

The post-2010 jurisprudence on children's rights under the Kenyan Constitution

Godfrey O Odongo*

Senior Programme Officer, WellSpring Philanthropic Fund, New York, United States of America

<https://orcid.org/0000-0001-8489-7502>

Summary: *The Constitution of Kenya, 2010 provides for a comprehensive Bill of Rights that seeks to ensure the protection of rights with an emphasis on 'marginalised' and 'vulnerable' persons. A dedicated clause and other specific provisions in the Bill of Rights detail the rights for children. Since 2010 the Kenyan judiciary has adopted a progressive stance by interpreting these provisions in ways that affirm children's autonomy and agency while recognising the reality of children's vulnerability and their need for protection. The expansive provisions of the Constitution have also enabled Kenyan courts to more readily embrace systematic remedial measures, such as judicial recommendations for the reform of the applicable legal framework and implementation of new policies to give effect to rights.*

Key words: *African Children's Charter; children's rights; Constitution of Kenya, 2010; Convention on the Rights of the Child; judicial enforcement*

* LLB (Moi) LLM (Pretoria) LLD (Western Cape); godongo22@yahoo.com

1 Introduction

The promulgation, in August 2010, of a new Constitution (2010 Constitution) has been termed 'the most significant achievement' in Kenya's governance since independence in 1963.¹ This in part is because the previous Constitution did not contain a comprehensive and enforceable Bill of Rights. The 2010 Constitution also ushered in a new legal and political dispensation in several respects.² The Constitution proposed a far-reaching restructuring of Kenya's governance structure – from a purely centralised governance system to devolved regional governance units, it provided a roadmap for the reform of the judiciary, legislature and executive and enunciated national values and principles, including ethos for leadership and integrity.³ It also provided for a comprehensive Bill of Rights that seeks to ensure the protection of rights with an emphasis on 'marginalised' and 'vulnerable' persons.⁴

In its Bill of Rights the Constitution provides that state organs and public officers have the duty to address the needs of vulnerable groups in society, including women, older members of society, persons with disabilities, children, the youth, members of minority or marginalised communities, and members of ethnic, religious or cultural communities.⁵

There is a dedicated clause in the Bill of Rights providing for enhanced protection of children's rights (article 53). This is in keeping with Kenya's obligation under the 1989 UN Convention on the Rights of the Child (CRC) and the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter), to put in place legislative and other measures for the implementation of children's rights.⁶

1 B Shihanya 'Constitutional Implementation in Kenya, 2010-2015: Challenges and prospects' (2012) Friedrich Ebert Stiftung, Occasional Paper 5 ISBN 9966-957-20-01, <http://www.katibainstitute.org/Archives/images/banners/Sihanya-Constitutional%20implementation%20in%20Kenya,%202010-2015--Challenges%20and%20Prospects.pdf> (accessed 20 September 2022) citing Commission for the Implementation of the Constitution (CIC), Quarterly Report January-March 2011.

2 As above.

3 2010 Constitution, ch 11 (devolved governments); chs 8-10 (on the legislature, executive and judiciary) and ch 6 (leadership and integrity).

4 Art 21(3) 2010 Constitution. See also G Odongo & G Musila 'Direct constitutional protection of economic, social and cultural rights under Kenya's 2010 Constitution' in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 346.

5 Art 24(3).

6 Art 4 CRC; art 1 African Children's Charter. Kenya ratified CRC in July 1990 and the Children's Charter in July 2000.

This article discusses the emerging post-2010 court jurisprudence on an array of children's rights. The selected cases are precedent setting and touch on a range of violations of children's rights in both the private sphere (such as children's rights to parental care) and the public sphere (such as state obligations to address children's lack of economic and social rights). While analysing these decisions the article examines some of the key implications of the entrenchment, for the first time, of children's rights in Kenya's supreme law.

2 Contextual background

The technical committee that was responsible for birthing the final text of the 2010 Constitution documented that, throughout the process of constitutional review, Kenyans had demanded an expanded Bill of Rights that explicitly guarantees the specific rights of women, children, the youth and persons with disabilities.⁷ The inclusion of children's rights in the 2010 Constitution also resonated with the pre-existence of the Children's Act, 2001 that had explicitly sought to give domestic legal effect to CRC and the African Children's Charter.⁸ The Children's Act, 2001 has since been repealed and replaced by a new and more expansive Children's Act, 2022 that came into legal force on 26 July 2022. The 2022 Act was specifically informed by the need to give better legal effect to the provisions of the 2010 Constitution.⁹

Pre-dating the adoption of the 2010 Constitution, there was, in general, a peripheral legal recognition of human rights in Kenya.¹⁰ Thus, while it had several flaws,¹¹ the now repealed Children's Act,

7 Committee of Experts on Constitutional Review 'Final report of the Committee of Experts on Constitutional Review' 11 October 2010 108, https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf (accessed 20 September 2022).

8 The Preamble to the Children's Act, 2001 stated: 'An Act of Parliament to make provision for parental responsibility ... to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes'.

9 According to the Preamble to the Children's Act, 2022 the purpose of this new law, among others, is 'to give effect to Article 53 of the Constitution, to make provisions for children's rights'.

10 Odongo & Musila (n 4) 339-340, discussing the exclusive and limited focus by Kenya's previous Bill of Rights on 'individualistic civil and political rights' which were largely not enforceable or justiciable in the courts.

11 Noting a lack of harmonisation of the Children's Act, 2001 and regulations with CRC, the UN Committee on the Rights of the Child, upon review of Kenya's record, in 2016 recommended that Kenya should expedite the process for the harmonisation of its domestic law with the Convention, including the adoption of new legislation to replace the Children's Act, 2001. See UN Committee on the Rights of the Child Concluding Observations on the combined 3rd to 5th periodic reports of Kenya, CRC/C/KEN/CO/3-5 para 8. The enactment in July of 2022 of the Children's Act, 2022 goes some way towards addressing this recommendation for harmonisation.

