherence to legal requirements.

2. Simulate First Arraignment:

Divide participants into groups of 4-5 individuals and assign roles:

- Magistrate: Conducts the arraignment proceedings.*
- Prosecutor: Presents the charges against the child.*
- Defence Lawyer: Represents the child's interests.*
- Observer: Takes notes and observes the proceedings.*

3. Role-play a simulated first arraignment scenario:

The scenarios are provided below. Encourage participants to act out their roles realistically and focus on child-friendly communication and appropriate procedures.

4. Debriefing Session:

After the simulation, facilitate a discussion focusing on the following questions:

- Accuracy and completeness of procedures: Were all the necessary legal steps followed?*

- Child-friendliness of communication: Was language and tone appropriate for the child's age and understanding?*
- Respect for the child's rights: Were the child's rights explained and respected throughout the proceedings?*
- Collaboration and teamwork: Did the different professionals involved work effectively together?*
- Areas for improvement: What aspects of the simulation could be improved to ensure a more fair and just process for the child?*

5. Group Reporting: Each group will share their key observations and recommendations for improvement with the entire group.

6. Facilitator Feedback: Provide additional feedback and highlight key learning points from the activity.

For advanced participants, introduce additional complexities to the simulated scenario, such as legal challenges or emotional responses from the child.

Incorporate technology, such as video recording or simulations, to add further depth and realism to the activity.

Note on individual cohort needs:

For participants with less legal knowledge, provide a list of key legal procedures and terminology for reference during the simulation.

5.8 SUMMARY



In this session we discussed the key requirements in the trial of a child in conflict with the law as envisaged by the Children Act 2022. We noted, in particular:

- a. Children should not be held in custody pending trial; holding children in remand should only be done as a last resort.
- b. Resonating with the child justice system's endeavour to facilitate restorative justice and rehabilitation, interventions for each child should be considered carefully and collaboratively.
- c. In tandem with these objectives, the court environment should be friendly and conducive for reflection on appropriate interventions for each child.
- d. Non-custodial options must be considered and custodial options should only be invoked when necessary and in the best interests of the child.

Memorable quotes



“Justice for all, especially for children, is the cornerstone of a healthy, prosperous society.” - Nelson Mandela

“Children are better rehabilitated within the community” - Gabriel Kitili

“It is easier to build strong children than to repair broken men” - Frederick Douglas

KEY DOMESTIC LEGAL INSTRUMENTS, POLICY AND STRATEGY DOCUMENTS RELATING TO CHILD JUSTICE

Constitution of Kenya 2010

Children Act 2022

Legal Aid Act 2016

Bail and Bond Policy Guidelines 2015

DCS Blueprint for Rehabilitation and Social Reintegration

Programmes for Children in Conflict with the Law in Kenya 2021

NCAJ National Strategy on Justice for Children 2023 – 2028

NCAJ Throughcare and Aftercare Procedures for Statutory Children Institutions in Kenya, Second Edition 2023

ODPP A Prosecutor's Guide to Children in the Criminal Justice System 2020

PACS Youth and Child Justice Strategy 2021- 2025

Sentencing Policy Guidelines 2023

NOTES

A series of horizontal dotted lines for taking notes.

