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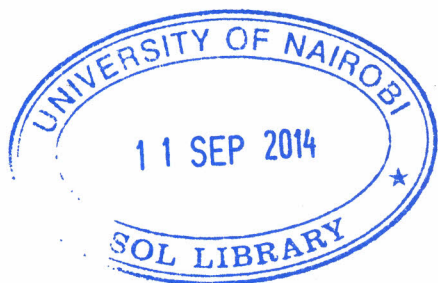
SCHOOL OF LAW

**ANALYSIS OF THE RIGHTS OF CHILDREN ACCOMPANYING THEIR
INCARCERATED MOTHERS IN KENYAN PRISONS**

BY

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**A research paper submitted in partial fulfillment of the requirement of the Degree of the
Master of Laws, University of Nairobi.**

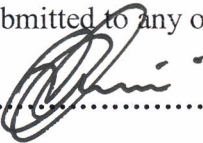
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DECLARATION

I, **Alice Wambui Macharia** do hereby declare that this Research Paper is my original work and it has not been submitted to any other institution.

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To all these great people above and to everyone else who encouraged me along the way in this academic sojourn, I say thank you very much. May the Lord extend your territory.

DEDICATION

This work is dedicated to my children Fridah, Janice and Steve and to their father John, my best friend and childhood soul mate without whose unfailing support this research project would not have been completed.

ABSTRACT

The motivation for doing the study stems from my interaction with incarcerated women with young children either born in prison or who accompanied their mothers into prison as the only suitable care giver. These children are denied several rights and privilege that children are normally entitled to.

The main aim of the study is therefore to analyse the rights of the children accompanying their incarcerated mothers in our Kenyan prisons.

To accomplish this goal, this study is divided into four Chapters. Chapter one is a broad overview and layout of the research. It looks at the statement of the research problem, theoretical framework within which the research is carried out and the research justification. It also covers the objective of the research, research questions, hypotheses, the methodology applied as well as the literature review.

Chapter 2 examines and provides an in depth understanding of international conventions and protocols touching on the rights of the children accompanying their incarcerated mothers in prison.

Chapter three undertakes a comprehensive coverage of the Kenyan situation on law, policy, and practices on the matters of the children accompanying the incarcerated mothers. The Chapter provides a birds' eye view of the law and exposes the reality on which the children in prison live in, hence making it easy to appreciate the need for the necessary measures to be taken and to recommend realistic changes. To this effect, an analysis of the provisions in the relevant acts will be undertaken, followed immediately thereafter with the findings from an institution entrusted with the implementation of the laws laid down in the Act.

Chapter four brings out the conclusion drawn from the study as well as the recommendations made in pursuit of efficient and effective rights of the children accompanying their incarcerated mothers in Kenyan prisons.

ACRONYMS

ACRWC	The Africa Charter on the Rights and Welfare of the Child
ADR	Alternative Dispute Resolution
AU	African Union
CNC	Council for Children
CNCC	Cambodian National Council for Children
CRC	Convention on the Rights of the Child
ESCR	Economic, Social, and Cultural Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
IHL	International Humanitarian Law
JDL's	Juveniles Deprived of their Liberty or Havana Rules
MOHA	Ministry of Home Affairs.
MOSALVY	The Ministry of Social Action, Labour, Veterans and Youth
NGO	Non Governmental Organization
QUNO	The Quaker United Nation's Office
UDHR	The Universal Declaration of Human Rights
UDHR	The Universal Declaration of Human Rights Cambodian National
UNCRC	United Nations Convention on the Rights of the Children

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CHAPTER ONE

“But for children of parents deprived of their liberty who accompany an imprisoned parent (mother) in custody, the change of residence results in more than a change of address.”¹

1.1 INTRODUCTION

In all systems there are laws of the community with different results when breached. These laws are broken by men and women alike, including pregnant women or those with young children.

Breach of these laws has many repercussions including the death penalty for most of the heinous crimes committed by human beings such as murder, treason and in the Islamic world, adultery. Non custodial sentences such as community service and probation sentences are usually for petty offenders.

In Kenya, the judiciary imposes fines in form of monetary compensations for acts of commission or omission by offenders, for instance in traffic offences. Further, custodial sentences in Kenya entail actual deprivation of personal liberty through imprisonment.

When confronted with deprivation of liberty, persons of all ages and sexes undoubtedly fear for the conditions in which the deprivation of liberty might take place. Of great concern also is the impact this may have on their lives, and on the lives of their family members. For young and dependent children, the deprivation of liberty of their main care-giver has adverse effects on their

¹Marlene Alejos, scholar, Geneva Switzerland, Babies and Small Children Residing in Prisons, Quaker United Nations Office, March 2005.<http://www'quon.org/geneva/pdf/humanrights/women-in-prison/200503>.

lives and on the enjoyment of their basic rights² as stipulated in the preamble of the main International Human Rights Conventions and the Convention on the Rights of the Child³.

In the absence of other or better options, mothers deprived of liberty very often prefer and choose to keep their babies and young children with them while in custody⁴. If possible, some mothers may also choose to have their small children spend their weekends in prison with them⁵.

Section 7 of the Children Act⁶ provides that a child shall be entitled to leisure, play and participation in cultural and artistic activities whereas section 8 goes on to state that no child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or, deprivation of liberty. Section 9 provides that every child shall have a right to health and medical care. This provision shall be the responsibility of the parents and the Government. Section 11 states that every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity for better development.

The children accompanying their incarcerated mothers are deprived of these rights which should be provided for⁷ and thereby curtailing their normal growth and development.

Deprivation of liberty remains a very difficult, controversial and sensitive subject since it involves many parameters which affect the physical, mental and social health of a detainee⁸. In my various visitations to women prisons and my interaction with this category of women, I established that imprisonment of women has an enormous impact upon children especially those

²It may directly and most likely negatively affect the child's survival, health, development and their psychological and emotional well-being.

³Adopted by the UN General Assembly on 20 November 1989.

⁴Magret Ngunjiri Deputy prisons commissioner and the in charge Langata Women Prison.

⁵It is an accepted but frequently controversial practice in many countries. In Canada, 'mothers can participate in the Mother-Child Programme and have their children living in the institution either on a full-time basis or on a part-time basis (weekends, holidays, school vacations)' See Directive 768- Institutional mother child programme issued by the commissioner of the correctional, Canada, 27th February 2003.

⁶Kenya Children Act. No.8 of 2001.

⁷Hon Beatrice Kones Assistant Minister, Ministry of Home Affairs on her address to inmates at Langata Women Prison, June 2011.

⁸Eleventh UN Congress on crime prevention and criminal justice, Charter for the human Rights of persons, deprived of their liberty," A State's criminal law policy on the one hand, and fundamental human rights obligations on the other", Bangkok, April 2005.

who accompany them in incarceration. In many countries, the vast majority of detained and imprisoned women are mothers with or without their children in prison and often, the sole and/or their main care giver⁹. The fact that not many fathers ask that their small children be allowed to remain with them while in custody, even for weekends, also reflects the reality that most frequently it is women who assume the role as primary care-giver for children.¹⁰

Far too little consideration has been given to the situation of these children. In particular, the adoption of the Convention on the Rights of the Child (CRC) has led to the re-evaluation of many aspects of children's lives from a child rights perspective.¹¹ This however has not yet extended to the cases of children living with the incarcerated parents.

This project is founded on the rights of children accompanying their mothers in prison, their developmental needs and rights as enshrined in various legislations. This is not a situation in which there are obvious right and wrong answers. Neither separating babies and young children from their mother nor keeping them in prison with their mother is desirable. The issues addressed hereunder are; what rights are these children entitled to under such situations? Are these rights provided for and to what extent?, how can these rights be best protected? The project seeks to determine whether imprisoning the children with their mothers is to their best interest, and whether once placed in custody, their rights such as right to basic food and nutrition, shelter, healthcare, to be protected from any inhuman treatment and punishment, right to play and parental care and protection among others are respected.¹²

This Chapter will look at the statement of the research problem, theoretical framework within which the research will be carried out, the research justification, objective of the research, research questions, hypotheses, the research methodology applied as well as literature review.

⁹ Marlene Alejos, *Babies and Small Children Residing in Prisons*, Quaker United Nations Office, March 2005

¹⁰ *Ibid.*

¹¹ CRC 19

¹² Article 53, Constitution of Kenya, 2010.

1.2 STATEMENT OF THE RESEARCH PROBLEM

For purposes of this study, the working definition of the child includes the one still developing in the womb of the pregnant woman on trial as well as those children aged below four years and still living in custody with their incarcerated mothers as provided for under section 30 of the Prisons Act¹³.

When pregnant women or mothers with young children are deprived of liberty, the situation becomes complex because the interests of the mother (as may those of the father, which are very rarely taken into account) and that of the child may diverge.

According to Mr. Isaiah Osugo, the currently serving commissioner of the prison, Kenya has witnessed an increase of women offenders in the criminal justice system and a rapid growth of the offenders who either are arrested when pregnant or end up giving birth after being sentenced or while still in remand homes. These parents remain the primary care givers even after being sentenced to serve time in the prisons.

A closer examination of the national legislation and policies by the researcher has exposed the reality that when the Kenyan Penal Institutions were being established, the Government had not envisioned incarceration of pregnant women, lactating mothers and women with young children.¹⁴ Despite the changing reality on the ground, the laws have not been amended and consequently, these children are a forgotten lot.¹⁵

It is therefore astonishing that despite the special situation of children of imprisoned mothers, their plight has not been addressed by the international community, nor has it been addressed by a special recommendation from one or any of the UN bodies or the National Legislation and Policies that seek to expressly address this issue.¹⁶ The vocal human rights bodies and NGOs¹⁷ involved in the examination of detention have also given this issue their back.

¹³The infant of a female prisoner may be received into the prison with its mother at the discretion of the officer in charge.

¹⁴ The first Women prison was established during the emergency period by the colonial government vide Gazette Notice No. 1132 of 1954.

¹⁵ The researcher has established that it is only section 30 of the prisons Act that makes specific reference to the children accompanying their incarcerated mothers in Kenyan Prison.

¹⁶ The Constitution of Kenya 2010, children Act, 2001 and Prisons Act Chapter 90.

¹⁷ The Centre for the Support of *Prisoners* (CSP)

It is sad to note that despite these Instruments and Legislations, Kenya (and many other countries) are yet to address this situation that has evolved with our criminal justice system. The prisons are charged with the responsibility of holding remanded and convicted criminal. These facilities are not mandated to hold these children. However the infant of a female prisoner may be received into the prison with its mother at the discretion of the officer in charge¹⁸. However, the Act does not provide for how the child shall be treated while in prison.

The lack of political good will by successive governments, to formulate policies that would culminate to adequate laws in addressing the problem of the children accompanying their mothers in prisons, indicates that the criminal justice system and the current legal and institutional framework have not had much input on how to deal with these children.

The gaps in legislation as well as weaknesses in the institutional structures have contributed greatly to the problems being experienced at the prison and in particular, the congestion and the subsequent breach of rights of these children. It is against this background that the researcher was compelled to conduct the research in this completely grey area in Kenya in an attempt bridge the gaping gaps.

