

# **KENYAN LAWS PROVIDING FOR THE CHILD RIGHTS AND CHILD PROTECTION**

## **Children Rights in Kenya – The Constitution of Kenya**

This is the Supreme law of Kenya; any law that is inconsistent with Constitution is null and void.

Chapter Five (5) of the Constitution contains the Bill of Rights, which offers protection for the safeguards of the individual rights and freedoms for every Kenyan. These include the right to association, movement, secure protection of the law, religion and conscience, and the right to life.

The Constitution however does not have the rights of children expressly spelt out or guaranteed.

## **Children Rights in Kenya – The Penal Code (Cap.63 Laws of Kenya)**

The Penal Code defines the Penal system in Kenya. It outlines criminal offenses and prescribes penalties to them.

The Penal Code protects children, in that acts and omissions, which amount to child abuse, are classified as punishable offences.

These include:

**Sexual abuse:** Offences outlined in the Penal Code- Rape, Defilement, indecent assault, incest (both by males and females) and unnatural offences.

**Physical Abuse:** Offences include: common assault, assault occasioning actual bodily harm and grievous bodily harm.

Other offences that protect the lives of children include concealment of birth, killing of the unborn, procurement of an abortion etc.

## **Age of Criminal Responsibility**

The Penal Code also sets an age below which a child cannot be held to be criminally responsible even when they have committed a crime. This is known as the age of criminal responsibility.

The age of criminal responsibility in Kenya is eight (8) years. This means that if a child of less than eight years performs an act or omission, which by law is defined as a crime like stealing or killing a person, he or she cannot be held responsible for the crime.

Therefore, the child cannot be charged in a court of law for prosecution.

The Penal Code goes further to say that if the child is between the ages of eight (8) and twelve (12) years of age, and commits a criminal offence, then before prosecution, the court must

establish whether the child understood the consequences of his/her actions. If not, then the child will not be prosecuted, but if it comes out that the child understood, then he/she will be prosecuted.

Further, the same law tells us that male children under the age of twelve (12) years are incapable of committing an offence associated with carnal knowledge or sexual intercourse.

Therefore, criminal action cannot be taken against say an eleven-year-old boy who has committed the offence of rape or defilement, because the law sees him as incapable of committing such an offence.

### **Children Rights in Kenya – The Evidence Act (Cap 80, Laws of Kenya).**

Section 124 of the Evidence Act calls for the corroboration of the evidence of children of tender years.

The above section was however amended by the Criminal Law Amendment Act of 2003 which adds the following proviso:

“provided that where a criminal case involving a sexual offense the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

This means that in cases of child sexual abuse, where the child is the victim, corroboration of the child’s evidence is not a must.

Corroboration means independent evidence, which implicates the person, accused of a crime by connecting him with it. This means that evidence that confirms that the person charged committed the offence.

Children of tender years are children under the age of ten years as is defined in the Children’s act.

### **Children Rights in Kenya – Matrimonial Causes Act (Cap 152, Laws of Kenya)**

This Act consolidates all the laws relating to matrimonial cases. The Act is important as it protects children in case of the dissolution of a marriage by providing for maintenance and custody of children.

Only children who are born within lawful wedlock are provided for in this Act.

Subordinate Courts (Separation and Maintenance) Act

The Act provides for children in case of judicial separation of their parents.

A married woman can apply for maintenance and custody orders in a case where the husband has willfully neglected the children.

### **Children Rights in Kenya – Employment Act (Cap 226, Laws of Kenya)**

This Act outlines the laws governing employment and protecting employees in Kenya.

The Act protects all children under the age of 16 years from employment in industrial undertaking except for internship or training.

Further, the Act outlines Children's Employment Rules, which provide for Protection of children at work.

### **Childrens Act Kenya (Cap. 586, Laws of Kenya)**

Childrens Act Kenya – Children Rights in Kenya

This is an Act of Parliament that provides for the rights of children and seeks to enhance the welfare of children in Kenya.

