

# RIGHTS OF THE CHILD IN KENYA

**An alternative report to the UN Committee on the Rights of the Child on the implementation of the Convention on the Rights of the Child in Kenya**

**44th session – Geneva, January 2007**



WORLD ORGANISATION AGAINST TORTURE

*Researched and written by Vénius Maroun in consultation with Cécile Trochu Grasso (OMCT)*

*Coordinated and edited by Cécile Trochu Grasso (OMCT)*

*Director of Publication: Eric Sottas*

**Geneva, August 2006**

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## **Thanks**

OMCT would like to thank Mrs. Priscilla Nyokabi from ICJ-Kenya Section for her welcome and availability, Mrs Jane Mbugua for her comments as well as Rose Odoyo from ANPPCAN, Millie Odhiambo from The CRADLE and Tim Ekesa from KAACR for their time. Thanks again to Vénus Maroun, intern at the OMCT for her precious help for the researches and the draft of the report.



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## **1. Preliminary remarks on the preparatory mission in Kenya**

The drafting process of the current report started in April 2006. In order to get a concrete view of the children's rights situation in Kenya, a representative from OMCT undertook a preparatory mission to Nairobi and its surroundings. It was carried out with the assistance from and in partnership with Priscilla Nyokabi, Programme assistant at the Kenyan Section of the International Commission of Jurists.

This three day mission (from 8 to 10 May) was an opportunity to meet the relevant national personalities involved in the protection of children's rights in Kenya from civil society: Mr. Tim Ekesa, Executive director of Kenya Alliance for Advancement of Children (KAACR), Ms. Quinter Azieno Akumu, a 16-year old girl acting with KAACR, Mrs. Millie Odhiambo, Executive Director of The Child Rights Advisory Documentation and Legal Centre (the CRADLE), Mrs. Rose Odoyo, Chief executive officer at African Network for the Prevention and Protection Against Child Abuse en Neglect (ANPPCAN-Kenya Chapter), Mrs. Jane Mbugua, Chair of the National NGOs CRC Committee; and the authorities: Mrs. Judy Tuda and Mrs. Caroline Towett from the National Council of Children Services (NCCS), Mr. NGuiku, Senior Children Officer within the Secretariat of the NCCS.

OMCT's representative also visited the Child Protection Unit of the Kilimani police station, Nairobi's Children's and Remand Homes.

This mission was vital in obtaining ground and recent information for the drafting of the report.

## 2. Introduction: situation of children in the country

### 2.1. Legal status of the child

#### 2.1.1. Definition of the child

In compliance with the Convention on the Rights of the Child, the Children Act<sup>1</sup> defines a child as any human being under the age of eighteen (18) years.

The Criminal Law Amendment Act<sup>2</sup> raised the minimum age of sexual consent to 16 years from the previous 14 years under the Penal Code,<sup>3</sup> following the last recommendations of the Committee on the Rights of the Child.<sup>4</sup> However, this only applies to girls. The sole provision applicable to boys is section 14 (3) of the Penal Code stating that “a male person under the age of 12 is presumed to be incapable of having carnal knowledge”.

With regards to the minimum age for marriage, the Children Act protects children from harmful cultural rites. The Act prohibits early marriage (section 14) and defines it as “marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation” (section 2). According to these terms and an interpretation in compliance with the Convention on the Rights of the Child, marriage of a child under eighteen should be prohibited. The last Concluding Observations issued by the UN Committee on the Rights of the Child recommended that Kenya review laws that were inconsistent with the Children Act in order to have the same minimum age for both boys and girls (preferably 18 years old). Such laws include Hindu Marriage and Divorce Act<sup>5</sup> (section 3 (1), lit. c) which still defines the minimum age for marriage of a girl at sixteen years and eighteen years for a boy. Besides, according to section 19 of the Marriage Act, the written consent of the person having lawful custody of a person under twenty-one years and who wants to get married is required. OMCT is very concerned that the Children Act, which outlaws early marriage, is not completely and properly applied because of several statutes still in force relating to minimum age for marriage and regrets that Kenya has not implemented the last recommendations of the Committee yet.

Regarding child labour, the Employment Act<sup>6</sup> (section 2) defines a child as an individual male or female who has not attained the age of sixteen years. This contradicts the Children Act which defines a child as any human being under the age of 18 years.

Relating to the minimum age for criminal responsibility, the minimum age of eight years for criminal responsibility has not been raised despite the last recommendations of the Committee.

#### 2.1.2. Main legislation with respect to children

##### a) International and Regional instruments

Kenya ratified the Convention on the Rights of the Child (hereinafter CRC) on 31<sup>st</sup> July 1990. The State Party submitted its initial report in 2000, eight years late. This has caused delays for all future reports. Thus, the second periodic report, which was due on 13<sup>th</sup> January 1997, was

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<sup>1</sup> Chapter 586 Laws of Kenya, 2001.

<sup>2</sup> Act n°5 of 2003.

<sup>3</sup> Chapter 63, Laws of Kenya.

<sup>4</sup> CRC/C/15/Add.160, point 23 (a).

<sup>5</sup> Chapter 157, Laws of Kenya.

<sup>6</sup> Chapter 226, Laws of Kenya.

only submitted in 2005 and covers the period from 1997 to 2003. Kenya should have submitted its third periodic report on 1<sup>st</sup> September 2002.

Kenya also signed, on 8<sup>th</sup> September 2000, the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography but has not yet ratified it. It ratified the Optional Protocol to the CRC on the involvement of children in armed conflict on 28<sup>th</sup> January 2002. However, it has not yet submitted the initial report due on 28<sup>th</sup> February 2004.

Relating to child labour, Kenya ratified ILO Convention n°132 on the Minimum Age and ILO Convention n°182 on the Worst Forms of Child Labour.

Kenya has also ratified the African Charter on the Rights and Welfare of the Child (ACRWC) and other international and regional instruments that generally affect the rights of the child such as the Convention against Torture (CAT), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human Rights and People's Rights and the African Union Convention Governing the Specific Aspects of Refugees.

## b) Domestic Legislation

### Constitution

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. There is no specific provision relating to children but all the provisions of the Constitution apply to all, including children.

