



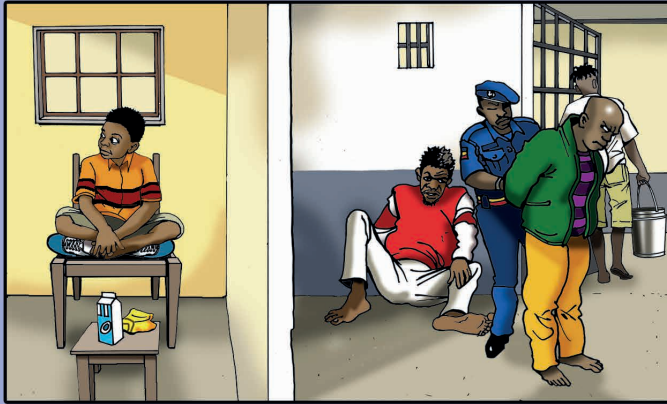
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

A PROSECUTOR'S GUIDE TO CHILDREN IN THE CRIMINAL JUSTICE SYSTEM



The child has a right to a legal representative.

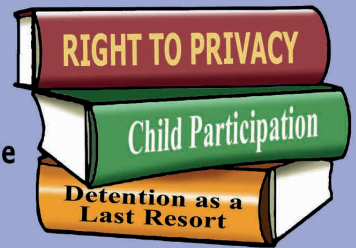
The child must be held separately from adults.



As ODPP we conduct trials in a language the child understands.



We ensure that the best interests of the child are safeguarded.



We use initials to protect the identity of the child.

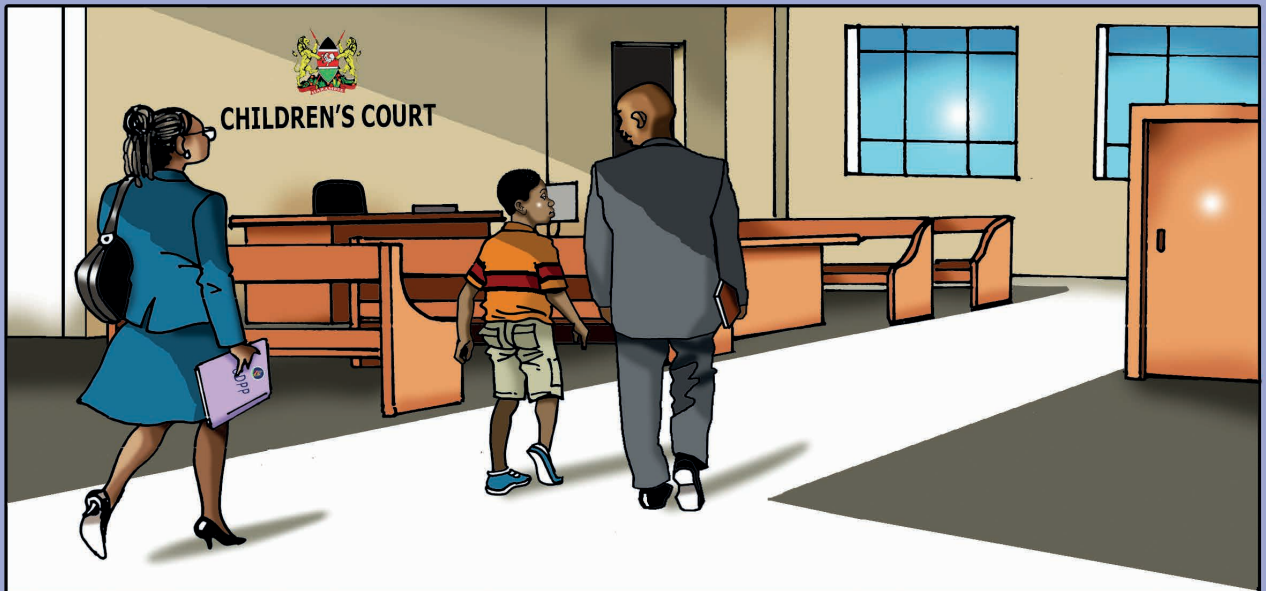


For example; Joseph Mpendwa will be referred to as J.M.

"J.M on the 15th day of January 2021 at Kabati area, Kamukunji Sub County within Nairobi County assaulted S.K., a child aged 10 years."

We give priority to children's cases.

Hearings must be conducted in closed session/camera.



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UNODC

United Nations Office on Drugs and Crime

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This Guide, known as A Prosecutor’s Guide to Children in the Criminal Justice System (the ‘Guide’), has been developed pursuant to the Constitution of Kenya, 2010, the national legal framework, and the relevant international child rights framework for dealing with children who come into contact with the criminal justice system. It sets out what is expected of all prosecutors in terms of how they should deal with children in conflict with the law and children who come into contact with the law.

May I make special mention of the critical role and unwavering dedication of the members of our Task Team on Juvenile Justice for bringing this Guide to fruition. The Task Team was led by chairperson Mr. Jacob Ondari, (formerly of ODPP) and Ms. Jacinta Nyamosi, OGW (Ag. DDPP); ably supported by the Head of the Children Division, Ms. Caroline Karimi (SPPC), Mr. Alloys Kemo (SADPP), Ms. Gikui Wangui Gichuhi (ADPP), Ms. Mary Wang’ele (ADPP), Ms. Ebby Maswai (SPPC), Ms. Linda Wawira (PPC), Ms. Charity Kagai (PC), Ms. Naomi Atina (PC), Ms. Mercy Nyaraita (PC), Mr. Abel Omariba (PC), Ms. Jillo Guyo (PC), Ms. Gertrude Kiilu (PC), Ms. Jemimah Aluda (formerly of ODPP), Ms. Rose Kipyego (CIO), Ms. Rosemary Mukiri (PS), Ms. Judith Mutemi (PS) and Mr. Micheal Suter (CO).

I wish to convey my sincere appreciation to the United Nations Office on Drugs and Crime (UNODC) and the European Union through the Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD). My sincere appreciation also goes to the United States Department of Justice. The ODPP recognizes the contribution of Ms. Charity Kagwi - Ndungu, Ms. Joyce Matara, Mr. Thorbjorn Bjornsson, Ms. Maria Temesvari and Mr. Michael Lusweti, all from UNODC; together with Ms. Tomika Patterson and Ms. Caroline Mtai from the US Department of Justice for their support. The technical and financial assistance of these partners was instrumental in the development and publication of this Guide.

Further, I wish to acknowledge the contribution of our other internal and external stakeholders for their invaluable input throughout the process. Their views, critique and contributions have tremendously enriched the content of this Guide.

It is my hope that this Guide will contribute immensely to the effective, efficient and expeditious dispensation of justice to children within Kenya’s criminal justice system.

NOORDIN HAJI, CBS, OGW
DIRECTOR OF PUBLIC PROSECUTION

ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
DCS	Department of Children Services
IAU	Internal Affairs Unit
IPOA	Independent Policing Oversight Authority
KNCHR	Kenya National Commission on Human Rights
NPS	National Police Service
ODPP	Office of the Director of Public Prosecutions
P&C	Protection and Care
PACS	Probation and After Care Service
PLEAD	Programme for Legal Empowerment and Aid Delivery in Kenya
SGBV	Sexual and Gender-based Violence
TSC	Teachers Service Commission
UNCRC	United Nations Convention on the Rights of the Child
UNODC	United Nations Office on Drugs and Crime
WPA	Witness Protection Agency

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FOREWORD

The Office of the Director of Public Prosecutions (ODPP) has developed this Prosecutor's Guide to Children in the Criminal Justice System as an easy-to-read reference tool to assist prosecutors when handling cases involving children who come into the criminal justice system.

There have been instances where the rights of children in conflict with the law have been violated during the trial process, and where children have even had their cases tried as adults. There are other instances where children have been charged for otherwise petty crimes and ended up being deprived of their liberty without regard to the circumstances that brought them into the criminal justice system. Whereas the Court and prosecution do not have a legal or statutory duty once a case has been concluded, this state of affairs exposes children in conflict with the law to possible violations of their rights. Due to their vulnerability, children who come into contact with the law as victims and witnesses of crime also need protection in order to prevent secondary victimisation while in the justice system.

It is a fact that child cases are generally complex and sensitive in nature. Therefore, while I am mindful of the fact that ours is an adversarial legal system, there are instances where actors in the child justice system are required to go beyond the letter of the law and the call of duty or in other instances, to take a 'social welfare approach' to ensure that decisions are in the best interest of the child. This is necessary to minimise the risk of discrimination and undue stress for children in the criminal justice system.

It is for this reason that this Guide aims to achieve the following:

1. Increase awareness and understanding of the rights of children in conflict with or in contact with the law
2. Serve as a practical framework to guide prosecutors on how to handle cases involving children in the criminal justice system

At every stage of a child's contact with the criminal justice system, their rights must be protected and upheld. They should be treated with sensitivity, respect and dignity.

It is, therefore, my hope that when fully implemented, this Guide will contribute to substantial improvements in the provision of access to justice for children and promote a more child-friendly criminal justice system in Kenya.

A handwritten signature in blue ink, appearing to read 'Noordin Haji', with a long horizontal stroke extending to the left.