2001 was unique in its comprehensive legal recognition of children's rights, including rights of an economic and social nature such as children's rights to education and health.¹² The 2001 law also made provision for rights that traditionally had been included in general child protection laws, such as the right to protection, and the rights to name and nationality and privacy.¹³ Overall, however, the reality was that without a corresponding expansive protection of children's rights in Kenya's pre-2010 Constitution, children's rights in the 2001 Act stood on tenuous legal grounds. This was because the Act and the expansive children's rights in it were subject to potential repeal on a simple majority vote in the legislature. With a supreme legal status and a higher threshold for legal amendments than ordinary statutes,¹⁴ the 2010 Kenyan Constitution provided a more legally-secure bolster to the protection of children's rights. The newly-enacted Children's Act, 2022 addresses many of the flaws of the 2001 law and provides for more consistency with the 2010 Constitution. This includes the new law's inclusion of provisions that were absent from the 2001 law regarding children's rights to parental care without discrimination¹⁵ and a wider range of options for guardianship, foster placement and adoption as alternative forms of care.¹⁶ The new law also enacts a novel set of options, including a diversion from the formal justice system, for courts and justice officials to resort to when handling children accused of committing crimes.¹⁷

3 Role of international law in the domestic legal system¹⁸

Article 2(6) of the 2010 Constitution provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya'. This provision was first interpreted in a few cases, such as the Kenyan

12 Secs 7 & 9 Children's Act, 2001.

13 Secs 3-22 Children's Act, 2001 Part II.

14 Ch 16 Constitution of Kenya (arts 255-257) detailing the need for super legislative majority votes and majority support in public referenda for certain constitutional amendments, including changes to the Bill of Rights.

15 Children's Act, 2022 Part III. Sec 32(1) of the Act in particular addresses the 2001 Act's flaw in not providing for the equal rights and obligation of parents to provide care for children born out of marriage. It states: 'Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, 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 whether or not the child is born within or outside wedlock.'

16 Children's Act, 2022 Parts X, XIII & XIV.

17 Children's Act, 2022 Part XV.

18 The views build on my earlier thoughts in G Odongo 'The role of international law in the judicial interpretation of new African children's laws: The Kenyan example' in T Liefwaard & and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (2017) 209-210.

Court of Appeal's decision in *David Njoroge Macharia v Republic*,¹⁹ where the Court asserted that under the Constitution, the provisions of treaties ratified by Kenya are by default deemed to be part of Kenyan law.²⁰ The three-judge bench held:²¹

Kenya is traditionally a dualist system; thus, treaty provisions do not have immediate effect in domestic law, nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, this position may have changed after the coming into force of our new Constitution.

Writing on other human rights issues, some scholars have adopted the same approach as the Court of Appeal by asserting that 'the African Charter [on Human and Peoples' Rights] and the Women's Protocol [to the African Charter] are now part of Kenyan law under the 2010 Constitution'.²² In an earlier contribution the author expressed the view that article 2(6) of the Constitution appears to 'transform Kenya, traditionally a dualist state (requiring domestication through statute of international law), into a monist one (in which international law is considered as part of municipal law)'.²³ In reality, however, a more guarded or nuanced interpretation is warranted because of the reality that many of the provisions of CRC and the African Children's Charter, like most other treaty provisions, are not self-executing. They require further corresponding national law, policy or judicial interpretation for there to be full domestic legal effect of international children's rights norms.

4 Status of CRC and the African Children's Charter in the domestic legal system

From the foregoing, CRC and the African Children's Charter may generally be considered part of Kenyan law by virtue of article 2(6)

¹⁹ [2011] eKLR.

²⁰ For an exhaustive analysis of the case, see MK Wasilczuk 'Substantial injustice: Why Kenyan children are entitled to counsel at state expense' (2012) 45 *NYU Journal of International Law and Politics* 291-333.

²¹ *Macharia* case (n 19) 12, with the judges stating that in an earlier case, *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, 'the superior court held that by virtue of the provisions of Section [sic] 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, were imported as part of the sources of the Kenyan Law and thus the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Kenya ratified on 1st May 1972 were part of the Kenyan law. The court went on to hold that the provisions of the ICCPR superseded those contained in the Banking Act.'

²² C Bosire, V Lando & W Kaguongo 'The impact of the African Charter and Women's Protocol in Kenya' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2012) 66.

²³ Odongo (n 18) 210.

of the Constitution. Indeed, in most cases where a CRC or African Children's Charter provision is self-executing (and not needing further statutory enactment or clarity) Kenyan judges tend to directly rely on the international children's rights norm as if it were part of the Kenyan Constitution or statutory laws. This was the case in a petition decided by the High Court in August 2017. In this case the child petitioner (referred to in the case as a 'minor' and by his initials POO) alleged a violation of rights, including the right, under article 53 of the Constitution, detailing that upon arrest by the police, children must be detained separately from adults. The High Court explicitly relied on both article 37(c) of CRC and article 53(1)(f)(ii) of the Constitution requiring the separation of children from adults during any detention.²⁴ This approach stating that the respective provisions of CRC should be considered part of Kenyan law is illustrated in other cases.²⁵

However, the post-2010 legal jurisprudence also demonstrates that further legislative, policy and judicial measures to fully guarantee children's rights are much needed in Kenya. The next parts of this article turn first to a discussion of the nature and scope of the child rights clause, proceeding to an analysis of court decisions that illuminate this need on issues ranging from children's rights to a nationality, implications of the best interests of the child principle to children's economic, social and cultural rights and rights in the justice system.

5 Reach and scope of the children's rights clause in the Constitution

Children's rights are included in many provisions of the 2010 Constitution but provided for in specific greater detail in article 53 which falls under Part 3 of the Bill of Rights. The children's rights clause (article 53) complements the general rights of all persons to the civil and political and economic, cultural and social rights in Part 2 of the Bill of Rights.²⁶ Thus, non-child-specific or general provisions, such as the Constitution's article 27 on the right to equality and non-

24 *POO (a Minor) v The Director of Public Prosecutions & Another* [2017] eKLR, para 41, <http://kenyalaw.org/caselaw/cases/view/140634/> (accessed 20 September 2022).

25 Eg, *Gabriel Nyabola v The Attorney General & 2 Others* [2014] eKLR para 30, <http://kenyalaw.org/caselaw/cases/view/102170/> (accessed 20 September 2022) where the Court states: 'Article 28 of the United Nations Convention on the Rights of the Child, which is incorporated in the Children Act, provides as follows ...'

26 Arts 26-51 Constitution of Kenya.

discrimination,²⁷ have proven integral to the way in which Kenyan courts interpret children's rights. Moreover, all the rights in the Constitution are to be interpreted, as required under Part 1 of the Bill of Rights, purposively and in a manner that enables the guarantee of human rights.²⁸

Article 53 – the children's rights clause – provides:

- (1) Every child has the right –
 - (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
 - (c) to basic nutrition, shelter and health care;
 - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and not to be detained, except as a measure of last resort, and when detained, to be held –
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age.
- (2) A child's best interests are of paramount importance in every matter concerning the child.