### Statutes

In its last Concluding Observations, the Committee expressed its concern about the Children Bill which had still to be discussed by the Parliament. The draft of this Bill was the result of years of work by a Special Task Force set up by the government under the auspices of the Office of the Attorney General. The Children Act has since been enacted and it entered into force on 4<sup>th</sup> January 2002. It “aims to promote the well-being of children in Kenya” in compliance with the principles set up in the CRC. “The Act is a merger of the repealed Guardianship of Infants Act, Adoption Act and Children and Young Person’s Act. The Children Act has incorporated most aspects of these repealed laws. The Act addresses the rights a child is entitled to and the role of the Government and parents in protecting these rights”.<sup>7</sup> “The Children Act brings together in one law all requirements concerning guardianship, fostering and adoption, custody, maintenance, care and protection of children, administration of children’s institutions, rights and responsibilities of a child, the role of parents and of the government in promoting and protecting the rights of the child and juvenile justice. Moreover there are always certain basic ideas, such as the child’s best interests and welfare, that govern all the parts of the Children Act, which must always be considered before any decision, or action concerning a child is made.”<sup>8</sup> The Children Act is a great improvement in the promotion and protection of the children’s rights. However, there are still several issues that it has not solved such as corporal punishment both at home and in institutions, or the minimum age for marriage or for criminal responsibility, among others.

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<sup>7</sup> *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

<sup>8</sup> *A Summary of the Children Act, Cap 586, Laws of Kenya*, a brochure by the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN Kenya Chapter)

The Legitimacy Act regulates the status of children born out of wedlock. The Criminal Law Amendment Act <sup>9</sup> and the Education Act (amendment)<sup>10</sup> prohibit corporal punishment in schools.

The Sexual Offence Bill has received presidential assent in July 2006. It seeks to enhance the provisions of the Children Act that protect children against sexual abuse and exploitation.

### **2.1.3. Structures of implementation, organising and supervising children's issues**

Different public structures have been established by the Children Act and they aim at promoting the welfare of the child and protecting his/her rights. According to the Children Act, the National Council for Children's Services (NCCS), inaugurated in September 2002, has the mandate to "supervise and control over the planning, financing and co-ordination of child rights and welfare activities and advise the Government on all aspects thereof." Amongst its different functions, the NCCS is in charge of the full implementation of Kenya's international and regional obligations relating to children. The NCCS is part of the Ministry of Home Affairs and is funded from Parliamentary budget. The Director of Children's Services (DCS) is the secretary of the NCCS and plays an important role to "set up, promote, coordinate and supervise services and facilities that deal with children"<sup>11</sup> such as providing assistance, care and accommodation to children victims or vulnerable children like children with disabilities, street children, sexually abused children, etc.

Under the Children Act, Local Authorities are mandated to ensure the enjoyment of children's rights at the local level and are supervised by the NCCS. They have the duty to "promote the good up-bringing of children by their families, through the establishment of suitable family-oriented programmes, and through the creation of a department to deal with the rights and welfare of children, public awareness and the co-ordination of relevant programme support initiatives from different social sub-sectors" (section 40 of the Children Act).

### **2.1.4. Judicial authorities dealing with children's issues**

#### **a) Children's courts: civil and criminal matters**

The Children Act has provisions providing the establishment of Children's Courts. According to section 73, these courts shall deal with civil matters such as parental responsibility, custody and maintenance, orders for the protection of children and children in need of care and protection among others. They shall hear criminal matters against children and have also jurisdiction to hear any case regarding an offence under the Children Act.

Section 74 of the Children Act stipulates that Children's Courts shall sit in a different room or building from other courts. In practice, there are Children's Courts separate from the other courts only in Nairobi and Mombasa. In the rest of the country, ordinary courts are turned into courts for children. In Nyeri, for instance two days in the week are dedicated to children matters at the court. Moreover, Children Magistrates have been appointed by the Chief Justice to preside over courts in most parts of the country to deal with children's issues.

Children's Courts have jurisdiction on cases involving children as offenders except when the child is charged with murder or an offence in which the child is charged together with an adult.

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<sup>9</sup> Act No. 5 of 2003

<sup>10</sup> Legal Notice n°56 of 2001

<sup>11</sup> *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Kiswahili, published by the Ministry of Home Affairs Children's Department, German Technical Cooperation, Save the Children - Canada

In those cases, the child is judged by “ordinary” criminal courts (High courts). However, the courts should take into account the best interest of the child as section 187 (1) of the Children Act prescribes.

b) Family’s courts and Kadhi’s courts: civil matters

Moreover, Family’s Courts and Khadhi’s Courts also have jurisdiction to deal with civil matters concerning children. “The Family Courts intervene in cases of difficulties in marriage, approve the dissolution of marriages and handle cases of inheritance. The Court will assist the child giving him/her the opportunity to be heard, protecting his/her right to inherit property or deciding whether a child can be adopted. The Children Courts are subordinate to the Family Courts which are themselves a division of the High Court.”<sup>12</sup> Khadis Courts can also intervene in children issues relating to civil matters such as marriage, divorce, inheritance but they only hear cases where the parties are Muslim by religion.<sup>13</sup>

c) Traditional justice

In customary traditional law, local chiefs and old wise men render justice within communities. People who do not have money to go to urban centres or pay a lawyer can find solutions to their problems thanks to this traditional system. Traditional justice is interesting for children on the sense it generally makes them avoid deprivation of liberty and try to find a penalty matching both the interest of the child and those of the community, on condition that it is ruled by procedural safeguards and that the best interest of the child is taken into account in all decisions involving a child.

## **2.2. Current actions taken by the State towards children**

The NCCS has prepared a Strategic Plan for the period 2005 - 2009 in order to promote and defend the rights and welfare of the child in Kenya. Relevant issues relating to child protection have been identified and grouped into four thematic areas that require attention. During the period, the National Council will thus focus on:

- policy development and review of laws: several gaps have been identified such as the need to change the juvenile justice system;
- planning, research, monitoring and evaluation;
- resource mobilisation, management, and organisational development;
- advocacy, media participation and partnerships like the issue of harmful cultural practices<sup>14</sup>.

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<sup>12</sup> *The place of children in Family Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

<sup>13</sup> *The place of children in Khadhi’s Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

<sup>14</sup> *Strategic Plan 2005-2009, Realising the Rights and Welfare of the Child*, National Council For Children Services

### **3. Non-discrimination (art. 2, 22, 23 CRC)**

#### **3.1. Legislation**

Section 82 of the Kenyan Constitution prohibits discrimination on grounds of race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.

Section 5 of the Children Act also provides that “no child should be subjected to discrimination on grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.”

#### **3.2. Practice: Vulnerable groups of children and victims of discrimination**

##### **3.2.1. Situation of refugee children (art. 22 of the CRC)**

267,731 refugees (including asylum seekers) stayed in the two refugee camps of Kenya<sup>15</sup> in January 2006. The majority of child refugees come from Somalia, Sudan, Ethiopia, Rwanda, and Burundi, and they stay in one of the two refugee camps in Kenya.<sup>16</sup>

Refugee children constitute a vulnerable group. They face discrimination due to cultural traditions and practices with girls suffering from sexual violence. For example, the CRADLE, a Kenyan NGO, had to place a refugee girl who was facing sexual abuse in a shelter home for her own security because the police refused to help her.