1.3 RESEARCH JUSTIFICATION

This study is necessary because despite the various international and national legislations touching on protection of fundamental rights of the children,¹⁹ far too little consideration has been given to the cases of children living with the incarcerated parents. Despite the increase of women offenders in the criminal justice system, a closer examination of the national legislation and policies exposes glaring paucity in provisions touching on the rights of the children accompanying their incarcerated mothers in the Kenyan prisons²⁰. Indeed, it appears as though their very existence behind the bars is assumed across the board as they continue to suffer their mothers' conviction. These children like all children have rights that must be catered for

¹⁸ Section 30 of the Prisons Act, Cap 90

¹⁹ *Ibid* 14

²⁰ There is an increased number of children in prison, either as unborn (pregnant mothers) or infants born in prison or brought into prison. According to Research done by Faraja Trust In Langata Prison in February 2012 There were 370 babies in Kenyan prisons with Langata holding a total of 80.

irrespective of where they are living. The researcher established that in Kenya no research or study has been done to ascertain their needs and the level of complying with the rights of the children while in prison.

The Prison's Act which was last revised in 1977 only provides for situations when a child accompanying the incarcerated mother may be received into prison with its mother.²¹The Children Act²² makes it clear that every child shall have an inherent right to life and it shall be the responsibility of the government and the family to ensure the survival and development of the child. However, while providing for the rights of the children extensively²³, the Act does not narrow down to the protection of this category of children.

1.4 OBJECTIVES

The general objective of this research is to carry out an analysis of the existing regulatory framework, institutions, and laws both National and International in relation to children living with their mothers in the prisons. The specific objectives are:

- (a) To examine the existing laws, statutes, conventions and policies that protects the rights and the best interests of children living with their mothers in prison in the context of Kenya and recommend changes to cater for the children rights.
- (b) To assess the level of compliance by Kenyan prisons with international best practices in the context of living conditions of the children accompanying their mothers in prisons, with the aim of making recommendation on ways and means of improving the same to cater for these children.

1.5 RESEARCH QUESTIONS

The basic questions that this research seeks to answer are:

²¹ Section 30 (4) of the Prisons Act which provides that such a child may only be permitted to remain in prison until it attains the age of four years or until arrangements for its proper care are concluded, whichever shall be earlier.

²² Section 4

²³ Part II of the Children's Act, Safeguards for the rights and welfare of the child.

1. Do the existing national laws, statutes, national conventions and policies adequately provide for the protection of the rights and the best interests of Kenyan children living with their incarcerated mothers?
2. Are the current conditions in Kenyan prisons effective in the protection of the rights of the children accompanying their incarcerated mothers?

1.6 HYPOTHESES

1. The current Kenyan legal framework regulating prisons does not adequately provide for the regulation and protection of the rights of the children living with their incarcerated mothers in prisons.
2. The current conditions in Kenyan prisons are not adequate and effective in the protection of the rights of the children accompanying their incarcerated mothers.

1.7 THEORETICAL FRAMEWORK

This research is in pursuit of the developmental rights of the children accompanying their incarcerated mothers in prison, and it is therefore premised on Natural law theory. By virtue of being human, these children have natural rights which should be granted always and not denied by the government because their mothers are in prison. Under Natural law theory, Human beings have inalienable rights. In the words of Thomas Aquinas, natural law was that part of the eternal law of God which was knowable by human beings by means of their power of reason.²⁴ Applying this theory, human beings were created by God all equal. It is thus against the law of the creator to trample on the rights of the children accompanying their mothers in prison simply because they lack the ability to agitate for their rights.

²⁴ Michael D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, p. 97, (London, Sweet & Maxwell).2001.

The concept of 'natural rights' is drawn from Natural law theory. According to John Locke, human beings in the state of nature are free and equal, yet insecure in their freedom. He outlined that when they enter society, they surrender only such rights as are necessary for their security and for the common good. Each individual retains fundamental prerogatives drawn from natural law relating to the integrity of persons and property. These rights are called natural rights and they flow from natural law. As such, they are considered as non-derogable. These are stated to include; the right to life, the right to be free from slavery/servitude, the right to be free from torture and the right to be free from the retroactive application of penal laws. The children in prison with their mothers should also enjoy these inalienable rights based on the fact that they are human beings and as such, no one has the right to lay any limitations on them.

Holding the children accompanying their mothers in prison under similar conditions with the prisoners amounts to treating them like criminals. Applying John Locke's theory of inalienable rights, this goes against the very precepts of natural law jurisprudence as the children are forced to surrender their inalienable rights such as right to liberty and freedom of movement. Their development is compromised by the extreme congestion in the holding cells and they face the risk of death or the contraction of serious diseases such as TB from the prisoners therein.

Viewed from this perspective, section 30 of the Prisons Act allowing the children into prison may be viewed as an unjust law. According to Thomas Aquinas²⁵, any human law that ``*departs from the law of nature ... is no longer law*'' To Aquinas, a law only 'obliges in conscience' to the extent that it is in keeping with the natural law. An unjust law has more the character of violence than of law. Yet Aquinas does not draw from this the conclusion that an unjust law is not a law. Thus the fact that a law is unjust does not provide one with an absolute license to disobey it. He concluded that Law is a necessary institution, and just laws will reflect directly or indirectly the

²⁵ Pius XI, *Studiorum Ducem* 11 (29 June 1923), Aquinas (1225 –7 March 1274) was the foremost classical proponent of natural theology, and the father of Thomism. His influence on Western thought is considerable, and much of modern philosophy was conceived as a reaction against, or as an agreement with his ideas, particularly in the areas of ethics, natural law, metaphysics, and political theory.

universal morality of natural law. William Blackstone²⁶ echoes Aquinas, saying that human laws have no validity if they contradict this higher law of nature²⁷.

A natural law theory based approach to the study of the rights of these children integrates within it the norms, standards and principles of the international human rights system into legislation, policies, programs and processes. Important elements are the recognition that human beings as subjects are holders of rights, equality and equity, standard setting and accountability, empowerment and participation. The human rights based approach offers a theoretical framework that will give direction for the development of policies and offers a framework to monitor and evaluate any existing policies, practices and actions for their real and potential impact on developmental rights of the children accompanying their incarcerated mothers into Kenyan prisons.

1.8 SCOPE AND LIMITS OF THE STUDY

There is a paucity of literature and research work on children who stay in prison with their mothers. As such, there will be reliance on a few sources of literature for purposes of referencing. However, I will supplement these sources with field work in the form of interviews with senior Prison officials at the Ministry and Prison Headquarters, Thika Probation Department, Thika Children Services Department, the Judiciary and an NGO working with prisons on matters touching on children.

1.9 RESEARCH METHODOLOGY

Due to lack of documented literature in Kenya on this specific area, the researcher²⁸ will primarily rely on personal face to face interviews with officials from the departments of the

²⁶ Sir William Blackstone (10 July 1723 – 14 February 1780) was an English jurist, judge and Tory politician of the eighteenth century. He is most noted for writing the *Commentaries on the Laws of England*.

²⁷ Schauer, Frederick and Walter Sinnott-Armstrong, Ed. *The Philosophy of Law: Classic and Contemporary Readings with Commentary*. Harcourt Brace and Company, 1996.

Some children live in prison because that is where their mother, or occasionally their father, lives. Without parental care and protection outside the prison, the children join their parent inside prison. Countries have legislation or guidelines that provide for this, and those usually indicate a maximum age for the child. This can range from a few months to a number of years. In Australia, children are allowed to stay with their mothers until the age of twelve months. Just like Kenya, the age limit in Canada is four years while in France it is eighteen months. In Cambodia, there is a recommendation that infants should be brought away from their mothers on reaching the age of six months in order to separate them from their mothers. However, the stipulated age limit is six years.²⁹ Just like in Kenya, there appear to be no explanations why the specific ages are chosen by the different countries.

In one of the reports by the Quaker United Nations Office³⁰, many countries allow children to accompany their mothers into prison, though policies vary widely in upper age limits. Policies also vary in how the prison defines the arrangement — some maintain that living with children is a privilege, others that it's a right. How well the prisons accommodate the presence of innocent inmates also varies, from European countries taking great pains to make sure the children don't know they are in prison to children being warehoused in huge dormitories with their mothers and other inmates.

Everyone — staff and incarcerated alike — emphasizes the positive influence of the children on the mothers and the relative safety of these children surrounded by a “collective maternal instinct.” But for the reported, the most heartbreaking part of the law is not so much tots doing time behind bars but the fact that, at 6 years old, the children — who have been more dependent on their mothers than most children out in society might have been — are suddenly taken away from the one person they know best.

What's clear from the report (which chronicles lots of egregious abuse by fellow inmates and staff, institutional neglect and lack of government oversight for the children) is that many countries haven't figured out how to punish the mother, honor the importance of keeping babies

²⁹ Statistics compiled by International Centre for Prisons Studies/Kings College in London

³⁰ Quaker United Nations Office report, “Violence Against Babies and Small Children Living in Prison With their Mothers” September 10, 2008

or young children with their mothers and simultaneously not punish the child. “Whilst there is a wealth of international law and guidelines concerning imprisonment, there are almost no specific standards regarding the treatment of children in prison with their mothers,” the report concludes. “With few exceptions, states and the United Nations human rights mechanisms have given little consideration to the rights and needs of children in prison with their mothers.”

In some prisons such as the New Delhi prison in India,³¹ special provision is made for mothers with children. This may include a crèche/nursery for young children, and in one instance a school, inside the prison. However, other countries including Kenya make no such provision, and some do not even provide additional food to the mother, which means her food must be divided between her and her children. As stipulated later on in Chapter 3, in Kenya it is only in Langata prison where Faraja Trust NGO has partnered with the prison authority to emulate a practice almost similar to that in New Delhi.

Marlene Alejos, in her report ‘Prison’³² notes that a child who is with her mother in prison is necessarily separated from her father and other members of her family. Furthermore, her life inside the prison leaves her vulnerable to disease, malnutrition and possible abuse by other prisoners or the guards. While the decision ought to be made on the basis of the best interests of the child, often it is forced upon the mother and child because of circumstances outside their control.

An article in the second edition (OAS) 2008 [Sp] (En) presents the results of a study on the position of a child in prison, residing with their parent, providing answers to the question whether residence in a prison can be in the child’s best interest.³³ The paper focuses mainly on the situation of babies and small children accompanying their mothers in prisons, i.e. children that reside in prisons either for extended (more than one week) or short periods (such as days, weekends, vacation).

Everyone, staff and incarcerated alike emphasizes the positive influence of the children on the mothers and the relative safety of these children surrounded by a “collective maternal instinct.”

³¹ Lisa Ling Report, Ultimate explorer host, New Delhi, India, 2004.

³² *Ibid* 1

³³ The Rights of the Child in the Inter-America Human Rights System: second edition (OAS) 2008 [Sp] [En]

But for me, the most heartbreaking part of the law is not so much tots doing time behind bars but the fact that, at 6 years old, the children who have been more dependent on their mothers than most children out in society might have been are suddenly taken away from the one person they know best.

What's clear from the report (which chronicles lots of egregious abuse by fellow inmates and staff, institutional neglect and lack of government oversight for the children) is that many countries haven't figured out how to punish the mother, honor the importance of keeping babies or young children with their mothers and simultaneously not punish the child. "Whilst there is a wealth of international law and guidelines concerning imprisonment, there are almost no specific standards regarding the treatment of children in prison with their mothers. With few exceptions, states and the United Nations human rights mechanisms have given little consideration to the rights and needs of children in prison with their mothers."

In another report by Samuel C. Baxter and Stacey L. Palm³⁴ under a sub title **Lasting scars**, the reporters opine that since mandatory sentencing began in the mid-1980s, the United States prison system has seen a dramatic upswing in incarceration rates. This includes an increase in the number of women, who now constitute the fastest growing segment of the prison population. Between 1995 and 2006, the Correctional Association of New York reported that "the number of women inmates in state and federal prisons nationwide increased by 64 percent."