NOORDIN HAJI, CBS, OGW
DIRECTOR OF PUBLIC PROSECUTIONS

PART I:

GENERAL GUIDING PRINCIPLES ON CHILD JUSTICE

INTRODUCTION

A child-friendly justice system is one that upholds the fundamental rights of children in conflict with and in contact with the law and that is tailored to fit their vulnerable situation. The Constitution of Kenya, 2010,¹ the national legal framework and the relevant international child rights instruments to which Kenya is a party all provide for several cross-cutting principles that are key to a child-friendly justice system. This Guide considers the guiding principles of child justice to be as follows:

1. The best interest of the child
2. Right to representation, legal aid and legal assistance
3. Protection from torture
4. Participation and right to be heard
5. Deprivation of liberty as a measure of last resort
6. Promotion of dignity and worth
7. Protection from discrimination
8. Right to privacy
9. Right to parental care and parental participation in proceedings

These principles cannot be read in isolation because they are all interrelated. It is essential, therefore, that a prosecutor takes a holistic approach to them.

¹ Articles 49, 50, 51 and 53 of the Constitution of Kenya

1.1. THE BEST INTEREST OF THE CHILD

The Constitution, the national legal framework and international child rights instruments² provide that where a child is directly or indirectly involved in or affected by the justice system, the best interest of the child shall be a primary consideration before taking any action requiring judicial and administrative decisions including safeguarding, promoting and conserving the rights and welfare of the child.

This principle must be interpreted on a case-by-case basis: it is flexible and often involves complex speculative choices, alternatives and predictions of outcomes. It covers all aspects of a child's life and must be read alongside the other principles. Given the vulnerable nature of children, their best interests can be easily overlooked if not specifically highlighted.

1.2. RIGHT TO REPRESENTATION, LEGAL AID AND LEGAL ASSISTANCE

A child is entitled to representation as is guaranteed by the Laws of Kenya³, and it is the duty of all prosecutors to respect and uphold this right at all times when the child is being processed within the criminal justice system. This is a legal guarantee and safeguard that ensures that no injustice is occasioned on the child throughout the process. This is important because a child does not have the capacity to understand legal procedure and is, therefore, unable to represent himself or herself. Thus, it is the responsibility of all duty bearers to ensure that all children within the criminal justice system are represented.

-
- 2 Article 43 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>; Article 17 of the African Charter on the Rights and Welfare of the Child (adopted July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49. Available at: <https://au.int/en/treaties/african-charter-rights-and-welfare-child>; Penal Reform International, Protecting Children's Rights in Criminal Justice Systems: A Training Manual and Reference Point for Professionals and Policymakers (June 2013). Available at: <https://www.penalreform.org/resource/juvenile-justice-manual/>
 - 3 Article 50(2)(h) of the Constitution of Kenya; Section 43(3) of the Legal Aid Act; Section 77 of the Children Act

1.3. PROTECTION FROM TORTURE

Any child within the criminal justice system, either as a child in conflict with the law or a child in contact with the law (as a victim or witness), must be protected from torture or other cruel, inhumane, degrading treatment or punishment.⁴ Further, they should not be unlawfully or arbitrarily deprived of their liberty.⁵

This principle not only denotes the prevention of harm to children, but also encompasses other core principles such as child development, best interests of the child, non-discrimination and child participation. Therefore, prosecutors in children cases have a duty to adhere to this principle when handling children's matters and must ensure that the right of every child to be protected is upheld.

1.4. PARTICIPATION AND RIGHT TO BE HEARD

Children should be provided with all necessary information and have that information explained to them in a language they understand. Where children may be too young to express themselves clearly, they should be assisted to do so or represented.

However, the UN Committee on the Rights of the Child has stated that age alone should not determine the significance of a child's view. Information, experience, environment, social and cultural expectations and levels of support are factors that all contribute to the development of a child's capacities to form a view.⁶

Children should not be compelled to participate but rather, be approached in a manner that encourages their participation. Where participation of a child may prejudice their mental, emotional or psychological development, they should be exempted from taking

Explanatory Note 1:

Prosecutors should protect this principle in practice by:

- 1. Allowing the child to speak*
- 2. Ensuring the views of the child are taken into account*
- 3. Ensuring the child has the necessary information, can intervene and freely express his or her opinion*

4 Article 53(1)(d) of the Constitution of Kenya

5 Article 37 of Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

6 Article 12 of Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>; Committee on the Right of the Child, General Comment No. 12: The right of the child to be heard (1 July 2009) UN Doc CRC/C/GC/12. Available at: <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

part in the proceedings. The examination of the child should be appropriate and not hostile or intrusive.

In upholding this principle, prosecutors should ensure that children can actively participate in judicial proceedings, either directly or indirectly, through a parent, guardian, guardian ad litem or legal representative. Each case must be carefully addressed with specificity to the circumstances while weighing against the principle of the best interest of the child. The weight given to a child's view must be assessed and considered on a case-by-case basis.⁷

1.5. DEPRIVATION OF LIBERTY AS A MEASURE OF LAST RESORT

The deprivation of liberty of children should be a measure of last resort. Provisions should be made for restorative justice, diversion mechanisms and alternatives to the deprivation of liberty. However, where it is necessary, then the same must be for the shortest appropriate period of time.⁸ Further, the children should be kept separately from adults in facilities that take into account age, gender⁹ (including intersex children) and mental disability. Fundamentally, any programming on justice for children should build on informal and traditional justice systems as long as they respect basic human rights principles and standards.¹⁰ All competent authorities that hold children within the justice system must ensure that their basic needs are taken care of and that the same is reviewed periodically.¹¹

1.6. PROMOTION OF DIGNITY AND WORTH

A child must be treated in a manner that is consistent with the child's sense of dignity and worth that makes them feel valued and respected.¹² This principle must be upheld

7 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (General Assembly resolution 40/33). Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

8 Article 53(1)(f)(i) of the Constitution of Kenya

9 Article 53(1)(f)(ii) of the Constitution of Kenya

10 United Nations, Guidance Note of the UN Secretary General: UN Approach to Justice for Children (September 2008). Available at: https://www.un.org/ruleoflaw/files/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf

11 Article 25 of Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

12 Article 40 of Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

through the entire process when a child is within the justice system. Respect for the dignity of the child also requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.¹³

1.7. PROTECTION FROM DISCRIMINATION

All children who come into contact with the criminal justice system must be treated equally and protected from all forms of discrimination. This is provided for under the Constitution of Kenya¹⁴ and the Children Act¹⁵, together with the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC); which prohibit discrimination on the basis of age, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status¹⁶. At every stage of a child's contact with the criminal justice system, thought must be given to the child's circumstances. All their rights must be protected and upheld. They must not be deprived of an opportunity to access education and health services¹⁷. They must be offered appropriate services without discrimination¹⁸.

1.8. RIGHT TO PRIVACY

The right to privacy is guaranteed by the Constitution of Kenya, the national legal framework¹⁹ and international child rights instruments²⁰. It is a fundamental right that must always be upheld during and after the trial process, whether the child is in conflict with the law or in contact with the law as a victim or witness. No information shall be

13 Committee on the Right of the Child, General Comment No. 10: Children's rights in juvenile justice (2 February 2007) UN Doc CRC/C/GC/10, paragraph 13. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

14 Article 27 of the Constitution of Kenya

15 Section 5 of the Children Act

16 Article 2 of the Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

17 Articles 53(1)(b) and (c) of the Constitution of Kenya

18 Penal Reform International, Protecting Children's Rights in Criminal Justice Systems: A Training Manual and Reference Point for Professionals and Policymakers (June 2013). Available at: <https://www.penalreform.org/resource/juvenile-justice-manual/>

19 Sections 19, 76(5) and 186(g) of the Children Act

20 Article 16 and 40(2)(b)(VII) of Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

published that may lead to the identification of a child in conflict with the law²¹ or a child in contact with the law as a victim or witness. This is because any failure to protect their privacy may expose the child to stigmatisation and danger. It is, therefore, the duty of all professionals within the criminal justice system to ensure that all proceedings are held in camera, unless there are clear reasons or it is in the best interests of the child that it be in public.

1.9. RIGHT TO PARENTAL CARE AND PARENTAL PARTICIPATION IN PROCEEDINGS

The rights of a parent or guardian are not extinguished when the child comes in contact with the criminal justice system, either as a child in conflict with the law, or a child in contact with the law as a victim or witness. This right must be protected at all times during the proceedings so as not to occasion any injustice to the child and also to reassure the child.

21 Committee on the Right of the Child, General Comment No. 10, paragraph 64. Available at <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

PART II:

GUIDE TO PROSECUTING CHILDREN IN CONFLICT WITH THE LAW

INTRODUCTION

A 'child in conflict with the law' refers to anyone aged under 18 years who comes into contact with the criminal justice system as a result of being suspected or accused of committing an offence.

Most children in conflict with the law have committed petty crimes or minor offences such as vagrancy, truancy or alcohol use. Some of these are known as 'status offences' and are not considered criminal when committed by adults. In addition, some children who engage in criminal behaviour may have been used or coerced by adults. Too often, prejudice related to race, ethnicity or social and economic status may bring a child into conflict with the law, even when no crime has been committed. It may also result in harsh treatment by law enforcement officials.



Models and approaches of handling children in conflict with the law are geared towards rehabilitative and restorative justice. This means that professionals in the child justice system should always take measures that aim to reintegrate the child into society. While applying this Guide, a prosecutor must consider all available options, dispositions, programmes and alternatives to institutional care and recommend appropriate referrals and follow up mechanisms for purposes of diversion,²² plea bargaining,²³ rehabilitation and reintegration.

