

CHILDHOOD IN KENYA: FROM THEORETICAL RIGHTS TO GOOD PRACTICES, A LANDSCAPE IN CONTRAST

**By
Jean-Pierre ALLINE**

Introduction: Is Kenyan Child overprotected or under-protected?

Many western NGOs have been working in Kenya for a very long time and particularly on the issue of street children. Besides, Kenya gives the impression of a country with positive socio-economic growth indicated by factors such as high number of school enrolment in the region. Nairobi is also the seat of numerous international organisations including the UN with thousands of its functionaries residing in Nairobi.

But despite all this, there remains the dark side of Kenya such as the fact that it is among the most unequal countries in the world with wage differentials standing at the ratio of one to fifty six; 40% of the population is unemployed; 50% of city dwellers live in slums; an ever-increasing number of street children.

The organisations operating in Kenya seem to be incapable to cope with these problems, particularly the ones concerning the vulnerability of children such as child labour, urban violence, and forced migrations due to interethnic conflicts. One of the core problems is that most NGOs are based on western judicial culture and its concomitant international declarations on rights that ignore the reality of informal “codes” of street gangs and traditional African ethos that guide childhood in Africa.

The combination of the illusory image of Kenya as a country in the process of development embracing international conventions based on western culture create the impression that the rights of children in Kenya is a resolved matter but the reality on the ground indicates to the contrary. This paper attempts to expose the level of concordance between the theoretical rights of children and the reality of children on the ground in Kenya.

Part I: The Rhetoric: Chaining the Rights

I-1) World and African Contexts

1. The UN Conventions

It is based on the text adopted in 1989 in New York, the *Convention on the Rights of the Child* (CRC). The document is founded on the principle of the “best interest of the child” which includes:

- The right to family (modelled on the western nuclear family and which prefers maternal custody in case of separation- contrasted to Islamic custom which prefers paternal custody)
- Right to education
- Socio-economic rights of the child which are poorly enforced in poor countries
- Right to protection from all forms of violence such as sexual violence, forced labour, physical violence, etc
- Creation of special tribunal for minors

2. The African Regional Convention

The basic text is the *African Charter on the Rights and Welfare of the Children* (ACRWC) adopted in 1990 by the African Union. It defines the child as anyone below 18 yrs of age and prioritizes the following elements with regards to the child:

- The interest of the child
- Non-discrimination against the child
- Right to life and development of the child
- Respect of the opinion and participation of the child
- Right to nationality
- Right to education including pregnant girls
- Right to health
- Prohibition of child labour
- Prohibition of child trafficking
- Prohibition of mistreatment

3. The Penal Code for Minors

Both texts referred to above recommend standards and guidelines for the creation of a penal code for minors. They recommend:

- The right to a special tribunal
- The age of penal responsibility be set at 12 yrs
- Re-education measures are preferable to custodial correctional measures in cases of convictions

4. Ad hoc Protections

Both CRC and ACRWC advocate the following issues as deserving special ad hoc protections:

- Child Trafficking which may include activities such as forced labour, forced early marriages, domestic house-helps, child prostitution and sale of body organs.
- Child Adoption: It recognises that international child adoptions constitute the most recent form of child trafficking. Both documents and many national documents on this matter prefer adoption by the extended family with international adoption coming in as the last resort. In Moslem states adoptions are predominantly clandestine due to the fact that Islam does not allow adoptions outside the extended family.
- Refugee Children: According to the UNHCR 45% of refugees are children and 60% of IDPs are children. The African text on refugees is the *African Charter on Human and People's Rights* (ACHPR) which was based on the *Refugees Convention* of 1951. The text is silent on minors. This prompted the need to specify rights of refugee children in ACRWC such as:
 - a) Reunification with family
 - b) Non-discrimination on the basis of nationality
 - c) Right to material survival within the refugee camp by access to water and food
 - d) Family care for children whose parents can not be traced
 - e) Respect of the child's language, culture, and religion
 - f) Right to nationality

- **Child Soldiers:** In the Geneva Convention captured children should be granted basic care and repatriated to their families. But the convention is limited only to interstate war and completely silent on civil wars. The ACRWC broadens its coverage on this matter to include not only children caught in civil war but also the ones in circumstances of internal tensions without combat. The ICC ratified by 29 states in Africa includes forced drafting of children as constituting an element of war crimes. Nevertheless, there still remains the gap on girl ‘soldiers’ who are recruited to serve as cooks, domestics, prostitutes, etc. The ACRWC treats them just as the boy soldiers. Moreover, there is the question which still looms of the girl child who is a victim of rape employed as an instrument of war especially in interethnic conflicts.

I-2) The Kenyan Context

1. Socio-economic Rights:

The basic text guaranteeing general socio-economic rights to children in Kenya is the *Children Act* of 2001. It is applicable to all minors below the age of 18yrs and it is based on the principles of “child welfare” and “the best interest of the child”. It is a transcription of ACRWC in the jurisdiction of Kenya and includes:

- Right to life and personal development of the child
- Non-discrimination
- Right to family life
- Right to name and nationality
- Protection of children who are in need of care and protection such as orphans, abandoned children, sick, sexually abused, etc
- Prohibition of violent traditional practices such as early marriages, and FGM
- Right to basic education and health care services

Besides the Act, Kenya has also created an inter-ministerial *National Council for Children’s Services* which is consultative on public policies regarding children.