Following its arrival in 2002, the new government was expected to solve the problem of Internally Displaced People (IDPs). The United Nations Office for the Coordination of Humanitarian Affairs estimated at 350,000 the number of IDPs in Kenya. However, the government has not taken yet the necessary measures to allow the IDP’s return to their land or the payment of compensation. Moreover, the situation is urgent since unresolved land disputes create tensions between communities and there are urgent humanitarian needs.<sup>17</sup>

##### **3.2.2. Situation of children with disabilities (mentally and physically) (art. 23 of the CRC)**

Section 12 of the Children Act states that “a disabled child shall have the right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible”.

However, in practice, children with disabilities suffer from discrimination. The case of Mueni, a 10-year-old deaf girl, illustrates the fact that children with disabilities are not treated equally. On 4 April 2004, Mueni (not her real name for her security) had been sexually abused by a neighbour but two years after the abuse, her case has not been heard yet. “The matter has been listed on several occasions for hearing, but each time has been adjourned, as no sign language interpreter has been available to assist in taking Mueni’s evidence”<sup>18</sup>. Despite the provisions of the Kenyan Constitution and the Children Act which states that every person shall be permitted to have, without payment, the assistance of an interpreter if s/he cannot understand the language used at the trial, there is no structure for those rights to be realised. A gap exists between the legislation and practice which leads to discrimination against disabled children. As Monica

<sup>15</sup> Dadaab camp near the Somalia border and Kakuma camp near the Sudan border.

<sup>16</sup> OMCT’s alternative report to the Committee on the Rights of the Child “Rights of the Child in Kenya”, 1998

<sup>17</sup> Kenya: tensions rise as government fails to address internal displacement, Internal Displacement Monitoring Center, 30 November 2004

<sup>18</sup> “Women with disabilities and sexual violence in Kenya”, Monica Mbaru-Mwangi, Chairperson of Kenya Union of the Blind and National treasurer of United Disabled Persons of Kenya, 18 May 2006

Mbaru-Mwangi<sup>19</sup>, an activist fighting for disabled person's rights wrote in her article, "it is a demonstration of the failure to address serious violations of sexual violence. Like any citizen whose rights are enshrined in the Constitution, Mueni should be given not only protection of the law, but also access to a sign-language interpreter, doctor, police officer and a judicial system which is aware of her specific needs in helping her attain justice."

### **3.2.3. Situation of children born out of wedlock**

Section 24 of the Children Act states that "where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility". However, if the father and the mother of the child were not married at the time of birth, the same section provides that the mother has parental responsibility at the first instance and the father can only acquire it after signing a Parental Responsibility Agreement with the mother or if he gets a Court Order upon application. In Mueni's case, her father has always refused to take up his parental responsibility duties and her mother has to bear alone the burden of her daughter's disability because she has no way to make him take his responsibilities.

### **3.2.4. Situation of girls: Female genital mutilation and early marriage**

Following the recommendations of the Committee<sup>20</sup> which expressed its deep concern on Female Genital Mutilation (FGM), the government amended its legislation in 2001 to be in compliance with article 24.3 of the Convention on the Rights of the Child prohibiting traditional practices prejudicial to the health of the child. Section 14 of the Children Act provides that "no person shall subject a child to female circumcision, early marriage or other cultural rites". Any person practising female genital mutilation can be sentenced to a term of imprisonment not exceeding twelve months, to a fine of fifty thousand shillings<sup>21</sup> maximum or both (section 20 Children Act). When the female genital mutilation results in the death of the girl, the person practising FGM could be charged of manslaughter or unlawful killing which is punishable with life imprisonment<sup>22</sup> (see section 202 of the Penal Code regarding an unlawful act or omission causing the death of a person).

Despite the reform, the Human Rights Committee expressed its concern on the persistence of that practice in its last Concluding Observations in 2005<sup>23</sup> and encouraged the State to "increase its efforts to combat the practice of FGM". Indeed, circumcision as a rite of passage for girls remains a deeply rooted traditional practice. For example, in Nairobi, girls who were trained and informed of the risks of FGM in rescue centres feared being forced to undergo FGM following their return to their community<sup>24</sup>. Moreover, in the remote village of Irindi, while her mother refused to allow her circumcision, Pamela Kathambi, 15-year-old, performed FGM on herself leading to her death. She did so because she was teased by her friends and peers for not being circumcised<sup>25</sup>.

OMCT considers that change in the legislation should be accompanied by awareness raising on the risks of FGM in order to change mentalities. Sensitisation is currently undertaken by NGOs

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<sup>19</sup> Ibid

<sup>20</sup> CRC/C/15/Add.160

<sup>21</sup> Equivalent to 680 USD.

<sup>22</sup> *Female Genital Mutilation (FGM) at a Glance*, Brochure of Kenya Alliance for Advancement of Children (KAACR)

<sup>23</sup> CCPR/CO/83/KEN

<sup>24</sup> *Kenya: Protect Us From FGM, Girls Appeal*, AllAfrica Global Media, Nairobi, 20 December 2005

<sup>25</sup> *KENYA: Girl Dies after Trying to Perform Female Genital Mutilation on Herself*, Child Rights Information Network, 23 June 2006

towards children in order to try to change their mentalities. They also act towards women practising FGM and try to find them another occupation. However, no actions are taken by the government, such as alerting people on the risks of FGM or trying to change their attitude, in order to stop this practice.

FGM is closely linked to early marriages as once a girl has been circumcised she is considered “ready for marriage”. Like FGM, early marriage is prohibited by section 14 of the Children Act. However, following severe drought in East Africa, which causes families to sink into extreme poverty, several fathers traded their daughters for cows and blankets. Often a sharp rise in cases of forced early marriages is observed during such periods. Some of the young girls who are married off are no more than eight or nine years old<sup>26</sup>. Kenyan authorities should increase measures to stop this practice that is a clear violation of children’s rights.

### **3.2.5. Street children**

Street children, often seen as offenders by law enforcement officers and the population in general, are victims of many forms of violence and discrimination: they are beaten, tortured and sometimes killed by the police. They are sometimes kept in police custody but NGOs encourage that they be put in Charitable Children Institutions or Remand Homes instead of police cells where they mix with adult criminals.

Street children need an adequate protection policy ruled by NCCS and Local Authorities. This could be, for instance, the training of policemen on children’s rights, establishing adequate and effective monitoring of police settings and separating child offenders and children in need to provide them with proper care.

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<sup>26</sup> *Child Wives of Kenya*, article of Los Angeles Times, 8 April 2006



## **4. Right to life (art. 6 CRC)**

### **4.1. Legislation**

Section 4 of the Children Act recognises explicitly the right of the child to life and the responsibility of the government and the family to ensure the best interests of the child. This is regarded as the first and paramount consideration in all actions and decisions concerning children.