2.1. HANDLING CHILDREN IN CONFLICT WITH THE LAW

1. A prosecutor should ensure that throughout the trial process, a child in conflict with the law is handled in a manner that is appropriate to the child's well-being.²⁴
2. Where the prosecutor is of the view that a child in conflict with the law is in need of psychosocial support, then the prosecutor should make an application for the Court to appoint a counsellor or child psychologist at the earliest opportunity.

Explanatory Note 2:

The prosecutor will work with the Children Officer to establish if the child is in need of care and protection as provided by Section 119 of the Children Act.

2.2. PRE-CHARGE STAGE

2.2.1. INVESTIGATIONS

3. Prosecutors should enhance collaboration and proactively work closely with other agencies such as the National Police Service, Department of Children Services and the Probation and After Care Service to guide the investigation of cases of children who come into contact with the criminal justice system.²⁵
4. The prosecutor shall request to be notified by investigative agencies of any arrest of a child or when an investigation involving a child has commenced.²⁶

22 Refer to the Diversion Guidelines

23 Refer to the Plea-Bargaining Guidelines

24 Section 187 of the Children Act

25 Section 5(3) of the ODPP Act

26 Section 27 of the ODPP Act and the Child Offender Rules, 5th Schedule of the Children Act

5. The prosecutor should notify investigative agencies of the need to conceal the identity of the child in conflict with the law.
6. The prosecutors should encourage Investigation Officers to use questioning that respects the rights of the child.
7. The prosecutor shall, at the earliest opportunity, establish the special needs of a child in conflict with the law.
8. The prosecutor shall establish from the investigative agencies if the child's parents have been informed of the arrest.
9. The prosecutor shall establish whether a Protection and Care (P&C) file has been opened by either the Children Officer, the Police Officer or the ODPP in respect of the welfare of the child in conflict with the law.
10. Where practicable, a P&C file should contain a P&C Form²⁷; a Social Welfare Report from the Children Officer; and where diversion or plea bargaining is being considered, a Social Inquiry Report from PACS.
11. The prosecutor shall proceed with making the decision to charge, notwithstanding the absence of any of these reports.
12. In prosecution-guided investigations, the prosecutor should ensure that due consideration is given to the dignity and emotional well-being of the child and that the

Explanatory Note 3:

Opening of a P&C file enables the Court to follow up and deal with the welfare issues affecting the child based on the report of the Children Officer; or an assessment of the criminogenic aspects or status on possibilities of reoffending based on the report of the Probation Officer. These issues cannot otherwise be dealt with in the Criminal Case file.

Explanatory Note 4:

At this stage, the Children Officer's Report will be used to inform on whether or not to plea bargain, divert or charge the child.

Explanatory Note 5:

The Children Officer's reports shall include the following information:

- Biodata of the child
- Contact of the reporter, if any
- Any special needs of the child
- The mental and physical health of the parents
- The need for continuation of a stable home environment
- Interactions and interrelationships with other members of the household
- Adjustments to the school environment and community
- Whether there is a pattern of domestic violence in the home
- Parental use of excessive discipline or emotional abuse
- Evidence of parental drug, alcohol or child/sex abuse and
- Any recommendation

27 See Annexure II

rights of the child are observed throughout the investigation process.²⁸

13. Before making the decision to charge, the prosecutor shall review the case files to ensure that the case is comprehensively investigated and adequately prepared.
14. All communication to the Investigating Officer should be in writing and records kept.

2.2.2. CONFESSIONS

15. The prosecutor shall support the Court to establish if a confession meets the basic requirements for confessions.
16. The prosecutor shall support the Court to establish if a confession was procured freely and voluntarily.²⁹
17. The prosecutor shall establish if at the time of making the confession, the child did so in fear of unknown consequences or if there was a suggestion of the possibility of imprisonment, which may lead the child to a confession that is otherwise not true.³⁰
18. While considering how a confession was secured, the prosecutor must take into account the age of the child; the education and exposure level of the child; whether the child understands the implications and consequences; whether the parent/guardian or legal representative was present; and the circumstances surrounding how the confession was secured.
19. When a child makes a confession, the prosecutor shall caution the child, parent, guardian or legal representative on the meaning, implication and consequences of the confession.

28 See Chapter 2 of the ODPP Decision to Charge Guidelines on Prosecution Guided Investigations, Articles 49, 53(2) of the Constitution of Kenya and Sections 4-19 of the Children Act

29 Article 49(1)(d) of the Constitution of Kenya, Section 186(d) of the Children Act and Part III of the Evidence Act; see also Committee on the Rights of the Child. General Comment No. 10, paragraph 57. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

30 Committee on the Right of the Child, General Comment No. 10, paragraph 57. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

20. A prosecutor should consider the case for diversion if a child confesses to an offence. This, however, will be on a case-by-case basis.

2.2.3. **USE OF INITIALS**

21. The prosecutor shall ensure that the name of the child, identity, home, last place of residence, school, particulars of the child's parents and/or relatives and any other information that may disclose the identity of the child is not revealed by using initials in the charge sheet and any other public document, including statements and publications.³¹

2.2.4. **AGE OF THE CHILD**

22. The prosecutor should establish the age of the child at the earliest opportunity.

23. The prosecutor shall confirm that the child has attained the age of criminal responsibility for the alleged offence.³²

24. The prosecutor must ensure that the Investigating Officer provides all the necessary documents to establish the child's age before approval of the charge.³³

Explanatory Note 6:

The documents used for proof of age includes any of the following:

- a birth certificate;
- birth notification;
- baptismal card;
- clinic card; and/or
- age assessment.

25. Where there is no proof of age by birth certificate, then any documents such as school reports shall be accepted and considered genuine by the prosecutor unless there is proof to the contrary.

26. Where the question of age still remains unascertained, the prosecutor may invoke Section 143 of the Children Act for the Court to make a determination on the age.

31 Section 76(5) of the Children Act

32 Committee on the Right of the Child, General Comment No. 10, paragraph 48. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>; Section 14(1) of the Penal Code; C Vs. DPP (1996) 1 AC 1 (House of Lords). Justice Majanja R. Vs J.O. and Anor (2015) eKLR Homa Bay HCCA135 and 136 of 2014, paragraph 27

33 Section 143 of the Children Act

In case of conflicting and/or inconclusive evidence, the child shall be given the benefit of the doubt.³⁴

27. The prosecutor shall ensure that the Charge Sheet indicates that the suspect is a child.
28. Where a child who has not attained the age of criminal responsibility commits a felony, the prosecutor shall make an application for the Court to open a P&C file.
29. Where the child in conflict with the law has attained the age of criminal responsibility but is below 12 years, the child shall not be held criminally responsible for an act or omission, unless the prosecutor proves the child had the capacity to know the act or omission was unlawful.³⁵

2.2.5. MAKING THE DECISION TO CHARGE

30. The prosecutor shall establish whether the child has attained the age of criminal responsibility.³⁶
31. The prosecutor shall always consider alternatives to prosecution.
32. While making a determination, the prosecutor shall also be guided by the ODPP Decision to Charge Guidelines, the ODPP Diversion Guidelines; the ODPP Plea Bargaining Guidelines; any other relevant ODPP policy documents; the evidence contained in the police file and the Protection & Care file.
33. The prosecutor shall be guided by the general international guiding principles on child justice and in particular, the principle on the best interest of the child.
34. The prosecutor shall ensure that the charges being preferred are proper.
35. Once presented with the investigation file, the prosecutor shall establish if the rights of the child have been upheld by enquiring:

34 Committee on the Right of the Child, General Comment No. 10, paragraph 39. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

35 Section 14(2) of the Penal Code

36 Section 14 of the Penal Code

- Where the child had been detained
- If the child was held separate from adults
- Whether the child had been kept in safe conditions
- Whether the child had been detained for more than 24 hours in police custody
- Whether there was mandatory initial contact with the parents or guardian after the arrest of the child
- Whether the child had legal representation and/or parent or a guardian present during interview(s)
- Whether a Children Officer was present in a case where a child's parent or guardian was not traced for them to be present during the child's interview(s).³⁷

36. The prosecutor should ensure that any communication to the Investigating Officer is in writing and that records are kept.

37. The prosecutor shall establish from the investigative agencies if the special needs of the child have been met.

38. While making a decision to charge, the prosecutor should also explore and identify a variety of dispositions, programmes and alternatives to institutional care that are available to the child.

39. The prosecutor should make appropriate referrals and follow up mechanisms for purposes of diversion, plea bargaining, rehabilitation and reintegration.

40. The prosecutor should ensure that both the child in conflict with the law and the parent or legal guardian are informed about the charge and the possible consequences in a manner that they can understand.³⁸

Explanatory Note 7:

Non-custodial measures include, but are not limited, to verbal sanctions such as admonition; reprimand and warning; conditional discharge; pardon; remission; supervision by a probation officer/children officer; community-based services and programmes such as temporary supervision and guidance; restitution and compensation of victims; educational and vocational training; and counselling by a qualified counsellor.

37 Rule No. 4 of the Child Offender Rules, 5th Schedule of the Children Act

38 Committee on the Right of the Child, General Comment No. 10, paragraph 39. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

41. The prosecutor should actively involve the child, parent, guardian, Guardian ad litem or legal representative in the decision-making process at the pre-charge stage.
42. The prosecutor shall use the ODPP Charge Sheet.³⁹

2.2.5.6. Guidance on decision to charge

43. The prosecutor shall be guided by the provisions of the ODPP Decision to Charge Guidelines.⁴⁰
44. The prosecutor shall ensure that there is sufficient evidence available to provide a realistic prospect of conviction (the Evidential Test) and that the interest of fair administration of justice would be served by prosecuting the matter (the Public Interest Test).
45. The prosecutor shall exercise discretion as to whether there is public interest in the case being prosecuted. This decision shall be guided by the principle of the best interest of the child, taking into account the information contained in the P&C file and any Social Inquiry Report available.
46. The prosecutor shall consider whether the matter is suitable for alternatives to prosecution.