Implementation mechanisms are envisaged in the primary children's law, the Children's Act, 2022 (such as the National Council for Children's Services)²⁹ and under the Constitution (for example, the national human rights commission).³⁰ However, the Constitution vests judicial authority in courts to adjudicate human rights. The Constitution recognises the right to pursue a judicial remedy if any rights have been or may be violated, and provides courts, particularly the High Court, with a wide range of potential options for judicial review and remedy.³¹

27 Art 27 partly provides: 'Every person is equal before the law and has the right to equal protection and equal benefit of the law. 2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.'

28 Arts 19-25 Constitution of Kenya.

29 Sec 42 Children's Act, 2022.

30 Art 59 Constitution of Kenya.

31 Art 23 of the Constitution provides for the authority of courts to 'uphold and enforce the Bill of Rights'. Art 165(3) provides the High Court with 'jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'.

6 Key thematic children's rights issues litigated post-2010

6.1 Enforcing children's rights to a name and nationality through a right to non-discrimination lens

Beyond the Constitution's provision of a right to a name and nationality, two laws primarily anchor the process and procedures by which children can acquire a name and nationality in Kenya. The Citizenship and Immigration Act of 2011 is the primary law on nationality, guaranteeing nationality for all children born in Kenya. It particularly resolves a long-standing historical discrimination by recognising the equal right of women and men to transmit nationality to their children. In its most recent review of Kenya's record of implementing CRC, the UN Committee on the Rights of the Child found that specific categories of vulnerable children, such as children born out of wedlock, refugee and asylum-seeking children and children from minority communities, are likely to face significant discrimination, which means that their right to a name and nationality is not realised.³² A much older law, the Registration of Births and Deaths Act of 1928,³³ makes provision for a birth and death registry. Enacted decades before a child rights-oriented era, a few of its key provision have been found to be in conflict with the Constitution. An example is section 12 which provides:

No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognised custom.

In the case of *LNW v AG & 3 Others (LNW case)*³⁴ the petitioner, suing on her and her four year-old child's behalf, contended before the High Court that this section was unconstitutional not only in light of article 53 of the Constitution but also because it violates the right to equality and the prohibition of discrimination of any person under article 27 of the Constitution.³⁵ The correlation between the right to a name and nationality with the right to non-discrimination is in keeping with the latter's right being part of the four 'core rights' that

³² UN Committee on the Rights of the Child (n 11) para 29.

³³ Ch 149 Laws of Kenya.

³⁴ Petition 484 of 2014, in the High of Kenya at Nairobi [2016] eCLR, <http://kenyalaw.org/caselaw/cases/view/122371/> (accessed 20 September 2022).

³⁵ Art 2(6) of the Constitution provides: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

underpin all other children's rights.³⁶ These are, namely, the right to non-discrimination; the best interests of the child; children's rights to life, survival and development; and their right to participation.³⁷ In particular, the right to non-discrimination, together with equality before the law and equal protection of the law without any discrimination, is basic and general to the protection of all human rights.³⁸

Anchoring its findings on the right to non-discrimination and the right to a name, the Court found section 12 of the Registration of Births and Deaths Act to be discriminatory against children born outside marriage.³⁹ It rejected the government's main assertion that this provision was meant to ascertain the authenticity and truth of paternity and to 'prevent unscrupulous mothers from vindicating any man of their choice for personal reasons'.⁴⁰ The judge relied on comparative jurisprudence from South Africa's Constitutional Court⁴¹ and cited the Constitution's article 27 (equality clause); article 8(1)⁴² of CRC; and article 25(2)⁴³ of the UN Declaration of Human Rights, to make the point that children's rights guaranteed under article 53, including the right to a name and nationality, as well as other rights must be accorded to all children, whether born within or outside a marriage.⁴⁴

The Court proceeded to direct that the impugned section 12 of the Registration of Births and Deaths Act be construed with necessary alterations, adaptations, qualifications and exceptions to bring it into conformity with the Constitution.⁴⁵ Beyond the right to a name, the Court observed that this unlawful discrimination would have a

36 UN Committee on the Rights of the Child General Comment 5 *General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 para 12, <https://www.refworld.org/docid/4538834f11.html> (accessed 20 September 2022).

37 As above.

38 UN Human Rights Committee, General Comment 18: *Non-discrimination*, adopted at the 37th session of the Human Rights Committee, 10 November 1989 para 1, citing arts 2(1) and 26 of the UN International Covenant on Civil and Political Rights, which are analogous to art 27 of the Constitution of Kenya, that obligates state parties to ensure the recognition of rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

39 *LNW case* (n 34) paras 69-75.

40 *LNW case* (n 34) paras 38, 85 & 89.

41 *Bhe & Others v Khayelitsha Magistrate & Others* CCT 49/03 [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

42 Art 8(1) of CRC provides: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.'

43 Art 25(2) of the Universal Declaration of Human Rights provides: 'Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'

44 *LNW case* (n 34) paras 71-79.

45 *LNW case* para 117.

'deleterious effect' on other children's rights, such as the right to parental care and protection and the right to health.⁴⁶

Thus, the inclusion of the right to a name and nationality as part of the Constitution's Bill of Rights has provided the High Court with a basis to examine the relevant legislation's alignment with this right and, where necessary, as in the *LNW* case, declare specific legal provisions unconstitutional. The denial of a right to nationality to certain categories of children in Kenya and the related need for a comprehensive legal review or reform remain a significant issue. A yet to be implemented decision of the African Committee of Experts on the Rights and Welfare of Children (African Children's Committee), *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*,⁴⁷ is illustrative. This case concerned a complaint regarding an official system-wide discrimination of children from a minority (the Nubian) community in ways that led the state system to deny them registration at birth, leading to a denial of citizenship. The African Children's Committee found that the non-registration of a significant number of Nubian children at birth coupled with an unduly bureaucratic and complicated vetting process for Nubian youth to access Kenyan national identification status constituted violations of the African Children's Charter's obligations. Specifically, the non-registration and subsequent denial of services abrogated the affected children's right to a name and nationality (article 6)⁴⁸ and violated their right to be protected from discrimination (contrary to article 3).⁴⁹ The Children's Committee found that the affected Nubian children would effectively be left stateless or potentially stateless with the consequence that they had inadequate access to public services such as education and health care in violation of articles 12(2) and 11(3)

46 *LNW* case paras 80 & 81.