### **4.2. Practice: Extrajudicial killings of street children**

Despite denial by the government, extra-judicial killings of street children still take place, though not on as often as in the past. Different national NGOs (ANPPCAN, CRADLE, KAACR) have denounced this. Children living in the street without a job or education are an easy target because of their poor condition. They are seen as offenders and are often beaten by police officers. These State agents often threaten them with death.

#### **Cases:**

In the case of 4-year-old Ian Macharia Githinji (not himself a street child), he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defense, eye-witness account indicated that the police shot carelessly in a crowd that was not violent and majority of whom were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.<sup>27</sup>

On the 6<sup>th</sup> of January 2004, the police shot a 13-year old boy 6 times for stealing a cellular phone. According to eye witness reports, he was made to sit and kneel before the police killed him, rejecting the case of self-defence.<sup>28</sup>

About 13<sup>th</sup> February 2004, the police beat up a student to death while preventing a riot in a Nakuru Secondary school.<sup>29</sup>

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<sup>27</sup> High Court, Criminal App. No 631/02

<sup>28</sup> Daily Nation, 7<sup>th</sup> January 2004

<sup>29</sup> Daily Nation, 14<sup>th</sup> February 2004

## **5. Protection from all forms of violence by caregivers (art. 19 CRC)**

### **5.1 Measures of protection against violence**

The Children Act provides protection from different forms of violence. Section 13 states that “a child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person”. People who infringe this provision could be sentenced to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both, according to section 20 of the Children Act. Section 127 of the Children Act creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty as a fine up to 200'000 shillings<sup>30</sup> or imprisonment for term of five years maximum or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

However, child abuse remains particularly important in Kenya. The level of sexual violence is particularly worrying. This violence occurs daily and is often committed by those who should protect the children (parents, relatives, teachers, other care givers, etc.). Legislation should come with concrete programmes and measures of implementation. In that respect, facing the high level of violence against children, especially sexual violence in Kenya, the NCCS, in partnership with UNICEF Kenya, civil society, religious groups and the private sector, set up a national campaign to end violence against children. The campaign was launched in July 2006 and aims to protect children and women victims of violence and to sensitise the population on the issue.<sup>31</sup>

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In addition, the government has created a crisis/help desk in police stations and a free phone number to denounce acts of child abuse. During the preparatory mission, OMCT representative came twice at the Kilimani police station on 9 and 10 May 2006 but nobody was in the diversion desk.

Moreover, as a means of protection, children in need of care and protection can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed.

### **5.2. Corporal punishment**

In 2001, the Education Act was amended to outlaw corporal punishment in schools. However, despite this ban, cases are still reported of children who suffer injury from corporal punishment in schools.<sup>32</sup> In one case, a child lost an eye following a beating by his teacher. When the case came to court, the teacher's colleagues produced false statements. Despite the amendment, the government should take sufficient measures to ensure that the legislation outlawing corporal punishment in schools is fully implemented.

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<sup>30</sup> Equivalent to 2'745 USD.

<sup>31</sup> Kenya: Campaign to stop violence against children, available at : [www.irinnews.org/report.asp?ReportID=54844&SelectRegion=East\\_Africa&SelectCountry=KENYA](http://www.irinnews.org/report.asp?ReportID=54844&SelectRegion=East_Africa&SelectCountry=KENYA)

<sup>32</sup> OMCT's alternative report to the Human Rights Committee “State violence in Kenya”, February 2005

### **Case of corporal punishment in a school:**

The results of a survey by ANPPCAN Kenya<sup>33</sup> shows that corporal punishment is used in “various forms of “disciplinary” methods [...]. In order of frequency, they include: smacking, pulling ears, scolding, cuffing, forcing a child to kneel on a hard floor, tapping, forcing a child to stand in the sun, requiring a child to remain motionless, physical exertion, pulling hair, isolating a child in a confined space, burning fingers, washing a child’s mouth with soap, denying a child the use of a toilet.”

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the administration of corporal punishment against seven of the students by the school administration<sup>34</sup>. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in a newspaper report of 13<sup>th</sup> May 2004 (EA Standard). He noted that despite the ban on corporal punishment, it was still being meted out in schools.

### **Corporal punishment in other settings:**

Besides, there is still no legislation to ban corporal punishment within the family where acts of physical violence can be used if they are not excessive. However, it remains unclear what “excessive” means exactly. One can consider that at least torture is excessive and thus not permitted, being expressly forbidden both by the Constitution and the Children Act.

Therefore, corporal punishment should be defined and expressly prohibited when committed by care givers in other settings. Creation of awareness should also be carried out in order to change mentalities. Indeed corporal punishment is too often seen as a normal way to educate children and children themselves do not realise that corporal punishment does not correspond to their best interest<sup>35</sup>. The government and members of civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs try to fill in for the lack of training and information towards parents and children.

## **5.3. Cases of sexual abuse and harassment at school**

In addition to corporal punishment cases, sexual abuse and harassment remains numerous in Kenya. When denunciations occur (which is a minority of cases), disciplinary sanctions against teachers can be applied such as suspension, but rarely penal prosecution remains rare.

It was reported in the newspaper East African Standard in May 2004 that a teacher was interdicted for sodomizing 36 boys in a Machakos Primary school.<sup>36</sup> Very rarely is any other legal action taken after an interdiction.

In February 2004, a teacher was suspended for sexually harassing his pupils in Eldoret.<sup>37</sup>

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<sup>33</sup> *From physical punishment to positive discipline, Alternatives to Physical/Corporal Punishment in Kenya*, an advocacy document, African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), 2005.

<sup>34</sup> East African Standard, 15<sup>th</sup> November, 2004.

<sup>35</sup> *From physical punishment to positive discipline, Alternatives to Physical/Corporal Punishment in Kenya*, an advocacy document, African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), 2005.

<sup>36</sup> East African Standard, 27<sup>th</sup> May 04

<sup>37</sup> Daily Nation, 27<sup>th</sup> February 2004

In November 2004, 3 teachers in Trans Mara District were arrested on allegations of defiling two primary school pupils aged 10 and 11 years old. The girls were lured into the teachers' houses and defiled.<sup>38</sup>

In October 2004, a teacher who defiled and made pregnant his pupil at Tumaini Primary School in Garissa District went missing after a warrant of his arrest was issued.<sup>39</sup>

In October 2004, a primary school teacher was alleged to have raped a standard 8 pupil in the staff room. Apparently no action had been taken against him and the local Catholic Justice and Peace Commission was demanding for his arrest.<sup>40</sup>

A teacher suspected of molesting girls during the last three years in a Kiambu Primary School was forgiven by the school's committee since he was a good teacher. The teacher was alleged to have fondled the breasts of standard six and eight girls for 3 years.<sup>41</sup>

In November 2004, a teacher at Nanga Primary School in Gwasssi Division of Suba District was charged with defiling a standard 8 girl whom he pretended to be coaching mathematics after official schools hours (at 5.30)<sup>42</sup>. Fortunately he was charged with the offence. Nonetheless as indicated above, this may not relate to a conviction.