Many of these law-breaking females are not only offenders, they are mothers, and most often it is their children who pay the highest price for their incarceration. Unlike fathers, it is estimated that 70% of women prisoners are primary caregivers.

Although children of incarcerated mothers are still able to cope and overcome the challenges set before them, there is always some residual emotional damage. Most experts agree that crime, even when not perpetrated on or by children, can leave lasting scars on a child's life.

³⁴ Samuel C. Baxter and Stacey L. Palm, Another Crumbling Brick in the Family's Foundation September 10 2008.

www.womenandprison.org. Accessed 27.11.2012.

Of course, this is not the ideal way to rear a child and having a mother in prison is an extreme, but very real, example of the high hurdles faced by many families in this age.

What are the effects on the development of children whose mothers enter the prison system both now and long-term? How does a mother's role change after imprisonment and how does this event upset the balance of the family system? How could one hope to successfully rear a child in such a situation?

Under yet another sub title '**Silent victims**', the children are called "crime's invisible victims," whose mothers are sent to prison and can range anywhere in age, from several weeks to 18 years old. Even children as young as 14 months old may have vivid memories of visiting their mother in jail, or live out their childhood in the foster care system without their birth mother at all.

Unlike those who grow up in a traditional nuclear family setting, these children may have no fond memories of baking cookies with their mothers or taking family vacations with her. Instead, "quality time" is spent talking to their mothers through bulletproof glass or watching as guards lead her into a metal cell.

The following are excerpts from two letters written by children of incarcerated women detailing the effects of the situation in their own words.

- A 12-year-old boy described his feelings during his mother's prison term: "The worst part of my mom being gone was that I didn't have anybody to talk to who really knew me. I stayed with my grandmother. It was hard for her to understand what was happening with me.

"I did not get to visit my mom. Not having my mom in my life was very hard. I had no one to help me go through my problems. Me and my mom were very close before and now I had no one to talk to. I could talk to my grandma somewhat but not personally. My sister tried to help, but she missed our mother too."

"It made me feel pretty bad. I was mad at my mom for a while because I was afraid she would come out and then go right back again."

- Another child, whose mother was in prison for six months, wrote, “I got to visit my mom every week when she was gone to jail. My dad took us. It was hard because I wanted to touch her but she was on the other side of a glass wall. The visits weren’t too long, we only had a certain amount of time before they told us it was time to leave. When the visit was over, I wanted to stay with her for a long time. I thought about it all day. I didn’t cry but I felt really bad. It stayed with me for a while after I went.

“I didn’t tell my friends where my mom was, I told them she moved away. I could talk to my grandmother and my dad about it, but it was hard for them too. I missed my mom a lot, I missed watching movies with her, bike riding with her and I missed telling jokes.”

Children of incarcerated mothers grow up with the stigma of knowing that their mother’s “home” is a place that society considers disgraceful. And instead of feeling proud to have a positive example to emulate, the child feels ashamed and rejected, angry and confused alone in a world that has difficulty understanding their situation. Often, these children cannot understand why their mother would *want* to be away from them.

Similar to children of divorced parents, they often reason that it is somehow their fault she no longer wants to take care of them, even when told otherwise.

The effects on children of imprisoned mothers do not end even when their mothers are released. According to statistics, such children are *six times* more likely to end up in prison when one or both parents have been incarcerated. Thus, along with imprisoned mothers, children become figuratively “locked” behind the metal bars of the U.S. prison system, thrown into a cycle that is hard to stop—whose ripples extend far beyond just the crime committed.

At the University of Akron for Early Childhood Development³⁵, an assistant professor who runs a program through the local jail system that enables incarcerated mothers to interact with their children once a week, said, “...all children are at risk if a parent has been incarcerated.”

³⁵ Sabine Ferran Gerhardt, Assistant Professor, Early Childhood Development Program, University of Akron, 2008.

“These are not the environments that children usually witness their moms being a part of,” she said. “Mom usually isn’t hanging out with such a diverse group of people. Mom isn’t usually asking somebody’s permission to do certain things. Mom isn’t usually sharing a room, or even bunk beds, literally, with somebody she hasn’t normally done that with.”

Instead of preparing bag lunches, picking their child up after soccer practice, and being there to teach and guide their little boy or girl, mothers are removed for months, years or even decades missing out on their child’s developmental years altogether.

Ms. Gerhardt said one of the hardest things for children to see is the disempowerment of their mothers, who are no longer viewed as an authority figure in their child’s life. When parents are disempowered, she said, children lose the sense of authority that their parent once maintained and the ability to trust in them to take care of them.

“It ruins a child’s sense of well-being and security that their parents are not in charge,” she said.

That consistency, Ms. Gerhardt said, is vital to a child’s mental development.

“Children need to know what to expect,” she said. “They need boundaries. They need to know what’s coming, because in general they just don’t know what’s coming. As adults, we don’t tend to explain to them how things are going to happen or when they are going to happen...And so they are pretty much living their lives constantly on edge.”

This often carries into adulthood.

In prisons, Ms. Gerhardt said, there is a disconnect when children see their mothers because it is “public parenting.” Mothers are less likely to be open with their children, and sometimes cannot hug or hold them at all. This builds a sense of rejection in a child, who does not understand why he or she is being rejected. Often, she said, children who feel their world spinning out of control search for something they can control: drugs, alcohol and their eating patterns (which can lead to anorexia or bulimia).

Additionally, children of incarcerated parents are more likely to lash out at authority figures especially police in the future, whom they hold responsible for taking away their mothers.

Not surprisingly, Ms. Gerhardt said, this has caused the family system to careen toward disaster. Instead of the parent taking care of the child, the child now feels obligated to take care of the parent. Instead of worrying if the weather will be nice enough to play outside, children of incarcerated parents worry about what their mothers will eat and where they will sleep.

“The entire communication pattern between mother and child is upset,” she said, stating later, “When that relationship starts to get strained, the entire family crumbles.”

But are mothers and fathers at fault? Who is to blame for their inability to parent and be good examples for their children?

Although Ms. Gerhardt maintains that, while all parents have the capability to make mistakes, part of the problem is that most often the parents have not been properly instructed on how to care for children in advance.

“Parents are never trained to be parents,” she said. “They just fall into that role, sometimes by choice, sometimes by accident...Unlike any other job where we give you training, where we give you an apprenticeship essentially, where we have a monitor there to help you through it...we’re flying solo through that process.”

Often lacking in parenting is the principle of cause and effect. In fact, many go through their entire lives not realizing this law applies to every situation they experience. The decisions of parents (the causes) can greatly affect and shape their children’s future.

Parents who commit a crime cause a shockwave of effects. They are put in prison and parted from their children. Their families are torn apart, often making grandparents fill the role of mother and father. Children must deal with the emotional effects from their parent’s decisions, often falling into crime and into the same cycle as their parents.

When these children grow and have families of their own, what will be taught?

But the effects do not stop there. They surge outward, affecting neighborhoods, cities, societies and entire nations. With each family the building blocks of nations torn apart, the fabric of society continues to shred.

And with each decision of parents, good or bad, the one most affected is their children.

In an article entitled **Life of children in prison** by Joyce J. Wangui, an Africa News reporter in Nairobi, Kenya³⁶, the writer undertook a study of Langata Women's Prison, a maximum-security facility in Kenya's capital, Nairobi. She observed that the prison is home to around 700-1000 inmates. She states that at a visit to the nursery school³⁷, one would assume the toddlers lead normal lives. They play and run around freely, oblivious of the high concrete walls and iron gates of the prison.

These toddlers do not even know they are in prison, the only place they call home. They are in prison for committing one crime:-being born to women who broke the law and were jailed. In this prison, there are more than 50 children under the age of four living inside the prison with their mothers, who are serving sentences for crimes ranging from homicide, theft, kidnapping to drug trafficking. These are Kenyan's youngest inmates, who are innocently keeping their mothers' company as they serve their jail terms.

She further observed that from the onset, these children look jovial as they wander around the kindergarten playground, doing all sorts of child games. Those who are still too young to walk are carried by their mothers, who play with them on the ground or at swings. One would mistake this playground for a children's park; the only difference is that their guardians are dressed in prison uniforms. Unlike other children in normal upbringing, the scenario here is different.

The children are accustomed to the same buildings, same people each day. They have no access to the outside world and are deprived of the 'fun' enjoyed by other kids. They cannot visit parks, show grounds, swimming pools or picnic sites. They cannot go on holidays in exciting destinations. The only place they call home is characterized by dark, cold cells and corridors that are often overcrowded, making the place stuffy and dump. And despite the prison's rehabilitation from its previous dilapidated status to a much cleaner and presentable facility, the researcher opines that it is still a far cry for a child's upbringing.

³⁶ <http://www.voiceofafricaradio.com/news/986-kenya-life-of-children-in-prison.html> accessed 27.9.2012

³⁷ Africa News reporter in Nairobi, Kenya.google search, accessed 12.05.2012

However, the researcher makes no recommendations on how to enhance the children's rights through formulation of laws, policies or practices in order to alleviate their suffering. This research purposes to bridge this glaring void in pursuit of the best interest of the child.

CHAPTER TWO

2.0 INTERNATIONAL CONVENTIONS, PROTOCOLS, POLICIES AND LEGISLATIONS ON THE RIGHTS OF CHILDREN; A COMPARATIVE ANALYSIS.

2.1 INTRODUCTION

Article 2(5) of the Kenyan Constitution states that the general rules of International Laws shall form part of Law of Kenya. Article 2(6) further provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution. This Chapter will therefore examine the various International and Regional Conventions, Protocols and Legislations relevant to the study. The review will enables insightful understanding of the area of study and hence the ability to internalize the rights of the children accompanying their incarcerated mothers in prisons, with a view of coming up with adequate solutions, recommendations and practical solutions to this underlying problem. At the end of the chapter, a comparative analysis of the practices in a few selected countries will be undertaken.

2.2 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR) (1948)

The UDHR provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.³⁸ Everyone has a right to life, liberty and security of person.³⁹ Further, all are equal before the law and are entitled without any discrimination to equal protection of the law. All are

³⁸ Article 1

³⁹ Article 3.

entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.⁴⁰

It is important to note that despite giving broad protection to humanity's fundamental rights it does not specifically address the rights of the children accompanying their mothers in the prison.

2.3 INTERNATIONAL HUMANITARIAN LAW (IHL)

In situations of international or non-international armed conflict, persons affected by conflict, in addition to being protected by national laws, are protected by international humanitarian law (IHL). Human rights law and refugee law, applicable also in situations of armed conflict, provide complementary protection. The main instruments of international humanitarian law are the four Geneva Conventions of 1949⁴¹ (applicable in international conflicts) and their two Additional Protocols of 1977⁴² (AP I is applicable in international conflicts, and AP II in non-international conflicts). The 1949 Geneva Conventions and Additional Protocols I and II, which are binding on both States and armed opposition groups, establish the principles for the protection of all those not taking part in hostilities.⁴³

IHL instruments contain detailed rules concerning the treatment of persons deprived of their liberty and also specific provisions on the treatment of women in detention. My view is that whenever there are women of child bearing age in any prison, there is a likelihood of presence of babies in their midst, whether born or unborn. The rights of these children ought to be respected and protected from any form of abuse.

Women who are deprived of their liberty for reasons related to the conflict are entitled to the same general protection as men without any discrimination, but also benefit from additional protection, taking into account their specific medical and physiological needs (articles 14 and 16

⁴⁰ Article 7.

⁴¹ First Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 1949 (GC I); Second Geneva Convention for the Amelioration of the Condition of Wounded, and Shipwrecked Members of Armed Forces at Sea, 1949 (GC II); Third Geneva Convention relative to the Treatment of Prisoners of War, 1949 (GC III); and Fourth Geneva Convention relative to the Treatment of Civilian Persons in Time of War, 1949 (GC IV).

