

# **CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN UGANDA**

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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 Uganda

**Key words:** child participation; family law; child protection; children's rights; justice system; Uganda

## **INTRODUCTION**

The Justice system in Uganda is based on the rights of citizens, however children have been affected by limited application of child rights based approach by relevant authorities which ought to be charged with the rights Justice systems.

Accordingly, International law recognises the importance of child friendly Justice. The CRC<sup>i</sup> guarantees the rights of the child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth which reinforces the child's respect for the Human Rights and Fundamental freedoms of others, and which takes into account the child's age, desirability and the child's assuming a constructive role in society.

At a Regional level, Article 17 of the African Charter on the Rights and welfare of the child has provisions on the protection of children in conflict with the law specifically provides that the children are entitled to special treatment in a manner consistent with the child's sense of dignity and reinforces the Child's respect to human Rights's and Fundamental freedom's of others

At National level, The Constitution of Uganda (1995 as Amended) sets out the Rights of children including the rights of children in conflict or contact with the Law Under The Constitution, a child offender who is kept in Lawful custody or detention shall be kept separately from adult offenders<sup>ii</sup>

Under the Children's Act Cap 59, it has progressive and enabling provisions on the care and the protection of children at risk and in conflict with the Law.

*Under Section 3 of the Children's Act cap 59 states clearly that The guiding principle, the welfare principle is paramount. It makes specific provisions on the process of arrest and charging, pre trial detention and hearings, adopting the child's rights based approach.*

The Children's Act Cap 59 puts in place crucial guarantees and mechanisms for child care and protection, including Family and Children's Court approved homes and National Rehabilitation centres and local council courts . This is geared at streamlining the administration of children justice in Uganda.

Uganda signed, ratified and domesticated the CRC which means that the standards elaborated in the CRC are applicable in Uganda and can supplement with the existing Constitutional provisions.

- i United Nations Convention on the Rights of A Child.
- ii Article 34 (6) Constitution of The Republic of Uganda (1995)

The Uganda Justice system consists of various institutions who implement the administration of justice right from the grass roots to the top as briefly discussed below.

## **1. LOCAL COUNCIL SYSTEM**

Local Councils are established under the Local government Act of 1997 as (Amended 2010). Under sec 10 of The Children's Act Cap 59, its the general duty of every Local Government Council from the village to the district level to safeguard and promote the welfare of children within the area designated.

## **2. UGANDA POLICE FORCE (UPF)**

The police has a special unit dedicated to handling children, known as the Child and Family protection Unit (CFPU). When dealing with the children, the police is enjoined to be mindful of the provisions of the Constitution and Children's Act and not forgetting the CRC.

One of the challenges police faces while dealing with children justice is lack of facilities for example inadequacy of remand homes.

### **3. THE DIRECTORATE OF PUBLIC PROSECUTION (DPP)**

Under Article 120<sup>iii</sup> The DPP is mandated to among others to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial.

The prosecution performance standards and guidelines of 2014 provide guidance for the DPP in child related cases under Sec 2.2 which states among others that a prosecutor should always ascertain the age of child victims in order to determine the appropriate charge and then should develop child friendly skills while handling witnesses.

### **4. COURTS OF JUDICATURE**

The Family and Children Court (FCC) is established under sec 13 of the Children's Act. It is established in every district and the court is enjoined to handle most of the child related cases with guidelines of the existing laws.

### **5. THE DEPARTMENT OF YOUTH AND CHILDREN'S AFFAIRS**

The department of Youth and Children 's Affairs is one of the departments in The Ministry of Gender, Labour and Social Development.

The department plays a very important role in the administration of justice and maintenance of law and order by offering probation services for children at risk and in conflict with the law. The department is run by probation or welfare officers found at district level and they facilitate courts in particularly the Family and Children Court in doing the social inquiry report about the child who is going through any criminal litigation.

iii The Constitution of the Republic of Uganda, 1995 (As amended)

Proceeding in Uganda takes two shapes, a criminal system and a Civil system. Under Art 257 (1) <sup>iv</sup> and Section 2 of The Children's Act (As Amended), a child is defined as

**'a person under the age of 18 years'**

Sec 88 of The Act Provides that the minimum age of Criminal responsibility shall be 12 (Twelve years). This makes it important to establish that the child being charged with a crime has attained the age of criminal responsibility. A child is party to proceedings depending in which angle He/she is caught in. In trial a child can be a juvenile offender or a witness.