In November 2004, a nursery school teacher was charged before a Nakuru court with defiling a 6-year old girl. The suspect is said to have defiled the girl in his office in Lomoloo Sisal Estate. He denied the offence in court and was released on a bond of Kshs. 2,000 (US \$ 25) with a surety of the same amount.

A 27-year old teacher went into hiding for 3 weeks after defiling a 13-year old form one student at Nyaimera Secondary School in Gucha District. The teacher was eventually arrested.<sup>43</sup>

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<sup>38</sup> East African Standard, 30 November 2004

<sup>39</sup> East African Standard, 26<sup>th</sup> October 2004

<sup>40</sup> East African Standard, 21 November 2004

<sup>41</sup> East African Standard, 6<sup>th</sup> August 2004

<sup>42</sup> East African Standard, 17<sup>th</sup> November 2004.

<sup>43</sup> East African Standard., 10<sup>th</sup> August 2004

## **6. Protection from economic exploitation (art. 32 CRC)**

### **6.1. Legislation**

According to Section 10 of the Children Act, “every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development”. However, child labour and recruitment of children into armed conflict are not completely forbidden and not all children are protected. Indeed, the Employment Act<sup>44</sup> defines a child in Section 2 as an individual male or female who has not attained the age of sixteen years. In terms of child labour, anyone who employs a child under sixteen years whether gainfully or otherwise in an industrial undertaking can be sentenced to a fine (section 35 of the Employment Act), except if the child is employed under a deed of apprenticeship or indentured learner ship. Specific provisions are also made to prohibit employment of a child in any open cast workings which are entered by means of a shaft or lift and this includes a quarry or mine.<sup>45</sup> However, the employment rules on child labour allow the employment of a child in any type of work with the written consent of an authorised officer. For instance, children can be employed in entertainment businesses such as bars, restaurants, and clubs with the written consent of the Labour Commissioner. Moreover, in practice, children are also employed in family business, including agriculture.

Despite the prohibition of participation of children in hostilities or conflicts by the Children Act, children can be engaged in armed conflict “voluntarily” with their parents’ consent according to the Armed Forces Act, chapter 199 (section 173). These norms do not respect international standards set up by the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict.

### **6.2. Practice**

Child labour is a current issue of concern in Kenya. Children are brought to urban centres from rural areas with promises that they will be taken to school only to be employed as domestic workers, in tea or sugar plantations, flower farms, or in the fishing industry. Moreover, many persons employ children below the age of 16. Violence against child workers is also an issue that need to be addressed.

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<sup>44</sup> Chapter 226, Laws of Kenya.

<sup>45</sup> OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005

## **7. Protection from all forms of sexual exploitation and sexual violence (art. 34 CRC) and from abduction, sale, trafficking in children (art. 35)**

Section 15 of the Children Act provides children with protection “from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials”.

The Children Act prohibits trafficking of children as a form of economic exploitation and considers it as a crime.

In July 2006, President Kibaki signed the Sexual Offence Bill that broadens the range of sexual offences that includes deliberate transmission of HIV/Aids, gang rape, sexual harassment, child trafficking, sex tourism, rape, incest and wrongful accusation. It also provides tougher penalties for several sexual crimes: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/Aids by a prison term of fifteen years minimum.

In practice, both boys and girls are victims of sexual violence. There are numerous cases of sexual harassment, gang rapes by young men in slums. Young men threaten their girlfriends with rape by a gang or a friend if she refuses to have sexual intercourse with him. Perpetrators of sexual violence can be relatives including fathers, pastors, teachers, etc. Due to their vulnerability, children with mental disabilities are also particularly at risk of being sexually abused.

The head-teacher of Kapenguria Boys High School was charged with attempting to defile an 11-year old girl who was pupil at Cornerstone Primary School in Eldoret. The girl was the daughter of the head-teacher’s cousin and for family reasons, the teacher was living at his cousin’s home where he defiled the girl. He was caught in the act, arrested and charged. The teacher was released on a bond of 30,000 Shillings.<sup>46</sup>

Relating to sexual exploitation, the *Jaboya concept* (sex for fish) constitutes an increasing concern. To be introduced in the commercialisation of the fish, women and girls should become prostitutes. This is the only means to get fish and “protection” from a procurer and survive is this circle.

In the coastal region, sex tourism and child prostitution is an issue of concern. The view of the increasing number of foreign tourists, in Malindi for instance, has pushed many under age children, mainly girls, to take profit from this easy source of earnings. In Malindi, it appears that many parents give a tacit consent to their daughters having relationships with foreigners. Having an Occidental boyfriend has become a culture in that town. This phenomenon leads to abuse of girls including sexual violence and exploitation but tourists are rarely troubled for their involvement in those practices.<sup>47</sup>

Regarding trafficking, Kenya is a transit place due to Mombasa, its main seaport, from which children are sent to Europe. Among other negative effects, trafficking is a source of illegal adoption of children.

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<sup>46</sup> Equivalent to 440 USD.

<sup>47</sup> Kenya: Booming tourism boosts juvenile sex trade, article available at : [www.irinnews.org/report.asp?ReportID=54633&SelectRegion=East\\_Africa](http://www.irinnews.org/report.asp?ReportID=54633&SelectRegion=East_Africa) .

## **8. Protection from torture and other cruel, inhuman or degrading treatment (art. 37-a)**

The Constitution and the Children Act both outlaw torture and other cruel, inhuman or degrading treatment or punishment. Chapter V, section 74 (1) of the Kenya Constitution protects every person from torture and inhuman or degrading punishment or other treatment. The Children Act (section 18 (1)) provides protection for children from different forms of violence and particularly torture and other cruel treatment or punishment.

Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the victim, able to pressure the child. However, on condition that the perpetrator has been denounced, he can be arrested, charged and prosecuted except if an agreement as been found between the victim, the family and the authors of the act. At the end, the penalties cannot be considered as dissuasive since, once convicted, the perpetrators often have the possibility to be released after having paid a bond.

Moreover, there have been cases of girls' rapes by policemen in which an "agreement" between the policeman and the victim's family was found to not accuse the policeman responsible of the rape. Cases of cruel, inhuman or degrading treatment or punishment also take place in institutions, particularly corporal punishment against child offenders (see Part 9).

## 9. Institutions receiving children

It exists different kind of institutions in Kenya, receiving two categories of children: those in need of care and protection<sup>48</sup> and those in conflict with the law. Despite section 119 (2) of the Children Act stating that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are often mixed in those institutions. Indeed, in Kenya, many children are considered and treated as child offenders for the sole reason they are in a poor social situation. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. There is an urgent need to separate the social welfare and criminal justice systems.<sup>49</sup>

Rehabilitation schools, children’s remand homes, children’s homes and borstal institutions<sup>50</sup> are public institutions. Charitable children’s institutions are private institutions whose existence has been formalised by the children Act.