⁴² Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 1977 (AP I) and Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (AP II). Civilians and combatants not actively taking part in hostilities (or *hors de combat*) because they are wounded, sick, shipwrecked or captured.

of the Third Geneva Convention).⁴⁴ Article 132 of the Fourth Geneva Convention establishes, for example, that: *'Parties to the conflict shall, moreover, endeavor during the course of the hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children...'* IHL also prohibits the execution of the death penalty on pregnant women or mothers with dependent children (article 76(3)).

2.4 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976. It commits its parties to work toward the granting of economic, social, and cultural rights (ESCR) to individuals, including labour rights and the right to health, the right to education, and the right to an adequate standard of living. As of October 2012, the Covenant had 160 parties. A further seven countries, including the United States of America, had signed but not yet ratified the Covenant.

The ICESCR is part of the International Bill of Human Rights, along with the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), including the latter's first and second Optional Protocols.

The Covenant is monitored by the UN Committee on Economic, Social and Cultural Rights.

This convention fails to provide for the women in prison as well as their children of tender age who accompany them behind the bars. However, it does not and the closest it comes to addressing the plight of the children is when it provides that Special measures of protection and assistance should be taken on behalf of all children and young person's without any

As noted in an ICRC study on the impact of armed conflict on women (*'Women facing War'* ICRC study on the impact of armed conflict on women, ICRC (2001)), examples of special protections could include giving additional food to pregnant and nursing mothers, the hearing of cases of detained or imprisoned pregnant women and maternity cases with priority, the admission of imprisoned pregnant women to institutions where they can receive medical treatment or other protection actions as relevant.

discrimination for reasons of parentage or other conditions. Children and young person's should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

This again has been basically used to address the plight of children in economic and social lines and not those accompanying their mothers in prison. Consequently, it is inadequate in this respect.

2.5 CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

The Convention on the rights of the child clearly upholds the best interest of the rights of the child⁴⁵. The rights of the child are well enumerated in the preamble of the convention and in specific it provides that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.⁴⁶

It further states that Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.⁴⁷

States Parties shall respect the right of the child The United Nations' Universal Declaration of Human Rights (1948) provides for special care and protection of children⁴⁸. Under the Convention, children, whether born in or out of wedlock, shall enjoy the same social protection. The United Nation's Convention on the Rights of the Child (CRC) goes ahead to define a child

⁴⁵ In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authority or legislative bodies, the best interest of the child shall be primary consideration.

⁴⁶ Article 7.

⁴⁷ Article 9

⁴⁸ Article 25 (2)

as every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. In its 54 Articles and two Optional Protocols, the CRC remains the most comprehensive international instrument that provides for full range of children rights including: Civil, cultural, economic, political and social rights. Under the Convention, children are entitled to the right: to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. The Convention outlines four core principles which include: Non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development⁴⁹, all of which are lacking in the Kenyan prisons due to congestion and lack of programmes.

Further, States Parties shall ensure that: ⁵⁰no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

⁴⁹ Article 27

⁵⁰ Article 37

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The UN Convention on the Rights of the Child, which has become a universal legal instrument and which binds 192 States Parties promotes the idea that a child must not be separated from his or her parents except under very particular circumstances;

The convention brings forth the principle that a child has a right to both parents and the state has an obligation to protect a child in danger while necessitating the absolute respect to the child's interest.

2.6 UNITED NATIONS (1997), GUIDELINES FOR ACTION ON CHILDREN IN THE CRIMINAL JUSTICE SYSTEM

The guidelines were recommended by Economic and Social Council as resolution 1997/30 of 21 July 1997

It planned for the implementation of the Convention on the Rights of the Child, the pursuit of its goals and the use and application of international standards and norms in juvenile justice

In relation to children in the criminal justice system, due account should be taken of concerns raised by intergovernmental and non-governmental organizations and other interested parties, in particular systemic issues, including inappropriate admissions and lengthy delays that have an impact on children deprived of their liberty.

2.7 REGIONAL INSTRUMENTS

2.7.1 AFRICA

In Africa, the countries of the African Union (AU) have established a regional human rights protection system⁵¹ and adopted key regional human rights instruments. Two key instruments that promote human rights in the African region are The African Charter on Human and Peoples' Rights (African Charter)⁵² and The African Charter on the Rights and Welfare of the Child.

The Africa Charter on the Rights and Welfare of the Child (ACRWC) in its preamble recognizes that children, due to the needs of their physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and require legal protection in conditions of freedom, dignity and security. Article 2 of the ACRWC defines a child as every human being below the age of 18 years. The Charter re-affirms the principles of: best interests of the child, children's survival and development, name, nationality and non-discrimination. Under the Charter, children are entitled to freedom of expression, freedom of association, freedom of conscience, thought and religion and right to privacy among others.

⁵³ States Parties to the African Charter have also established within the African human rights protection system and mechanisms an African Human Rights Commission and an African Court

⁵¹ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

⁵² Adopted in Nairobi, Kenya in June 1981, and entered into force in 1986, has been signed/acceded/ratified by the 53 Member States of the OAU (now replaced by the AU).

⁵³ Adopted in Addis Ababa, Ethiopia on 11 July 1990, has been signed by 37 and ratified by only 33 Member States of the AU. Countries that have not yet ratified the African Charter on the Rights and Welfare of the Child include: Burundi, Central Africa Rep., Congo, Djibouti, Democratic Rep. of Congo, Gabon, Ghana, Guinea-Bissau, Liberia, Madagascar, Mauritania, Namibia, Sahrawi Arab Democratic Republic, Somalia, Saint-Tome & Principe, Sudan, Swaziland, Tunisia, Zambia.

on Human and Peoples' Rights.⁵⁴ Most recently, the AU also adopted The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁵⁵

Some progress has also been made in the African region with regard to the drafting of regional norms for the protection of persons deprived of their liberty. In 1996, the first Pan- African Seminar on Prison Conditions in Africa was held in Uganda, and the Kampala Declaration on Prison Conditions in Africa was adopted.⁵⁶ Among other issues, participants in the Seminar recommended to the African Commission for Human and Peoples' Rights the appointment of a Special Rapporteur on Prisons and Conditions of Detention in Africa. Later in 1996, the mandate for the Special Rapporteur was established to assess prison conditions in Africa, to report on major problems, and to make recommendations to improve prisons and conditions of detention. Since the creation of the mandate, the Special Rapporteur has conducted several country visits to study prison conditions and to engage in a dialogue with authorities and relevant actors at the local level with a view to address major obstacles in prison systems. Following these country visits, the Special Rapporteur has also made specific recommendations for the improvement of prison conditions, and in some cases also has addressed the situation of pregnant women in prisons. The recommendations submitted by the Rapporteur following a visit to Mozambique in April and to Malawi in June 2001 recommend, for example, that: "*expecting and breast-feeding mothers, elderly women should not be sent to prison*". In November 2003, and as a follow-up to the first and second Pan-African Conferences on prison conditions held in Kampala, Uganda⁵⁷ (1996) and Ouagadougou, Burkina Faso⁵⁸ (2002), the African Commission on Human and Peoples' Rights adopted the Ouagadougou Declaration and Action Plan on accelerating prisons and penal reform in Africa.⁵⁹ The Ouagadougou Declaration recommended to the African Commission the drafting of an "African Charter on Prisoners' Rights" and endorsed the idea of

⁵⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in Burkina Faso on 9 June 1998. It has been signed by 43 and ratified by 19 Member States of the AU.

⁵⁵ Adopted in Maputo, Mozambique on 11 July 2003, it has been signed by 31 and ratified by only 3 Member States of the AU, namely Comoros, Libya and Rwanda. It has not entered into force yet, as it is stipulated that it will enter into force after 15 ratifications.

⁵⁶ The Kampala Declaration on Prison Conditions was also adopted by the United Nations in 1997 (ECOSOC Resolution 1997/36 of 21 July 1997).

⁵⁹ 34th Ordinary session of the African Commission on Human and Peoples' Rights, Banjul, Gambia, from 6-20 November 2003.

developing a universal instrument (under the auspices of the United Nations) - a “Charter of Basic Rights for Prisoners”, in which the African experience and concerns should be reflected. Unfortunately, neither the Ouagadougou Declaration nor Plan of Action address the specific situation of pregnant women deprived of their liberty and of small children residing in prisons.

The African Charter on the Rights and Welfare of the Child reaffirms adherence of African States to international human rights norms, making particular reference to the Convention on the Rights of the Child. It stipulates that the child occupies a ‘unique and privileged position in the African society’ and that the child should grow up in a family environment; requires particular care with regard to health, physical, mental, moral, social development and legal protection; and stresses that the promotion and protection of the rights and welfare of the child implies duties on everyone. The Charter defines children as ‘every human being below the age of 18 years’. It also recognizes the principle of the best interests of the child to be a primary consideration in all judicial and administrative actions concerning the child, with the child’s views to be heard and considered. It also stipulates that parents or persons directly responsible for the upbringing and development of the child shall ensure that the best interests of the child shall be a main concern at all times. Important survival and development, protection and participatory rights for children, in accordance with the customs, traditions, cultural or religious practices of the African people, are also stipulated, recognizing the equality of rights and responsibilities of spouses with regard to children and the entitlement of every child to parental care and protection, the right of every child to live with his or her parents and, if separated from his/her parents, only to ensure his/her best interests. The Charter also stipulates that States will support parents or other persons responsible for the care of children in their responsibilities and assist them in case of need of material assistance with regard to nutrition, health, education, clothing and housing; assist them in their child-rearing responsibilities and ensure the development of institutions responsible for providing care for children. The African Charter on the Rights and Welfare of Children has a specific provision on the issue of children of imprisoned mothers⁶⁰

⁶⁰ *Article 30: Children of Imprisoned Mothers* states as follows: *1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:*

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁶¹ (which has not yet entered into force) builds on the principles set forth in the African Charter on Human and Peoples' Rights by further specifying values and principles relevant to women in Africa. It also contains additional provisions that are directly relevant to pregnant or nursing women deprived of their liberty. With regard to health and reproductive rights, the Protocol sets the obligation of Member States *"to establish and strengthen prenatal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding"*⁶². It also provides for the special protection of 'women in distress' and stipulates that States have an obligation *"to ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity"*⁶³.

Although the protocol strongly supports the rights and plight of the children in prison, the Kenyan law has not incorporated it. The researcher is of the opinion that this provision ought to have been included in the Kenyan Children Act as it comprehensively addresses the specific needs of the children accompanying their incarcerated mothers.

-
- a) *Ensure that a non-custodial sentence will always be first considered when sentencing such mothers;*
 - b) *Establish and promote measures alternative to institutional confinement for the treatment of such mothers;*
 - c) *Establish special alternative institutions for holding such mothers;*
 - d) *Ensure that a mother shall not be imprisoned with her child;*
 - e) *The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation."*

⁶¹ Adopted in Maputo, Mozambique on 11 July 2003. Has been signed by 31 and ratified by only 3 Member States of the AU, namely Comoros, Libya and Rwanda.

⁶² Article 14.2(b)

⁶³ Article 24(b)

2.8 COMPARATIVE ANALYSIS

In some countries, children living in the prison are 'invisible' to the justice system and forgotten by the social services.⁶⁴ In many countries these children are not even registered (in the records of the institution or elsewhere) and are accepted to live in the institutions on an 'informal' basis only.

