IOSR Journal Of Humanities And Social Science (IOSR-JHSS)
Volume 27, Issue 10, Series 3 (October, 2022) 44-48
e-ISSN: 2279-0837, p-ISSN: 2279-0845.
www.iosrjournals.org

Child Involvement in Clinical Decision Making In Kenya- A Case Analysis for Law Amelioration

Brian Kipkoech[1], Derrick Kimani Kimani[2]
[1]*Bachelor of Science Nurse Intern, Kenyatta National Hospital- Kenya.*
[2]*LLM, Geneva Academy of International Humanitarian Law& Human Rights-Switzerland.*

Abstract
Globally, much of contemporary medical practice encourages adult clients to actively participate in clinical decision-making. Children's participation in healthcare decisions has many benefits. It is fundamental in developing competence, confidence, and a sense of responsibility, therefore, grooming them to better participate in society in later life. Article 12 UN Convention on the Rights of the Child noted that children should be given the capacity to form their views and the right to express their opinions freely. Kenyan Children Act (2001) dictates that there is much need for children to be allowed to give their views and opinions on issues directly affecting them. Comparative analysis indicates that South Africa has more advanced policies to accommodate children's participation in clinical decision-making. The South Africa Children Act 38 of 2005, section 129 part 2, indicates that a child may consent to their medical treatment or to the medical treatment of their child if- the child is over 12 years of age and the child has sufficient maturity and has the mental capacity to comprehend the benefits, risks and other implications of the management approach. Kenya can be an excellent student to learn from the South African scenario and improve her quality of pediatric care.

Keywords: Child, children's participation, UN Convention on Rights of the Child, South Africa Children Act 38 of 2005, consent.

Date of Submission: 26-09-2022 Date of Acceptance: 11-10-2022

I. Introduction

Globally, there is much contemporary medical practice that encourages adult clients to actively take part in clinical decisions making. Despite that there are varied legal ages adopted in different geographical settings, there is an age in which this is limited including in the minor group of society. The process of informed consent has been controversial in various settings bringing about different ethical dilemmas relating to care delivery within the healthcare provision[1]. It can be defined as a state where healthcare providers act along with clients in making autonomous and voluntary decisions relating to their clinical management after comprehensive education and a good understanding of the information.

However, in situations when the client is not of legal consenting age, including children, for example, this participation in shared clinical decision-making is limited. In most settings, according to Dailey &Rosenbury[2], here are the traditional legal or contemporary provisions that children within communities are immature and therefore are given limited chances to exercise their autonomy despite being subject to clinical care delivery. Children, aged less than six years have a limited comprehension to make meaningful decisions regarding their clinical management. However, children aged more than nine years and adolescents have a well-established cognitive and emotional capacity to participate in clinical decisions depending on their levels of capacity[3]. There are variations in the time in which children achieve cognitive capacities. Some children may be able to comprehend information at an early age despite not being within the legally identified adulthood age. Some legal systems identify these mature minors as autonomous people that can make independent clinical decisions without the involvement of older adults including their parents.

Over time, there has been an active effort to include children in the clinical decision-making about their health. This saw the development of international laws and development of policies to guide this development. Among the examples of these efforts include the United Nations Convention on the Rights of Children which was based on the principality of participation and respect for the views of the minors[4]. Moreover, the European Convention on Human Rights and Biomedicine of the Council of Europe was based on the same ground with the consideration of the opinion of the minors depending on their age and maturity level[5]. Other legal developments that have had a hand in this development include the Youth Health Strategies by the World Health Organization and most papers of medical societies globally have made this proposal. This paper will seek to give an insight into practice in Kenya and give a comparative analysis with South Africa. South Africa is among

the few sub-Saharan countries that have well-established legal and policy development on children's involvement in medical decisions[6].

Benefits of engaging minors in medical decisions

Children's participation in healthcare decisions has a number of benefits. Mantovani et al[7] noted that it is fundamental in developing competence, confidence and a sense of responsibility, therefore, grooming them to better participate in society in later life. Further, participation in medical decisions has importance in giving children a sense of control and making them adjust better to the medical management they are under[8].

Children's participation in medical decisions is much more important in sensitive matters such as reproductive and mental health. Initial participation at an early stage of life builds and established good self-esteem which is important in growth into adulthood. Evidence also indicates that this gives increased confidence and has a positive impact on their health-seeking behaviours in future with a well-established trust between them and those within the healthcare profession[9].

International Legal Framework

UN Convention on the Rights of the Child

The UN Convention on Rights of the Child is an umbrella that is made of civil, political, economic and social rights that are directly related to children[10]. Made of forty-four substantive issues that stand to protect the children, this article affirms the responsibility of the UN state partnership to ensure that the rights of children are protected at all times. Kenya ratified the convention on 30th July 1990 and was therefore expected to undertake specific legal measures towards its implementation.