Some of those institutions are provided for in the Children Act: rehabilitation schools and remand homes (sections 47 to 57 of the Children Act), and charitable children’s institutions (sections 58 to 72 of the Children Act). Borstal institutions are only mentioned in section 55 (1), lit. b of the Children Act as settings where a child over 16 years old committed to a rehabilitation school with difficult character, exercising inappropriate influence or being persistent absconder, can be sent. In general, borstal institutions are provided for in Chapter 92 of the Laws of Kenya- Borstal Institutions Act. However, children’s homes do not have statutory grounds.

### 9.1. Rehabilitation schools

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<sup>48</sup> Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection: “(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or
- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

<sup>49</sup>

<sup>50</sup> For further developments, see part 9 of the present report.



According to the Children Act, children from 10 years old can be sent to a rehabilitation school following a care order issued by a Children's Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated<sup>51</sup> and have been established "to provide accommodation and facilities for the care and protection of children" (section 47 (1)). Despite this formulation, rehabilitation schools also receive children in conflict with the law and section 48 of the Children Act especially states that those institutions shall keep in separate areas children in need of care and protection and children in conflict with the law, in addition to a separation regarding the gender and the age.

In practice, the separation between boys and girls is respected: there are around 12 rehabilitation schools in the whole country, two of which are devoted to girls exclusively.

Children in conflict with the law that are committed to rehabilitation schools are generally those who have been convicted and are over 10 and under 15 years old.<sup>52</sup>

The rehabilitative care of children concretely consists in the maintenance, the training and the rehabilitation of children and particular in the possibility of following an apprenticeship to learn a vocation such as tailor, mason, etc. However, equipment is often lacking.

A child sent to a rehabilitation school cannot stay for a period longer than three years and can neither stay beyond the date s/he attains the age of 18, except by order of the Children's Court.<sup>53</sup> After the period spent in the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children's Services for a period of two years.<sup>54</sup>

A special treatment is also provided towards absconders and children of difficult character or exercising inappropriate influence (section 55 (1)). For those aged 16 and under, they risk seeing the period of committal increased (6 months maximum); for those children over 16 years old, they can be sent to a borstal institution. A child can also be provided with medical treatment or professional counselling if the child is a drug addict or s/he is suffering from a mental illness.

## **9.2. Children's Remand Homes**

The Children Act also establishes remand homes (section 50 of the Children Act) where children could be sent on a judge's order for a temporary period. The grounds on which a child is sent to these institutions have not been clearly established. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with law.

Regarding children in conflict with the law, they are sent to remand homes during the period the investigation is pending. They generally do not stay more than 3 months, but it could be more, particularly in case of serious offences. Previously, the pre-trial period of detention could be very long, but practice has improved and judges now mainly decide non-custodial sentences.

Children receive lessons inside the home and also have access to leisure activities.

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<sup>51</sup> Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children's Department, German Technical Cooperation and Save the Children – Canada.

<sup>52</sup> Section 191 (e) of the Children Act.

<sup>53</sup> Section 53 (3) of the Children Act.

<sup>54</sup> Section 54 (2) of the Children Act.

Nairobi's remand home has a capacity of eighty children. The age of children is between 8 and 17 years old. There are no separate facilities for children in need of care, forty-one in May 2006, and those in conflict with the law, twenty-five. Nevertheless, this has been justified by the necessity to maintain the confidentiality of cases. Each group receives care according to its particular needs. However, separation is effective at night between boys and girls and among boys between the youngest and adolescents.

All children should be registered upon arrival but it is not done so regularly. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care<sup>55</sup> so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not suffer from corporal punishment. However, some acts of violence exist, particularly sexual abuse by teenage boys. When such acts happen, the rule is that the staff talks with the author of the abuse and then informs the relevant magistrate to decide on the best action. The adequate implementation of the procedure remains however difficult to monitor.

### **9.3. Children's homes**

Children's homes provide protection and care to young children. Children in need of special protection are sent to those institutions. For example, abused, abandoned children, victims of trafficking, sexually abused girls, forced child workers, etc. Children with HIV-AIDS may also receive medical care but there is a lack of skilled staff. Staff members are often not trained to have a child care approach and not well paid. There is a need for more informed and skilled workers. Children are sent to the home only on recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. A children's home represents a temporary place of safety. After the child's arrival, some alternatives are looked for such as placement with relatives or other guardians, in charitable institutions or adoption.

Children's homes should be added as public institutions provided for in the Children Act.

The Nairobi Children's Home was opened in 1989 under the authority of the Ministry of Home Affairs. It initially received children from 0 to 6 years. This age has since been raised to 10 years<sup>56</sup> (according to the latest information received in May 2006). It is meant to house around 50 children but the current number is around 112. Moreover, although it is provided for education to be given to the children, neighbouring schools often refused to accept children from the home and it is also difficult to find an external teacher that agrees to come and gives lessons to children, as explained the manager of the Nairobi's children's home during the preparatory mission.

### **9.4. Charitable children's institutions**

The Children Act also provides for private institutions that secure accommodation and care to children in need. Section 58 of the Children Act defines a charitable children's institution as "a home or institution which has been established by a person, corporate or non-profit, a religious organisation or a non-governmental organisation and has been granted approval by the NCCS to

<sup>55</sup> Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

<sup>56</sup> According to the latest information received in May 2006 during the preparatory mission.

manage a programme for the care, protection, rehabilitation or control of children.” Children in need of care could be sent to a charitable children’s institution in an emergency situation or by way of a care order. Charitable children’s institutions are established after the approval of the NCCS.

## **9.5. Borstal institutions**

The Borstal Institutions Act<sup>57</sup> provides for borstal institutions receiving youth offenders from 15 to 18 years old. Borstal institutions are corrective and reinsertion centres: according to section 6 of the Borstal Institutions Act, the Court can decide to send the youth offender to a borstal institution when “it is expedient for his reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years.” Moreover, a youth offender executing a sentence of imprisonment could be sent by the Court to a borstal institution instead of undergoing the rest of his/her sentence in prison.

There are currently three borstal institutions in the whole country:

- Kamiti Youth Corrective Training Centre (Kaimtu district, Central Province)
- Shikusa (Kakamega District, Western Province)
- Admiralty Radio Station, Shimo-la-Tewa (Mombasa District, Coast Province).

According to section 24 of the Borstal Institutions Act, the Minister of Justice, a judge or a magistrate may visit any borstal institution. The powers and the duties of prison officers working in a borstal institution are established by the Prisons Act. Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and corporal punishment. Indeed, section 55 of the Prisons Act authorises corporal punishment inflicted on boys<sup>58</sup>: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old. This is contradictory to section 191 (2) of the Children Act according to which “no child offender shall be subjected to corporal punishment”.