Countries are experiencing general paucity of legislation on the rights and well being of the children accompanying their incarcerated mothers in prison. This notwithstanding, the Convention on the Rights of the Child should be used to guide all actions regarding children of persons deprived of their liberty and the adoption/implementation of policies should be part of comprehensive plans of action for children.

Australia ratified the Convention on the Rights of the Child in 1990. The policy directive was issued in 2001. No mention of the Convention on the Rights of the Child is made in the text.⁶⁵

Canada ratified the Convention on the Rights of the Child in 1991 and the policy was adopted in 2003. While the Convention is not directly mentioned in the text of the policy, the principle of the best interests of the child is stated as being the 'pre-eminent consideration in all decisions relating to the participation in the Mother-Child Program'⁶⁶.

Cambodia ratified the Convention on the Rights of the Child in 1992. The Proclamation of the Ministry of Interior (MoI) was issued in 1998 and the (MOSALVY)⁶⁷ circular issued in 1995. The Proclamation of the MoI does not make any reference to the CRC, while the circular clearly states that it was issued with the purpose of 'protecting the child and to properly implement the

⁶⁴ It is very difficult to obtain information on the number of children residing in prisons. For example, when looking for statistics on children living with their imprisoned mothers in France, the official information regarding the adult prison population does not include this information (see website <http://www.justice.gouv.fr/chiffres/ap/chiffres2004.htm>) nor is it contained in the section of juvenile justice (<http://www.justice.gouv.fr/chiffres/mineurs02.htm>).

⁶⁵ Australia has ratified the Convention on the Rights of the Child but the ratification does not automatically result in the incorporation of the international norms into national laws. Only provisions incorporated into domestic legislation can be invoked by courts and enforced through national mechanisms.

⁶⁶ **Canada:** Directive 768 – 'Institutional Mother-Child Program' issued by the Commissioner of the Correctional Service, Canada (27 February 2003).

⁶⁷ The Ministry of Social Action, Labour, Veterans and Youth.

Convention on the Rights of the Child'. The administration of juvenile centres falls under the jurisdiction of the Ministry for the Rehabilitation of Juveniles.⁶⁸ MOSALVY is the agency responsible for the administration of State centres for orphans and abandoned children. The responsibility for the coordination of the implementation, consideration and evaluation of all policies and programmes relating to the life, development and protection of Cambodian children is the responsibility of the Cambodian National Council for Children (CNCE) established in 1995, which is presided over by MOSALVY.

France ratified the Convention on the Rights of the Child in 1990 and the policy was drafted in 1999. The circular makes explicit reference to France's international obligation to implement the provisions contained in the Convention on the Rights of the Child.

The situation of young offenders in France is regulated by Ordinance of 2 February 1945 on child offenders, amended by the Act of 8 February 1995 and the Act of 1 July 1996⁶⁹The ministry responsible for family affairs, currently the Ministry of Employment and Solidarity, is responsible for the coordination of ministerial measures to implement the Convention on the Rights of the Child in France.

The Committee on the Rights of the Child has recommended that State parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction. The

Committee has recommended the establishment of coordinating and monitoring bodies, and the development at national level of child-focused and child-sensitive bodies, to ensure that children's rights are a priority in all legislation, state plans and actions.

The policies issued in Cambodia and France are very clear about their commitment to and interest in ensuring the implementation of provisions contained in the Convention on the Rights of the Child. While not expressly noted, the authorities responsible for the issuing of the policy in Canada also seemed to have had the Convention in mind when it was drafted.

⁶⁸ See Initial report of Cambodia to the CRC Committee (CRC/C/11/Add.16 or 24 June 1998, paragraph 232). Reference is made to the Subsidiary Decree no. 17 of the Council of Ministers, which defines the role and powers of the rehabilitation centre for juvenile delinquents.

⁶⁹ Reported by France to the CRC Committee in its second periodic report of 2003 (CRC/C/6/Add.26, paragraphs 380 to 394).

The challenge in many countries remains to make the children's rights agenda a priority, not only at the political level, expressing good intentions, but more importantly at the practical level, by all those that implement policies and/or act on behalf of the State and who can affect children's lives directly.

In its General Comment 5 (2003), the Committee noted that "...effective implementation of the Convention requires visible cross sectoral coordination to recognize and realize children's rights across Government, between different levels of government and between Government and civil society – including in particular children and young people themselves." It is very important to ensure that policies and programmes regarding parents deprived of their liberty and their dependent children, including children residing in prisons, take into account children's rights.

As noted earlier, ratification does not automatically result in the incorporation of the international norms into national laws. Only provisions incorporated into domestic legislation can be invoked by courts and enforced through national mechanisms.

Comparatively, the researcher is of the opinion that the country with the best practices that Kenya would be recommended to borrow from is The New Delhi prison. This is one of Asia's largest prison⁷⁰. It allows mothers to keep their children with them until the child turns five. While the environment does have a family orientation, it's still very much a prison where kids serve time with their mothers.

The arrangement is not without its nurturing aspects. Female prisoners run a "crèche" for the children—a sort of playschool where they spend their day from 9 to 5. Sabria, a prisoner who runs the crèche program, explained it to Ling: "We try and give them what is the basic education that the child needs at the age of five," she said, "and their schedule includes everything which is fun. They do exercises and all sorts of activities."

Three square meals day and decent housing conditions are better than some of these inmates—mother or child—might expect on the outside.

⁷⁰ Brian Handwerk, National Geographic Ultimate Explorer, January 30, 2004.

At the end of the day, the kids enjoy the bonds of motherhood but they do so within prison walls. Those there since birth know of no other life. And after the age of five, the kids must leave the prison for another home on the outside, a hostel, with relatives, or perhaps even on the street.

3. CHAPTER THREE

3.0 AN ANALYSIS OF THE KENYAN LAWS AND INSTITUTIONS THAT DEAL WITH THE CHILDREN IN PRISON.

3.1 INTRODUCTION

The Chapter will undertake a comprehensive coverage of the Kenyan situation on law, policy, and practices on the matters of the children accompanying the incarcerated mothers. The provisions in the constitution and other relevant laws will be discussed followed immediately thereafter by an analysis of what is actually taking place on the ground. The different organizations to which the specific laws mainly apply or, are entrusted with the implementation of each of the laws will be assessed.

3.2 THE KENYAN CONSTITUTION 2010

The current constitution was ratified by Kenyans and promulgated by the president thereby coming into force and being the supreme law of Kenya. The constitution recognizes the general rules of international law domesticating them to form part of the laws of Kenya.⁷¹ It further provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.⁷² It stipulates that the general rules of international law shall form part of the law of Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

The Constitution of Kenya 2010 remains progressive in guaranteeing children rights. Other than the general rights and freedoms; which children are also entitled to, Article 53 provides for specific children right which *inter alia* include: protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.

⁷¹ Article 2(5) of the Constitution

⁷² Ibid, Article 2(6)

The Constitution guarantees children in Kenya the right 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. Child protection under the Constitution of Kenya has both vertical and horizontal application meaning that the right to child protection is enforceable against both the State and individual persons. Article 260 of the Constitution defines a child as any individual who has not attained the age of 18 years.

The Kenyan Constitution provides for broad general protection of the rights of children under article 5. Under Part 3 on Specific Application of Rights, the Constitution of Kenya 2010 elaborates certain rights to ensure greater Certainty as to the application of those rights and fundamental freedoms to certain groups of persons, and states that this Part shall not be construed as limiting or qualifying any right.⁷³

The Constitution further provides that⁷⁴ every child has the right to a name and nationality from birth, to free and compulsory basic education, to basic nutrition, shelter and health care, to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour and 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.

The child has a right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time, to be separate from adults and in conditions that take account of the child's sex and age. A child's best interests are of paramount importance in every matter concerning the child.

The Kenyan laws are plausible in addressing the rights of mothers with babies in prison. However with the coming into force of the new constitution there is a ray of hope in legislation and policy framework being developed by the Kenyan government. Despite these provisions, the children inside the prison walls do not enjoy these rights and there is need for the government to ensure the rights are not enforced.

⁷³ Article 52 of the Kenyan Constitution, 2010.

⁷⁴ Article 53 of the Kenyan Constitution, 2010.

3.2.1. BILL OF RIGHTS

The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

The rights and fundamental freedoms in the Bill Rights belong to each individual and are not granted by the State. It does not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognises those conferred by law, except to the extent that they are inconsistent with this Chapter on the bill of rights; and are subject only to the limitations contemplated in the Constitution.

Fair administrative actions as provide under the bill of rights states that every person has the right to administrative action that is expeditious, efficient, reasonable and procedurally fair.

If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Parliament is duty bound to enact legislation to give effect to the rights herein above and that, legislation shall provided for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal and promote efficient administration

This article envisages streamlining administrative actions of persons charged with such authority and giving a guide as well as developing best practices for exercising such authority. This is specifically relevant since the admission and care of children incarcerated with their mothers in prison is at the discretion of the in charge of the individual prisons.⁷⁵

The constitution is the basic law in the country and all laws and institutions created by law are directly or indirectly hinged on it. These include the Penal Code and other criminal laws as well as the Judiciary that ensures the laws are implemented in pursuit of justice and human rights.

⁷⁵ Section 30(1) of the prisons Act which provides that every prisoner confined in any prison shall be deemed to be in the lawful custody of the officer in charge of the prison.

3.3 THE PENAL CODE, CAP.63

The Penal Code is the key penal law in the country and therefore its breach is the gateway into the prison. In specific and of relevance to this thesis, where a woman convicted of an offence punishable by death is found to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of the death penalty⁷⁶.

Where a woman convicted of an offence punishable by death alleges that she is pregnant, or where the court before whom she is so convicted thinks fit so to order, the question whether or not the woman is pregnant shall, before sentence is passed on her, be determined by the trial judge.⁷⁷

The question as to whether the woman is pregnant or not shall be determined by the judge on such evidence as may be laid before him by the woman or the Republic and the Judge shall make a finding.⁷⁸ Where in the proceedings under this section the judge finds that the woman in question is not pregnant, the woman may appeal to the Court of Appeal, and that Court, if satisfied that for any reason the finding should be set aside, shall quash the sentence passed on her and instead thereof pass on her a sentence of imprisonment for life⁷⁹.

If for any reason whatsoever the trial judge is unable to sit for the purpose of determining the question whether or not the woman is pregnant, then some other judge of the High Court shall sit and determine that question.⁸⁰

From the foregoing provisions, it is clear that the unborn child is recognized and protected by the laws of Kenya.

⁷⁶ Section 211

⁷⁷ Section 212(1)

⁷⁸ Section 212(2)

⁷⁹ Section 212(3)

⁸⁰ Section 212(4)

3.4 THE JUDICIARY

The Judiciary is the institution that deals with the implementation of the provisions of the statutory laws stipulated here above which includes the Penal Code among others. Judiciary is the main entry point to the prison in that it is the judicial officers who commit the convicts' behind bars after sentencing. Although the police also put suspect in the police cells and in remand as their cases proceed, upon the determination of the cases it is at the discretion of the magistrate or the judge to determine the mode of sentencing to employ.

It is at this juncture that the decision whether the lactating or pregnant woman should be placed on a non custodial or custodial sentence is reached. There are various factors that guide the judicial officer in making this decision but top on the list is the social and the religious background of the particular officer.

This is because as much as the officer is applying the law as it is, they are informed by their respective backgrounds and experiences. The judicial officer in Kenya can no longer claim that their 'hands are tied'. The constitution as well as the guidelines provided by the judiciary now grants the sentencing court a wide discretion which may be pursued in according a non custodial sentence, bail or bond to pregnant or nursing mothers where there is good will and especially when the charge is a misdemeanor.

