The Potential of Traditional Justice Systems in Enhancing Access to Child-Friendly Justice

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ABSTRACT

Although the constitution of Kenya 2010 and other international human rights instruments provide for the right of access to justice, the same remain unattained for the most part especially among vulnerable groups. Children represent one of the groups which experience the highest number of human rights violations. Despite legislative and other policy attempts to secure children's access to justice, many children do not report violations partly because their violators are usually their immediate guardians. The formal justice system fails to provide adequate safeguards to protect children from victimization should they report any violation by their guradians. Similarly, the formal justice system does provide sufficient redress for children in conflict with the law are also exposed to harsh penal systems that lack sufficient child sensitive procedures. Such systems increase their propensity to commit crimes in the future as opposed to the intended deterrent effect.

As one of the vulnerable groups in society, children encounter various hurdles in their quest to access justice within the formal justice system. In particular, many children: lack the requisite knowledge and resources to pursue a legal claim; lack legal capacity to initiate legal proceedings on their own; face financial constrints; suffer from language constraints; have to travel long distances to access formal justice institutions; fear ostracism by going to court; some find the formal justice system harsh and undesirable; do not see themselves victims; face heightened risk of stigmatization and retaliation; face the risk of institutionalization in the formal justice system; face pressure from failies to settle disputes out of court; and the fact that family support is essential to the successful participation of children in the justice system-all mean that the formal justice sytem is not well suited for processing disputes involving children thus hampering their access to justice.

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This state of affairs impels the need of exploring alternatice justice system that can potentially provide child friendly justice procedure. Traditional justice systems, which are recognized under article 159 of the constitution of 2010, are closer to people and do not have the stringent formalities that are found in the formal justice system and therefore, potentially provide a friendly avenue for children to access justice. Traditional justice system could cure these chllenges by resolving dipsutes in a relatively shorter time and diverting children away from the harsh formal justice system. These systems are also significantly cheaper, more accessible, and less complicated than the formal justice system.

In recognition of the need to embrace traditional justice systems in dispute resolution, the chief justice recently launched the Alternative justice systems Policy 2020 which , among other things, seeks to mainstream customary and traditional justice systems that have for long been at the periphery of the Kenyan justice system. This policy document will potentially ease access to justice by children since it will do away with the rigidities of formal justice processes that make it difficult to access child friendly justice and embrace the more flexible and friendly traditional justice system. The access to child friendly justice should afford all children, regardless of their socio-economic background or any other status, with sufficient avenues to obtain redress for any violations.

Against this backdrop, this paper argues that Traditional Justice Systems as provided for under article 159(c) of the Constitution and the Alternative Justice Systems Policy can potentially avail a child-friendly justice system thereby actualizing the right of access to justice enshrined under article 58 of the Constitution.

Keywords: Child-friendly Justice, Traditional Justice System and Access to Justice

INTRODUCTION

The promulgation of the Constitution of Kenya 2010 heralded hope to many Kenyans especially regarding their access to justice. The Constitution

mandates the State to ensure access to justice for everyone[1]. However, the same remains unattained for the most part, particularly among vulnerable groups. As one of the vulnerable groups in society, children encounter various hurdles in their quest to access justice within the formal justice system. In particular, many children: lack the requisite knowledge and resources to pursue a legal claim; lack legal capacity to initiate legal proceedings on their own; face financial constraints; have to travel long distances to access formal justice institution. They also fear ostracism by going to court; find the formal justice system harsh and undesirable; face a heightened risk of stigmatization and retaliation;[2] and face the risk of institutionalization in the formal justice system. These challenges point to the fact that the formal justice system, as currently framed, is not well suited for processing disputes involving children, thereby hampering their right to access justice.