2. Penal Code and Justice for Minors

a. **Courts:** The Children Act provides for the existence of a justice system for minors with the creation of children (juvenile) courts. The proceedings of such courts take place in camera and cover all cases of juvenile delinquencies except capital offences (e.g. homicide, rape, robbery with violence), in which instances the offenders are subjected to adult trial courts.

b. **Sentences:** The Act prohibits imprisonment except in cases of capital offences. Instead it recommends reparations, probation, mediation and re-education measures as sentences

c. Re-educational Measures:

- There are 9 rehabilitation schools in Kenya established for the re-education of juvenile delinquents and vagabonds between 8-16 yrs. Two of them, Kirigiti and Dagoretti are for girls only.
- 3 Borsal Institutions which are correctional institutions for minors given much serious sentences
- 2 youth corrective training centres reserved for minors between 14-17yrs guilty of crimes which do not carry the death penalty

- There are also two adult prisons for young mothers in Kakamega and Lan’gata where the convicts are allowed to stay with their children

Part II: Reality, Practice and Obstacles

II-1) The Kenyan Case: Cultural and Economic Obstacles

1. “Hidden” Children: girl-child, handicapped, HIV, labour:
 - a) The Girl-Child: the African Child Policy Forum 2006 in Addis Ababa singles out rape, FGM and inequality in schooling as the problems afflicting the girl-child in Africa. It attributes these to customs and poor public policy. In Kenya boys still outnumber girls in school enrolment and completion. This is strongly founded on the African ethos where the male ought to assure the survival of the family.
 - b) Handicapped Children: It is noted that about 80% of handicapped children are found in poor countries. There are special schools for them but there are attempts towards inclusive education. The major difficulty in most parts of Africa is on how to change the traditional representations of these children often seen as a curse, a shame, etc. Kenya has about 750 000 handicapped children in normal schools according to UNESCO. Even though Kenya has intensified campaigns to change taboos attached to handicaps the UNESCO points out the following weaknesses in Kenyan policy towards handicaps: lack of legal framework; lack of financial resources; lack of statistics and absence of agencies in charge of special needs.
 - c) HIV/AIDS: Children who are either infected or affected by the pandemic do not access school adequately due to lack of family support or the unfounded fear that they may infect others in school. By 2005 Kenya reportedly had approximately ½ a million orphans who fed continuously to the ever-growing numbers of street children in big towns thereby worsening the situation of children in the country
 - d) Child labour: This is the most frequent form of exploitation and it takes the form of either forced labour or free labour of children. Two factors make it hard to eradicate namely; the traditional practice of involving children in simple domestic tasks and high poverty levels. Kenya has included in the new constitution the right provision of basic needs and education for children but without specifying the means of achieving this

2. Street Children and Re-education:

After many years of rejection, street children are becoming a subject of public policy as has been shown but there are still a dark side to the implementation of the policy:

- Long hours of waiting between arrest and arraignment in court
- Lack of legal representation for the arrested children even though in theory they have a right to legal representation
- Poor sanitation and the Juvenile remand homes

3. African Ethos and Cultural Conceptions of Childhood:

The traditional practices that turn children into adults through initiation rites is a major obstacle to the implementation of children rights based on western criteria.

Besides these customs make the actors to be resistant to change of mentality and operationalisation of international law on children

But one of the worrying trends is the rise of the phenomenon of child sorcerers perceived as under the influence of malevolent powers. These include children with disabilities, “abnormal” births and Albinos

II-2) “Good Practices” and Advocacy

1. Reintegration policies and “Life Projects”:

Despite the setbacks and weaknesses, Kenya has put in place programmes of educational aid including health education apart from penal re-education. Due to the campaigns of *Child Welfare Society of Kenya*, there is increased awareness that juvenile delinquency is also a socio-economic problem. They recommend the separation of abandoned children from the delinquents. Equally important is the fact that a number of NGOs and religious organisations active in children’s affairs have been integrated into government structures to bolster the provision of legal aid, training of special educators and magistrates who preside over juvenile cases.

Life projects are processes based on the thought of Boris Cyrulnik that a human being, however immature, has inner resources necessary for the restoration of equilibrium after traumatic experiences. Big NGOs and Kenyan social workers have tried in this respect to help young people formulate projects of life. The projects may include elements such as: plans to go back to school and family, placement for a vocational training; identification of adoptive families, etc.

2. Restorative Justice and Legal Aid:

Restorative justice is a counter-model to the official state tribunal system which is replaced in some instances by customary traditional courts or councils. It aims at restoring the social and psychological equilibriums upset by the offence. It is already institutionalised for juvenile cases in Uganda and South Africa. Kenya which has opted for a centralised, national procedure of children courts could learn from these experiences

3. Family “resilience” and Community practices:

Family ‘resilience’ is concept devised by Prof. Thibon to describe the collective capacity of communities to spontaneously formulate informal practices to regulate collective crises. Certain communal practices are favourable towards the development of family resilience for example the *duol* among the Luo which has served as a collective response towards the phenomenon of widows and orphans due to HIV/AIDS through self-help projects

Conclusion: Clarification of the categories of Children in difficult conditions

In order for the children rights to be operational there is need to disaggregate the carryall concept of “*children in difficult conditions*”. It can factor in many variables such as spatial variables to breakdown the category into children in public and spaces, domestic or workplace, urban or rural, etc There are also social variables which determine in different societies who is considered a good from a bad child.

Street children may be the major focus but there are also intermediary cases of vulnerable children e.g. those from poor families in shanty estates. The latter category is always more difficult to bring to the notice of public policy because it is presumed that they are under the care of the family, while in deed they may be under control of ghetto gangs.