However, the discretion may be applied either positively or negatively depending on the wishes of the sentencing judicial officer. There are no provisions or a guideline compelling the sentencing court not to impose custodial sentences on the expectant or lactating mothers. This void has led to the increase in the numbers of children in the Kenyan prisons as well as suffering for those children left outside prison by these mothers.

3.5 THIKA DISTRICT PROBATION HEADQUARTERS

Under the Probation of Offenders Act, 1907, the court is granted powers to release convicted offenders under the probation order. Although the act does not specifically make any provision

for mothers accompanied by their child into prison, the following general provision may be applied to their benefit;

When any person is found guilty of having committed an offence not punishable with death and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.⁸¹

Before making any order under this Act, the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

When an order under sub- section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

The court making a supervision order under sub- section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit

⁸¹ Section 4(1), Probation of Offenders Act, Cap 64 Laws of Kenya.

to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

The probation department is the institution that the judiciary depends on in getting pre-sentencing reports on those it convicts before sentencing them. The sentencing court refers the matter to the probation officer who goes to the field to inquire from relatives, neighbors and administration on the character of the convict. The report is then taken to the court to shed more light and thereby inform the court further on the character of the person appearing before it and best suited sentence to be imposed.

In the course of the research, the Thika district chief probation officer⁸² informed the researcher that their contact as probation officers with the mothers incarcerated with their children starts after the mother is referred to them by the court for assessment of suitability for a non custodial sentence as per the provisions of section 24 of the Penal code. Non custodial sentences consist of probation and community service order and they are mostly suitable for those sentenced to not more than three years. Under the probation order, the convict serves their sentence outside custody as they go about their day today activities but under the supervision of a probation officer until the completion of the term of the sentence.

Community service order may also be imposed by the court through the probation Department. It entails serving the sentence outside prison under the supervision of the community service officers who doubles up as the probation officers. Under the community service order, one is sentenced to manual service to the community at a government institution such as a school or a hospital for the duration of the sentence.

Referrals to the probation department may also be made for bail assessment. Upon referral, the probation officer is required to visit the prisoner or the remandee in the custody for relevant

⁸² Mr.Kala Mwasyia, Principle Probation Officer, Thika.

assessment and on direction on how the complainant and the relatives may be reached. As such, the first contact with the incarcerated mother is either at the prison or at the police cells.

As a department, probation officers are committed to ensuring that as far as possible, the mothers with dependent children inside and outside prison are granted non custodial sentences. In determining whether to recommend a non custodial sentence or not, the probation officer is guided by the nature of the offence committed. The fact that the court had considered it appropriate to refer the prisoner for non custodial sentencing encourages the probation officer in making favorable recommendations.

The recommendations are however based on the sentiments of the complainant, family members, the neighbors as well as the administration officer such as the area chief. This is to ensure that the mother will be accepted back into the society within which she will serve the sentence.

However, in cases where the offence entailed abuse of a child, the probation officer is likely to make an unfavorable recommendation so as to protect the child from the abuser. In all the situations, the probation officers pursue the best interest of the child. It was however made very clear that the department can only assist these mothers after they are referred by the courts, thereby limiting the numbers of the children they can ensure are safely out of prison.

3.6 THE PRISON'S ACT, CAP 90

The Ministry of Home Affairs (MOHA) comprises of the prisons department, the probation department and the betting control and licensing board services. The ministry is the Government Institution entrusted with formulating policies for governing the penal institutions. However, the Ministry of Home Affairs has not come up with any policy for the protection and well being of the children accompanying the incarcerated mothers in prisons. The only specific provision touching on these children is under section 30 of the Prison's Act which was last revised in 1977. The section stipulates that every prisoner confined in any prison shall be deemed to be in the lawful custody of the officer in charge of the prison.

Every officer in charge shall keep and detain all persons duly committed to his custody by any court or other competent authority according to the terms of the warrant or order by which such person has been committed, or until such person is discharged by due course of law.

A prisoner who is being removed or transferred from one prison to another shall, while outside the prison, be kept in the custody of the prison officer directed to convey him and shall be deemed to be in the lawful custody of the officer in charge of the prison at which such prison officer is serving.

Subject to such conditions as may be prescribed, the infant child of a female prisoner may be received into prison with its mother and may be supplied with clothing and necessaries at public expense: Provided that such child shall only be permitted to remain in prison until it attains the age of four years or until arrangements for its proper care outside prison are concluded, whichever shall be the earlier.

The Act does not; however bring out the criteria to be applied in determining whether permitting such a child to live in the prison with the mother is in the best interest of that child. It does not make it clear on who makes the arrangements to have the child withdrawn from prison on attaining the age of four years, nor does it stipulate how the four years age limit was reached and agreed upon as adequate for separation of the child from the mother. For deeper understanding of the prison life for these children, a visit to Langata women prison shed much more light.

3.7 LANG'ATA WOMEN PRISON

The women prisons in Kenya are home to over 370 babies with Langata Women Prison holding the highest number. At the time of the research, this prison was home to 80 of these babies. Most of the babies came in with their mothers as it was not advisable to separate them from their primary care givers. Some were born there after the expectant mothers were arrested. The women are normally taken to the nearby general hospitals once labour pains sets in so as not to deliver inside prison. They have to be accompanied by female prison officers for security purposes. The labour ward is guarded as the women give birth therein and the wards too are under tight security as they recuperate. The women and the new born babies are then taken back to the prison.

The Prisons Act provides⁸³ that Subject to such conditions as may be prescribed, the infant child of a female prisoner may be received into prison with its mother and may be supplied with clothing and necessaries at public expense: Provided that such child shall only be permitted to

⁸³ Ibid

remain in prison until it attains the age of four years or until arrangements for its proper care outside prison are concluded, whichever shall be the earlier.

There is no provision detailing the need for the well being of the children behind bars. Their stay there is based on the directives of the officer in charge of that particular prison. If he or she fails to direct that the child should be provided with meals, then the mother has to share her meals with her baby. The issue of the registration of their birth and immunization are therefore dependent on the officer's wishes as they are not compelled by any provision to ensure this is done. Langata women's Prison is currently headed by an officer who has partnered with various NGOs who provide the necessary care to these children.

The prison officers are also sensitized on how to treat the children as well as the mothers. Almost all breast feeding children are confined in the cells with their mothers throughout the day and night. Most inmates who find themselves in this situation are forced by the circumstances obtaining back home whereby there seems to be no one available or willing to remain with their children. Experts say that children of incarcerated parents are six times more likely than other youth to land in prison at some point in their own lives, and the situation may be worse for the children living with their incarcerated mothers in prison.

In one of the cases of which the researcher followed involving a mother with a six months old baby boy in prison, the relatives were unwilling to take care of the baby claiming that the child was likely to turn out like the mother and therefore be a negative influence to their children. The visit also revealed that this particular mother had left behind four other children aged between 5 and 2 years at the rental room at Daka-ini in Murang'a. The landlord was the one taking care of them and was at the verge of throwing them out on to the streets since the relatives had refused to take them.

Apart from the hostile environment back home, there is also the problem of the prison warders. Some of the prison warders are not role models, and the way they treat the prisoners may also negatively affect the children. The law requires that in the controlling prisoners, prison officers should seek to influence the prisoners positively through their own example and leadership. The officers are encouraged to maintain discipline and order with fairness but firmness. This is rarely the case because the prison officers themselves are a very frustrated lot due to poor pay,

dehumanizing living conditions and mistreatment from their seniors as well as stagnation in one job group for even over 20 years for some of them. Indeed, the cases of prison officers committing suicide or turning the guns on their colleagues are very common in Kenya. It is therefore ironical to expect the same officers to be entrusted with motivating and uplifting the morale of the imprisoned mothers and their children therein.

The prisons have guidelines stipulating the maximum age at which a child can remain in prison, which varies from a few months to four years. The impact this will have on the child's life, as well as the conditions in which the children will be held, are to be considered when deciding whether it is in the child's best interests to remain in prison. However, these guidelines are not always adhered to, either because they allow for some flexibility in exceptional circumstances, or because the children cannot be cared for outside.⁸⁴ These tend to have negative effects on the child's growth and development.

Commenting on the situation, an Educational psychologist Dr Josephine Arasa of the USIU opines that the cognitive, emotional, physical, social and educational growth that children go through from birth and into early adulthood are greatly hindered if they are confined.

The environmental interaction influences behavior, and that development is considered a reaction to rewards, punishments, stimuli and reinforcement. Dr Arasa however warns that though early relationships with care givers play a major role in child development and continue to influence social relationships throughout life, the children risked being securely attached to those care givers. The doctor observes that "Once they are removed from such prisons, these children may have difficulty coping with the outside world".

It was pointed out that the courts are the entry points to the prison and therefore they have the discretion to commit a woman with a child of tender age or even an expectant mother to a custodial or a non custodial sentence. Once sentenced, the prison authority has no choice but to

⁸⁴ In India for example, children as old as 15 years have reportedly remained in prison with their parents, because nobody is willing to collect them. Other countries like Norway however, do not allow children of any age to live in prison.

obey the court order, whether or not a child is in the picture. The officer in charge of the prison felt that the judiciary needs more statutory provisions and further sensitization on the need to sentence expectant mothers and those with breastfeeding and dependent children to non custodial sentences.

3.8 FARAJA TRUST

This is a Non Governmental Trust that has shown keen interest on the well being of the children since its foundation in 1999.

The NGO in collaboration with the Kenya Prisons Service has started a programme for the children imprisoned with their parents to mitigate the problem of becoming socially isolated by allowing them to mix with the children from the surrounding areas. The Trust has set up a resource centre worth 3million where the children are taken to spend the day learning, sharing meals and playing with other children from the communities living within the surroundings to ensure their psychological and emotional growth.

The children only go back to the prison to spend the nights, thereby limiting their time behind bars, while not missing out on bonding with their mothers altogether. This mitigates against the negative impacts of parental incarceration on the children's lives, and assists the children to realize their dreams and aspirations. It also prepares them for the life within the larger community after the mothers complete their sentences.

Upon completion of their jail terms, Faraja Trust assists the mothers in setting up small income generating ventures in order to enable them to provide for their children and to effectively re-integrate back into the society and start off a decent life. This further ensures that the mothers' rate of reoffending and thereby taking the child back into the prison are drastically reduced.

It is noteworthy that although this is what the government itself should be doing for its citizenry; there is no government undertaking or policy on the welfare of these children and their care givers. This void, in my opinion is due to lack of legislation compelling the government to

commit to providing for the rights and wellbeing of the Kenyan children living behind the bars in our prisons.

3.9 THE CHILDREN ACT NO. 8 of 2001.

In Kenya, this is the main statute that protects the rights of the children. While extensively providing for these rights⁸⁵ in Part II under Safeguards for the Rights and Welfare of the Child, the Children's Act does not narrow down to the protection of the children living behind the prison walls with their mothers.

The CRC and the African Charter on the Rights and Welfare of the Child (ACRWC) is domesticated in Kenya by the Children Act of 2001. However, it has been established that despite the fact that Kenya has adopted several protocols, conventions and even enacted laws for the protection and modalities of the upbringing of children in the society, and even established various governmental departments and institutions to ensure this happens, Kenya has failed on the protection and care of children born and brought up in prison due to incarceration of their primary care givers; the mothers. The need to urgently provide this protection cannot be gainsaid.