2.2.5.7. Sexual offences

47. The prosecutor shall not permit any plea bargain,⁴¹ out-of-Court settlement or Alternative Dispute Resolution in sexual offences where the victim is a child.

Explanatory Note 8:

Section 8(1) of the Sexual Offences Act makes it an offence for a person to cause penetration with a child. However, there are cases of consensual sexual relationships between minors, which have been termed as 'Romeo and Juliet' cases through judicial precedents. In such cases where the Subject is between 14 and 17 years, while the Complainant is not more than three years younger than the Subject, a prosecution is unlikely to be appropriate. The prosecutor may, in the best interest of the child, and in exercise of their discretion, invoke the provision of Articles 157(6) (a), (b), (c) and 157(11) of the Constitution of Kenya.

³⁹ See Annexure I: ODPP Charge Sheet

⁴⁰ See the ODPP Decision to Charge Guidelines

⁴¹ Section 137(N) of the Criminal Procedure Code

48. The prosecutor may consider diversion in ‘Romeo and Juliet’ cases⁴² if it is in the best interest of the child or children.
49. In making a decision on a ‘Romeo and Juliet’ case, the prosecutor shall pay careful regard to the following factors:
- The relative ages of both the Subject and the Complainant and their levels of maturity
 - Whether there was “consent” or use of any form of coercion or violence in commission of the act
 - Any other relevant circumstances.
50. Where a prosecutor makes a decision to take an alternative to prosecution, the same must be put in writing.

Explanatory Note 9:

Where the age gap between the suspect and the victim is wide, or the children are below the age of 14, then the same shall not be termed as a ‘Romeo and Juliet’ case.

2.2.5.8. Victims of trafficking

51. The prosecutor shall ensure that no child victim of trafficking is charged for any criminal act committed as a direct result of being trafficked.⁴³

2.2.5.9. Cooperating child in conflict with the law

52. If a child in conflict with the law is cooperating, the prosecutor shall take the cooperation into consideration and exercise discretion in the best interest of the child.

Explanatory Note 10:

Victims of trafficking in persons are routinely victims of enforced prostitution and other forms of exploitation. The prosecutor must consider that under Section 14 of the Counter-Trafficking in Persons Act 2010 a victim of trafficking in persons shall not be criminally liable for any offence related to being in Kenya illegally or for any criminal act that was a direct result of being trafficked.

42 National Council on the Administration of Justice, Status Report on Children in the Justice System in Kenya (2019) page 17. Available at: <https://ncaj.go.ke/wp-content/uploads/2019/11/NCAJ-Report-Digital-Version.pdf>

43 Section 14 of the Counter-Trafficking in Persons Act, 2010

2.2.6. COMPLAINTS ON VIOLATIONS OF THE RIGHTS OF THE CHILD

53. Where it is suspected that the rights of a child in conflict with the law have been violated, the prosecutor shall cause the complaint to be investigated and ensure appropriate action is taken.⁴⁴

Explanatory Note 11:

The DPP has the authority to direct an investigative agency to investigate any allegation of criminal conduct.

54. If it is suspected that a member of the National Police Service, security agency or any other relevant government agency is responsible for violating a child's rights, the prosecutor shall inform his or her supervisor and include the DPP in copy of all correspondence concerning the complaint.
55. Where it is suspected that a child's rights have been violated, the prosecutor shall cause investigations to be conducted and take appropriate action, including but not limited to prosecution, referral to IPOA, IAU, KNCHR, TSC or the National Legal Aid and Awareness Programme, for further action.

2.3. PRE - TRIAL STAGE

2.3.1. PROVISION OF LEGAL REPRESENTATION

56. The prosecutor shall make an application that the child in conflict with the law is provided with a legal representative.
57. The prosecutor shall ensure that at any stage in the criminal justice process, the child in conflict with the law is promptly informed, appropriately advised, and receives legal representation as required by making an application to the Court on the basis that lack of legal representation may result in substantial injustice.⁴⁵
58. The prosecutor shall make an application to the Court for a parent or guardian to stand with the child in order to take care of the social needs of the child in conflict with the law.

44 Article 157(4) of the Constitution of Kenya and Section 5(2)(b) of the ODPP Act

45 Article 50(2)(h) of the Constitution of Kenya; Section 43(3) of the Legal Aid Act; Section 77 of the Children Act

2.3.2. APPOINTMENT OF GUARDIAN AD LITEM

59. Where the child in conflict with the law does not have a parent or guardian, the prosecutor shall make an application for the Court to appoint a guardian ad litem for the child.⁴⁶

Explanatory Note 12:

The appointment of the Guardian ad litem shall not be in lieu of legal representation.

2.3.3. ALTERNATIVES TO PROSECUTION AND TRIAL

60. While dealing with a child in conflict with the law, the prosecutor shall identify a variety of dispositions, programmes and alternatives to institutional care available to the child and recommend appropriate referrals and follow-up mechanisms for purposes of diversion, plea bargaining, rehabilitation and reintegration.
61. The prosecutor shall consider and be guided by the ODPP Diversion Guidelines, the ODPP Diversion Policy, the ODPP Plea Bargaining Guidelines, the Bail and Bond Policy and all relevant laws before judgment.
62. When considering alternatives to prosecution, the prosecutor shall be guided by Kenya's Constitution and all other enabling laws.⁴⁷

2.3.3.4. *Diversion*

63. The prosecutor shall consider and be guided by the ODPP Diversion Policy and Guidelines.
64. The prosecutor should be satisfied that a prosecution will be necessary should the offer of diversion be rejected, or if the child in conflict with the law does not complete the conditions set by a diversion agreement.

⁴⁶ Section 79 of the Children Act

⁴⁷ Article 159(2)(c) of the Constitution of Kenya

65. The prosecutor shall consider diversion in all criminal cases involving children.⁴⁸
66. The prosecutor should make a decision on diversion as early as possible after a child in conflict with the law has been arrested.
67. When considering diversion in the case of a child in conflict with the law, the prosecutor shall take into account the seriousness of the offence and the personal circumstances of the child, including the likelihood of reoffending and like in all other decisions concerning children, the best interest of the child and their developmental needs will be of paramount value.

Explanatory Note 13:

Diversion may be considered as an appropriate response for all offences committed by children, including serious offences. While not all cases may be suitable for diversion, it should be the manner for dealing with the majority of cases involving children in conflict with the law. Diversion can be considered at any time from arrest to the close of the prosecution case. A decision on diversion can thus be made either before or after a charge is laid.

2.3.3.5. Plea bargaining

68. The prosecutor shall consider and be guided by the ODPP Plea Bargaining Guidelines.
69. The prosecutor shall ensure that the plea negotiations are initiated at the earliest opportunity.
70. The prosecutor shall not permit any plea bargaining for offences under the Sexual Offences Act, offences of genocide, war crimes and crimes against humanity.⁴⁹
71. The prosecutor shall ensure that the child in conflict with the law understands all the plea agreement terms.
72. The prosecutor shall ensure that either the parent, guardian or legal representative of the child in conflict with the law is present when the plea agreement is concluded.

⁴⁸ See Guide No. 35 of the ODPP Diversion Policy Guidelines and Explanatory Notes

⁴⁹ Section 137N of the Criminal Procedure Code

2.3.4. BAIL AND BOND

73. The prosecutor shall be guided by the Child Offender Rules and the Bail and Bond Policy Guidelines⁵⁰ when making decisions on bail and bond for a child in conflict with the law.
74. The prosecutor shall make a determination on whether or not to oppose a Bail and Bond application based on the special needs of the child in conflict with the law.

2.3.5. PRE - TRIAL DETENTION

75. The prosecutor shall ensure that pre-trial detention for a child in conflict with the law shall only be used as a measure of last resort and in the best interest of the child.⁵¹
76. The prosecutor shall ensure that a child in conflict with the law is not detained unless there are compelling reasons for the detention and that the detention shall be for the shortest time possible.⁵²
77. The prosecutor shall ensure that a child in conflict with the law is not held for more than twenty-four (24) hours without leave of the Court⁵³, and where it is inevitable, it must be

50 Rules 5 and 9 of the Child Offender Rules, 5th Schedule of the Children Act; and Paragraph 4.4J of the Bail and Bond Policy Guidelines

51 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113), rule 17. Available at: https://www.unodc.org/pdf/criminal_justice/United_Nations_Rules_for_the_Protection_of_Juveniles_Deprived_of_their_Liberty.pdf; see also the ODPP Bail and Bond Policy Guidelines

52 Article 53(1)(f)(i) of the Constitution of Kenya; see the Bail and Bond Policy Guidelines

53 Article 49(1)(f) of the Constitution of Kenya and Rule 4(1) of the Child Offender Rules, 5th Schedule of the Children Act

Explanatory Note 14:

Pre-trial detention is discouraged as a general rule. Children in conflict with the law who are detained under arrest or awaiting trial (“untried”) are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the greatest extent possible and limited only to exceptional circumstances.