47 The African Committee of Experts on the Rights and Welfare of the Child *Decision on the Communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) against the Government of Kenya*, 22 March 2011, Communication Com/002/2009, <https://www.refworld.org/cases,ACERWC,4f5f04492.html> (accessed 20 September 2022). See also E Fokala & L Chenwi 'Stateless and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' (2014) 6 *African Journal of Legal Studies* 357; E Durojaye & EA Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) 2 *African Human Rights Law Journal* 564; E Fokala 'Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians' (2021) *De Jure* 476.

48 African Children's Committee (n 47) para 54.

49 African Children's Committee (n 47) para 57.

of the African Charter which provides for all children's rights to the highest attainable standard of health and education.⁵⁰

The African Children's Committee's decision and the High Court's *LNW* decision showcase how there is a need for further statutory reform and administrative and policy steps that Kenya should take in order to make it practical, especially for certain categories of children with regard to the right to a name and nationality.

6.2 Protection: The right to be protected from abuse and violence

Article 53(1)(d) of the Constitution provides for children's rights to be protected from abuse, neglect and harmful cultural practices. Building on this provision Kenyan courts have adopted a comprehensive interpretation of children's rights in a way that establishes these rights as part of the broader human rights scheme. The courts are also able, drawing from the elaborate inclusion of the nature and scope of children's rights, to flesh out the full spectrum of the obligations of duty bearers, particularly the state.

The case of *LJ & Another v Astarikoh Henry Amkoah*,⁵¹ decided by the High Court in 2015, sets a benchmark on the nature and scope of the state's obligation to protect children from abuse. This case involved the issue of sexual abuse of children, particularly girls, in Kenyan schools – a form of abuse that the Court considered a 'general serious problem'.⁵² The case was brought by and on behalf of two girls who sought civil remedies for alleged defilement and sexual assault perpetrated by a male teacher.⁵³

Exercising its jurisdiction to enforce the Bill of Rights, the High Court found that the teacher, the Teachers Service Commission (TSC) and the government jointly, directly and vicariously were legally responsible for failing to protect the girls from abuse. This finding was despite the judge's recognition that the TSC had already dismissed the teacher for his conduct following the TSC's internal disciplinary

50 African Children's Committee (n 47) paras 62-63.

51 Petition 331 of 2011 [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/109721/> (accessed 20 September 2022).

52 *LJ* (n 51) para 131, noting: 'It is its evidence that in the period 2009-2011 [the Teachers' Services Commission] has punished by way of dismissal and de-registration a total of 175 teachers, on account of sexual-related offences. Coupled with the statistics adduced by the interested parties and the Amicus ... [the] problem of defilement and sexual abuse of children generally is a serious problem, that needs to be addressed with all the tools and means that are in the 3rd and 4th respondents' control.'

53 *LJ* (n 51) para 111.

process. To the Court, protecting children from abuse went beyond individual accountability of abusive teachers. It established that the TSC enforcement procedure for abusive conduct prioritised teacher discipline at the expense of psychological, medical and other forms of support.⁵⁴ The state's constitutional obligation to uphold the rights of children to be protected from violence had to be viewed in a comprehensive fashion beyond disciplinary procedure.⁵⁵

The Court's overall finding of liability was premised on the inadequacy of the content and implementation of the relevant TSC circular and code of ethics that the TSC had put in place to address teacher misconduct. For example, the Court found that this code of ethics, which barred teacher-student contact outside school hours (which rule was routinely violated)⁵⁶ had not been adequately disseminated and was not properly understood by children.⁵⁷ Drawing from comparative decisions in other jurisdictions such as that of Zambia,⁵⁸ which had held the teachers' regulatory authority and the government responsible for individual teachers' conduct, the Court found that the TSC and the state were civilly liable for the teacher's conduct.⁵⁹ It ordered the state to pay the two petitioners monetary damages in the amount of KES 5 million (US \$50 000) and recommended the establishment of a zero-tolerance mechanism for sexual abuse in schools.⁶⁰

This case demonstrates how Kenyan judges have reinforced the interconnected nature of children's rights in the post-2010 period. Thus, in the Court's analysis, sexual assault suffered by the girls and the consequences of such violence constituted a violation of their constitutionally-guaranteed rights to dignity (article 28 of the Constitution); negatively impacted their right to education (article 43); and their right to health (article 43).⁶¹ However, it is also noticeable in this case that in its conclusion of findings the Court went with the petitioners' citation of a violation of general rights to health and education under article 43 and did not include a consideration of similar children-specific rights to education and

54 *LJ* (n 51) para 135.

55 *LJ* (n 51) para 111 and para 135, the judge stating: 'I did not hear the state or the TSC refer to any policy or process for ensuring counselling or other psychological support for victims of sexual violence. It appears that the state views its role as limited only to punishing offenders ...'

56 *LJ* (n 51) para 133.

57 *LJ* (n 51) para 134.

58 *LJ* (n 51) para 147, citing the case of *RMK v Edward Hakasenke & Others* 2006/HP/032, decided by the High Court in Zambia.

59 *LJ* (n 51) para 154.

60 *LJ* (n 51) paras 164-165.

61 *LJ* (n 51) paras 119-123.

protection from abuse under article 53.⁶² This approach of defaulting to the Constitution's general human rights, as opposed to child-specific rights, did not hamper the Court in providing bold remedial measures to the petitioners. However, by failing to enunciate the specific corresponding legal obligations in the Constitution's article 53 child-specific rights, the Court risks failing to unpack the normative obligations that define the specific and, in some cases, enhanced legal guarantees of children's rights under the Constitution.

6.3 Reinforcing children's rights to non-discrimination and their best interests in the context of parental care and responsibility

In keeping with the phrasing of CRC and the African Children's Charter,⁶³ both the Kenyan Constitution, the previous 2001 and current Children's Act, 2022 have legislated for the primacy of the child's best interests.⁶⁴ Article 53(2) of the Constitution provides that a 'child's best interests are of paramount importance in every matter concerning the child'. Section 8(1)(a) of the Children's Act, 2022 also provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

Thus far in the post-2010 period, Kenyan courts have invoked the best interests principle mostly in disputes in the realm of parental care and obligations. The first in a line of cases is an illustrative 2013 case, *ZAK & Another v MA and the Attorney General (ZAK case)*.⁶⁵ The petition was brought by the petitioner, a man known in the case by the abbreviation ZAK, who sought to assert parental responsibility for his two biological children. He sought to refute such responsibility for two other children who had been born before his cohabitation with the mother of the children, from whom he was separated at the time the case was heard. He made the argument that section 24(3) of the

62 *IJ* (n 51) para 158. This is more surprising considering how the Court initially notes in paras 115-116 how the rights of children are not to be subjected to any form of sexual or physical violence, and their rights to education, non-discrimination and dignity that were provided for in the then Children's Act, 2001, art 53 of the Constitution and art 19 of CRC were relevant to the case.