To cure these challenges, there is need to explore alternative justice systems that can potentially provide child-friendly justice procedures. Traditional Justice Systems (TJS), recognized under article 159 of the Constitution of Kenya 2010, are people-centric. They are one such potential alternative justice system as they do not have the stringent formalities found in the formal justice system and, therefore, potentially provide a friendly avenue for children to access justice. TJS could cure these challenges by resolving disputes in a relatively shorter time and diverting children away from the harsh formal justice system. These systems are also significantly cheaper, more accessible, and less complicated than the formal justice system. Against this backdrop, this paper argues that TJS as provided for under article 159(c) of the Constitution and the Alternative Justice Systems Policy 2020 can potentially avail a child-friendly justice system thereby actualizing the right of access to justice for children as enshrined under article 48 of the Constitution.

Toward this end, this paper progresses as follows. After this introduction, part II explores the contours and architecture of a child-friendly justice system to demonstrate its core features. Part III draws from case law in expounding some of the gaps in the formal justice systems, particularly in sexual offences cases. Part IV makes the case for Traditional Justice Systems by exploring

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1 The Constitution of Kenya, 2010 Art 48.

2 Ton Liefaard, "Access to Justice for Children: Towards a Specific Research and Implementation Agenda" (2019) 27 The International Journal of Children's Rights 195.

their potential in resolving disputes. Part V highlights some of the challenges of TJS in ensuring access to justice for children. Part VI concludes.

Role and Features of Child-friendly Justice Systems

A child friendly justice system guarantees the effective implementation and respect for children's rights[3]. Such a system should deliver responsive, speedy, age-appropriate, accessible, modified, and diligent justice while respecting other fundamental human rights such as the rights to a fair hearing, privacy, and human dignity[4]. According to the Committee on the Rights of the Child, the main aim of child friendly justice systems is to create a system that respects and effectively implements children's rights after considering the child's maturity and understanding.[5] As such, a child-friendly justice system needs to be flexible enough to meet every child's specific, varied and intricate needs, but rigid enough to ensure the conviction of any persons that violate children rights.

A child-friendly justice system should provide sufficient age-appropriate information to the child regarding their trial or hearing processes[6]. This information should describe the purpose, scope and nature of each stage, including the length, location, reason for the proceedings, and the people that will be present in court. Access to relevant and reliable information will enable children to meaningfully participate in any judicial processes[7].

A child-friendly justice system should also take meaningful measures to protect a child from trauma or victimization associated with participation in a trial process. A child might find it hard to narrate any traumatic experience they had in the presence of an accused person or testify against a close family member who abused them. Such an experience may traumatize a child and

3 Aoife Daly and Stephanie Rap, "Children's Participation in the Justice System" [2018] International Human Rights of Children 299.

4 Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 2010.

5 General Comment No. 10 on Children's rights in juvenile justice (UN Committee on the Rights of the Child, 2007).

6 Stephanie Rap, "A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court" (2016) 24 The International Journal of Children's Rights 93.

7 Helen Stalford, Liam Cairns and Jeremy Marshall, "Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information" (2017) 5 Social Inclusion 207.

lead to juvenile delinquency[8]. Similarly, other children might ridicule a child in conflict with the law, causing the child to withdraw from society or experience Post Traumatic Stress Disorder (PTSD)[9]. To protect a child from such trauma, a justice system needs to, as much as possible, divert a child from the criminal justice system, ensure the child's mental health, and adopt different and creative methods of obtaining evidence from child witnesses, without necessarily having them appear before a court[10].

A child friendly justice system should also ensure swift resolution of any disputes involving a child, especially where the child is the complainant or key witness. Protracted trials that involve several court appearances detrimentally affect children's mental health and general wellbeing[11]. Children with prolonged contact with any trial report increased anxiety levels, which makes it difficult for them to give credible and accurate evidence[12]. Such anxiety and stress, if not properly managed, could persist after trial causing the child to develop mental issues such as depression and in extreme cases may result in suicide.