Explanatory Note 15:

There will be circumstances where it may be necessary to detain a child alleged to have committed an offence, but these should be limited to where the child is an immediate danger to him or herself or others, or it is considered necessary to ensure his or her appearance at the court proceedings. But even in such cases, community placement should be carefully considered, such as close supervision or placement with a fit person as determined by the Court (e.g. undertakings by parent(s), guardian(s) or a religious leader).

for the shortest time possible.

78. The prosecutor should not seek an order for pre-trial detention of a child in conflict with the law where there is no real prospect that the child would receive a custodial sentence.

Explanatory Note 16:

Non-monetary bail or personal bond from parents should be sought as most child offenders cannot pay and it discriminates against poor and marginalized families.

79. When making a decision to request pre-trial detention of a female child in conflict with the law, the prosecutor shall take into account their gender vulnerability,⁵⁴ including inter alia the availability of gender-specific officers and cells.
80. The prosecutor shall ensure that the victim's views are considered in deciding whether to seek pre-trial detention.
81. Where it comes to the knowledge of the prosecutor that a child is detained with adults, the prosecutor shall bring it to the Court's attention for relevant Orders.

82. The prosecutor should liaise with relevant professionals in the child justice system and, based on their advice or reports, make an application to the Court for the child to be committed to the most suitable institution.⁵⁵

Explanatory Note 17:

Pre-trial detention should also in principle, not be applied for misdemeanours.

2.3.6. PRE - TRIAL CONFERENCE

83. The prosecutor should conduct a pre-trial conference for the purpose of preparation for the trial in order to improve the quality of the trial.
84. The prosecutor should ensure that all pre-trial conferences are undertaken in an appropriate manner in accordance with the ODPP Decision to Charge Guidelines.⁵⁶

54 Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (General Assembly resolution 65/229, annex), rule 65. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

55 Guidelines on justice in matters involving child victims and witnesses of crime (Economic and Social Council (ECOSOC) Resolution 2005/20, annex), paragraph 19. Available at: <https://www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf>

56 See Guideline 4.5 of the ODPP Decision to Charge Guidelines

85. Whereas it is not mandatory for the child in conflict with the law to attend, the prosecutor shall determine who needs to be present at the pre-trial conference.
86. To inform in decision making, the prosecutor shall ensure that they have all the information on the child in conflict with the law and the victim in the investigation file, including:
- Whether the file has complied with all the different laws and policies
 - Whether the evidence is sufficient
 - Whether the child in conflict with the law has a legal representative
 - Whether all the witnesses have been bonded
87. For effective and efficient prosecution, the prosecutor shall ensure active case management of children matters by:
- Having a duplicate investigation file in a White ODPP File Jacket
 - Maintaining a separate record of assigned children matters
 - Ensuring a separate ODPP children's registry exists at each Court station
 - Informing the Investigating Officer of the hearing dates
 - Supplying copies of statements and exhibits to the defence

2.4. TRIAL STAGE

2.4.1. APPLICATION FOR PRIORITY HEARING

88. At plea taking, the prosecutor shall ensure that cases of children in conflict with the law are heard expeditiously by making an application for a priority hearing.
89. The prosecutor should comply with the timelines as set out in the Child Offender Rules.⁵⁷

Explanatory Note 18:

There is little point in conducting a trial for a child offender long after the alleged commission of an offence as the child will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically.

⁵⁷ Rule 12 of the Child Offender Rules, 5th Schedule of the Children Act

90. The prosecutor should ensure that decisions involving children cases are made in an efficient, effective and timely manner so as to protect the rights of the child.

2.4.2. PROCEDURAL REQUIREMENTS DURING TRIAL

91. The prosecutor shall inform the Court of the need for an interpreter or counsellor in a timely manner.

92. A prosecutor shall ensure that the child in conflict with the law and parent/guardian are informed of the right to legal representation.

Explanatory Note 19:

The prosecutor can make an Application for Orders that are in the best interests of the child offender pending plea and availability of a legal representative.

93. The prosecutor should liaise with the Investigating Officer in making all necessary efforts to ensure the presence of the parent, guardian, guardian ad litem or legal representative of the child in conflict with the law.⁵⁸
94. A prosecutor shall not proceed with plea taking if a parent, guardian, guardian ad litem or legal representative are not present, unless the Court rules or holds that it will not occasion substantial injustice to the child in conflict with the law.⁵⁹
95. A prosecutor shall make an application to the Court that a case involving a child in conflict with the law be heard in camera, to ensure that the rights of the child are protected.

2.4.3. DISPOSAL OF CASES

96. The prosecutor should encourage restorative justice⁶⁰.
97. Where restorative justice measures are considered, the prosecutor shall inform the child in conflict with the law, the parent, guardian, guardian ad litem or legal

58 Rule 8 of the Child Offender Rules, 5th Schedule of the Children Act

59 Sections 4 and 76 of the Children Act

60 See Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (General Assembly resolution 2002/12, annex). Available at: <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-use-of-restorative-justice-programmes-in-criminal-matters/>

representatives of available restorative justice programmes,⁶¹ which may include restitution and/or compensation⁶² and how to access them.⁶³ However, the best interest of the child should be of primary consideration.

2.4.4. ROLE OF THE PROSECUTOR IN DISPOSAL OF CASES

98. The prosecutor has the responsibility to assist the Court in arriving at a decision as to the appropriate disposal by making submissions which will draw the Court's attention to:
- Any victim impact statement
 - Any Statutory provisions and case law relevant to the offence under consideration
 - Any relevant aggravating and mitigating factors
 - The need to call for a Probation Officer's report and a Children Officer's report to guide the disposal of the case⁶⁴
99. In all children cases, the prosecutor has an obligation to draw the Court's attention to its disposal options.⁶⁵
100. Where practicable, the prosecutor shall make an application to the Court for the attendance of a parent, guardian, guardian ad litem or legal representative during disposal.⁶⁶
101. The prosecutor shall not use the words "conviction" and "sentence" in relation to a child in conflict with the law but "a finding of guilt" and "an order upon a finding of guilt" instead.⁶⁷

61 Sections 14 and 24 of the Victim Protection Act

62 Section 31 of the Penal Code; Section 176 of the Criminal Procedure Code; Section 191(1)(f) of the Children Act; Section 6 of the Probation of Offenders Act

63 See Guide 66 and 67 of the ODPP Diversion Policy Guidelines and Explanatory Notes

64 Section 4(6) and (8) of the Probation of Offenders Act; Section 78 of the Children Act; Rule 11 of the Child Offender Rules, 5th Schedule of the Children Act

65 Sections 190 and 191 of the Children Act

66 Rule 8 of the Child Offender Rules, 5th Schedule of the Children Act

67 Section 189 of the Children Act

2.5. POST - TRIAL STAGE

2.5.1. REVISION

102. The prosecutor may urge the Court to review its own Order if it is in the best interest of the child.⁶⁸
103. A prosecutor may invoke the powers of the High Court to call for and examine the record of any criminal proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such Subordinate Court.⁶⁹

2.5.2. APPEAL

104. The prosecutor, if not satisfied with the Judgment, Ruling, Order or sentence, may appeal to a higher Court against such Judgment, Ruling, Order or Sentence on matters of law and fact.

68 Sections 53, 117 and 125(4) of the Children Act

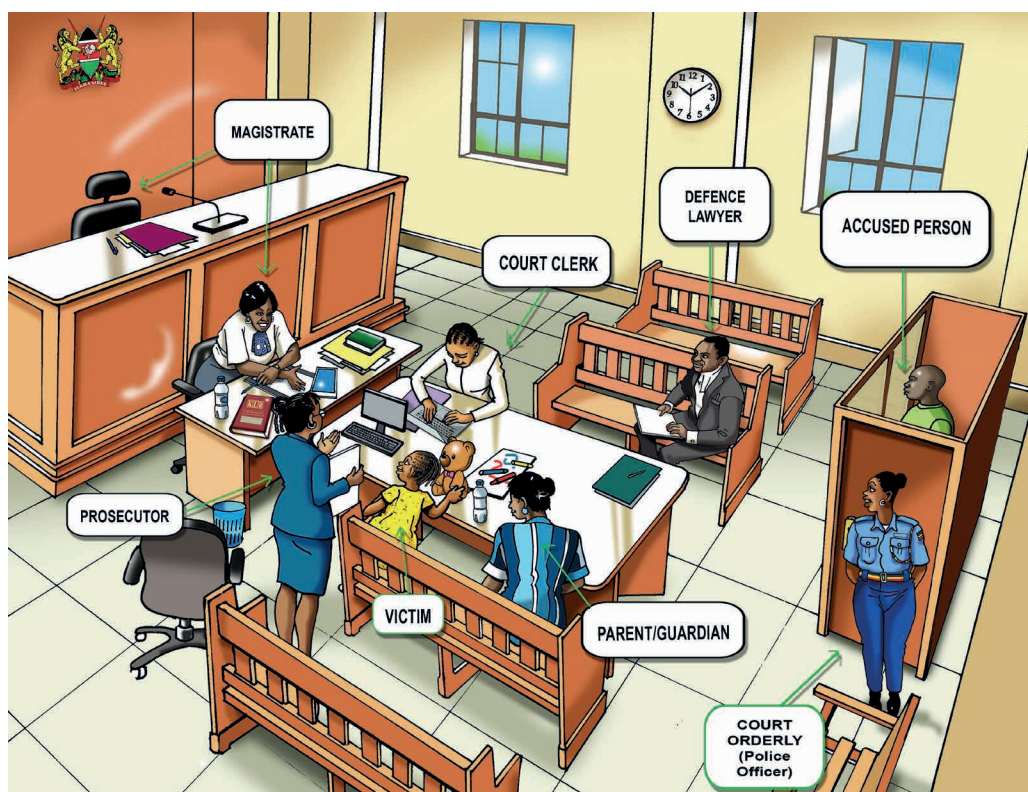
69 Sections 362, 363 & 364 of the Criminal Procedure Code

PART III:

GUIDE TO HANDLING CHILDREN IN CONTACT WITH THE LAW

INTRODUCTION

This part of the document seeks to guide prosecutors on how to handle children in contact with the law within the criminal justice system as victims and witnesses. Due to their vulnerability, they need to be protected and treated with compassion and extra care. Where necessary, prosecutors should make an application to the Court for orders referring children to institutions that can offer support and monitor their progress to ensure that their dignity and access to justice are upheld.