#### **Childrens Act Kenya (CA) was enacted for the following main reasons:**

- To put together the provisions of the various laws that affected children;
- To give effect the provisions of the CRC and the African charter on the rights and welfare of the child.

### **Childrens Act Kenya**

Childrens Act Kenyat has XIII main parts with various provisions:

#### **CHILDRENS ACT KENYA – PART I: INTERPRETATION.**

This part gives the legal definition of various terms, phrases and sections in the CA.

#### **CHILDRENS ACT KENYA – PART II: SAFEGUARDS FOR THE RIGHTS AND WELFARE OF CHILDREN**

The CA provides for the rights of all children as are provided for in the CRC and the African Charter. They are as follows:

**Inherent right to life.** The Government and the family have the responsibility of ensuring the survival and development of every child.

**Right to parental care**-Every child has the right to live with and be cared for by his/her parents.

**Right to Education-** Every child is entitled to free and compulsory primary education the provision of which shall be the responsibility of the Government and the parents.

**Right to religious education-** Every child has a right to religious education. Parents have the responsibility of providing children with appropriate guidance in religious education.

**Right to health care.** – Every child has a right to health and medical care of which parents and the Government shall have the responsibility of providing for.

**Protection from child labor and armed conflict.** – Every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Children should also not be recruited in armed conflict or take part in hostilities. Where armed conflict occurs, respect for and protection and care of children shall be maintained in accordance with the law.

**Right to Name and Nationality.** – Every child has a right to a name and nationality. Where a child is deprived of his identity, the Government shall provide appropriate assistance and protection with a view to establishing his or her identity.

**Right of Children with disabilities to be treated with dignity.** Every child with a disability has a right to be treated with dignity, and to be given appropriate medical treatment, special care and education.

**Protection from child abuse.** – Every child is entitled to protection from physical, psychological, sexual, neglect and any other form of exploitation including sale, trafficking or abduction by any person.

**Protection from harmful cultural rites.** – No child should be subjected to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.

**Protection from the sexual exploitation.** – All children shall be protected from sexual exploitation, prostitution, inducement or coercion to engage in any sexual activity and exposure to pornographic materials.

**Protection from drugs.** – Every child shall be protected from the use of all drugs and from being used in their production, trafficking or distribution.

**Leisure and recreation.** – A child has the right to leisure, play and to participate in cultural and artistic activities.

**Torture and deprivation of liberty.** – No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty.

**Right to privacy.** – Every child has a right to privacy subject to parental guidance.

## **UNDERLYING PRINCIPLES**

**These rights are to be practiced with the following principles:**

### **“Best interests Principle”**

In 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 children shall be a primary consideration.

### **“Non Discrimination”**

No child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, color, birth, social, political, economic or other status, race, disability, tribe residence or local connection.

### **“The Child’s Opinion”**

When working with children, it is always important to allow the child to air their views or opinions on an issue and also to ensure that the views or opinions are respected and given due weight.

### **“Maximum Survival and Development”**

All actions affecting children should be directed in ensuring that their lives are protected and that they develop in the best possible way.

## **CHILDRENS ACT KENYA – PART III: PARENTAL RESPONSIBILITY**

Parental responsibility refers to the duties, rights, powers responsibilities and authority, which by law a parent of a child has over the child and the child’s property in a manner consistent with the evolving capacities of the child.

### ***The duties include;***

*Maintenance of the child and provision of adequate diet, shelter, clothing, medical care, and education and guidance.*

## **CHILDRENS ACT KENYA – PART IV: ADMINISTRATION OF CHILDREN’S SERVICES.**

National council for the Administration of Children Services

The Children Act establishes the National Council for the Administration of children's Services, which shall have the following functions:

Exercise general supervision and control over planning, coordination of child rights and welfare activities;

To advise the Government on all aspects of child rights and welfare of children

The Act also stipulates the role and responsibilities of the Director of Children's Services and that of the Local Authorities in safeguarding and promoting the rights and welfare of children within its area of operation

### **CHILDRENS ACT KENYA – PART V: CHILDREN'S INSTITUTIONS.**

This part gives provisions, guidelines on and role of institutions that may be established; two by the Government and one by persons other than the Government.

