

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN KENYA

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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 family and protection matters. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Kenya,

Key words: child participation; family law; child protection; children's rights, justice system; Kenya.

By defining that a specific situation concerns a child, does he/she become a party to the proceedings? YES (However, in criminal matters, their names are not written in full, and in Civil matters, they sue through a *next friend*).

Does he/she have the right to legal representation by a lawyer? YES
Are there limits to intervention of this lawyer in comparison to other parties?

The lawyer has an ethical duty to represent only the child's opinion, including cases where he/she does not consider the child's opinion in accordance with his or her best interests? YES. However the culpability age is 12years in Kenyan law, therefore the tasked with the duty to pursue the best interest of his/her client being a child in this case.

How does the child participate in court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional?

Both directly and indirectly through a representative assigned to him/her by the court, if the child has to testify, the court has to proceed *In camera*, and after a *voir dire* the minor will testify from a concealed room/space, where they will not get into direct physical eye contact with other members before the Court.

Where a child before a court in proceedings is unrepresented, the court may order that the child be granted legal representation and any expenses regarding to legal representation of a child shall be defrayed out of monies provided by parliament.

If it is another professional, can you identify it and specify its responsibilities, please?

Where the court considers it imperative for the proper determination of any matter in issue before it, of its own motion upon application, it may call on any expert witness as it seems appropriate to provide assistance to the court be it a psychologist or probation officer or children's officer. These include Children's welfare officers (who are employees of the state) and Probation officers, who may visit the Minors home, or place of abode to establish the facts surrounding the life of the minor.

If the participation is direct, is it voluntary? In this case, who consults the child if and how he/she wants to participate? Are there any institutional protocols on how to do that? Are there any informative materials specifically prepared for children about its participation? Can you share it with our members?

If the child does not want to participate directly, what alternatives are there in your country to ensure indirect participation? Children are allowed to bring cases in civil courts under the Civil Procedure Rules with assistance of an adult "next friend" who is often a guardian. If the child's next friend retains a legal representative, the next friend must further sign and file a written document granting the advocate the authority to proceed with the case.

If there are doubts about what the child really wants or his/her opinion is really expressed, what's the solution in your country?

The children's officer gives a report in a proceeding entailing a child and an appeal window exists on the matter in contest in higher courts.

The court as well has powers conferred to it to appoint a *guardian ad litem* to safeguard the interests of the child.

In cases of direct participation, in what procedural phase does it take place? Is there a quantitative limit on consultation with the child? The child participates in this delimitation? YES

How ?.

A child may take a witness capacity to take the stand and testify this is however done with a lot of caution and care as to the sensitivity of the matter. The child will always be consulted by court concerning what steps that Court intends to take and their concerns are noted by Court.

When the opportunity to participate in the child is offered, what is the extent of options available to the child?

The court may order all or any persons not being members or officers of the court or parties to the case or their advocates be excluded from court when the child testifies.

I mean, should the child be limited to the aspects considered important by the adults or can the child bring other questions and possibilities?

How is the courtroom where participation takes place? And the formalities of the child's participation in-front of the judge? Is the participation taking place in the regular courtroom or in the office? A Children's Court sits in a different building or room, or at different times from those in which sittings of courts other than Children's Courts are held.

Who is present in the courtroom/ cabinet?

- Members and officers of the court
- Parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case.
- Parents or guardians of any child brought before the court
- *Bona fide* registered representatives of newspapers or news agencies
- Such other persons as the court may specially authorize to be present.

How are the people dressed? No specific recommendations or provisions are made in this regard other than decency and respectable clothing.

Can you present a photo of such an atmosphere? Yes

Is there a protocol on how to address questions to the child in family and child protection issues? Who developed it? Can you share it with our members? If there is not, how do you do it? We have protocols established by the Children's Act of Kenya, which gives guidelines on how to handle all matters, from juvenile reporting protocols at the police station, how they minors are handled, how their matters are investigated, how their statements are recorded, who records them, who accompanies them to the station, how to inform

them or their guardians on the progress of their case, how they are transported to Court and how they ought to testify in Court.

Who is allowed to ask questions the child? Are the questions asked directly by the party or are they intermediated by the judge? What are the concerns adopted by the judge to avoid questions that may embarrass or violate the rights of the child? How does the debate unfold around the regularity of questions if the child is present in the atmosphere?

Procedurally, the Magistrate will summarize the questions as presented in the pretrial for civil cases, and lead the minor in questioning them. Theirs is simply to establish the truthfulness of their evidence.

In Criminal matters, where a minor is a witness, the lawyers or the accused person may ask questions to the minor, who will not have an eye to eye contact with the suspect. The Magistrate will always be in control of what may and what may not be asked, the moderate the process to ensure that the minor is not embarrassed or made to lose their mind and fail to offer their testimony.

Is the decision taken in front of the child? If the child wants to, can he/she stay in the room?

Procedurally, in Criminal matters, the minor has no choice but to be kept away from the eyes of the suspect as possible. At times in extreme cases of defilement, the girls are even kept under witness protection, and only produced to Court on the material day when they have to testify, with as little as possible contact with the suspect and their lawyers.

Are there any special rules about the consideration of the child's opinion in the context of the reasons for the decision? Not special considerations as such, but opinions are usually sought in Divorce matters, children matters and distribution of matrimonial property. These are usually as to which parent the minors may want to remain with, which home they would like to live, which schools they may prefer to go to. All these questions are asked to the minors, and the decisions are either way made by Court, considering the minor's best interests.

What's the weight given to the child's opinion? Weight is given to their opinion in relation to their welfare and well their wellbeing. However, Court may overrule their opinions if it deems it not in their best interests.

Is it the age a criteria? Which one? If the child's degree of maturity is taken to account, how is this maturity assessed? By whom? What are the criteria considered? The standard criteria is age, any child of below the age of maturity is treated as such. Children matters are very sensitive and always urgent, the prevailing rule is their welfare, where their welfare is not properly taken care of, then their opinions and level of maturity is not of any importance. If their opinions are constructive, as in, they point towards their best interest, and then they will be considered.

How is the decision communicated to the child? Are there any protocols for this communication? There are no rules as to how court decisions are communicated to minors. However, Courts have developed their own practice of talking the minors through the decisions they have made, rather than reading them through. If the minors have any questions as to the decisions of court, they always find the atmosphere welcoming and conducive to ask on the right steps to take as pertains to the decisions.

If the child has doubts or questions, is he/she allowed to speak with the judge? How do you do that? The Magistrate/Judge is tasked to create an enabling atmosphere for the minors to ask questions, and give them options to either agree or disagree with the decision, and even ask what options they have (minors) if they disagree with the decision of the Court.

Does the child have the right to appeal the decision? YES. To the High Court, then Court of Appeal and subsequently the Supreme Court for a better hearing and ruling as may be sought by the child.