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The Politics of Defining a Child: Re-examining the Age of Criminal Responsibility, Minimum Age of Sexual Consent and Age of Admission to Employment in Kenya

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Abstract:

Kenya is a signatory to a number of regional and international conventions that provide an explicit definition of a child. At the domestic level, The Constitution of Kenya 2010 has provided an explicit definition of a child. It would therefore seem that, for Kenya, the real identity of a child is a forgone conclusion. However, through a critical examination of child rights themes of age of criminal responsibility, minimum age of sexual consent, and age of admission to employment, this analytical study concludes that the definition of a child in Kenya is still hazy, Constitutional stipulations notwithstanding. The study recommends that Kenya deliberately consolidate its legislative provisions on the definition of a child to address apparent gaps.

Keywords: Definition of a child, Child rights, age of criminal responsibility, minimum age of sexual consent, age of admission to employment

1. Introduction

If you were to undertake a random survey on the streets of Nairobi asking Kenyans what their understanding of the term child is, you would most likely find a near universal definition: That a child is anyone who has not attained the age of 18 years. This would be so because, from a non-analytical perspective, the definition of a child has never been contentious in Kenya; at least not from a purely theoretical orientation. For any discussion on children rights to make sense, the foundational definition of a child must not be under contention. In this paper, I argue that although the Constitution of Kenya, the Supreme law of the land, is explicit on the definition of the child, the turbulence of the 'real identity' of a child range on. Using contemporary discussions, recent case law, concluding observations by various treaty bodies and legislative provisions, I conclude that, the pull and push factors of defining a child must be urgently addressed, before they water down the gains Kenya has achieved on safeguarding and promoting the rights of children. Through a review of the age of criminal responsibility, minimum age of sexual consent and minimum age of admission to employment, I argue on the need to consider the definition of a child beyond constitutional stipulations.

2. Definition of a Child in Kenya: A Snapshot of the Constitution and Conventions

Article 2 of the Constitution of Kenya is categorical that, 'This Constitution is the supreme law of the Republic and binds all persons and all State organs. Under article 260, the Constitution defines a child as 'an individual who has not attained the age of 18 years.' Further, article 2 (6) stipulates that, 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya'. Kenya has ratified several treaties and conventions that provide concrete definitions of a child. They include the United Nations Convention on the Rights of the Child (UNCRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and the ILO Worst Forms of Child Labor Convention. Article 1 of the UNCRC, for example, defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. Article 2 of the ACRWC similarly defines a child as 'every human being below the age of 18 years'. The Worst Forms of Child Labor Convention, 1999 (No. 182) on the other hand defines children as 'all persons under the age of 18'.

Kenya is also signatory to a number of treaties and conventions that allow member states to determine country specific age brackets in the determination of childhood. The ILO Minimum Age Convention, 1973 (No.138), for example, requires all signatories to the Convention to fix a minimum age for admission to employment.

3. Legislative Provisions on the Definition of a Child

Legislative definitions of a child in Kenya have evolved over the years. The Children Act (No. 8 of 2001) is the primary legislative framework for safeguarding and promoting the rights of the child in the country. Section 2 of the Act defines a child as 'any human being under the age of eighteen years.' Instructively, the Children Act repealed the Children and Young Persons Act (Cap. 141), the Adoption Act (Cap. 143) and the Guardianship of Infants Act (Cap. 144) which had varying definitions of a child. In its concluding observations on Kenya's initial report under the ACRWC, the African

Committee of Experts on the Rights and Welfare of the Child (ACERWC) in 2009 noted conflicting conceptual definitions of a child in Kenyan legislations. While noting with approval that the Children Act 2001 incorporates a definition aligned to the Charter, the Committee contended that, 'In Kenya, multiple definitions of a child based on socio-cultural considerations do not allow for enhanced child protection' (Art.2). More than a decade later, these multiple definitions have not been addressed with regard to such domains as age of criminal responsibility and age of admission into employment. Voices advocating for lowering of the minimum age of sexual consent are getting louder each passing day.