63 Art 4(1) of the African Children's Charter provides: 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.' Art 3(1) of CRC is similar albeit requiring the child's best interests to be made 'a' rather than 'the' primary consideration.

64 Sec 8(1) Children's Act, 2022. The new Act includes a First Schedule list of factors to be considered in adjudging children's best interests.

65 [2013] *eKLR*, <http://kenyalaw.org/caselaw/cases/view/89114/> (accessed 21 September 2022).

then Children's Act, 2001 and section 25 of that Act, by which a father of a child born outside a marriage could either acquire or be implied to have acquired parental responsibility,⁶⁶ were unconstitutional. The petitioner further argued that these provisions of the Children's Act, 2001 were discriminatory to fathers in his situation in view of article 27 (the equality clause) of the Constitution, which provides in part that '[e]very person is equal before the law and has the right to equal protection and equal benefit of the law'. In dealing with the matter, the Court first unequivocally stated that, while the petition had been brought by the father of the children seeking to assert his rights, the determination of the case involved the welfare of the children.⁶⁷ Hence, the Court was to bear in mind the principle that the child's best interests are of paramount importance in every matter concerning the child.⁶⁸ Following an analysis primarily based on the clear language of the Constitution (article 53(1)(e)) providing for the right of all children to parental care as the duty of both parents, Ngugi J categorically stated:⁶⁹

The Children[s] Act [2001] must be read as imposing parental responsibility for children on both of their biological parents, whether they were married to each other or not at the time of the child's birth. The 2nd respondent [the Attorney General] has the responsibility, which I note, from its written submissions in this matter, it is fully alive to, to present the necessary amendments to Section 24(3) and 25 for enactment by Parliament ... to ensure conformity with the Constitution.

The ZAK decision was subsequently affirmed by a line of decisions of the High Court. In a case decided in February 2019, *NSA & Another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & Another (NSA case)*⁷⁰ the High Court considered that the provisions of the Children's Act, 2001 and the Law of Succession Act,⁷¹ which gave a father the discretion to choose explicitly or impliedly (through care and maintenance) whether a child is to be considered his 'relative' for purposes of inheritance,⁷² contravened article 53(1)(e) of the Constitution which requires parents to provide for their children whether they are married or not.⁷³ Speaking to the

66 The mother of the children, the first respondent, argued that, because of their cohabitation and his provision of maintenance for the children for more than two years, the petitioner could be implied, under sec 25(2) of the Act, to have acquired parental responsibility for the two children born to another father.

67 ZAK case (n 65) para 19.

68 As above.

69 ZAK case (n 65) para 29.

70 [2019] eKLR, <http://kenyalaw.org/caselaw/cases/view/170405/> (accessed 1 October 2020).

71 Ch 160 Laws of Kenya.

72 Children's Act, 2001 sec 2(b); Law of Succession Act, secs 3(2) & 3(3).

73 NSA case (n 70) paras 44-45.

child rights ethos of the Constitution, the Court explicitly stated in this case:⁷⁴

Article 53(2) [of the Constitution] provides that a child's best interests are of paramount importance in every matter concerning the child. Article 53 is the reference point as far as the rights of children are concerned. It is the yardstick by which laws relating to children are to be measured. The plain meaning of the article is that fathers and mothers have equal responsibility to a child they bear, and this responsibility is not left to the volition of the man or woman. The bottom line is that both ... must take responsibility.

This legal position established by the Constitution and affirmed by courts shone a light on how an otherwise progressive children's rights statute (the Children's Act, 2001) was at odds with the guarantee of rights under the Constitution. Section 32(1) of the new Children's Act, 2022 has since removed this inconsistency by specifically making provision for children's rights to parental care regardless of the marital status of the parents or guardians.

6.4 Children's economic, social and cultural rights

For the first time in Kenya's legal and constitutional history, the 2010 Constitution in article 43 guarantees every person, including children, the rights to health, housing, food, water, social security and education. Articles 20, 21 and 24 of the Constitution lay down general principles that apply regarding the interpretation and limitation of rights. These include the principle that rights cannot be limited except by law and that such law must be reasonable and justifiable in an open and democratic society based on human dignity, equality, equity and freedom (article 24); that the state bears the burden to prove that it lacks resources to implement economic, social and cultural rights (article 20(5)); and the obligation to take legislative, policy and other measures to progressively realise economic, social and cultural rights (article 21(2)). Specifically, for children, article 53 further provides:

Every child has the right –

...

- (b) to free and compulsory basic education;
- (c) to basic nutrition, shelter and health care.

The Constitution does not explicitly extend the qualifications with regard to the progressive nature of the realisation of general economic, social and cultural rights (article 43) to these children's

⁷⁴ NSA case (n 70) para 45.

rights under article 53. It has been observed in previous academic literature discussing economic, social and cultural rights under the 2010 Constitution that this non-qualification implies that the children-specific economic, social and cultural rights, under article 53, are of an immediate nature.⁷⁵ However, the starting point for children's rights is the legal recognition of the primary responsibility of parents or guardians for the upbringing and development of their children.⁷⁶ The state's role as a provider of rights, in contrast to its role of ensuring that parents provide for children, is secondary to the primary obligation or parental responsibility of parents. The exception would be situations involving children without parental or guardian care. For this reason, the evolving Kenyan jurisprudence on children's economic, social and cultural rights is distinguishable from the adjudication of general economic, social and cultural rights under article 43 of the Constitution. In the determination of general economic, social and cultural rights issues, Kenyan courts have appeared to adopt a standard that probes whether the state has put in place 'reasonable measures' involving laws, policies and administrative measures to implement a given right.⁷⁷ This approach contrasts with a potential alternative approach that would seek to probe whether the state's approach ensures the enjoyment of the 'minimum core obligation' of these rights.⁷⁸ In light of the parental or guardian primary responsibility starting point discussed earlier in this paragraph, the adjudication of children's economic, social and cultural rights before Kenyan courts appears to follow neither the reasonableness standard nor the minimum core obligation consideration. In this regard, Kenyan judges have mostly looked to South Africa for comparison.