The convention recognized that the family is the fundamental unit of society and the national environment for the growth and development of children. In this recognition, children should be given the necessary protection and assistance so that they can assume their responsibility in the community[10]. Further, the Convention noted that children by nature of their physical and mental immaturity demand a lot of special protection and care that includes legal safeguarding before and immediately after birth.

Article 12 of the convention noted that children should be given the capacity to form their own views and the right to express those views freely. Specifically, in matters affecting the children, their views and opinions should be accorded due weight in accordance with the weight and maturity of the children. In this provision, children in particular should be given the opportunity to be heard in any judicial or administrative action that affects them directly in manners that are consistent with the national laws. Besides, Article 13 provides that children have the freedom of expression including freedom to seek, receive and impart information and ideas of all kinds orally, written or in print form or through the media of their choice. In Kenya, there is a minimal implementation of this. Specifically, within this jurisdiction, elder members of the society the larger part in clinical decision-making that directly involves children[11]. Despite that there is a slower consideration of children in decision-making, there are much more steps that need to be scaled.

The African Charter on the Rights and Welfare of the Child

The African Union was established as an intergovernmental organization that is made of over 55 member states from the African region. Kenya is among the member states of this union and is made of a number of charters that include health, politics, security, economy and environmental matters[12]. Under this union, children are guardedunder the African Charter of the Rights and Welfare of the Child. The former Organization of African Union, now known as the African Union adopted the African Convention on the Rights and the Welfare of the Child (ACRWC) in 1990 and was implemented to full function in 1999[13].

Part one gives an insight into the rights and duties which is made of the rights and welfare of the child. Specifically, Article II defines a child as every human being below the age of 18 years. Article IV indicate that all the actions relating to the child should be taken by any person or any given authority in the best interest of the child. In this sense, the primary consideration in such actions should be the child.

Some of the articles in this charter relate to other internationally recognized policies and treaties. Similar to the UN Convention on Rights of the Child, article VII indicates the freedom of expression. Every child has the freedom to communicate his/her own views that shall be assured the right to express his opinions freely in all matters [Article VII]. Therefore, this affirms the need that children to express their concerns in any setting including when receiving medical care. However, this has not been affirmed in Kenya since adults rob them of the role of expression and seeking information during medical or surgical management.

National legal and policy framework

The Constitution of Kenya 2010 (CoK 2010) was adopted to govern the sovereign land of Kenya. It is the supreme law of the land that binds all the citizenry and the various state organs. According to the CoK 2010, every vulnerable member of society including children should be protected and their needs provided for. Further, Chapter 4 of this constitution carries the Bill of Rights that offers individual rights and freedom to all

Kenyans. Article 260 of the constitution defines a child as any individual who has not attained the age of eighteen years. Further, article 21 and 53 of the CoK 2010 defines children as vulnerable members of society and the state carries the responsibility to meet their needs and protect them from vulnerability at all times.

The Children Act (2001) was adopted to incorporate international regulations on protecting the rights of the child in the local laws. The Act dictates that there is much need that children to be allowed to give their views and opinions on issues directly affecting them. Specifically, these should include respect for their opinions and adherence with much gravity[14]. Section 2 of the Act defines a child as any human under the age of eighteen years. In all matters, any action relating to the child should be given the utmost importance. Section 42 demands that all these actions include public or private welfare institutions, legal bodies and judicial bodies, therefore, making all children-related institutions including health facilities fall within this shadow.

The Health Act No. 21 of 2017 regulates the characteristic of healthcare service delivery in Kenya. These acts demand the promotion, protection and respect for all children's rights including access to basic nutrition and healthcare services. Section 8 demands that all health information should be given to the subjects at all times. No health service should be given at any point without their consent; with the people with legal capacity given the mandate to consent for children under the age stipulated by the act.

The National Plan of Action for Children in Kenya 2015-2022 provides an operational framework to guide stakeholders and partners in coordinating, planning, implementing and monitoring programmes for the child. Chapter four of the plan outlines the right of participation which gives the children an opportunity to form and give their views, right of expression, thought and religion among others. The plan is cognizant of the fact that the children's views and experiences within family, school and other decisions making levels have a play in developing their esteem, cognition and other relevant social skills.

Example of ethical dilemma relating to the age of consent

Ethical and legal provisions demand that healthcare providers should consent before undertaking any medical procedures, relating to treatment or research, on their clients. However, different countries and states globally have varied approaches towards this including differences in the consenting ages established. This has long birthed a number of ethical dilemmas that are related to care therefore robbing it of its quality over time.

Teen pregnancies and births are a common phenomenon in Kenya[15]. According to the Kenyan Ministry of Health and the Kenya Bureau of Statistics, there were over 45, 000 cases of pregnant adolescents aged between ten and nineteen years between the months of January and February 2022. This translates to more than 40,000 births *ceteris paribus*, indicating that there would be parents younger than the legal age of consenting in Kenya, eighteen years old. In cases when their newborns need health care procedures including surgery, there are dilemmas on whom to consent. In such states, their mothers cannot legally consent for their own bodies, therefore making an impression of incapacity to consent for their newborns. In such states, the 'teenage parent' parents are not recognized by law to consent for such newborns, therefore, begging the question of who should legally consent for such children. An extrapolated view of this means that there are dilemmas on contraceptive use among this group of population.

