



JOINING FORCES ALLIANCE FOR CHILDREN IN KENYA

DAY OF THE AFRICAN CHILD

16th June 2020

ACCESS TO A CHILD-FRIENDLY JUSTICE SYSTEM IN KENYA

KEY MESSAGES

The Joining Forces Alliance for Children in Kenya is a coalition of six child focused Non-Governmental organizations whose members are ChildFund Kenya, Plan International Kenya, Save the Children Kenya, SOS Children's Villages Kenya, Terre des Hommes and World Vision Kenya. The Six agencies are working together, in the best interest of the child, to strengthen collaboration with Government of Kenya Ministries, Departments and Agencies and other partners, at the National and County levels, in ensuring that children rights are secured and that the principles of the United Nations Convention on the Rights of the Child are upheld.

The Day of the African child is celebrated in memory of the events of 16th June 1976 student uprising in Soweto, South Africa, where thousands of students took to the streets to demonstrate against the poor quality of education they received on account of their color, under the apartheid regime. The students also demanded to be taught in their own language. The demonstrations were violently quelled resulting to several deaths and injuries. In 1991, the Organization of African Unity (OAU) took a bold decision to have the day marked annually not only to celebrate the bold decision that children took on that day, but also to reflect on the commitment towards addressing the numerous challenges facing children across the continent.

The selected theme for 2020 is "Access to a child friendly Justice system in Africa". A child friendly justice system is one that is sensitive to the needs of children in contact with the law. Three broad categories of children can encounter a justice system. First children in conflict with the law, basically children accused of committing offences. Secondly, there are children who find themselves in court due to disputes over custody, maintenance, adoption, foster care among others. Finally, children can also be subjects of administrative actions including citizenship and immigration.

Kenya has made several strides in the pursuit of attaining a child friendly justice system. The Constitution of Kenya 2010, under Article 48 requires "...the State to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice..."

The Joining Forces Alliance for Children in Kenya has identified the following gaps that militate against the realization of a child friendly justice system in Kenya.

Gap	Key Messages
Children who commit minor offences are still being subjected to the criminal justice system	<ul style="list-style-type: none"> Children in conflict with the law, especially those accused of committing minor offences should not be taken through the courts system, rather they should be diverted to community based systems Diversion aims to avoid the stigma associated with prosecution and the danger of entangling children in a pattern of offending behaviour. Diversory options seek to mitigate the retributive nature of criminal justice processes in recognition of the particular vulnerabilities of child offenders and the vagaries of such processes. The draft children Bill elaborately provides for diversion of children from the criminal justice system
Children in conflict with the law not getting free legal representation	<ul style="list-style-type: none"> All Children coming into contact with the law should be provided with free legal aid to enable them navigate through the justice system. Section 43(3) of the Legal Aid Act is not phrased in mandatory terms as it provides that: <i>Where a child is brought before a court in proceedings under the Children Act (No. 8 of 2001) or any other written law, the court may where the child is unrepresented, order the Service to provide legal representation for the child.</i> The corresponding section for suspects of capital offences however has a mandatory requirement by providing that: <i>Where an accused person is brought before the court and is charged with an offence punishable by death, the court shall, where the accused is unrepresented, order the Service to provide legal representation for the accused.</i> The draft children Bill provides makes legal representation for children a mandatory requirement.
The age of criminal responsibility is below the internationally acceptable level	<ul style="list-style-type: none"> Section 14 of the Penal Code places the age of criminal responsibility at 8 years. The presumption is that a child aged over 8 years can stand trial before our courts of law. The Committee on the Rights of the Child has advised the Government to <i>raise the minimum age of criminal responsibility to an internationally acceptable level, and ensure that all children, by definition persons under 18 years of age, are protected by the juvenile justice system;</i> The draft Children Bill proposes to raise the age of criminal responsibility to 12 years from the current 8 years.

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Cases involving children take inordinately long to conclude	<p>The Children Act under schedule 5 rule 10 sets timeframes for concluding children cases in the following terms:</p> <p>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.</p> <p>(3) Where, owing to the 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.</p> <p>(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken the case shall be dismissed and the child shall be discharged and the child shall not be liable to any further proceedings for the same offence.”</p> <ul style="list-style-type: none"> ▪ The Court of Appeal sitting in Mombasa in the case of Kazungu Kasiwa Mkunzo and another Vs Republic declared that the provisions setting time limits for conclusion of children cases were unconstitutional and proceeded to declare them null and void. The net effect of this declaration is that children cases can drag on for a long time, and as a result children continue experiencing numerous challenges associated with delayed conclusion. Prolonged exposure to the criminal justice system denies the children their childhood besides exposing them to social stigma. ▪ The proposed children Bill re-enacts the minimum timeframes in accordance with the Constitution of Kenya 2010.
Children in contact with the law being mixed with adults within police stations	<p>Article 53 of the Constitution of Kenya provides for minimum safeguards for children within the criminal justice system. The article prohibits the detention of children except as a measure of last resort, and when detained, to be held—</p> <ul style="list-style-type: none"> (i) for the shortest appropriate period of time; and (ii) separate from adults and in conditions that take account of the child’s sex and age.
Lack of functional Child Protection Units across many police stations	<ul style="list-style-type: none"> ▪ The government through the ministry of interior and coordination in collaboration with the DCS and probation departments needs to ensure that all police stations have

Gap	Key Messages
	functional CPUs to enhance safety of children as they await reintegration/ court cases.
Minimal awareness among Nyumba Kumi platforms about child friendly justice system	<ul style="list-style-type: none"> ▪ Most of the Nyumba Kumi platforms and the Sub-Location level Area advisory Councils across various parts of the Country do not have child friendly mechanisms for enabling children and their families to report cases of child rights violations ▪ A child justice system capacity enhancement programme should be rolled out targeted at Nyumba Kumi platform members and members of the Sub-Location Area Advisory Councils

Conclusion

The Joining Forces Alliance for Children in Kenya, appreciate the efforts put in place to safeguard children generally in addition to the opportunity for improvement in safeguards for children in Kenya.

As we commemorate the day of African child on 16th June 2020; we must remember that all of us have the responsibility of ensuring that no child is left behind.

Further, **the unnecessary delays in enacting the Children Bill, 2019; have impacted retrogressively to gains made by Kenya in the 2010 Constitution**, in her commitment to the African Charter on the Rights and Welfare of the Child (ACRWC), the UN Convention on the rights and welfare of the Child (UNCRC), the global compact on migration and the Sustainable Development Goals.

We therefore call upon the Attorney General to fastrack the enactment of the Children' Bill, 2019 in order to ensure that children are not left behind in this dispensation.