



CHILD PARTICIPATION IN JUVENILE JUSTICE IN KENYA. A LAWYER'S PERSPECTIVE

National Report for AIMJF's Comparative and Collaborative Research.

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La participación de los niños en la justicia juvenil en Kenia. Una perspectiva del abogado

Informe nacional para la investigación comparativa y colaborativa de la AIMJF.

La participation des enfants à la justice juvénile au Kenya. Une perspective de l'avocat

Rapport national pour la recherche comparative et collaborative de l'AIMJF.

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation in juvenile justice. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Kenya.

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre la participación de adolescentes en la justicia juvenil. El artículo explica los aspectos legales, institucionales y procesales de la participación infantil en el sistema de justicia en Kenia

Résumé : Le document fait partie d'une recherche collaborative organisée par l'Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur la participation des enfants à la justice juvénile. L'article explique des aspects légaux, institutionnels et procéduraux de la participation des enfants dans le système de justice au Kenya.

Introduction

The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts to establish links between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

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To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of how child participation in juvenile justice is organized worldwide.

This national report is based on a questionnaire prepared by AIMJF.

Questionnaire

Questionnaire:

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1. General description of the procedure and the system

- 1.1. What is the name of the Court in your country with jurisdiction for wrongful acts committed by children? Does the name vary among different regions of your Country? Does this Court also have jurisdiction for other matters? Which one?

The name of the Court is the children's Court. The name of the Court does not vary. Yes, the Court handles other matters but on specifically defined days.

- 1.2. What is the minimum age of criminal responsibility (MACR)?

The age for criminal culpability is 12 years.

1.3. Until which age is a child subjected to the jurisdiction of the Youth Court? Does your legislation provide the possibility or possible obligation to treat a child under 18 as an adult? If yes, in which cases and in what way?

Yes, 18 years is treated as an adult.

1.4. Does this Court maintain the jurisdiction regardless of age at the time of the judgment if the offense was committed before the age of 18?

Children under the age of 18 years are not treated as adults unless they attain the age of 18 years before judgement is issued.

1.5. Can you describe the general steps of the procedure?

- a) The Subject is brought to court at the expense of the state.
- b) The Children's report officer should be present.
- c) The Child is given a legal representative at the expense of the state.

1.6. What are the opportunities for the child hearing in the whole proceeding?

The child being vulnerable, the court has to take judicial notice and have its best interest in the decision.

1.7. Are there differences on how to proceed according to the age or other criteria? Please specify.



The child being vulnerable, the court has to take judicial notice and have its best interest in the decision.

2. Judicial hearing

2.1. Is it mandatory for the child to participate in the hearing or is it optional? Is the child invited or summoned for the hearing?

It is mandatory for the child to participate in the hearing.

2.2. Is this call to appear, irrespective of its modality, made together with parent/representative or does the child receive a separate invitation/summon? Is it made in a child-friendly language? Can you please add a copy of this document?

Yes, the children are invited through their parents or guardian.

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2.3. Are there separate entrances and accesses for the child and other persons (professionals, victims and witnesses) to the room where the child is heard?

Ideally the entrance should be separate but it is not.

2.4. Is there a specific waiting room assigned to the child, separated from other people (especially victim and witnesses of the same case; any adults)? Can you share a photo of this place, if any?

Yes, we have the waiting room. (photos)



2.5.If children are brought by the police from places of detention, are they transported separately from adults? Do they have to wait in cells, if so under what conditions (e.g. single or group cells, separation from adults etc.)?

Yes, they are transported separately.

2.6.Is there some space where the child and his/her support persons can meet confidentially before and after the hearing?

No specific place.

2.7. Where does the hearing occur? In the courtroom, chambers, in another room (if so please specify)? If various options apply, which situation will determine the difference in the approach?

Hearing occurs in chambers

2.8. Are there differences in terms of accommodation between the hearing environment in comparison with a family (or child protection, or child victim/witness) hearing environment?

Yes, here is a difference in hearings.

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2.9. Are there differences regarding the hearing room in comparison with a regular criminal courtroom (for adults)?

No different hearing rooms.

2.10. Are hearings sound or video recorded? Does such option exist?

They exist but not in all Courts.

2.11. Who must, may, may not take part in the judicial hearing? If there are differences according to the situation, please specify.

The public are prohibited.

2.12. Can you please share a photo of the hearing room, specifying where each person sits? (or provide a drawing of photo not possible)

Photos of hearing rooms are not possible.

2.13. Is there any informative material for children to explain who will attend and how the hearing will be held? Can you please share it/them?

No material for children to explain.

2.14. Who normally hears the child in juvenile justice proceedings? Is it the Judge or other professional? If it is another professional, does the child have the right to be heard by the Judge? In which circumstances?

There are judges who hear their cases.