Kenya's formal justice system is riddled with delays, lengthy processes, rigidity, and insufficient victim protection[13]. As such, the Kenyan formal justice system has struggled to deliver child-friendly justice, necessitating the need for the adoption of an alternative justice system. The flexibility and leniency in TJS make the systems more appropriate in delivering child-friendly justice.

Challenges of the Formal Justice System

8 Julian D Ford and others, "Pathways from Traumatic Child Victimization to Delinquency: Implications for Juvenile and Permanency Court Proceedings and Decisions" (2006) 57 Juvenile and Family Court Journal 13.

9 Kristine Buffington, Carly B Dierkhising and Shawn C Marsh, "Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency" (2010) 61 Juvenile and Family Court Journal 13.

10 Barbara Ryan, Judge Cynthia Bashant and Deena Brooks, "Protecting and Supporting Children in the Child Welfare System and the Juvenile Court" (2006) 57 Juvenile and Family Court Journal 61.

11 Stephanie D Block and others, "Abused and Neglected Children in Court: Knowledge and Attitudes" (2010) 34 Child Abuse & Neglect 659.

12 Sarah Caprioli and David A Crenshaw, "The Culture of Silencing Child Victims of Sexual Abuse" (2016) 57 Journal of Humanistic Psychology 190.

13 Jürg Helbling, Walter Kälin and Prosper Nobirabo, "Access to Justice, Impunity and Legal Pluralism in Kenya" (2015) 47 The Journal of Legal Pluralism and Unofficial Law 347.

Sexual offence cases involving children are sensitive judicial matters adjudicated by courts of law. As such, judicial officers involved in delivering judgments in such matters ought to exercise diligence and caution to ensure they deliver child-friendly justice in the matter while respecting the child's right to a fair hearing. However, as will be discussed in detail in this paper, precedents from our courts demonstrate the inability of the formal justice system to deliver child-friendly justice in sexual offences cases. This is because of the high standard of proof usually required in criminal cases, the skewed interpretation of the law adopted by some judicial officers, the difficulty in adducing evidence that requires examination of children, and the laxity and lack of diligence in the prosecutor's office in obtaining sufficient evidence to secure convictions.

In *Martin Charo v Republic*[14]*,* the accused, a 24 year old man, was accused of defiling a 13 year old girl. The minor in the case voluntarily went to the house of the accused to engage in sexual activity. After returning home, her parents took her to the police station to record the incident and then to the hospital. The accused was convicted in the trial court of defiling the minor. He appealed to the High Court on grounds that; a crucial witness did not testify in the case, the case was not proved beyond reasonable doubt, the sentence meted against him was excessive and that the P3 form was irregularly produced. The High Court judge acquitted the accused, and held that since the complainant testified that she went to the appellant's home to have sex willingly, under no circumstances could the complainant be said to have been a victim of defilement. The judge at page 3 and 4 commented that even if the appellant did not adduce evidence as to the steps he took to ascertain the age of the complainant, the complainant behaved like an adult, and the accused ought not to be condemned for the voluntary acts of the complainant when the complainant was enjoying the relationship.

The learned judge erred in treating the defilement case as a rape case. This is with regard to the consensual element of the crimes. In rape, consent is considered a valid defense. However, in defilement where consent or the lack of it is not a requirement for the offence, it is difficult to understand the judge's reasoning given that in any case, the law regards minors as lacking the capacity to consent to any sexual transaction[15].

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14 [2016] eKLR.

15 Luis Franceschi, 'On Rape and Defilement, The Law Falls Short' Daily Nation (Kenya, 13 May 2016) <

In *Dominic Kibet Mwareng v Republic*[16]*,* the accused was charged with defiling an 11 year old girl. The complainant admitted to having engaged in sexual activity with the accused in two separate instances before the third instance, which was in issue. The complainant alleges that in the third instance, the accused followed her and took her to a maize field where he defiled her. The accused however contested the conviction on the grounds that the actual age of the complainant had not been proven and further that the P3 form produced did not support the evidence of the offence he was charged with. The P3 form produced was filled 4 days after the incident and showed no evidence of tear and showed old penetration. The court held that the exact age of the minor had not been proven, the burden of proof which lay on the prosecution had not been discharged and further that the P3 form produced was irreconcilable with the alleged penetration and therefore acquitted the accused. The learned judge held this in contravention of the already established rule that the exact age of a minor does not need to be proven in cases of defilement provided the minor is proven to be under 18 years of age save for in determination of the period of sentencing[17].