## **9.6. Monitoring and supervision of those institutions**

Section 68 of the Children Act creates the inspection committees that are appointed by the Minister to inspect rehabilitation schools, children’s remand home and charitable children’s institutions. An inspection committee makes recommendations reported to the Minister and implemented by the director of the Children’s Services.

Section 67 of the Children Act enables the Director of the Children’s Services to appoint officers to inspect charitable children’s institutions. Those officers can receive wide powers and should produce an inspection’s report and proposed remedial measures such as the appointment of a new management.

Moreover, local monitoring committees have been created at the level of Area Advisory Councils. They are registered at the Minister of Home Affairs and composed of representatives from NGOs, public officials dealing with children, catholic churches, Muslim communities, or the police. The local monitoring committees are able to receive and lodge complaints in case of dysfunction (including child abuse) in an institution. However, this monitoring system is not yet operational.

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<sup>57</sup> Chapter 92 Laws of Kenya.

<sup>58</sup> Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

In the year 2002, the NGO CRADLE handled a case relating to sexual abuse of children in a privately run institution “Spring Chicken”. In this case, the government allowed a non-Kenyan national to operate a school in one of the urban slums of Nairobi without proper registration. Some of the parents complained of reported cases of sexual abuse of children by the foreign owner of the institution. Instead of arresting and prosecuting this person, the children who were potential witnesses were arrested and detained for hours by the police on trumped up charges. Moreover, some of the parents were constantly harassed, arrested, detained and charged with stealing chicken from the school owner. It was only after the intervention by the CRADLE that the matter was followed up by the police, albeit reluctantly (in one instance on the hearing date, the witnesses, including 10-year old orphaned children were arrested and hence could not attend the trial). Due to lack of police cooperation, even though the matter went to full trial, he was acquitted as no proper investigations were carried out. He was later arrested by a different police unit when found in possession of a list of over 70 children against whose names he marked “virgin”, “not virgin” prompting the police to believe that he had indeed sexually abused the girls who were in his institution. However, he was acquitted a second time and had even proceeded to open another institution outside of Nairobi with no rules, guidelines or supervision from the government.

Children before four years old are generally keeping in detention with their imprisoned mothers.

## **10. Administration of juvenile justice (art. 40 CRC)**

### **10.1. Minimum age for criminal responsibility**

OMCT is deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, “a person under the age of eight years is not criminally responsible” and from eight years to twelve “is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission”. In its last Concluding Observations,<sup>59</sup> the Committee on the Rights of the Child expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old. However, the Criminal Law Amendment Act of 2003 did not change the legislation relating to the minimum age for criminal responsibility which is still 8 years.

In 2004, a 7-year old boy had been charged with the rape of a 9-year-old girl and kept in custody at the Riruta Satellite Police Station with adults who allegedly harassed him. When he appeared before the Court, even though the Court decided the boy could not be charged because he was under the age of eight, he was sent to Kabete Remand home as his parents could not pay the bail amounting to 20,000 Shillings.<sup>60</sup> This is a clear violation of section 14 of the Penal Code, because although aged under eight years old and officially uncharged, the boy was sent to a remand home and therefore, in practice, considered as a juvenile suspect.

### **10.2. Description of the juvenile justice system**

#### **10.2.1. Arrest and excessive use of force**

While making an arrest, police officers cannot use excessive force. According to section 21 of the Criminal Procedure Code,<sup>61</sup> police officers may use force affecting an arrest but it should be reasonable and necessary regarding the particular circumstances. Section 18 of the Penal Code establishes that “where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person”<sup>62</sup>. The respect of human rights during this kind of arrest thus mainly depends on the way this section is interpreted by the Kenyan Courts. The interpretation of the words necessary and reasonable should be limited to restricted cases and should be down in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

#### **Cases:**

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<sup>59</sup> CRC/C/15/Add.160

<sup>60</sup> Equivalent to 275 USD.

<sup>61</sup> Chapter 75 Law of Kenya – Criminal Procedure Code.

<sup>62</sup> In a recent case, *Antony Njue Njeru v Republic* [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

In the case of 17-year old street boy Kamau, the police shot and wounded him on allegations of stealing a cellular phone. He lost sight in both eyes on account of the attack. However, instead of arresting the police and charging them with this heinous crime, the boy was arrested with trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted after a full trial. The policemen have not been charged and the government has failed to offer compensation to Kamau for the loss of his eyesight.<sup>63</sup>

A 7-year old boy was placed in police cells with hardened criminals on accusation of rape of a 9-year old girl. He was locked up at Riruta Satellite Police Station. He complained of being physically ill as well as being harassed by the adult suspects.<sup>64</sup> He was then taken to court on the 5<sup>th</sup> of January 2004 but could not be charged with the offence of rape due to his age. However, he was remanded at Kabete Remand Home (in Nairobi) after the parents could not pay the bond of 20,000.00 Shillings<sup>65</sup>.

### 10.2.2. Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offenders Rules, once a child is arrested on suspicion of having infringed the law, he/she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview can be led without the presence of the representative of the child. During the period prior to trial, when being in custody, children must be separated from adult offenders. The Court can decide to send the accused child to a remand home<sup>66</sup> during the time of the investigation, but the period of stay should not exceed six months (in case of an offence punishable by death, in case of any other offence, the maximum is three months).

Principles protecting children involved in the juvenile justice system:<sup>67</sup>

- the Court may grant a legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government when the child had been unable to obtain one;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;

<sup>63</sup> Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

<sup>64</sup> Daily Nation, 5<sup>th</sup> January 2004

<sup>65</sup> Daily Nation, 6<sup>th</sup> January 2004

<sup>66</sup> According to Child Offenders Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody it should be carried out in a Children's Remand Home, except when the child over 15 years old proves its unruly or depraved character; s/he could be sent to a borstal institution.

<sup>67</sup> Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

- the Court should make orders in accordance with the best interests of the child and in consideration with the child's welfare, feelings and needs;
- the child has a right to medical assistance.

Some efforts have been carried out to separate children from adults in police settings particularly by setting up the Diversion Programme (see Part 10.2.4) but most police stations still do not separate children accused of having infringed the penal law from those in need of care and protection. This increases the stigmatisation of children in need that continue to be treated as potential offenders after their arrest.

In practice, children are often beaten by police officers during and after the arrest, especially street children.

Although children should not be kept in police custody, some are temporarily deprived of their liberty before trial and, in that case, can be subjected to violence from adult inmates when there are not kept separately. It appears that guards and police officers are generally aware of those practices but do nothing to prevent abuse of children by adult inmates.