2.15. Are there guidelines or a protocol on how to interact with the child? Can you please share it/them? Do those interacting with the child receive specific training on this?

Yes, there are procedures and protocols to interact with children

2.16. Can you please describe the ritual? (Some guiding questions are below)

2.16.1. Does the judge wear a gown/wig during the hearing? Would it be different in a family court? And in a criminal court for adults? Can you please share a photo?

They wear wigs but its optional.

2.16.2. Does the prosecutor and the defense attorney have to wear a gown or to use special clothes?

They may wear but it is not mandatory.

2.16.3. Who else is allowed to attend the hearings?

The parties, State Counsels, probation rears, Court Assistants,

2.16.4. Are there cloth restrictions for the child, his/her parents or non-legal professionals to enter in the hearing room?

Restrictions are on a case to case basis. Children do not wear special clothing.

2.16.5. When the child is deprived of liberty, does he/she wear regular clothing or a uniform? What kind of security measures/measures of restraint may be adopted? Is their use regulated by law (if so, please share provision)? Would it be visible for any attendee that the child is deprived of liberty?

They wear regular clothing.

2.16.6. Is the judge/decision maker in the hearing room when the child enters?

Judge decides the cases.

2.16.7. Does the child have to stand up?

The child does not have to stand. Standing is optional.

2.16.8. Does someone have to allow the child (or others attendees) to sit down?

Yes, the court clerk allows people to sit down.

2.16.9. Does the child have to remain standing during the hearing?

No, the child can sit down.

2.16.10. Is there any kind of solemn speech or specific information/explanations provided to the child before he/she has the opportunity to speak? What is it said at this moment?

There is viva voce as solvent speech. The child is asked whether he/she understands the importance of telling the truth.

2.16.11. Does the child have to make any kind of commitment or swear an oath before speaking?

Yes, if they understand the importance of the oath but if not then affirmation will suffice.

2.16.12. Who poses the questions to the child: judge, psychologist, any other? Does the child respond directly or via a third person, eg lawyer?

The judge may pose the questions or the state counsel. The state counsel is the leads; the judge only seeks clarity.

2.16.13. Is the child allowed to consult his/her defense attorney or his/her family during the hearing?

Yes, the child can consult whoever he wishes

2.16.14. Who is allowed to address the child? Only the judge, both the judge and the parties (prosecutor and defense attorney) or just the parties (prosecutor and defense attorney)? Is there an order of who interacts with the child?

No order, they are all engaged in addressing the child.

2.16.15. If other professionals (such as social workers or probation officers) are attending the hearing, what is their role? Are they allowed to speak to the child?

Not really because the child is represented.

2.16.16. If some professional presents a report during the hearing, is the child allowed to interfere or correct the information or conclusions?

Not really because the child is represented.

2.17. Do you consider that the hearing is structured in a formal way or is it more open to a dialogical interaction with the child?

It is structured.

2.17.1. How would you characterize the tone of the dialogue and the general attitude of the hearing? Must the child answer strictly to the questions or is he/she allowed to freely speak about what has happened? The interaction is focused on the wrongful act or, additionally, is it open to contextualize the child's behavior, his/her family condition, educational process, social experiences, and to express some aspects of his/her subjectivity? What promotes such dialogue, what hampers it, in your opinion?

The tone has to be child friendly and the child speaks freely and generally.

2.17.2. Is it an occasion for the Judge to strictly give the opportunity for each party to speak, according to the rules, in order to take a decision, or a moment that enable some kind of less formal interaction with the child with some kind of feedback on the pros and cons of his/her behavior as part of a negotiation of plea-bargaining, restorative justice or other alternative to the trial?

Yes, the judge gives an opportunity to speak but allows the child to be broad and explain themselves.

2.17.3. Is the Judge or any other professional allowed to make any recommendation on how the child should behave?

Yes, the judge can recommend how the child should behave.

2.18. Does the child have, during the hearing, the same legal and procedural guarantees and safeguards as an adult? What are the differences?

Yes, the process is the same and the rights on fair hearing are afforded to them.

2.19. What special protections are available to prevent trauma to the child (because of the nature of a hearing) which are not available in regular criminal court for adults??

Court may engage a friend to be with the child for trauma & sometimes even psychologists.



3. Generic questions concerning the improvement of Youth Courts

3.1. In your country, do the judges, prosecutors and defense attorneys benefit from specific initial and continue training on children's rights in juvenile justice and specifically on child hearing in this setting?

They have trainings but very rare.

3.2. Anything else you would like to add on this topic?

I have nothing to add.

3.3. Any reform proposals in progress on any of the above issues?

Yes, there are reforms and rules being drafted.

3.4. Any suggestions for improvement from your side?

- a) The process should be simplified
- b) Children's court should be built separately from other courts.
- c) Do away with procedural technicalities