In *Daniel Ombasa Omwoyo v Republic*[18]*,* the accused was, in the trial court, charged with the offence of defiling a 9 year old girl. The trial magistrate however substituted the offence with that of attempted defilement and convicted him.[19] On appeal, the accused argued that all the components of the offence had not been proven beyond reasonable doubt and in particular, the proof of attempted defilement. The complainant, in her testimony, claimed that the accused locked her in his shop and started removing her clothes, at which point she started screaming and members of the public came to her rescue[20]. She claimed to have never slept with a man and she does not know how the same feels like[21]. A P3 form was however produced that indicated that the girl had been defiled[22]. Nevertheless, the judge acquitted the appellant[23]. This acquittal is a typical case of miscarriage of justice for the minor. In this case, the minor did not clearly know what it meant to engage in

https://www.nation.co.ke/oped/blogs/dot9/franceschi/2274464-3201580-9cs6ee/index.html> accessed 17th January 2018.

16 [2013] eKLR.

17 This was so held in the case of *Tumaini Maasai Mwanga v R. Mombasa CRA. No.364 of 2010.*

18 [2016] eKLR

19 Ibid para 11.

20 Ibid para 17.

21 Ibid para 36.

22 Ibid para 37.

23 Ibid para 44.

sexual activity or how the same would feel like and she therefore could not testify of what the man did to her, which could have been proven by the P3 form that indicated defilement. The girl was however granted no redress and the accused acquitted.

In *David Ochieng Aketch v Republic*[24]*,* the accused was charged with the offences of attempting to defile a minor and an alternative charge of committing an indecent act with a child. The accused was the complainant's barber and he was alleged to have called her to his shop while the complainant was headed for school and attempted to defile her. The complainant was traumatized and was recorded to have even wailed while in court. The P3 form did not show any defilement but rather indicated tenderness in her genital organs but no bruises were recorded. In his defense, the accused chose to keep silent. The trial magistrate convicted the accused based on the evidence of the complainant and claimed it needed no corroboration and she was satisfied the complainant was telling the truth. On appeal however, the judge held that mere tenderness of genital organs was not a sufficient ground for convicting the accused as the tenderness could have been caused by any factor[25]. He further held that there were inconsistencies in the prosecutions' case for which he could not safely convict the accused and therefore acquitted the accused[26]. The judge erred in failing to consider that the elements of the offence of attempted defilement that ought to be proven are age of the minor, a positive identification of the accused and an account of a series of events which if uninterrupted would have resulted in defilement[27]. All the elements in the case were proven and further the tenderness in her genital organs supported the same but the judge held that the tenderness in her genital organs could be caused by a myriad of factors and for that reason acquitted the accused.

In *Omus Kiringi Chivatsi v Republic*[28]*,* the accused was charged with defiling a 16 year old girl. It was alleged that the complainant befriended the accused and they had sex. She testified that she would visit the accused after school and whenever she visited, they would engage in coitus. As a result of the sexual activity, the minor got pregnant. On learning of the pregnancy, the complainants' mother forgave the accused but the chief insisted that the