Besides, due to the lack of means of the police in charge of the children's transport from the police station to remand homes, children can spend until two months in police cells.

### **10.2.3. Measures**

#### **a) Different measures are provided for as a penalty towards a child offender (section 191 of the Children Act):**

- "by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
- if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
- by ordering the offender to pay a fine, compensation or costs, or any or all of them;
- in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
- by placing the offender under the care of a qualified counsellor;
- by ordering him to be placed in an educational institution or a vocational training programme;
- by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;
- by making a community service order."

#### **b) Restriction on punishment**

Section 190 of the Children Act outlaws the imprisonment and the detention in a camp of a child offender. It also states that a child shall not be sentenced to death and only children from 10 ten years old can be sent to a rehabilitation school.

Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders. However, OMCT deplores that under section 36 of the Borstal

Institutions Act corporal punishment remains used in those institutions against juvenile between 15 and 18 years old.

### **c) Alternative measures**

Alternatives to deprivation of liberty are possible on recommendation of a probation officer or children's officer. They could be close supervision or placement with a counsellor or a fit person determined by the court<sup>68</sup> and community services too. Kenya should take measures to generalise these alternatives solutions and to create and implement further alternatives taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender.

#### **10.2.4. Alternative to criminal justice system: Diversion Programme**

The aim of the Diversion Programme is to prevent children in conflict with the law to come into contact with the formal justice system and particularly to define alternative support (such as rehabilitative non-custodial measures) to custodial and correctional penalties.

Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.<sup>69</sup> When a child is apprehended,<sup>70</sup> s/he should be brought to the diversion desk of the police station when it exists. A police officer, who has been specially trained on children's rights<sup>71</sup> and does not wear a uniform, decides whether or not the child is eligible for diversion. During that time the child should be kept separately from other inmates. In case the child is eligible for diversion, s/he is then interviewed by a diversion committee composed of officials and representatives of the civil society that decides on the opportunity or not to charge and prosecute the child. Instead of face the child with the criminal justice system, the diversion committee can decide to give a caution in case of less serious or first time petty offence, or to set a reasonable bond, or to release the child to a suitable guardian or parent, or to coordinate with a children's officer.

However, so that diversion can take place, the child has to first acknowledge its responsibility for the criminal offence s/he accused of. Therefore, children that are arrested simply because they are in the street do not have the possibility to get benefit from this diversion programme. This is the same for children that have been charged but choose to not plead guilty in a case where there is sufficient evidence to prosecute them. This condition should disappear because it limits considerably the number of children that could legitimately benefit from the diversion programme. Moreover, this condition does not take into account children in need of care and protection such as street children who are the large part of children dealing with the police. Furthermore, in practice it appears that police officers rarely try to apply diversionary measures.

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<sup>68</sup> Point 10 (6) of the Child Offenders Rules in the Fifth Schedule of the Children Act.

<sup>69</sup> 14 police diversion desks existed in May 2006 according to NCCS figures.

<sup>70</sup> According to the Children Act, children are not arrested but are apprehended.

<sup>71</sup> According to the Programme of Juvenile Delinquent System, every officers working with children are trained how to deal with children.



## 11. Recommendations

OMCT recommends the Kenyan authorities to:

1. harmonise the age of sexual consent for girls and boys and preferably raise the minimum age of sexual consent for boys to sixteen (16) so that it is the same as for girls;
2. harmonise the Hindu Marriage and Divorce Act and the Marriage Act with the Children Act so that the minimum age for marriage is eighteen (18) years old for every children, without any discrimination according to the gender and cultural background;
3. raise the minimum legal age for criminal responsibility;
4. ratify the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography;
5. take adequate measures to prevent refugees from discrimination and violence and take into account the particularly vulnerability of child refugees;
6. take necessary measures to allow the internally displaced persons' return to their land or the payment of compensation as well as the resolution of land conflicts;
7. ensure that children with disabilities do not suffer from discrimination and take appropriate measures to prevent cases of abuse and inequalities in all aspects of their life;
8. sensitise children, families and persons practicing FGM on the danger that FGM can cause against children's health and development;
9. sensitise people on the prohibition of the harmful traditional practices and inform why and how children should be protected from those practices;
10. take adequate measures to prevent violence against street children, particularly violence from police officers such as extra-judicial killings and other ill-treatment;
11. reinforce the child-friendly instruments available for child victims of abuse to denounce and complain, such as help desks and free phone number;
12. ensure that corporal punishment is no more perpetrated in schools, particularly by sensitising children and their families on the possibility to complain and teachers themselves on the possibility to use alternative means of education;
13. provide a clear and large definition of corporal punishment in compliance with General Comment n°8 of the CRC (CRC/C/GC/8);
14. outlaw corporal punishment in all institutions receiving children;
15. take adequate measures to prosecute teachers responsible for corporal punishment and sexual abuse against children, bring them to trial and apply the appropriate penal and/or administrative sanctions as provided by law;

16. reduce the practice of child labour and abuse and violence against employed children, particularly by sensitising children and their families on the risk of exploitation, and by the supervision of all sectors employing children (including informal one and exploitation networks) by independent labour inspectors;
17. protect children from sexual violence and exploitation by prosecuting those responsible of such acts, bringing them to trial and applying the appropriate penal sanctions as provided by law;
18. strengthen the care, the recovery, the rehabilitation and the follow-up of child victims of sexual violence and exploitation;
19. ensure the implementation of the new legislation on sexual offences with measures of prevention such as sensitisation of children and potential perpetrators and effective prosecution of perpetrators;
20. provide separation between children in conflict with the law and children in need of care in institutions;
21. provide adequate treatment to children in need of care within a genuine system of social welfare, and stop considering criminal justice as a solution for those children;
22. provide and develop appropriate training of all persons working with children, particularly, policemen and persons working in institutions;
23. give statutory status to children's homes as public institutions for child care and protection in the Children Act;
24. increase the capacities of Nairobi's children's home in term of place and staff;
25. ensure that local monitoring committees will be operational soon and permanently by allocating enough funds;
26. harmonise legislation according to the Children Act so that no child offender is subjected to corporal punishment in any setting where children are deprived of their liberty;
27. provide adequate care to children in detention with their imprisoned mothers;
28. ensure that arrest respects child's vulnerability, does not stigmatise or humiliate the child and is not carried out with violence by providing training to police officers about children's rights and by teaching methods of dealing with children and by sentencing (criminally and/or administratively) police officers having infringed children's rights;
29. set up committees or inspectors to regularly monitor all premises where children can be deprived of their liberty and particularly police stations;
30. ensure that deprivation of liberty is a measure of last resort and for the shortest period of time;
31. develop and spread the use of alternative measures by magistrates dealing with children;

32. implement the diversion programme to all police stations of the country and to remove the condition of acknowledging guiltiness to get benefit from the diversion programme.



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