The Children Act defines a child as any person under the age of 18 years and makes provisions for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; and administration of children's institutions among others. Section 3 of the Act mandates the Government of Kenya to take steps to the maximum of its available resources to progressively achieve the full realization of the rights of the child as provided for under the Act including protection from abuse, violence and exploitation. Section 4 of the Act bestows the responsibility of ensuring the development and survival of the child on the family and the government. The section further mandates any person or institution charged with the responsibility of making any decision for or on behalf of a child to do so and make the same in the best interests of the child.

The Act provides that the Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child set out in this Part.

⁸⁵ Part II of the Children's Act on safeguards for the rights and welfare of the child.

Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child. 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 the child shall be a primary consideration.

All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to;

- (a) Safeguard and promote the rights and welfare of the child;
- (b) Conserve and promote the welfare of the child;
- (c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest

In 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.

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

A child shall have a right to live with and to be cared for by his parents except where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, the best alternative care available shall be provided for the child.

Where a child is separated from his family without the leave of the court, the Government shall provide assistance for reunification of the child with his family.

Every child shall have a right to health and medical care the provision of which shall be the responsibility of the parents and the Government. Every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide

appropriate assistance and protection, with a view to establishing his identity. A child shall be entitled to leisure, play and participation in cultural and artistic activities.

No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or, deprivation of liberty and notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment. A child offender shall be separated from adults in custody.

In order to analyze the substantive application of the Children Act, a visit to the Department of Children Services at Thika was undertaken.

3.10 THIKA CHILDREN'S DEPARTMENT.

The children department is the institution that is tasked with the implementation of the statutory provisions of the Children Act. Like their counterparts at the probation department, the children officers only gets into the picture of the children accompanying their incarcerated mother after being called upon by the court. The court in exercising its discretion may call upon the children's officer to suggest how the best interest of a child accompanying the mother may be achieved.

The court may seek to establish whether there is a children's home that may be willing to take in the child as the mother serves her term in prison. Sometimes substitute caregivers improve children's lives. The children's officer may also be required to interview the prisoner's relatives to establish whether there is anyone suitable and willing to take care of the child while the mother is in custody. The officer is also expected to make the necessary arrangements and supervision of the child's stay with the identified care giver.

In making the decision on how to go about the placement of the child, the children's officer is guided by the pursuit of the best interest of the child as set out in the Children Act. In some instances, the court may decide to let the child remain with the mother in prison. Under such circumstances, the court may direct the children's officer to continue with prison visits to ensure the well being of the child. The children's officer in Thika informed us that in case the child's

well being is threatened by continued stay at the prison; she may move the court to review the mothers' sentence. The practice is however not very common.

4. CHAPTER FOUR

4.0 CONCLUSION AND RECOMMENDATIONS

4.1 CONCLUSION

This Chapter will set out the conclusions drawn from the research .An assessment of whether the Objectives have been fulfilled or not as well as whether the Hypothesis has been proved will be undertaken. Other relevant conclusions in regard to compliance with the Convention on the Rights of the Child on National statutes, in the context of small children residing in prisons and some personal remarks will also be brought forth.

At the end of the Chapter, a proposal of Suggested guidelines for drafting laws to protect babies and small children residing in prisons with their incarcerated mothers will be provided. The target group is the entire Government through the legislature. Suggested guidelines on formulating regulation and policies will also be brought forth. These will mainly be intended for prison authorities and prison staff to engage them actively in the promotion and protection of the human rights of this category of forgotten children.

The general objectives of the research was look at and carry out an analysis of the existing regulatory framework, institutions, and laws, both National and International in relation to children living with their mothers in the prisons. The specific objectives were:

- (a) To examine the existing laws, statutes, conventions and policies that protects the rights and the best interests of children living with their mothers in prison in the context of Kenya and recommend changes to cater for the children rights.
- (b) To assess the level of compliance by Kenyan prisons with international best practices in the context of living conditions of the children accompanying their mothers in prisons, with the aim of making recommendation on ways and means of improving the same to cater for these children.

The research exhaustively looked at the international, regional as well as the national laws governing the rights of the children accompanying their incarcerated mothers in the Kenyan prisons. It exposes glaring gaps in the Prisons Act, which provides for the admission of the child into the prison but falls short of recognizing the individuality of this child as a human being with an inherent right to life. It should have gone a step further to make elaborate provisions for the well being of the children behind bars in full recognition that though unborn or a minor, the child is a complete human being with all the human rights and all rights specifically bestowed on children by law, whether internationally, regionally or nationally.

The study concludes that there is need to urgently amend the prisons Act to expressly provide for the recognition of the necessity to nurture the unborn and breastfeeding child for proper growth and development. This need can only be achieved through the mother who should therefore be given proper diet and supplements where necessary, in fulfillment of the child's right to proper health and medical care. The comfort of the mother including an appropriate bed and beddings should also be ensured for the benefit of the child and in pursuit of the child's best interest. The envisioned amendments should be applied and enforced across all the prisons in the country.

Every child has a right to a name and nationality. However there are no proper records held in the prisons in proof of registrations of the births and deaths of the children born by incarcerated mothers or those who accompany their mothers into prison for one reason or the other. The law and state policy should hold the government accountable for every birth or death of any child in custody. To this end, there is need to come up with stringent legislation against which the government can be assessed for compliance.

Children have a statutory right to freedom of movement which should be facilitated by the government and the institutions entrusted with the well being of the particular child. However, the research has established that for the children in prison, this right is curtailed by their mothers' imprisonment. The prison authority should put in place measures to ensure that the children in their care do not suffer deprivation of this liberty.

All schools in Kenya are required to have play grounds to ensure that the child enjoys the right to leisure and play for better physical health. However, the children in prison are denied the right and the freedom to play. There is no law or policy in place to ensure that this is provided for. The

prison authority should cater for this right by providing space for outdoor activities for the children in their care.

The right to proper food and nutrition for proper growth and development should be adequately provided for by the government. The research established that there is no provision of food ration for the children and the mothers have to share whatever little they are given with their child. These children are victims of their mothers' circumstances and since the incarcerated mother cannot provide for her child as she would while at home, the government must automatically step into this void to ensure that the child does not suffer from lack of this basic necessity. The treasury should provide funds to specifically meet the need for a balanced diet for the child accompanying the mother in prison.

Article 53 (b) of the constitution provides for the right to free and compulsory basic education to all children in Kenya. Whereas under normal circumstances children as young as three years may join kindergartens before proceeding to nursery school, the children in prison are denied this right. The prison authority should be statutorily held accountable for implementing mechanism for early learning for the children who attain school going age while still in custody with the mother. Their progress should be keenly monitored in order to map out other talents in the individual child at that early stage for future career development.

It is noted from the research that women are a small minority of the prison population, but a minority that is growing at a disproportionate rate in terms of expansion of the prison space. Their presence behind prison walls was unforeseen and therefore unplanned for. Consequently, their needs, and indeed their rights and therefore by extension those of their children, are frequently not catered by prison. The prisons are extremely congested and the development and wellbeing of not only the mothers but also the children accompanying them is deplorable in most of the holding facilities. The children are forced by circumstances to share the cells with their mothers and the other women therein.

As the Special Rapporteur on Prisons and Conditions of Detention in Africa stated:

'Prisons are not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mother.'

The children suffer other limitations such as general scarcity of resources in the larger prison fraternity such as lack of beds and beddings. There is no requirement that the children be provided with any necessities since they are not in the prison records which are strictly followed in issuing all the provisions. The government should provide these resources to the children and the prison authority should come up with registers giving details of the children in their custody to guide them on acquisition and distribution of the necessary items.

After examining the existing relevant laws, statutes, conventions and the policies, the study concluded that these laws are not adequate, nor are they effective in comprehensively protecting the rights of these children. Further, there is need to focus on the impact of maternal imprisonment to the community and the larger society. It should be appreciated that there are no simple solutions to this unfortunate dilemma but this notwithstanding; the complexity of the situation is totally no excuse for failing to protect the rights of children who have a parent in prison.

4.2 RECOMMENDATIONS

This section presents a proposal of suggested guidelines for drafting laws to protect babies and small children residing in prisons with their incarcerated mothers. The target group is the entire Government through the legislature. Suggested guidelines on formulating regulation and policies will also be brought forth. These will mainly be intended for prison authorities and prison staff to engage them actively in the promotion and protection of the human rights of this category of forgotten children.

Small children residing in prisons with an imprisoned parent are ‘formally speaking’ not deprived of their liberty for having committed an offence or a crime. Rather, they are the victims of their mothers’ conviction and the subsequent circumstances and yet, they are compelled to suffer for crimes they never committed. Due to their tender age, they are incapable of agitating for their rights as provided under section 48 of the constitution that states as follows;

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

My recommendation is that a mechanism for the enforcement of the rights enshrined in Article 53 of the constitution and part two of the Children Act should be provided for to protect the children and to avert the notion that these laws enacted by parliament are just paper rights, “more honored in disobedience than obedience”⁸⁶.The NGO’s working on children matters should agitate for the provision of the rights of all children including those living behind prison bars with their mothers.

The United Nations Convention on the Rights of the Child is a human rights treaty setting out the civil, political, economic, social, health and cultural rights of children. Nations that ratify this convention are bound to it by international law. Compliance is monitored by the UN Committee on the Rights of the Child, which is composed of members from countries around the world. Once a year, the Committee submits a report to the Third Committee of the United Nations General Assembly, which also hears a statement from the CRC Chair, and the Assembly adopts a Resolution on the Rights of the Child.

Governments of countries that have ratified the Convention are required to report to, and appear before, the United Nations Committee on the Rights of the Child periodically to be examined on their progress with regards to the advancement of the implementation of the Convention and the status of child rights in their country. Their reports and the committee's written views and concerns are available on the committee's website.

The UN General Assembly adopted the Convention and opened it for signature on 20 November 1989 (the 30th anniversary of its Declaration of the Rights of the Child). It came into force on 2 September 1990, after it was ratified by the required number of nations. Currently, 193 countries are party to it, including every member of the United Nations except Somalia, South Sudan and the United States. Somalia’s cabinet ministers had announced plans in late 2009 to ratify the treaty.

⁸⁶ Muli wa Kyendo ,Nation newspaper reporter,Kenya, in his report,“Over 300 children held in Kenyan Prisons” available at <http://www.digitaljournal.com/article/264039>.

Kenya has ratified this treaty and the research recommends that the populace should hold the government accountable through presenting in parliament as well as availing to the public the periodical reports it tables before The United Nations Committee on the Rights of the Child as obtains in Kenya over the duration in issue.

The constitution of Kenya 2010 pursuant to CRC article 3 on the principle of the best interests of the child as the overarching principle, entrusts the protection and enforcement of the Children rights to the government of the day and the parents.

Chapter 4 of the constitution enshrines the Bill of Rights which is composed of rights for all Kenyans, children included. The Children Act No.8 of 2001 under Article 4 provides for the principle of the best interest of the child and states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration. The interest of the child shall be treated as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-

(a)Safeguard and promote the rights and welfare of the child;

(b)Conserve and promote the welfare of the child;

(c)Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

It is recommended that to safeguard and promote the rights and welfare of the child, the court should, in all matters before it where the accused is expectant or is accompanied by a child of tender age, be compelled by law to resort to non custodial sentences. In every decision made by the court, the best interest of the child must be pursued at all costs.