[24] [2015] eKLR
[25] Ibid para 24.
[26] Ibid para 16.
[27] The Penal Code CAP 63, s 388 defines attempt to commit offences.
[28] [2017] eKLR

accused be arrested and tried for defiling the minor[29]. The accused was found guilty of defiling the minor at the trial court and sentenced to 15 years imprisonment[30]. He appealed on the grounds that the complainant was not a reliable witness, the prosecution did not prove its case beyond reasonable doubt and further that the complainants' age had not been proven. The prosecution claimed that the complainant told the court that she was 16 years old and further her mother corroborated her evidence by claiming she was 16 years of age[31]. The judge however acquitted the accused on grounds that the age of the complainant had not been proven and further the conduct of the complainant in willingly engaging in sexual activity with the accused meant that she was enjoying the relationship until she got pregnant. He held that there was no evidence that the accused had deceived the complainant to have sex with her and the accused should not spend 15 years in prison for the consensual sexual activity he had with the minor[32].

The judge erred in failing to consider the mischief that was intended to be prevented in the enactment of the Sexual Offences Act which is that minors do not have the capacity to consent to sexual activity. The judge also erred in acquitting the accused on the ground that the complainants' age had not been proven. The judge could have ordered that more evidence be adduced to enable it assess the exact age of the minor and furthermore, the exact age of the complainant is especially relevant in sentencing, as was held in *Lameck Okeyo Onyango v Republic* [2014] eKLR. When proving the offence of defilement, the court only needs to satisfy itself that the complainant is under 18 years of age, which had already been proven. The prosecution should also have been proactive enough to ensure that their evidence proved their case beyond reasonable doubt but instead failed in tendering sufficient evidence to prove the age of the complainant.

In *Michael Lokomar v Republic*[33]*,* the accused was charged with attempting to defile a 7 year old girl. It was alleged that he went to the complainants' home, spread a mat and asked the complainant to sleep on it. He then removed both their clothes and is alleged to have placed his penis between her thighs and anal region. The complainant then cried at which point her father is said to have come to her rescue. The complainant's father called the

29 ibid at page 2.
30 ibid at page 1.
31 ibid at page 2.
32 ibid at page 3.
33 [2017] eKLR

police and subsequently, the accused was arrested and charged with the offence of attempted defilement. The trial magistrate found him guilty and sentenced him to ten years' imprisonment. The accused appealed on grounds that the trial magistrate should have considered that he overstayed in police custody, that all the plaintiff witnesses were members of the same family and ought to have been treated as single evidence, that key witnesses were not called to testify such as the alleged neighbors, that there was no medical report produced and finally that there was no age assessment done on the minor to prove her alleged age[34]. The High Court judge acquitted the accused on grounds that the evidence of the vulnerable complainant, who gave her testimony through an intermediary, was not corroborated as it had some discrepancies compared to the testimony of all other witnesses who testified[35]. This case indicates a glaring gap in the law since the law provides that the evidence of a child victim of sexual abuse does not need any corroboration provided the court satisfies itself that the minor is telling the truth[36]. The same standards ought to be extended to a minor who is too vulnerable to testify on their own and testifies through an intermediary.

In *Alphonce Odhiambo Olwa v Republic,*[37] the accused was charged on the main count with the offence of defilement. He also faced an alternative charge of committing an indecent act with a child. It was alleged that he defiled his neighbour, a student aged 17 years, and further impregnated her. He was convicted but appealed on grounds that the particulars of the offence of defilement had not been sufficiently proved and therefore the case was not proven beyond reasonable doubt[38]. He claimed that the necessary ingredients of the offence that ought to be proven are: proof of penetration, positive identification of the alleged perpetrator and finally the age of the victim. The victim in her testimony claimed that she knew him and further that he defiled her[39]. The prosecution was tasked with producing DNA evidence to prove that the appellant was the father of the unborn child. The prosecution did not however avail such evidence and as a result, the judge held that the evidence of the victim could not be relied on entirely. He claimed the victim was not a credible witness and her evidence needed corroboration, which would only be done by the DNA test results.[40] Failure to avail such evidence

34 ibid at page 2.
35 ibid at page 4.
36 The Evidence Act CAP 80, s124.
37 [2017] eKLR
38 ibid para 3.
39 ibid para 13.
40 ibid para 20.

by the prosecution caused the appellant to be acquitted. This case demonstrates the systemic errors in the formal justice system and a lack of role fidelity among all stakeholders from the prosecution in carrying out effective investigations to the judges in applying the law without any regard to the best interest of a child.