Kenya's context is analogous to South Africa's in the sense that the South African Constitution similarly provides for unqualified children's economic, social and cultural rights alongside general economic, social and cultural rights.⁷⁹ In interpreting this inclusion of

75 Odongo & Musila (n 4) 348.

76 Eg, art 18(1) of CRC provides: 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.' Art 19(1) of the African Children's Charter similarly provides that '[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents'.

77 See generally Odongo & Musila (n 4).

78 Odongo & Musila (n 4) 367.

79 Constitution of the Republic of South Africa, 1996, sec 28(1)(c) which states that '[e]very child has the right to basic nutrition, shelter, basic health care services and social services'.

economic, social and cultural rights as part of the child rights clause, the South African Constitutional Court has held:⁸⁰

Where children are being cared for by their parents and family, the state did not incur a primary obligation to provide shelter to parents and their children on demand. The obligation of the state to provide shelter directly was only triggered when children lacked family care because, for example, they were orphaned or abandoned.

Liebenberg and Sloth-Nielsen have argued that this stance has the effect of minimising the state's role in ensuring children's economic, social and cultural rights in family or parental contexts of indigence or poverty.⁸¹ The South African Constitutional Court has more recently appeared to depart from this reasoning. In a case involving an imminent threat of eviction of a public school from a private property, which would have meant that the affected children's rights to education would have been violated, the South African Constitutional Court seemed to change track towards a consideration of the state's primary role as provider for certain economic, social and cultural rights.⁸² The Court held that the South African Constitution's provision for the right to basic education (section 29(1)(a)) meant that this right was not limited in the manner of general economic, social and cultural rights in sections 26 and 27 of the South African Constitution. Therefore, the state education authorities were obliged to put in place immediate alternative arrangements which would mean that the children's education were not disrupted.

The Kenyan courts' jurisprudence on children's economic, social and cultural rights is still nascent. There have been no reported cases that adjudicate great depth questions of children's rights to basic nutrition and health care. However, there already is a line of cases that are illustrative of how Kenyan courts are interpreting aspects of children's rights to education and housing. A select few examples are addressed in the parts that follow.

80 S Liebenberg 'Direct protection of economic, social and cultural rights in South Africa' in Chirwa & Chenwi (n 4) 322, discussing the case of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

81 Liebenberg (n 80) citing J Sloth Nielsen 'The child's right to social services, the right to social security and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 *South African Journal on Human Rights* 210.

82 The case *Juma Masjid Primary School v Essay NO* (8) BCLR (CC), as discussed in Liebenberg (n 80) 323-324.

6.5.1 Right to basic education

The case of *Githunguri Residents Association v Cabinet Secretary Ministry of Education & Others (Githunguri case)*⁸³ revolved around the concern that many Kenyan family households have had with user and monetary costs at a time post-2003 when the government had put in place a policy of free primary education.⁸⁴ Apart from seeking to interpret article 53 of the Constitution on the right to basic education, the case sought clarity on the legal implications of sections 29(1) and (2)(b) of the Basic Education Act of 2013.⁸⁵ The Act was enacted to give effect to the right to basic education in the aftermath of the adoption of the Constitution. Sections 29(1) and (2) (b) of the Act prohibit public schools from imposing the payment of tuition fees for any pupils while allowing for other monetary levies and charges (other than tuition fees) but only with the approval of the Cabinet Secretary in consultation with the local County Education Board. Section 29(2) provides unequivocally that '[n]o child shall be refused to attend school because of failure to pay such charges'. In this case the Court found that the school district had unlawfully and irregularly imposed several monetary costs, charges and levies, including 'activity fees', which some parents and pupils were unable to pay. As a result, several students were not allowed to attend school. Citing international law obligations, including CRC and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and comparative case law from, among others, the South African and regional West African (ECOWAS) Court,⁸⁶ the High Court concluded that the imposition of these monetary fees, levies and costs were illegal. According to Lenaola J:⁸⁷

'Free' means 'free' and not subject to attendant costs in the name of activity fund, building fund, lunch and transport costs, etc. It is not surprising for example that in Githunguri Township Primary School these extra-curricular activity costs and specifically 'the lunch programme' was estimated in 2013 to cost Kshs12 million all to be paid by parents. How can that be the case when fees are not supposed to be paid but parents still labour to raise that kind of money?

83 Petition 464 of 2013 [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/109726/> (accessed 21 September 2022).

84 *Githunguri* (n 83) para 1.

85 Act 14 of 2013, Laws of Kenya.

86 *Githunguri case* (n 83) para 46, citing the ECOWAS case *SERAC v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/07/10, Judgment of 6 December 2010, for the legal assertion that 'a right to primary education is universal and not subject to any resource limitations'.

87 *Githunguri case* (n 83) para 57.

On the immediate nature of the legal obligation to guarantee the right to basic education, the Court added:⁸⁸

It is ... the conviction and strong view of this Court that the right to basic education is not to be progressively realised as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen the Constitution.

In contrast to the right to basic education which it considers to be immediate in line with the Constitution, the High Court has had occasion to interpret the obligation of the state to progressively realise the general right to education (article 43). In *MMM v Permanent Secretary, Ministry of Education & Others*,⁸⁹ the Court considered the issue of a parent's inability to pay school fees required at post-primary or secondary school. It held that the state was obliged to provide access to bursaries for qualifying indigent children and families. The Court also held that it was important for the government to demonstrate its commitment and 'actions taken towards the progressive realisation of the right to education in a holistic manner'.⁹⁰ The Court noted that while this was not the proper case for it to make a more detailed elaboration on the nature of the right to education under article 43(f) of the Constitution, the Court needed to bring certain issues to the attention of the state.⁹¹ These included its view that progressive realisation need not be contingent on increased resources to implement the right; policies must be designed and resources applied in a meaningful, practical and result-based formula rather than an approach based on political and other motivations; and that realising the right to education in Kenya will require an 'incremental approach' which must be within 'a structured and publicised framework'.⁹²

6.5.2 *Right to housing*

The High Court and the Court of Appeal have had occasion to adjudicate the content of the general right to housing under article 43 of the Constitution, particularly in the context of forced evictions of families and households. In fact, the right to housing has been the most litigated of all socio-economic rights under the 2010 Constitution.⁹³

88 *Githunguri case* (n 83) para 58.

89 Petition 133 of 2013 [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/91830/> (accessed 20 September 2022).

90 *MMM* (n 89) para 18.

91 As above.

92 *MMM* (n 89) para 20, citing the South African example of *Section 27 & 2 Others v Minister for Education Case 24565 of 2012*.