3.1. GENERAL PROVISIONS

3.1.1. PROTECTION AND CARE FILE

105. The prosecutor should ensure that a P&C file is opened for all cases of children in contact with the law as victims and witnesses.
106. The prosecutor should, at the earliest opportunity, establish the special needs of the child victim or witness and thereafter make an appropriate application to the Court under the relevant Laws, including an application for the Court to appoint a counsellor or child psychologist.
107. The prosecutor should establish from the Children Officer if a possible offence was committed against a child that is brought to Court as a child in need of care and protection.⁷⁰

3.1.2. PROTECTION OF PRIVACY

108. The prosecutor shall protect the privacy of a child witness and maintain the confidentiality of their information.⁷¹
109. The prosecutor shall make an application to the Court to exclude the public from the courtrooms to ensure that the child witness is not exposed when giving their testimony, especially in cases of sexual abuse.⁷²
110. The prosecutor shall ensure that the name of the child victim, identity, home, last place of residence, school, particulars of the child's parents or relatives and any other information that may disclose the identity of the child shall not be revealed.⁷³

⁷⁰ Section 119 of the Children Act

⁷¹ Section 19 of the Children Act; Article 40(2)(b)(vii) of the Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>; Committee on the Right of the Child, General Comment No. 10, paragraph 64. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

⁷² Section 75 of the Children Act

⁷³ Section 76(5) of the Children Act

111. The prosecutor shall ensure that only the initials of the child victim appear on the charge sheet and all other public documents.
112. The prosecutor shall reveal the full name and date of birth of the child to the accused person within a reasonable period before the commencement of the proceedings for the preparation of his or her defence.

3.1.3. **SUPPORTING CHILDREN**

113. If the child is traumatized and unable to testify, the prosecutor shall make an application to have a counsellor provided to the child.
114. At any stage of the criminal justice process, when a child victim or witness is at risk, the prosecutor shall liaise with relevant institutions to ensure the child is put in a place of safety.⁷⁴

3.1.4. **APPLICATION FOR PRIORITY HEARING**

115. At plea taking, the prosecutor should ensure that cases, where children are victims or witnesses, are heard expeditiously by making an application for a priority hearing.
116. The prosecutor should ensure that decisions involving children cases are made in an efficient, effective and timely manner to protect the rights of the child.
117. The prosecutor shall provide an opportunity for the child victim or witness to testify early in the case.

Explanatory Note 20:

Prosecutors should discourage unnecessary attendance of the child at court unless they are testifying. The prosecutor shall prepare the witnesses on time. The prosecutor shall endeavour to avoid unnecessary adjournments.

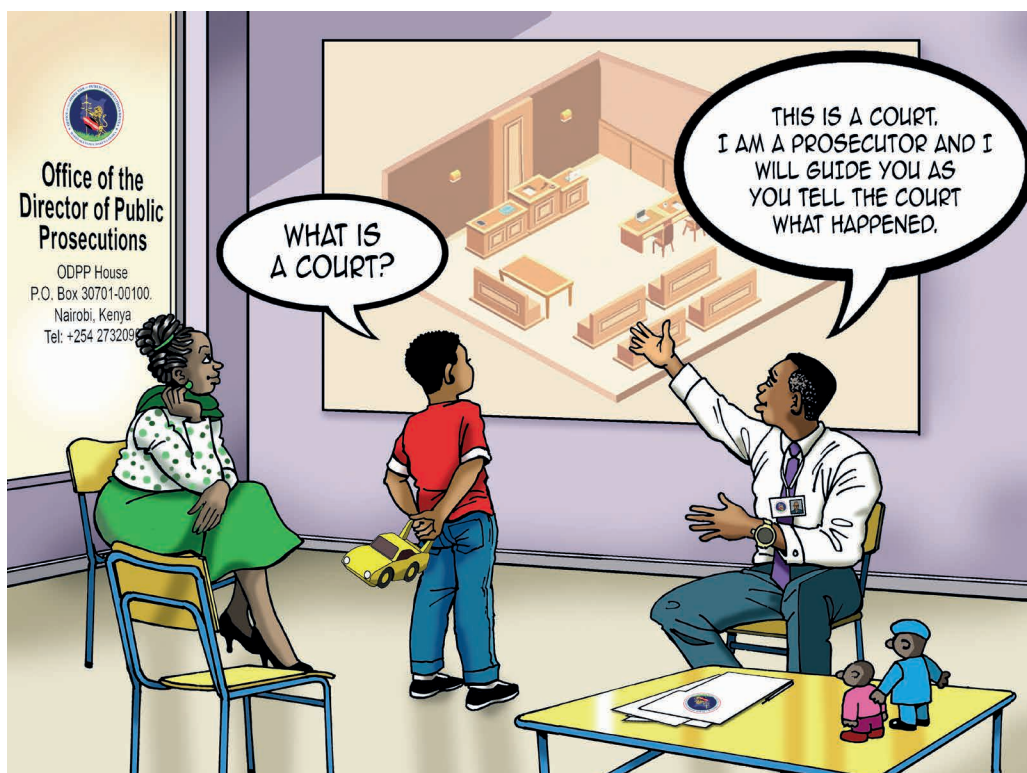
⁷⁴ See Guidelines on justice in matters involving child victims and witnesses of crime. Available at: <https://www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf>; see also the Children Act, the Witness Protection Act and the Victim Protection Act

3.1.5. NO PLEA BARGAINING IN SEXUAL OFFENCES CASES

118. The prosecutor shall not permit any plea bargain in sexual offence cases.⁷⁵

3.2. PRE - TRIAL STAGE

3.2.1. PREPARATION FOR TRIAL



119. The prosecutor should be alive to various factors relating to child victims or witnesses including but not limited to their age, level of education, competency levels, medical issues and the relationship between the child and the subject.

120. During the examination of the child, the prosecutor should ensure that interviews and questions are child-sensitive and not hostile.

⁷⁵ Section 137(N) of the Criminal Procedure Code

121. The prosecutor should provide support for victims and witnesses by making an application for witness facilitation to enable them to attend the pre-trial conference or the hearing.
122. The prosecutor should hold a pre-trial conference with the child victim and/or witness before the hearing. This will be on a case-by-case basis.
123. When conducting the pre-trial session, the prosecutor should endeavour to avoid re-traumatization.
124. The prosecutor should have the pre-trial conference as close as possible to the date of the child appearing in Court.
125. The prosecutor should take the child victim or witness through the Court process and undertake a Court orientation.
126. The prosecutor should develop their child-friendly skills in order to better handle child victims and witnesses.
127. The prosecutor shall take necessary action to ensure that there is no intimidation of the child victim and witness before, during and after trial as they face high risk of victimization.⁷⁶
128. Where necessary and when the issue of a vulnerable adult or child witness is brought to the attention of the prosecutor, the prosecutor shall liaise with the Witness Protection Agency (WPA) to place any vulnerable witness under protective care.⁷⁷
129. The prosecutor should also determine whether a child will need an intermediary or counsellor at the pre-trial stage.

Explanatory Note 21:

Refer to the ODPP Sexual and Gender-Based Violence (SGBV) Training Manual on how to interview, interact, and handle children of different ages in a child-friendly manner.

Explanatory Note 22:

Where it is brought to the attention of the prosecution that there is intimidation, then the prosecutor shall take steps to ensure that the issue is brought to the attention of the Court and/or the matter is referred to the WPA by proposing follow-up under the P&C file.

⁷⁶ Section 4(3) and 5(3) of the Witness Protection Act

⁷⁷ See the Witness Protection Act

3.2.2. VULNERABLE CHILD VICTIMS AND WITNESSES

130. The prosecutor shall, where necessary, make an application to the Court to declare a child victim/witness vulnerable.⁷⁸
131. The prosecutor shall inform a child victim of sexual violence of the protective measures available.⁷⁹
132. The prosecutor shall ensure that child victims and witnesses who are vulnerable are treated in a manner that addresses their special needs and respects their dignity throughout the trial, while taking into account their age, gender, disability and level of maturity and fully respecting their physical and mental well-being.
133. Where the child is a witness, evidence should be taken at the earliest opportunity to counter any risks of memory lapse, witness intimidation or disappearance before evidence can be taken.
134. If necessary, the prosecutor shall make an application for Protection Orders for a child victim or witness against the offender.⁸⁰
135. The prosecutor should ensure that the Court is child-friendly by taking the following measures to protect the vulnerable witnesses, child victims and witnesses:
 - Children should be asked whom they would like to accompany them to Court, noting that if the person selected is also a witness, then the Court should take his/her evidence first.
 - The child should be consulted on any reservations they may have on the presence of any individual in the courtroom, and any such reservations should be taken into consideration.
 - Where necessary, provide refreshments for children and create a conducive environment such as play therapy, to facilitate a child's testimony. This will be done in liaison with the Head of Station.