**LEGAL REPRESENTATION FOR CHILDREN**

Yes, under Section 16 (1) (e)<sup>v</sup>, gives a child a right to Legal representation. A child who is in contact or conflict with the law has a right to have either a legal counsel or representation.

Yes, at times the lawyers tend not to represent the true opinion of this child for a number of reasons for example;

1. The cultural practices in Uganda demand children to listen to the adults irrespective of their opinions whether it affects the child positively or not. This makes the child's opinions disregarded in most cases.
2. A child is not even aware of his/her rights and more less if his/her opinion matters.
3. At times even The lawyers themselves are not so grounded in juvenile justice practice.
4. The other stakeholders take children cases to be minor.

**PART 2**

Yes The Child participates in Court proceedings. He/she may participate directly or through a legal representation. Under the Children ( Family and Children's) Court Rules SI 59-2, gives guidance under sec 4 (2) a

The child can participate in court proceedings by

- a) Appearing in court and sitting next to the magistrate,
- b) The child's parent or guardian being around
- c)The child having a legal representation
  
- d) A child can also be represented by a probation social welfare officer and they derive their mandate from Probation Act

The Constitution of the Republic of Uganda, 1995 (As Amended)

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v The Children's Act Supra

Other Responsible officers include Probation Social Welfare Officers. (PSWO)

### **Responsibilities of a probation Social Welfare Officer**

1. The PSWO facilitates court particularly the Family & Children Court Rules (FCC) with the social inquiry report and this guides court to arrive to a an appropriate decision.
2. Are mandated to take unilateral measures for the emergency protection of a child under the Children Act supra.
3. Apply for a supervision or care orders as a situation warrants.
4. Play a monitoring role over the Children and if their situation requires varying or not.

### **PART 3 DOES THE CHILD PARTICIPATE & WHO CONSULTS THE CHILD ON HOW HE/SHE WANTS TO PARTICIPATE**

YES the child participates in court proceedings. He/she may participate directly or through a legal representation, Next friend, parent or guardian ad litem.

Its automatic, If the child is an offender he/she can participate directly without any consultation on whether to participate or not.

### **INSTITUTIONAL PROTOCOL**

Yes the institution is guided by The Uganda Constitution supra, The Children's Act Supra, The Family & Children's Court Rules, The Penal Code Act<sup>vi</sup>. And all this is guided by Sec 3 of the Children's Act which lays out the cardinal principle ( Welfare Principle) that the courts rely on.

*The welfare principle entails that in whatever decision that a key stakeholder arrives at, it must be in consideration of the best interest of the child.*

### **INFORMATIVE MATERIALS**

NO: At the moment no materials are in place to give guidance to children in contact or conflict with the law.

#### **PART 4:INDIRECT PARTICIPATION**

In criminal cases, the child has no option, even if the child is represented in court, the child must be present.

However in civil litigation the child can be represented by the advocate, parent, Next friend, probation and social welfare officer.

#### **SOLUTION ON DOUBT OF THE CHILD**

vi Cap 120, As Amended.

There is no law on doubt but in practice, the Judicial Officer makes a decision in guidance of Sec 3 of The Children's Act, which enlists the welfare principle.

A social inquiry report, also gives guidance before a decision is made. However this can be detrimental to the child since, there is a gap in information collection by the social workers who some times do not know what to collect, when to collect, how to collect and why to collect.

#### **PART 5: DIRECT PARTICIPATION**

Direct participation takes place at plea taking<sup>vii</sup>, plea bargain<sup>viii</sup> and the Allocutus<sup>ix</sup> phase.

#### **QUANTITATIVE LIMIT ON CONSULTATION WITH THE CHILD.**

NO. There is no quantitative limit, its broad and open ended<sup>x</sup> and depends on the Judicial officer handling the matter and activeness of the child.

#### **CHILD PARTICIPATION IN DECISION MAKING**

Through legal representation, parents and probation offers help in the whole process.

#### **OPTIONS AVAILABLE TO THE CHILD.**

The child can bring other questions and possibilities but with great limitation since the child has no confidence to answer the questions and are always engulfed with fear and even have no knowledge of their rights.

## **PART 6: COURT ROOM PARTICIPATION**

This is done in chambers or any informal setting which is provided for under section 15 of the Children Act.