93 See *Odongo & Musila* (n 4) 350.

Thus far, litigation on housing has mainly been on the general right to housing (article 43) as opposed to the specific provision in article 53(1)(c) of the Constitution on children's rights to shelter. The case of *Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others*⁹⁴ is emblematic of the adjudication on the issue of forced evictions and its impact on children. This dispute concerned a public corporation's eviction of over 300 long-term tenant residents from blocks of houses that it had owned. The corporation provided tenants with a 90-day notice period to vacate the property to make way for a commercial development project. The respondents contended, among others, that this notice period was inadequate and that without further procedural safeguards the eviction would violate several of their rights, including their right to housing and the rights of children to a shelter and basic education.

The Court found a violation of the general right to housing under article 43 on the basis that the way in which some of the petitioners were eventually evicted from the property was 'reckless' and that the evictions did not follow the due minimum process safeguards required by the UN guidelines on evictions.⁹⁵ The Court held that even if the right to housing was subject to progressive realisation, the state must take incremental steps, including the adoption of laws and policies, towards such realisation.⁹⁶ The Court did not consider – and it is not clear why not – the fact that children's rights to a shelter under article 53(1)(c) were not framed as contingent on the state taking such incremental progressive steps. It noted, however, that children were among members of society that would be 'disproportionately' impacted by forced evictions, which may hinder the enjoyment of children's rights. The Court explained that forced evictions carried out in the middle of a school calendar hampered children's rights to education.⁹⁷

94 Constitutional Petition 65 of 2010 [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/90359/> (accessed 22 September 2022).

95 *Ayuma* (n 94) para 92. The Court arrived at this conclusion having adopted international and South African comparative case law in determining the content of the right to housing. The Court specifically adopted the due process safeguards in the 'UN Basic Principles and Guidelines on Development Based Evictions and Displacement, Annex 1 of the Special Rapporteur on adequate housing as a component of the right to adequate living', A/HRC/4/18, https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf (accessed 15 September 2020).

96 *Ayuma* (n 94) para 110.

97 According to Lenaola J, '[c]hildren are among the most vulnerable of the vulnerable members of the society alongside the elderly ... The petitioners aver that the eviction in this case took place in the middle of a school term. That would obviously affect the petitioners' children's right to education as the same would be disrupted unnecessarily ...' paras 104-105, citing the UN Committee on Economic, Social and Cultural Rights General Comment 7: Right to adequate

6.6 Children's rights in the justice system

The High Court has had occasion to give meaning to the provision in article 53(1)(f) of the Constitution, which provides that for children alleged to have, accused of or recognised as having committed a crime, detention, at any point of criminal justice process, should be used as a last resort, and when resorted to by law enforcement officials or the courts, be imposed for the shortest period possible. In *MWK and the CRADLE – Children's Foundation v The Attorney General & 4 Others*⁹⁸ a teenage girl sought judicial remedy partly alleging that the manner of her arrest by the police, for alleged public nuisance and the crime of possession of cannabis, did not consider the facts of her childhood and that the police had effectively resorted to her arrest and one-day detention in police custody, as a first, rather than last, resort. The Court premised its determination on several provisions of the Bill of Rights, including the rights to dignity, privacy and protection from cruel, inhuman and degrading treatment and the child rights-specific provisions of article 53(1)(f). It also emphasized the fact that the child's best interests were the key factor in adjudging the propriety of police conduct.⁹⁹ Of the specific ethos that guides the child rights-orientated nature of article 53(1), the Court explained:¹⁰⁰

The need for our society to be sensitive to a child's inherent vulnerability is behind the provisions of Article 53 of the Constitution ... The interests of children are multifarious. However, in the context of arrests of children, Article 53 seeks to insulate them from the trauma of an arrest by demanding in peremptory terms that, even when a child has to be arrested, his or her best interests must be accorded paramount importance ... All that the Constitution requires is that, unlike pre-2010, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them.

The Court concluded that the rights of the child, including the right not to be detained except as a last resort, had been violated

housing (art 11.1) forced evictions, adopted at the 6th session of the Committee, 13 December 1991, contained in document E/1992/23).

98 [2017] eKLR, <http://kenyalaw.org/caselaw/cases/view/145769/> (accessed 15 October 2020).

99 *MWK* (n 98) para 58: 'This Court is constitutionally obliged to consider the facts complained of in this case through the lens of Article 53(d), (f) and (2) of the Constitution to determine if the police officers considered the first Petitioners' best interests, and if they did, whether they accorded the best interests paramount importance.'

100 *MWK* (n 98) paras 67-69.

and awarded monetary damages of KES 4 000 000 (US \$40 000). This court decision aligns with the views of the UN Committee on the Rights of the Child. The CRC Committee has explained the import of articles 37(a) and 40(3)(b) of CRC considering restrictions on children's detention as a key core principle of the requisite comprehensive juvenile justice policy required as a legal obligation of state parties.¹⁰¹ In particular, the Committee has recommended that to ensure compliance with this principle at all stages of the justice process – pre, during and post-trial – states should consider programmes, processes and systems, including diversion and other measures that would ensure that children in conflict with the law are not primarily handled through a formal justice process of arrest and arraignment in a court of law.¹⁰² Prior to the newly-enacted Children's Act, 2022 there had been broad non-compliance with the Children's Act, 2001 with regard to the obligations related to the rights of children not to be detained except as a last resort and for the shortest period possible. Consistent with the Constitution's provisions that limit children's pre-trial detention, the recently-adopted Children's Act, 2022 reiterates that 'institutionalisation and detention of children in conflict with the law, pending trial, shall be used as a means of last resort'.¹⁰³ The new Act's introduction, for the first time in Kenyan law, of the option for diversion¹⁰⁴ – policies, procedures and programmes to channel children away from the formal justice system – is anchored in objectives of the Constitution as articulated in this High Court judgment. These include the goals of minimising stigma, the rehabilitation of the child offender as well as potential restitution for victims of crimes and the potential reconciliation between the parties.¹⁰⁵

Under the Children's Act, 2022,¹⁰⁶ CRC¹⁰⁷ and the African Children's Charter,¹⁰⁸ children alleged to have, accused of or recognised as having committed capital offences may not be subjected to the death penalty in Kenya. However, by virtue of the Penal Code¹⁰⁹ – Kenya's pre-independence 1930s-era primary code of criminal law – children who may otherwise be subjected to the death penalty would upon conviction be imprisoned on the 'President's pleasure',

101 See UN Committee on the Rights of the Child, General Comment 24: Children's Rights in Juvenile Justice – to replace General Comment 10 on Juvenile Justice (2007), CRC/C/GC/24, 18 September 2019 paras 13-19.