In *John Kimani Njoroge v Republic*[41]*,* the accused was charged with the offence of committing an indecent act with a child. The particulars of the offence are that he was a librarian in a language centre where the complainant and other children attended classes. It is alleged that he intentionally and unlawfully held the waist of the 13 year old complainant and kissed her on the mouth. The child, being traumatized by the incident, ran to her mother holding her waist in utter confusion and explained the incident to her mother. The trial court convicted the accused of the offence and sentenced him to ten years' imprisonment. The High Court however overturned the judgement and held that the evidence adduced did not support the offence of an indecent act and therefore acquitted the accused[42].

According to section 2 of the Sexual Offences Act, an indecent act involves contact between any part of the body with the genital organs, breasts or buttocks of another[43]. Kissing a minor in the mouth does not therefore have any redress in law. This is despite the trauma that the incident may visit on a child. This indicates a gap in the law as the law does not appreciate the understanding of sex from a child's perspective. A child understands sex differently from an adult. Similarly, children in different ages appreciate and understand sex differently. For children, sex has a very narrow and confining definition[44]. Therefore, the law should strive and protect a child's innocence by protecting her from what she, in her tender age, views as sexual violence. The law ought to incorporate and appreciate the views of those it is intended to protect.

Undoubtedly, despite having elaborate laws that provide for the protection of children from sexual abuse and other related offences, systemic issues, a narrow and skewed interpretation of the law, and the high standard of proof in criminal cases prevent the formal criminal justice system from delivering

41 [2018] eKLR
42 ibid at para 1.
43 The Sexual Offences Act NO. 3 of 2006, s2(1)
44 Richard Ives, Children's Sexual Rights - The Rights of Children edited by Bob Franklin (first published 1986, Basil Blackwell Ltd) 143, 152.

justice to child victims of sexual offences. This creates the need for having a more flexible legal system dealing with children matters. Due to their legitimacy, flexibility, and effectiveness, Traditional Justice Systems might offer better protection to child victims and children in conflict with the law.

Potential of Traditional Justice Systems in Child-friendly Justice

Traditional Justice Systems refer to informal justice systems that existed before colonialism. One of the core features of such systems which made them effective is their legitimacy[45]. These systems were developed by different communities to deal with their unique challenges. As such, people found it easier to comply with the laws since they responded to their inimitable needs[46]. However, after independence, the country gradually moved away from these systems in favour of the formal colonial laws inherited from the British. These inherited laws were developed for the Western countries and were only imported in the country to, among other functions, oppress and intimidate Africans[47]. Article 11 of the Constitution of Kenya 2010 attempts to redress this by promoting culture and such alternative justice systems[48]. The Alternative Justice Systems Policy, 2020 also advocates for the mainstreaming of traditional justice systems as a means of dispute resolution since it is more accessible and cost effective compared to formal justice systems[49].

According to the Office of the United Nations High Commissioner for Human Rights, the use of TJS in the resolution of disputes is more appropriate than

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45 Estelle Hurter, "Access to Justice: To Dream the Impossible Dream?" (2011) 44 The Comparative and International Law Journal of Southern Africa 408.

46 Francis Kariuki, "African Traditional Justice Systems" (2018) http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf accessed November 24, 2020.

47 Abra Lyman and Darren Kew, "An African Dilemma: Resolving Indigenous Conflicts in Kenya" (2010) 11 Georgetown Journal of International Affairs 37.

48 Article 11 of the Constitution of Kenya, 2010 recognizes the importance of culture and mandates the country to promote all forms of cultural expression. Article 159 allows the Judiciary to promote traditional justice systems (TJS) to enhance access to justice and reduce the delays in resolving disputes.