3.1. Age of Criminal Responsibility in Kenya

Although article 40 (3) of UNCRC requires State parties to establish a Minimum Age of Criminal Responsibility (MACR), it does not mention a specific minimum age. However, in its General Comment No. 10 (2007) on Children's rights in juvenile justice, the Committee on the Rights of the Child 'urges States parties not to lower their MACR to the age of 12' (Par.33). Referencing the African Union Principles on the Rights to a Fair Trial and Legal Assistance in Africa, the General Comment No. 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child and systems strengthening for child protection emphasizes that MACR 'should not be lower than 12 years of age and States must endeavor to raise this progressively to at least 15 years of age'. (P.25)

In Kenya, Section 14(1) of the Penal Code (Cap 63) specifies that, 'A person under the age of eight years is not criminally responsible for any act or omission'. Section 14 (2) adds that, 'A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission, he had capacity to know that he ought not to do the act or make the omission'.

In its concluding observations, in November 2001, on Kenya's initial report under the UNCRC, the Committee on the Rights of the Child was 'concerned about the various legal minimum ages which are inconsistent, discriminatory and/or too low. In particular, the minimum age of eight years for criminal responsibility is too low' (Par.22). The Committee recommended that Kenya 'increase the legal age for criminal responsibility and for sexual consent' (Par.23). In its concluding observations to Kenya's initial report under the ACRWC, in November 2009, the ACERWC faulted section 14 of the Penal Code noting that, 'the issue is how to prove that an 8-year old child had the capacity to know that he was committing an act punished by the law' (Art.2). The Committee lamented that 'in that case, it should be acknowledged that the judge can only rely solely on his firm conviction to sentence that child, which shows there could be cases of abuse' (Art.2). The Committee concluded that it was 'imperative and urgent to raise the criminal liability age to 12 years' (Art.2).

In its concluding observations to Kenya's first periodic report in 2014 under the ACRWC, the ACERWC again regretted that the age of criminal responsibility remained 8 years. Noting that criminal prosecution of children at the age of 8 years vividly affects the wellbeing and development of children, the Committee called upon Kenya 'to adopt the draft Child Justice Bill of 2012 as soon as possible in order to raise the minimum age of criminal capacity to 12' (Par.13). The UN Committee on the Rights of the Child, in its concluding observations to Kenya's combined third, fourth and fifth periodic reports in 2016, again urged the country to 'raise the minimum age of criminal responsibility to an internationally acceptable level, and ensure that all children, by definition persons under 18 years of age, are protected by the juvenile justice system' (Par.76).

During Kenya's review under the Universal Periodic Review (UPR) process in January 2020, the country accepted a recommendation by the Czech Republic to 'raise the age of criminal responsibility' 'This was hardly new. During the January 2015 UPR process, the Czech Republic had a similar recommendation for Kenya to 'raise the age of criminal responsibility so that it complies with international standards as set out by the Convention on the Rights of the Child'. At the time, Kenya also accepted a recommendation by Serbia to 'conform the juvenile justice system to be in accordance with international standards so as to prevent children from being legally accountable in courts'.

This section has dwelt in detail the various recommendations by various treaty bodies regarding increasing the MACR in Kenya. It is almost two decades since the UN Committee on the Rights of the Child first gave its recommendation to this effect. Why is it such an important issue? What prejudices do children suffer when they are subjected to the juvenile justice system at an early age? Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly referred to as the Beijing Rules) recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity of the child. It compromises the general wellbeing and development of the child. Additionally, 'if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless'. It is thus greatly inconveniencing for the Kenyan child that the Constitution of Kenya 2010, hailed as highly progressive, would guarantee the principle of best interest of children while the national justice system, through the retrogressive provisions of the Penal Code, undermines the very principle.

3.2. Minimum Age of Sexual Consent in Kenya

International human rights conventions do not indicate what the Minimum Age of Sexual Consent (MASC) should be. However, the Committee on the Rights of the Child in its General Comment No. 20(2006) on the implementation of the rights of the child during adolescence advises that, 'States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent' and should 'avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity'.