Further, first priority should be given to Alternative Dispute Resolution (ADR). Courts in Kenya are no longer adversarial and the court can guide the parties on the various options available to them .A child rights approach has also been propagated by the Committee on the Right of the Child.⁸⁷Once States ratify international human rights instruments, they commit themselves,

⁸⁷ UNCRC Committee General Comment No.10: Children's' Rights in Juvenile Justice 2007

through whichever government is in power, to compliance with the rights embodied in those instruments. States hold the primary responsibilities and are accountable to the holders of those rights for their Implementation. A State Party to the CRC is under obligation to take legislative, administrative, social and educational measures to protect children's rights and to have regard for the relevant provisions of other international instruments.⁸⁸

One of the reasons given for the enactment of the African Charter for the Rights and Welfare of the Child was that the UNCRC did not appreciate the socio- cultural and economic realities in Africa.⁸⁹ There are elements unique to Africa that may be addressed by a solution that is sensitive to this fact, such as the traditional African dispute resolution mechanisms that work towards rehabilitation and reintegration as opposed to retribution. African traditional justice systems have a positive aspect to contribute to modern justice systems and what is actually known as restorative justice. The new buzz word in the criminal justice sphere is deeply embedded in African customary law. The courts must therefore be compelled to exercise its discretion in giving due regard to ADR as enshrined under Article 159 subsection 2(c) which states that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute Resolution mechanisms shall be promoted. Further, the court shall recorded evidence of the attempt made on convincing the parties to opt for ADR instead of proceeding with the court case. To this end, cause lists in most of the courts have incorporated a provision under the heading of reconciliation and withdrawals as opposed to hearings.

Where the parties fail to settle for ADR despite the courts intervention, the court shall ask for a pre-sentencing report from either the children's officer or the probation officer. The report is aimed at advising the court on the nature of sentencing to be imposed. Emphasis should be given to non custodial sentences such as probation or community service. The officer making the report should endeavor to advice the court on whether the offender is sorry and remorseful, the feelings of the victim, the family as well as the community in general, especially whether they would be willing to forgive and accept the offender back amongst them, even as they serve their non custodial jail term. The community needs to be educated on the implications of the non

⁸⁸ Art. 32(2).

⁸⁹ Frans Viljoen, journalist, "State reporting under the African Charter on Human and People's Rights", *Journal of African Law* 2000 110-118.

custodial sentences to make them understand that despite being out of prison, the offender is serving their jail term and so was not just set free as is the misconception. They as well as their children should not be discriminated against when they get out of jail. Labeling and profiling are the major hurdles that an offender faces in the rehabilitation process even after completion of their jail sentence. Appropriate support should be given to ease the reintegration process⁹⁰.

The option of suspended sentence, bail or bond should then be weighed with the aid of the pre bail report from the department of probation. In Kenya today, almost all offences are bailable and therefore where there is goodwill on the part of the sentencing court, many of these mothers can attend court only during the hearings or mentions, thereby saving the children the suffering encountered behind bars.

The financial capabilities of the offender and her family should be carefully weighed against the weight of the offence committed to ensure that whereas the bail or bond imposed is in tandem with the amounts in issue, the offender is reasonably able to pay and thereby avert a situation whereby the convict ends up serving the full term due to inability to raise the bail or bond. In Latvia, the Working Group on Arbitrary Detention reported⁹¹ that they met “In police cells people who had been sentenced to fines for administrative offences and, because they had not paid the fines, were serving custodial sentences of up to 15 days. These people were generally not well-off and were serving the alternative sentence because they were insolvent.”

As a last resort, where imprisonment is mandatory, the court should open a file on the child to be placed inside the mothers file such that every time the mother appears for mention or hearing, the court can monitor the well being of the child. This will change the reality on the ground whereby children living in the prison are ‘invisible’ to the justice system and forgotten by the social services.⁹² In many countries, these children are not even registered (in the records of the institution or elsewhere) and are accepted to live in the institutions on an ‘informal’ basis only.

⁹⁰ Ireland: Detention of Children in Ireland International Standards and Best Practice (Jan. 28, 2010). Available at http://www.crin.org/docs/IPRT_Detention_of_Children_in_Ireland.pdf

⁹¹ Working Group on Arbitrary Detention reported⁹¹ (E/CN.4/2005/6/Add.2, Para 64)

⁹² It is very difficult to obtain information on the number of children residing in prisons. For example, when looking for statistics on children living with their imprisoned mothers in France, the official information regarding the adult prison population does not include this information (see website

Further, a pre-sentencing report should be sought to bring out the information concerning the alternative possible care givers including an NGO or a children's home under the government support, if need be. Preference for the next best placement option for the child should however be given to the father of the child, with a view of placing the child under his care, pursuant to the provisions of Article 53 subsection (e) of the constitution which provides that a child is entitled "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."

For the mothers already in prison with their children, my recommendation is that all the courts should ask for data from prisons detailing how many children are held therein as well as other relevant information pertaining to their birth legislation, immunization, age, health among others. Details of crimes committed by their care givers, time served already and the prison authorities view of her behavior and positive growth if any. This information is to be used in reviewing the sentence.

Another recourse that may be exploited to secure release of these mothers already in prison is by recommending them to the Advisory committee to petition the president for consideration under the power of mercy as provided for by Article 133 of the constitution which states;

On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by granting a free or conditional pardon to a person convicted of an offence, postponing the carrying out of a punishment, either for a specified or indefinite period, substituting a less severe form of punishment; or remitting all or part of a punishment.

A non custodial sentence is to be pursued as far as humanly possible to Conserve and promote the welfare of each of these children while appreciating the fact that the convicted mother must serve the sentence. In so doing, the court shall be guided by the nature and the facts of the case, having in mind the reality of instances where the community has resorted to "mob justice" from frustrations of having repeat offenders released from the police stations or the courts without the community being consulted after they take them there. The court decision should therefore be

<http://www.justice.gouv.fr/chiffres/ap/chiffres2004.htm>) nor is it contained in the section of juvenile justice (<http://www.justice.gouv.fr/chiffres/mineurs02.htm>).

reached from a transparent all inclusive and informed point of view. This calls for a judiciary that is beyond reproach, and therefore enjoys the confidence of the Kenyan populace. The ongoing judicial vetting is a step in the right direction and should be upheld to the very end.

Writing legislation that is progressive, comprehensive and attends to the holistic needs of children is not sufficient in itself. The implementation of legislation transforms legislation into living reality. Implementation requires the monitoring of implementation of legislation and policy and its impact on effective service delivery to children. In the words of the South African Law Reform Committee, monitoring is “a continuous follow-up of the activities of government, non-government organizations (NGO’s) and other child related structures to ensure the effective implementation of the Convention of the Rights of the Child and child welfare legislation”.

Appropriate and independent monitoring of the implementation of laws relating to children is essential as it assists in evaluating the gaps in the legislative provisions, gaps in implementation and also what accounts for the gaps in implementation and what can be done to address the issues. Monitoring can also inform legislators as to the need for further law reform, either as a result of the legislation being unworkable or as new problems and challenges arise in the social context that require some legislative intervention. Monitoring systems need to be independent of the structures that are being monitored.

Law enforcement also involves sensitivity training of law enforcement officials. Law reform should mandate that law enforcement institutions, the police, prosecutors, judges, magistrates and prison officers undergo rigorous training in children’s rights and enforcement of relevant laws. The working conditions and the morale of the prison officers should also be enhanced. They should be required to take a course and pass an examination on laws and requirements in the constitution and children Act on matters touching on the handling of the babies and their mothers under their custody before taking on duties.

The researcher recommends formulation of an independent Act of Parliament governing the arrest, court proceedings and imprisonment of expectant women, lactating mothers as well as mothers with babies of tender age. This would be the sure way to ensure the rights of the children in prison with their mothers are guaranteed and provided for. One of the major recommendation by the Special Rapporteur on Prisons and Conditions of Detention in Africa

formed in 1996 at the first Pan- African Seminar on Prison Conditions in Africa held in Uganda was that: “*expecting and breast-feeding mothers and elderly women should not be sent to prison*”.

In most parts of Africa, the mother is considered to be the primary care taker of the child. With this regard, the African Children’s Charter attaches particular importance to the need of the child to grow up with the mother and makes special provisions, never articulated in any human rights instruments, relating to mothers facing criminal charges for which imprisonment may be imposed upon conviction. Such provisions include the consideration of a non-custodial sentence when considering sentencing mothers; State parties must establish and promote measures alternative to institutional confinement for the treatment of such mothers; state parties must ensure that a mother should not be imprisoned with her child; the death sentence should not be imposed on such mothers and; the essential aim of the penitentiary system should be the reformation, integration of the mother to the family and social rehabilitation.⁹³ Furthermore, the Charter discourages separation of the child from its parents unless ‘a judicial authority determines in accordance with the appropriate law that such a separation is in the best interests of the child’.⁹⁴ The protection in the Charted is stronger than that found under the CRC which entrusts the duty to determine whether the separation is in the best interest of the child to ‘competent authorities’.⁹⁵

The researcher strongly recommend that section 30 of the ACRWA which is the only Instrument with specific provision on the issue of children of imprisoned mothers be lifted and applied in the proposed Act *mutatis mutandis* to read as follows;

The Government undertakes to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- a) *Ensure that a non-custodial sentence will always be first considered when sentencing such mothers;*

⁹³ Article 30 ACRWC

⁹⁴ Article 19(1)ACRWC

⁹⁵ Article 20 CRC

- b) *Establish and promote measures alternative to institutional confinement for the treatment of such mothers;*
- c) *Establish special alternative institutions for holding such mothers;*
- d) *Ensure that a mother shall not be imprisoned with her child;*
- e) *The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.”*

A thorough examination of the Kenyan laws reveals that while inadequate domestic laws governing the treatment of the children accompanying their mothers in prison plague our country (only section 30 of the Prisons Act directly mentions these children⁹⁶), there is little awareness of the very existence of these children behind the prison bars. The community education programs are not made part of the governments undertaking and the children continue to suffer untold misery. The need to have media campaigns to promote awareness of these children’s rights cannot be gainsaid. However, unless backed by political will to provide the necessary budgets for these plans, this endeavor will have little effect. As the situation stands currently, no resources are allocated to the prison for the upkeep of these children by the Kenyan government.

The research has established that the government holds the mandate and the responsibility of protecting the rights of the children accompanying their incarcerated mothers. It goes to great lengths in protecting the life of the unborn baby. This is evidenced by the provisions of section 211 of the Penal code which states that where a woman convicted of an offence punishable by death is found to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of sentence of death. Further, section 26 of the constitution states that every person has the right to life and that the life of a person begins at conception.

A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law. Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

⁹⁶ Section 30 of the Prisons Act, Cap 90

The researcher is fully convinced, after personal encounters when visiting some of these children in prison, that being with their mothers behind bars is not always to their best interest. We must all, as a country strive to find better ways to keep out of prison those mothers that pose no threat to the society, while at the same time trying to improve the prison experience for those who do. The overall goal of every sentencing court should be to separate the babies from this category of the mothers at whatever costs, since, if they are a threat to the larger community, then they surely are a negative influence to their own children as well, despite their maternal discretion.

The government should also explore the option of partnering under public private partnership (PPP) as well as other development partners, NGOs or persons of good will to establish a second tier prison facility specifically for holding this category of prisoners. The government should also make adequate legislations to cater for the regulation of the prison facilities in accordance with the international norms and practices. To a large extent, Faraja Trust has shown the way forward and the government should embrace and emulate such initiatives whole heartedly and spread them out to all the prisons within the forty seven (47) counties in Kenya.

“I’m torn. Anytime a mother gets imprisoned, it’s obviously a lose-lose-lose situation for mother, baby and society at large. But is the answer curtailing kids’ freedom to keep them under a mother’s wing? Or is this just another way humanity has learned to throw the baby out with the bathwater?”⁹⁷ ”

⁹⁷ Lloyd, author, “ Gentrification wars in San Francisco's Mission District”, in his report, " Mexico City lets incarcerated women keep their children until the age of 6", February 2008.

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