*' A family and Children court shall whenever possible sit in a different building from the one normally used by other courts*

## **FORMALITIES OF CHILD'S PARTICIPATION**

- Section 16 of the Children's Act provides that the proceedings shall be held in camera without any formalities .
- Proceedings should be as informal as possible and by inquiry rather than by exposing the child to adversarial procedures
- The parents ,or guardians or legal representative of the child shall be present wherever possible

## **WHO ARE PRESENT IN COURT**

vii **Plea taking** means an answer to a charge made against an offender in a criminal case.

viii **Plea Bargain** means when an offender pleas guilty to the offence in exchange for a more lenient punishment.

ix **Allocutus** is a formal statement made to court by the offender who has been found guilty prior to being sentenced. x Open ended. Meaning that the Juvenile is required to elaborate on his or her answers.



Sec 16 (2) of The Act provides that

- ' A part from members and officers of the court, other parties to be present are: a) All parties involved in the case have to be present.
- b) Parents or guardians of the child before court
- c) a probation and social welfare officer

### **HOW ARE THE PEOPLE DRESSED**

The dress code is a formal one and Judges are implored to remove wigs and red gowns, while Lawyers are also supposed to be informally dressed. See photo attached.



***On the Left , the Judicial officer and the court interpreter. On the right, the Juvenile and the guardian.***

**PART 7: PROTOCOL ON HOW TO ADDRESS QUESTIONS TO THE CHILD IN FCC<sup>xi</sup>**

**YES** The protocols were developed by UNICEF, ECARO, October 2018.

- Child friendly language is used during the entire process of trial and questions are asked in form of inquiries rather than interrogation.

**PART 8: WHO IS ALLOWED TO ASK QUESTIONS TO THE CHILD .**

- All persons involved in the case are allowed to ask questions directly. That's to say, The Judicial officer, Legal counsel and the witnesses.

**CONCERNS ADOPTED BY THE JUDGE TO AVOID QUESTIONS THAT MAY EMBARRASS / VIOLATE RIGHTS OF THE CHILD.**

- Before the trial, The Judicial officer makes a briefing on the do's and the do nots of the trial, putting mind that the child has a right to be heard
- The questions that are embarrassing in nature the Judicial officer asks the child not to answer and also stop the person not to ask such questions.
- The child is sent out to allow the adults to iron out any issue to ensure fair and comfortable trial to be conducted.

**PART 9: DECISION TAKEN IN FRONT OF THE CHILD**

- In criminal cases, the decision is taken in the child's presence.
- However, in civil matters, since the child sued through a next friend or guardian Ad litem, the decision is taken without the child's presence.

## **PART 10: CONSIDERATION OF THE CHILD'S OPINION**

The cardinal principle is that every decision, arrived at by judicial officers, should be in the best interest of the child and due weight is supposed to be given to the opinion of the child. However, often times the child tends to keep quiet and leave it to the adults and decision makers.

### **a) Age**

Yes age is a criteria.

Criminal responsibility begins from 12 years in Uganda and any child who gives evidence in court, his or her level of understanding must be assessed by conducting a Voir dire by the trial magistrate and the court must be satisfied that the child is old enough to understand the proceedings or decision.

### **xi Family & Children's Court**

A medical report or a certified birth certificate can also be obtained in case of determining the age of the child.

In conducting a voir dire, normal questions such as What is your name?, How old are you?, who are your parents?, which school do you go to ?, Do you understand the difference between right and wrong ?, Is it right or wrong to tell a lie?

## **COMMUNICATION OF THE DECISION**

The decision is communicated directly by the trial Judge/Magistrate.

YES: The protocol is the communication and language should be child friendly.

## **CAN A CHILD SPEAK TO A JUDICIAL OFFICER**

A child is allowed to speak to the judge / trial Magistrate or through legal representation and the guardian. However, if the communication is a decision made especially a criminal case, a child is not allowed again to communicate, except a trial Magistrate explains to the child the consequences of the decision and remedies available.

## **PART 11 WHETHER THE CHILD HAS THE RIGHT OF APPEAL**

**YES:** The child has the right of appeal just like any other person as provided for under Rule 33<sup>xii</sup>

## **CONCLUSION**

**There many measures in place to guide protection, participation and promotion of Juvenile Justice system in Uganda. However the system is still faced with the challenges of limited legal representation, inadequate detention facilities, non strict adherence to the standard guidelines and practices by the stake holders.**

xii The Children(Family and children Court Rules)