MASC has had a mixed history in Kenya. As noted under the discussion on age of criminal responsibility above, in 2001 the UN Committee on the Rights of the Child was concerned about the MASC in Kenya. At the time, section 145(1) of

the Penal Code (now repealed) provided that: 'Any person who unlawfully and carnally knew any girl under the age of fourteen years was guilty of a felony and was liable to imprisonment with hard labor for 14 years together with corporal punishment'. Under the Criminal Law (Amendment) Act 2003 (No. 5 of 2003), which came into force on 25th July 2003, this section was amended to provide that, 'Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labor for life'. At the time, Kenya had different laws on marriage that allowed girls under the age of 16 years to get married. This made implementation of the MASC provisions difficult.

Today, Kenya has uniform MASC for all types of marriages. Section 4 of the Marriage Act (No. 4 of 2014) is explicit that 'a person shall not marry unless that person has attained the age of eighteen years. Instructively, the Act repealed the Marriage Act (Cap. 150), the African Christian Marriage and Divorce Act (Cap. 151), the Matrimonial Causes Act (Cap. 152), the Subordinate Court (Separation and Maintenance) Act (Cap. 153), the Mohammedan Marriage and Divorce Registration Act (Cap. 155), the Mohammedan Marriage Divorce and Succession Act (Cap. 156), the Hindu Marriage and Divorce Act (Cap. 157) that contemplated different ages of marriage under different marriage systems.

On sexual consent, the Sexual Offences Act (No. 3 of 2006) is categorical that a person 'Consents if he or she agrees by choice, and has the freedom and capacity to make that choice'. Under Section 43 of the Act, a child is adjudged incapable in law of appreciating the nature of a sexual act. In recent years, there has been renewed calls advocating for lowering the MASC in Kenya. A number of recent judicial pronouncements have served to prop up the thinking that 18 years may be too high for MASC. In a judgment dated 22nd March 2017, in the case of *Omus Kiringi Chivatsi V Republic (Criminal Appeal No. 32 of 2016)*, the High Court in Malindi acquitted a defilement suspect on the argument that alleged victim, a 16-year-old girl behaved like an adult and 'she enjoyed the relationship'. The Court was of the opinion that she 'engaged herself in sexual endeavors and was enjoying the exploration until when she became pregnant'. As such, the case presented 'a picture of someone who went to the appellant's house to have sex and then go back home', her age notwithstanding. Women's Link Worldwide ranked the judgement as the world's worst ruling for women rights in 2016.

The Court of Appeal adopted a similar line of thinking in the case of *Eliud Waweru Wambui V Republic (Criminal Appeal 102 of 2016)*. In a judgement delivered on 22nd March 2019 in Nairobi, a three-judge bench, while releasing a defilement suspect, argued for the review of the Sexual Offences Act noting that:

'Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years' (P.7).

Noting that 'many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years', the Court called for 'a candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality' (P.7)

On 25th January 2019, the High Court in the case of *SNN V Republic (Criminal Revision 104 of 2018)* proposed revisions to the Sexual Offences Act noting that:

'It is not in doubt that intentions of the Sexual Offences Act were great, to protect everyone from sexual violence and in particular the vulnerable members of society who include children. However, it appears to have been overlooked that children would involve themselves in various forms of sexual activity at different developmental stages and that there was need to provide for that' (P.3)

The Statute Law (Miscellaneous Amendment Bill) 2016 that proposed lowering of the MASC from 18 to 16 years did not sail through Parliament, partly due to oppositional advocacy from religious groups and a section of civil society. The discussion on lowering the MASC may have cooled off. It certainly has not died. With recent pronouncements, the judiciary is adding its voice to the debate. That voice will find anchorage in legislation one way or the other. Additionally, going by the previous recommendations to Kenya by both the UN Committee on the Rights of the Child and the ACERWC, they would regard this discussion as one without merit at best and redundant at worst. MASC must be looked at from multiple perspectives including education, health and wellbeing of the child. Reducing the debate to mere aspects of the criminal justice system, as some actors in Kenya have, is missing the whole point.