78 Section 16 of the Witness Protection Act; Section 31 of the Sexual Offences Act; and Sections 119 of the Children Act

79 Section 32 of the Sexual Offences Act

80 Section 114 of the Children Act; the Victim Protection Act; the Protection against Domestic Violence Act

- The cases should be heard in camera or closed sessions.⁸¹
- Child-friendly language and tone shall be used by all, and in the event that this does not happen, then the prosecutor shall raise an objection.
- Child-friendly questions and style shall be used in Court, including using inquiries rather than interrogations.
- Apply to the Court to exclude the press where appropriate.
- Where appropriate, encourage the use of descriptive aids such as drawings, anatomically-accurate dolls, and/or toys to assist the child in testifying.

3.3. TRIAL STAGE

3.3.1. PLEA TAKING STAGE

136. At plea taking, a prosecutor should make an application for a priority hearing date on all matters involving a child in contact with the law. Where the child is a witness, evidence should be taken at the earliest opportunity to counter any risks of memory lapse, witness intimidation or disappearance before evidence can be taken.

3.3.2. VICTIM REPRESENTATION AND PARTICIPATION

137. A prosecutor shall inform the child victim or witness of his/her right to be present at the trial, either in person or through a representative of his/her choice.⁸² Despite the fact that victims have this right, the prosecutor should avoid having the child witness come to Court when unnecessary.

Explanatory Note 23:

The victim in reference here is one who may be vulnerable on account of tender years or mental or physical disability.

138. The prosecutor shall inform a child victim or his/her representative that they can give their views during diversion, plea bargaining⁸³ and/or sentencing.

139. The prosecutor shall record the efforts that were made to allow the victim to

81 Committee on the Right of the Child, General Comment No. 10, paragraph 64. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

82 Section 9(1)(a) of the Victim Protection Act

83 Section 137D(C) of the Criminal Procedure Act

provide his or her views.

140. The prosecutor shall ensure that the victim, parent, guardian, guardian ad litem or legal representative is informed in advance of the evidence that the prosecution intends to rely on and produce during the trial.

141. The prosecutor shall provide the child victim or their representative with sufficient details relating to the charge that the accused is facing.

142. The prosecutor shall move the Court where appropriate to adopt the following protection measures of a child victim or witness during the trial:

- Use of information technology in presenting evidence
- Giving evidence through intermediaries
- Where appropriate, apply to the Court to move to where the victim is situated
- Apply to the Court for the case to be heard on a priority basis and at the convenience of the child
- Ensure that the child victim or witness does not see the accused before testifying
- Ensure use of witness protection boxes or screens and voice distortion devices
- Ensure that the case is heard in camera
- Where appropriate, ensure use of pseudonyms

143. The prosecutor shall make an application to the Court to exclude the public from the courtroom to ensure that the child witness is not exposed when giving their testimony, especially in cases of sexual abuse.⁸⁴

144. If the child is traumatized and unable to testify, the prosecutor shall refer the case

Explanatory Note 24:

A prosecutor must be vigilant to ensure that:

There is minimal contact between the child and the accused.

That the sitting arrangements in Court are in a manner that is comfortable for the child in that they are not in direct or close sitting proximity to the accused.

⁸⁴ Section 19 of the Children Act; Section 75 of the Children Act; Article 16 of Convention on the Rights of the Child. Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>; Committee on the Right of the Child, General Comment No. 10, Paragraph 64. Available at: <https://www.un.org/ruleoflaw/files/CRC.C.GC.10.pdf>

to their immediate supervisor with a request that a counsellor is provided for the child.

3.3.3. VOIR DIRE - TAKING EVIDENCE OF VICTIMS OF TENDER AGE

145. The prosecutor shall inform the child through the Court that a voir dire will be conducted and explain what the term ‘voir dire’ means in language that the child will understand.
146. The prosecutor shall inform the Court of the age of the child for the purpose of conducting the *voir dire*.⁸⁵

3.3.4. USE AND ROLE OF INTERMEDIARIES

147. The prosecutor shall make an application for the Court to declare that a child victim or witness requires an intermediary.
148. Thereafter, a prosecutor shall make an application for the Court to appoint an intermediary.⁸⁶
149. Where the intermediary is an independent communication facilitator, the prosecutor shall make an application for the child to testify first.
150. Where the intermediary is a witness, the prosecutor shall make an application to the Court for the intermediary to testify first.

Explanatory Note 25:

An intermediary is an independent communication facilitator whose role is to simplify two-way communication between a vulnerable person and other participants in the legal process. Intermediaries provide impartial assistance to those with communication difficulties, learning difficulties or mental health problems. Their duty is to the Court, not to the parties involved. An intermediary will assess the communication needs and abilities of the vulnerable person and advise how best to communicate with the individual.

3.3.5. VICTIM IMPACT STATEMENT

151. The prosecutor should inform the victim and their representative that they have a

⁸⁵ Section 19 of the Oaths and Statutory Declarations Act

⁸⁶ Section 31 of the Sexual Offences Act

right to record a Victim Impact Statement.

152. Where the victim expresses a wish to write a Victim Impact Statement, the prosecutor shall refer the victim and/or their representative to the relevant victim support agencies for assistance.⁸⁷
153. Where the Victim Impact Statement has been prepared, the prosecutor will ensure that it is filed and presented in Court.
154. The prosecutor shall make reference to the Victim Impact Statement during submissions on sentencing.

87 Section 12(2) of the Victim Protection Act and Section 329C of the Criminal Procedure Code

3.4. POST-TRIAL STAGE

3.4.1. ROLE OF THE PROSECUTOR POST TRIAL

155. The prosecutor may make an application to the Court to review its Order or the Court file if it is in the best interest of the child.⁸⁸

Explanatory Note 26:

In P&C matters, the Children's Court does not become 'functus officio' (of no further official authority or legal effect) even after an Order has been issued.

3.4.2. ROLE OF THE PROSECUTOR IN DISPOSAL

156. If necessary, the prosecutor shall make an application for Protection Orders for a child victim or witness against the accused.⁸⁹

Explanatory Note 27:

In cases involving violence, including sexual violence against children, the prosecutor should emphasise the seriousness of the offence and draw the Court's attention to any additional applicable aggravating factors such as the age of the child; whether the child is mentally ill or intellectually handicapped; repeated violent acts; abuse by a person in a position of trust or an authority figure; and perpetration of violence against a child by an offender who is in a close relationship with the child.

88 Sections 53, 117 and 125 of the Children Act

89 Section 114 of the Children Act; the Victim Protection Act 2014; the Protection against Domestic Violence Act

PART IV:

REGISTER; MONITORING AND EVALUATION; AND REVIEW OF THE GUIDE

INTRODUCTION

The purpose of this part is to monitor and evaluate how the Guide is being implemented with a view to identifying and documenting its successes and shortcomings. To this end, the ODPP shall keep a record of the progress of implementing this Guide.

4.1. REGISTER OF CHILDREN CASES

There will be a register of children cases maintained by the prosecutor handling children's matters. The purpose of this is to keep a record of the children in the criminal justice system and how their cases have been resolved. If the case has been resolved through diversion or plea bargaining, the same shall also be recorded in the respective register.

4.2. MONITORING, EVALUATION AND REVIEW

Monitoring, evaluation and review are critical for assessing how this Guide is being implemented and complied with. They are also tools for identifying and documenting successes and for tracking progress. The ODPP will establish a system of monitoring and evaluating the effectiveness of this Guide.

4.3. SUPERVISION AND MONITORING OF THE INDIVIDUAL PROSECUTORIAL DECISIONS

The DPP will establish a system of monitoring and evaluating this Guide's effectiveness through routine data collection and supervision.

ANNEXURE I: SAMPLE ODPP CHARGE SHEET

Court File No.	
ODPP Case No.	
ODPP Station	



Police Case No.	
OB Number:	
Date Drafted	

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

CHARGE SHEET

Full Name of Accused 1 : M./J.

Nationality : ☒ Kenyan : ☐ Non-Kenyan	Country of Origin : Kenya
Identification Document : ☐ National ID: ☐	Passport ID/PP Number : NIL
Date of Birth / Age: CHILD 15 YEARS	County : NAIROBI
Gender : ☒ Male : ☐ Female : ☐ Intersex	Sub County : KAMUKUNJI
Postal Address : 1-00100, NAIROBI	Ward :
Telephone Number(s) : 0722-123456	Email :
Languages Spoken : ☐ English : ☐ Kiswahili : ☐ Other	Other language :
Accused person: ☐ Represented : ☒ Not represented	Advocate Name :

Date of Arrest : 01-01-2030	Arresting officer : P.C. JOHN
Arrested : ☐ With Warrant : ☐ Without Warrant	Police Station : KILELESHWA
Date to Court : 10-1-2030	Investigating Officer : P.C. JANE

Charge (Second Count)	DEFILEMENT CONTRARY TO SECTION 8 (1) AS READ WITH SECTION 8 (2) OF THE SEXUAL OFFENCES ACT NO. 4 OF 2006
Particulars of offence	<u>J.M.</u> On the 22nd day of December 2030 at Kabati area, Kamukunji Sub County within Nairobi County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of N.M. a child aged 5 years.