49 United Nations Office on Drugs and Crime, "Partners Welcome Move to Mainstream Alternative Justice Systems in Kenya" (*www.unodc.org*, 2020) https://www.unodc.org/easternafrica/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-kenya.html#:~:text=AJS%20may%20be%20defined%20as accessed November 24, 2020.

the formal system since they use familiar languages; and the informality and simplicity associated with TJS provides an avenue for healing from any abuse[50]. In Kenya, TJS worked immaculately in the past in protecting children from sexual abuse. An examination of TJS in the Gusii community reveals that Gusii elders imposed very hefty fines on any person who defiled a child or committed an indecent assault with a child. For instance, such a person would have to pay a fine equivalent to a six month salary and be shamed by the mature women in the community to deter other men from raping young girls.[51] In Limpopo, South Africa, the community observed that children feared the police and ran away whenever they saw a police officer. Such fear made it impossible for children to cooperate with police officers or other judicial officers since they believed that the police would arrest and torment them. The fear also made it difficult for them to report any offences to police officers[52]. However, adopting traditional justice increased the number of children who willingly cooperated in proceedings and complied with any directives issued by judicial officers.

Generally, many children who end up in borstal institutions or remand centers find it hard to reintegrate into society due to the labels placed on them and the perceptions by other children[53]. Since the main focus of TJS is reconciliation and reparation, adopting the system could divert children in conflict with the law from the harsh penal system[54].

Challenges of Traditional Justice Systems in Child-friendly Justice

TJS has several challenges that may hamper access to child-friendly justice. For instance, some cultures advocate for harmful practices such as child

50 Office of the United Nations High Commissioner for Human Rights, "HUMAN RIGHTS AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA" (2016) https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf accessed November 24, 2020.

51 Brett L Shadle, "Rape in the Courts of Gusiiland, Kenya, 1940s-1960s" (2008) 51 African Studies Review 27.

52 Boyane Tshehla and Institute for Security Studies, *Traditional Justice in Practice : A Limpopo Case Study* (Institute for Security Studies 2005).

53 Carol A Hand, Judith Hankes and Toni House, "Restorative Justice: The Indigenous Justice System" (2012) 15 Contemporary Justice Review 449.

54 Felisa U Etemadi, "Community-Based Diversion for Children in Conflict with the Law: The Cebu City Experience" (2005) 15 Children, Youth and Environments.

marriages, female genital mutilation, and gender discrimination[55]. If the country adopts TJS in dispute resolution, it might promote such negative cultural practices that harm children. This challenge calls for the selective adoption of cultural practices where society only promotes the positive aspects and condemns any negative practices associated with culture. While selectively adopting the cultural practices might appear cumbersome, the country could develop a committee that will evaluate all the cultural practices in the different communities and identify the acceptable practices which can be adopted and promoted in dispute resolution.

Customary law is also diverse since every Kenyan community has different customs which influence their customary law. As such, it would be difficult to come up with a unified law or system against which elders can resolve disputes. However, despite the lack of unity, all customary practices have fundamental principles such as justice, retribution and ensuring peace. TJS can uphold and prioritize these principles in resolving all disputes[56].

CONCLUSION

Access to Justice remains an intractable problem in Kenya despite the right being enshrined in the Constitution and other statutes. However, challenges in Kenya's formal justice system make it difficult to provide access to child-friendly justice. As such, this paper has made the case for the adoption of traditional justice systems in delivering child-friendly justice owing to their flexibility, accessibility and reliability.

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55 Ann Njeri Joseph, Joshia Otieno Osamba and Josiah Kinyua Murage, "Role of Culture in Conflict Management- a Case of Tetu Sub-County, Kenya" (2019) 8 Journal of Arts & Humanities 68, 70.

56 Francis Kariuki, "African Traditional Justice Systems" (2018) http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf accessed November 24, 2020.