1. Rehabilitation Schools
2. Children's Remand Home
3. Charitable Children's Institutions

### **CHILDRENS ACT KENYA – PART VI: CHILDREN'S COURT.**

Children's Courts are established to hear the following matters:

#### **Civil cases:**

These are cases concerning parental responsibility, Custody and maintenance, guardianship, children in need of care and protection and granting judicial orders for the protection of children.

#### **Criminal cases:**

The Court also hears cases of children who are in conflict with the law or child offenders except where a child is charged with murder or is jointly charged with an adult(s).

#### **Other offences:**

The Court also hears cases against people who have been cruel or neglectful of their children and any other offences outlined in the Act.

Children's Courts are presided over by Children's Magistrates appointed by the Chief Justice.

### **CHILDRENS ACT KENYA – PART VIII: CUSTODY AND MAINTENANCE**

#### **Custody**

This refers to the parental duties and responsibilities as relates to the actual possession of a child often given by a Court.

### **Who can be Given Custody?**

1. A parent of a child;
2. A guardian;

Any other person who applies for custody of the child but has had actual custody for three months before making the application and has the permission of the parent or guardian.

### **What factors are to be considered before making a custody order?**

#### **The wishes of the child;**

The wishes of the parents, guardians, foster parents or any other persons who have had custody of the child for the past three years;

- Cultural and religious background of the child;
- Best interests of the child.
- Maintenance

Maintenance refers to the supply of the necessities of life for a child. For children this includes adequate diet, shelter, health and medical services and education.

### **Who has the duty to maintain a child?**

- Parents of a child who were married to each other at the time of a child's birth;
- Parents of a child who were not married to each other at the time of a child's birth but have subsequently gotten married;
- If the parents are not married but the father has acquired parental responsibility;
- Joint custodians of a child;
- Joint Guardians of a child.

Any parent, guardian, custodian of a child may apply to the children's court for maintenance orders if they have an issue to do with maintenance.

The court may order a parent to provide for a child's upkeep but will take into consideration the financial means of those involved.

## **CHILDRENS ACT KENYA – PART IX: GUARDIANSHIP**

### **Who is a Guardian?**

A guardian is a person appointed to take care of a child alone or the child and his property after the death of a parent.

## **CHILDRENS ACT KENYA – PART X: JUDICIAL ORDERS FOR THE PROTECTION OF CHILDREN**

These are orders that the Court can grant for the protection of children and to ensure that their welfare is enhanced.

## **CHILDRENS ACT KENYA – PART XI: CHILDREN IN NEED OF CARE AND PROTECTION**

These are children who include;

- Orphaned or have been abandoned or are destitute;
  - Parents have been imprisoned;
  - Homeless or are beggars;
  - Prevented from receiving an education;
  - A female child subjected to FGM or early marriage or children exposed to harmful cultural practices;
  - A child exposed to domestic violence;
  - Who is pregnant;
1. Who is terminally ill or whose parents are terminally ill or who has a disability;
  2. Who have been sexually abused;
  3. Who are exposed to child labour, et al.

## **CHILDRENS ACT KENYA – PART XII: FOSTER CARE PLACEMENT**

Foster care placement means the placement of a child with a person who is not the child's parent, relative or guardian and who is willing to undertake the care and maintenance of that child.

A child can be taken to a foster parent through placement by the Director of Children's Services and the manager of a charitable institution or Rehabilitation School where the child has been placed through a care order.

### **Who May Foster Parent?**

- A married couple;
- A single woman aged above 25 years (but she may not foster a male child)
- A single man aged above 25 years (but he may not foster a female child)

## **CHILDRENS ACT KENYA – PART XIII: ADOPTION**

Adoption vests parental rights and duties relating to a child if the adopter or the person whom the adoption order has been granted.

The Act establishes an Adoption Committee to oversee adoption issues in the country.



## **CHILDRENS ACT KENYA – PART XIV: CHILD OFFENDERS.**

The Act outlines ways of dealing with children who are in conflict with the law