3.3. Age of Admission to Employment

Under the ILO Minimum Age Convention, 1973 (No.138) each member State is required to specify a minimum age for admission to employment or work within its territory. Generally, the specified minimum age, according to article 2 of the Convention 'shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years. Additionally, as per article 3 of the Convention, "The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years'. Kenya ratified the Convention in April 1979 and specified the minimum age of admission to employment as 16 years.

In Kenya, article 53 of the Constitution guarantees every child the right of protection from hazardous or exploitative labour. Section 56 of the Employment Act (No. 11 of 2007) legalizes the employment of a child between 13-16 years of age to perform light work. Such light work must not, inter alia, be 'likely to be harmful to the child's health or development', or to 'prejudice the child's attendance at school, his participation in vocational orientation or training programs approved by the Cabinet Secretary'. Section 56 of the Act is categorical that 'No person shall employ a child who has not attained the age of thirteen years whether gainfully or otherwise in any undertaking'.

In its 2001 concluding observations on Kenya's initial report under the CRC, the Committee on the Rights of the Child was 'Concerned about the large number of children engaged in labor and the lack of information and adequate data on the situation of child labor and economic exploitation' in Kenya. At the time the Committee was

concerned that 'notwithstanding various legal provisions there is no firm minimum age for admission to employment and that child labor is still prevalent' in the county. It urged Kenya 'to establish a clear legal minimum age for employment' (Par 60).

Additionally, in 2009, the ACERWC observed that although Kenya has adopted a law, which fixes the minimum age for admission to employment and stipulates that nobody can employ a person below 18 years of age, the country had not adopted stringent measures to combat underage employment. It noted, 'many children of 8 years of age work as domestic servants in families in order to survive' (Art. 15).

In its concluding observations on Kenya's combined 3rd to 5th periodic report under the CRC, the Committee on the Rights of the Child, in 2016, recommended that Kenya 'Harmonize all legislation on child labor with the Convention and with the ILO conventions that the State party has ratified' and 'Amend the Employment Act so that children participating in apprenticeships are prohibited from engaging in unsafe industrial undertakings' (Par.72)

It is noteworthy that basic education in Kenya is constitutionally free and compulsory. This, according to Section 30 of the Basic Education Act (No.14 of 2013) includes primary and secondary education. Additionally, Section 38(1) of the Act provides that 'No person shall employ a child of compulsory school age in any labor or occupation that prevents such child from attending school'.

It is in consideration of the diversity of legislative provisions regarding child labor that the ACERWC notes that Kenya lacks stringent measures for addressing child labor while the Committee on the Rights of the Child calls for harmonization. From the few legal stipulations above, it is clear that without harmonization, the legislative regime on Child labor in Kenya renders itself to abuse and, in the process, compromise the rights of children. Although the the National Policy on the Elimination of Child Labour (Sessional Paper No. 1 of 2015) was adopted in 2016 to promote synergies and mainstream child labour across Kenya, the legislative disharmony may turn out to be the Achilles' heel in its implementation.

4. Conclusion

For Kenya, the definition of a child should perhaps be the last thing one would want to critically examine. In addition to mainstreaming children rights, the Constitution of Kenya has specific articles on the definition, protection and promotion of diverse aspects of child rights. Additionally, several national legislations have extensively defined and addressed these rights. Kenya is also party to international and regional human rights conventions that further buttress children rights.

However, despite the Constitutional and legislative provisions, certain children rights have been or could be compromised because of the nuances of defining a child. In Kenya, increasing the minimum age of criminal responsibility has been a subject of conferences and boardroom arguments for over two decades now. It will never be known how many children have irredeemably suffered over that period of inaction. Children continue suffering the blunt of child labor in Kenya due to, among other factors, legislative disharmony. The ongoing debates, if successful in lowering the MASC, will be a great setback in the gains Kenya has made on children rights in general and girls' rights in particular. Sobriety must be the fulcrum around which Kenya must anchor its underlying debates on all aspects of defining a child.

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