Alternative Charge	COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 4 OF 2006.
Particulars of offence	<u>J.M.</u> On the 22nd day of December 2030 at Kabati area, Kamukunji Sub County within Nairobi County, intentionally and unlawfully touched the vagina of N.M. a child aged 5 years with his penis.

NAME OF PROSECUTOR

ODPP STAMP DATE AND SIGNATURE OF PROSECUTOR

ANNEXURE II: PROTECTION AND CARE FORM

Form P&C1



REPUBLIC OF KENYA

IN THE CHILDREN'S COURT AT
PROTECTION AND CARE NO.
APPLICATION FOR AN ORDER UNDER SECTION OF THE CHILDREN ACT

C.O/S.NO.....
Police Case No.
Date to Court.....
Protection and Care No.

Child's Particulars

Name of Child.....
Apparent Age..... Gender..... Nationality.....
County..... Language(s) Religion..... Disability.....
Special needs (list any needs that the child may have)
.....

Parent(s)/Guardian(s) Particulars

Name 1.
2.
Telephone/mobile
Physical / Home Address.....
Postal Address.....
Relationship with the child

CATEGORIES OF CHILDREN IN NEED OF CARE AND PROTECTION

(tick as appropriate) A child who/whose,

- has no parent/guardian
- has been abandoned by his parent or guardian,
- is destitute
- found begging or receiving alms

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ANNEXURE II: PROTECTION AND CARE FORM *Cont.*

- parent has been imprisoned
- parents or guardian find difficulty in parenting
- parent or guardian does not or is unable or unfit to exercise proper care and guardianship
- is truant or is falling into bad association
- is prevented from receiving education
- is subjected or is likely to be subjected to female circumcision or child marriage or to customs and practices prejudicial to the child's life, education and health
- is kept in any premises which, in the opinion of a medical officer, is overcrowded, unsanitary or dangerous
- is exposed to domestic violence
- is pregnant
- is terminally ill,
- parent(s) is terminally ill
- has a disability and is unlawfully confined and or is ill treated
- has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography
- Is engaged in any work likely to harm his/her health, education, mental or moral development
- Is displaced as a consequence of war, civil disturbances or natural disasters
- Is exposed to any circumstances likely to interfere with his/her physical, mental and social development;
- Is engaged in the use of, or trafficking of drugs
- Any of the offences mentioned in the Third Schedule to the Children Act; (includes assault, unnatural offences and offences within the sexual offences Act)
 - committed against him
 - or if he is a member of the same household as a child against whom any such offence has been committed or
 - is a member of the same household as a person who has been convicted of such an offence against a child

BRIEF FACTS

As being in need of Protection and care under sectionof the Children Act No. 8 of 2001

Applicant.....

ANNEXURE III: CHECKLIST

Name of child			
Age			
Gender	Male	Female	Intersex
Court file number			
Police file number			
Police Station			
Nature of offence			
Name and contact of parent/guardian/guardian ad litem			
Name and contact of legal representative			

A. PROSECUTING CHILDREN IN CONFLICT WITH THE LAW

1. PRE-CHARGE STAGE

Investigations

		Yes	No
	Has a P&C file been opened?		
	Have the parents or guardians been informed of the arrest?		
	Have the special needs of the child been addressed?		

Confessions

		Yes	No
	Did the confession meet the standards required under the Confession rules?		
	Based on the confession, is the case suitable for diversion?		

Use of initials

		Yes	No
	Has the identity of the child been concealed?		
	Does the Charge Sheet bear the initials of the child?		

Age of the child

	Yes	No
Are there documents to establish the age of the child?		
Has the child attained the age of criminal responsibility?		
Does the Charge Sheet indicate that the suspect is a child?		

Making the decision to charge

	Yes	No
Is there sufficient evidence that provide a realistic prospect of conviction?		
Does the case meet the public interest test?		
Can alternatives to prosecution and trial be applied in the case?		
Has information in the Protection and Care file been considered?		

Complaints on violations of the rights of the child

	Yes	No
Is there a complaint on the violation of the rights of the child?		
Has the complaint been investigated?		

2. PRE - TRIAL STAGE

Application for priority hearing

	Yes	No
Has an application for priority hearing been made to the Court?		

Provision of legal representation

	Yes	No
Does the child have legal representation?		
If not, has an application for Legal Aid been made to the Court?		

Appointment of Guardian Ad Litem

	Yes	No
Is the parent or guardian of the child present in Court during Court appearance and proceedings?		

If neither a parent nor guardian is present in Court, has a guardian ad litem been appointed?		
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Pre - Trial detention

	Yes	No
Is it necessary that the child in conflict with the law be detained?		
Have the views of the victim been considered?		

B. HANDLING CHILDREN IN CONTACT WITH THE LAW

Protection and Care file

	Yes	No
Has a P&C file been opened?		
Have the special needs of the child been addressed?		

Protection of privacy

	Yes	No
Has the identity of the child been concealed?		
Have the initials of the child victim been used in the Charge Sheet?		

Supporting children

	Yes	No
Does the child require psychosocial support?		
Does the child need to be put in a place of safety?		

Plea taking stage

	Yes	No
Has an application for priority hearing been made to Court?		

1. PRE - TRIAL STAGE

Preparation for trial

		Yes	No
	Has a pre-trial with the child victim and/or witness been organised?		
	Does the child witness need to be referred to a Witness Protection Agency?		
	Does the child victim/witness need an intermediary?		
	Does the child require special facilities to testify e.g., Witness Protection Box?		

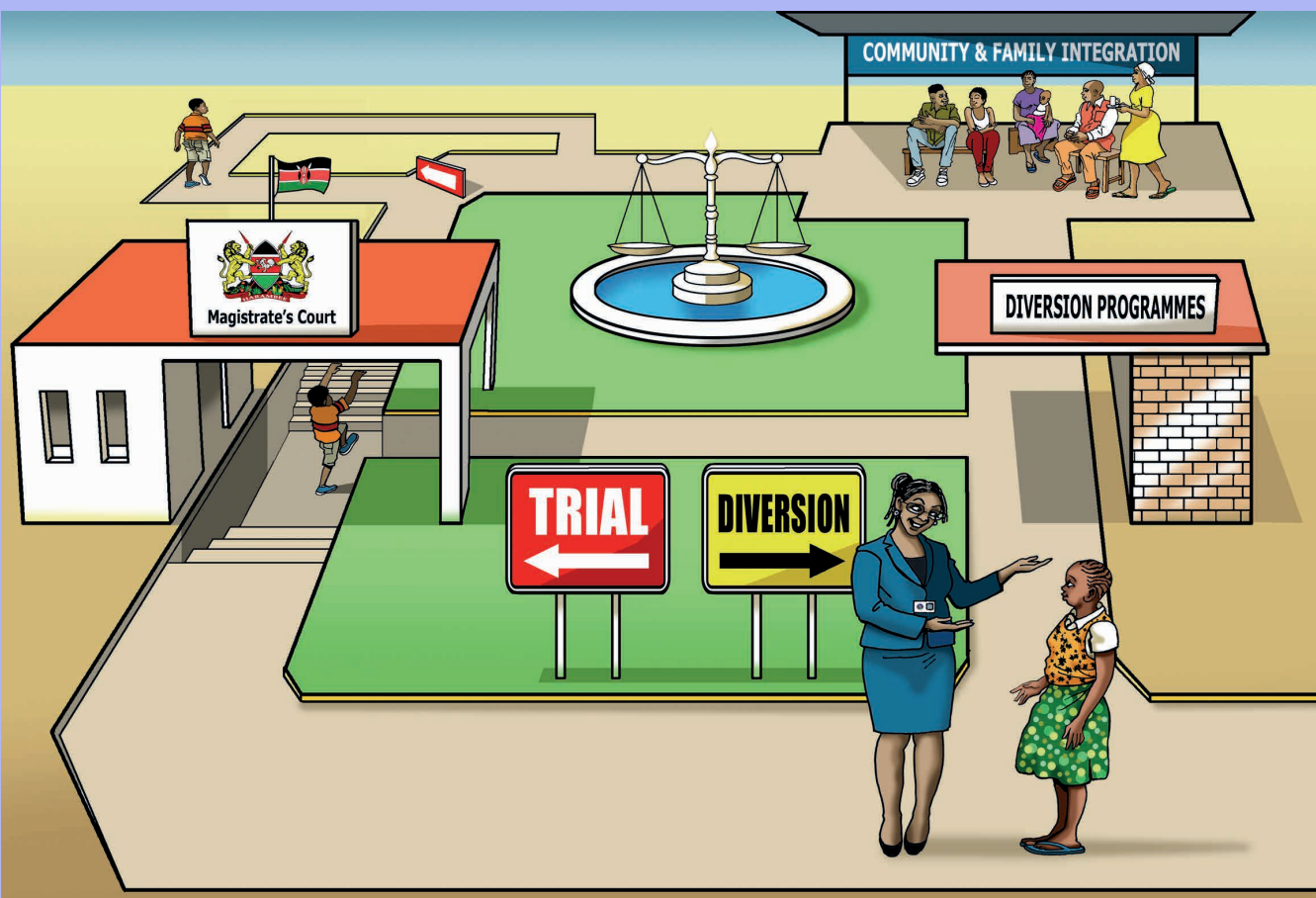
2. TRIAL STAGE

Voir dire - Taking evidence of victims of tender age

		Yes	No
	Does the child require voir dire examination?		
	Are the proceedings being held in camera?		

Victim Impact Statement

		Yes	No
	Has the victim and their representative been informed about their right to prepare a Victim Impact Statement?		



Contact us:

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