102 UN Committee on the Rights of the Child (n 101) paras 13-19 & 72.

103 Sec 223(1) Children's Act, 2022.

104 Secs 227-232 Children's Act, 2022.

105 Sec 226 Children's Act, 2022.

106 Section 238(2) which mirrors sec 191(2) of the repealed Children's Act, 2001.

107 Art 37(a).

108 Art 5(1).

109 Penal Code, ch 63 Laws of Kenya.

a principle drawn from Kenya's British colonial heritage under which the Penal Code was promulgated.¹¹⁰ In the 2015 case of *AOO & 6 Others v The Attorney General and the Office of the Director of Public Prosecutions*¹¹¹ the Court considered this provision unconstitutional, reasoning as follows:¹¹²

In addition to the 'so-called traditional approach' (the crime, the offender and the interests of society), child offenders should be sentenced with due regard to article 53(1) of the Constitution. In particular, every child has the right 'not to be detained except as a measure of last resort' and then 'the child may be detained only for the shortest appropriate period of time'... If detained, child offenders have the right to be kept separate from adult prisoners and to be treated and accommodated in 'conditions that take account of the child's age'. The international instruments that affect the sentencing of child offenders emphasise the reintegration of the child into society. The principle that imprisonment should be used as a last resort and then for the shortest period possible, are expressly included in the Constitution.

The Court ordered that the six children in this case, who had been convicted of capital offences and who were at risk of being in indefinite detention 'at the pleasure of the President', to be immediately released from custody. Since July 2022 the newly-enacted Children's Act, 2022 has codified this legal position providing that no court shall impose the death penalty on a child 'notwithstanding the nature of any offence'.¹¹³

7 Children's legal standing in litigation

In a radical departure from a pre-2010 restricted jurisprudential posture on standing, the Constitution has widely expanded the consideration of who has a right to sue or bring claims for judicial adjudication for alleged human rights violations. Articles 22 and 258 both confer legal standing not only on a person acting in their 'own interest' but also a person acting in the 'interest of a group or class of persons' or 'in the public interest'.¹¹⁴ The Children's Act, 2022

¹¹⁰ Penal Code, secs 25(2) & (3).

¹¹¹ [2017] eKLR, http://kenyalaw.org/caselaw/cases/view/135588/#_ftn2 (accessed 20 September 2022).

¹¹² AOO (n 111) 5.

¹¹³ Sec 238(2) Children's Act, 2022.

¹¹⁴ Art 22 provides: '1 Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. 2 In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members.' Art 258 is similarly worded in

unequivocally legislates for children's voice and agency by providing in section 8(3) that '[i]n any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity'.

In totality, these provisions make it clear that children have legal standing to adjudicate issues of rights violations bringing claims where their own interests may be affected or claims that adjudicate the interests of others – children and adults alike. In the words of a High Court judge, in Kenya's new constitutional dispensation 'a person who commences action to challenge an administrative decision or to enforce constitutional rights is not required to demonstrate by way of affidavits or other documentation that he is representing the public interest'.¹¹⁵

In practice, however, there are formidable obstacles to access justice before Kenyan courts. These include onerous court procedures and high legal costs which are unaffordable by many children and families in a country where most have no access to a dedicated public legal aid scheme.¹¹⁶ These make it difficult for children to bring cases, except with the intervention of adult parents and caregivers or non-governmental organisations (NGOs), acting in their or the public interest. Besides, despite the progressive and expansive legal framework in support of children's rights, paternalism remains a dominant theme in Kenya's legal tradition. This has the effect that the adjudication of children's rights before Kenyan courts by and large is exercised through the prism and perspective of adults in their capacity as parents or parties interested in a case, rather than in recognition of children's agency and capacity to act.

reference to 'the violation of the Constitution' in contrast to art 22's reference to the violation of rights.

115 *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited Ex parte Cradle – Children Foundation (suing through Geoffrey Maganya)* [2012] eKLR 4, <http://kenyalaw.org/caselaw/cases/view/118504/> (accessed 22 September 2022).

116 As of 2017 it was estimated that only 4% of Kenyans use courts as a mechanism for dispute resolution, with the rest (96%) relying on informal justice systems. See International Development Law Organisation (IDLO) 'Kenya: Justice sector reforms to enhance access to justice', IDLO quarterly report, January-March 2017, https://aidstream.org/files/documents/01_KEN---Justice-Sector-Reforms---The-Netherlands---Progress-Report-and-Summary-of-Results-2017-QTR-I-20170531020537.pdf (accessed 22 September 2022).

8 Conclusion

The Constitution of Kenya, 2010 provides an elevated legal recognition of children rights. The Constitution's framers recognised that previous laws, including the relatively progressive but now repealed Children's Act, 2001 contained inconsistencies and gray areas, for example, regarding the legal status of children born out of marriage. The recent enactment of the Children's Act, 2022 brings Kenyan statutory law in better conformity with both the Constitution and relevant international law. The Constitution's specific inclusion of rights and principles drawn from CRC has enabled Kenyan courts to be proactive in enforcing children's rights against the reality of existing legal frameworks, some of which are or were at odds with international law. In cases where existing statutes undercut children's rights, the Constitution's status as the supreme domestic law has provided judges with a legal basis for the invalidation of these laws.

The expansive and comprehensive nature of the Constitution's Bill of Rights has also enabled courts to consider the mutually-reinforcing and integrated nature of all rights in the Constitution, children's rights included. However, it is imperative that, given the Constitution's specific inclusion of a children's rights clause and child-specific rights, Kenyan courts must not fail to clarify the elevated nature of child-specific rights which the Constitution provides in addition to general human rights. This suggestion finds resonance in the relatively nascent adjudication of economic, social and cultural rights claims. Here Kenyan judges, relying on international and comparative law, have demonstrated an appreciation for the normative implications of children rights, but there is a need for courts to provide further judicial clarity and policy guidance on the nature and scope of economic, social and cultural rights.

In addition to the clarity on the nature and scope of rights, the 2010 Constitution empowers Kenyan courts with a wide range of remedies that they can impose when adjudicating rights claims. Thus, compared to the pre-2010 period, the courts are now more willing to embrace systematic remedial measures, such as judicial recommendations for the reform of the applicable legal framework and implementation of new policies that give effect to children's rights.