Comparative analysis of legal and policy framework on child participation in medical decision-making in Kenya and South Africa

The South African constitution is in line with the African Charter on Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child. According to ÁFRICA[16], just like the Kenyan constitution, it defines children as persons under the age of 18. Its previous stand on this definition before the amendment indicated the age of majority as 21 years. Further, both constitutions hold the constitutional rights to dignity, access to health information, freedom of association and access to reproductive health.

The South Africa Children Act 38 of 2005 was passed and adopted in 2005. This act saw the amelioration in the rights of the child relating to autonomy. Specifically, according to Mkhwanazi[17], its implementation gave children the capacity to participate in making clinical decisions and be active parts of the general care process. Section 129 of the Act part 2 indicates that a child may consent to his or her own medical treatment or to the medical treatment of his or her child if- the child is over 12 years of age and the child has sufficient maturity and has the mental capacity to comprehend the benefits, risks and other implications of the management approach.

A child may consent to his or her own medical treatment or to the medical treatment of his or her child if-
(a)the child is over the age of 12 years; and
(b)the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and implications of the treatment

Similar to this part, part three also gives the same provision for consent to perform a surgical operation on a child or on their children but an auxiliary provision that they are assisted by their parent or guardian. Unlike in Kenya, such legal provision is inexistent.

The South Africa Children Act 38 of 2005 is an important script to draw a number of lessons. With its flexibility and expansion to accommodate children to age 12, there are a number of risks and insufficiencies in care that can be foregone. The Act recognizes that intellectual development takes a varied pace depending on factors including the environment and social arena[18]. Adopting an Act that recognizes that there are competent children within the society that can claim autonomy from their parents or guardians is important.

An example of a legal process includes *Castell V De Greef 1994.* This ruling established the "reasonable patient" standard of care for disclosure of informed consent. The court established that all clients have the right to self-identification and autonomy. This case affirmed the need to obtain informed consent before any medical action from "reasonable clients" therefore affirming the child's fundamental right to consent and autonomy[19].

Lessons that Kenya can draw from South Africa

From the selected legal policies and frameworks, there are discernible gaps in pediatric care in Kenya that need to be addressed. The South African departure from the perception of children as property and having restricted autonomy ought to be a good script that Kenya can learn from. Despite that there is legal and policy frameworks that Kenya has put across, there are limited occasions of their implementation and dilemmas that arise with children demanding the autonomy of their children.

It's high time Kenya accommodated the relaxation of a number of juristic acts. The legal consenting age should be dynamic to accommodate the societal circumstances that arise in different social settings. Reduction of the legal medical age of consenting to about 12 years just like the South African provision, will be important in recognizing the autonomy rights of the expanding number of children who have been denied treatment decisions.

The best medical interests of the child remain the paramount consideration in determining the reasonableness of medical decisions made by mature minors. As demonstrated above, the relevant provisions of the Children's Act demonstrate that individual autonomy is not an overriding value in medical decision-making by competent children. The legal protection of child protection rights is meant to ensure that the state protects the child against personal decisions that are not in their best interests[20]. As rights and general principles, the best interests of the child and the right to life, survival and development are designed to ensure that children do not exercise autonomy in ways that are detrimental to their own lives, development and well-being. These principles demonstrate that personal decisions, by the child, which threatens the child's right to life are likely to be regarded as 'unreasonable' and to attract state intervention under the Children's Act.

II. Conclusion

Every society ought to protect its members especially the legally identified vulnerable groups. In medical treatment and research, there is a need to address the gaps that relate to the ineffective participation of children within this scope. As indicated above, Kenya can be a good student to learn from the South African scenario and improve her quality of pediatric care. Specifically, there is more need for flexibility to accommodate the dynamic society and arising societal concerns and inefficiencies in care. Further, lessons can be drawn in countries with well-established public healthcare systems away from sub-Saharan Africa including the United States, France and Belgium among others.

BIBLIOGRAPHY

List of statutes

[1]. The Constitution of Kenya 2010
[2]. The Children Act (2001) (Cap 586 Laws of Kenya)
[3]. The Children Act South Africa 2001
[4]. The Health Act No. 21 of 2017

List of international instruments

[5]. *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990)
[6]. *United NationsConvention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577
[7]. United Nations *Convention on the Rights of the Child*, adopted in 1989, ratified by Kenya on 4TH July 1990

List of case(s)

[8]. *Castell V De Greef 1994 (4) SA 408 (C).*

Journal articles

[9]. De Micco F, Martino F, Campobasso CP. Ethical issues in age assessment by the third molar development. Australian Journal of Forensic Sciences. 2022 Jan 2;54(1):88-99.
[10]. Dailey AC, Rosenbury LA. The New Law of the Child. The Yale Law Journal. 2018 Apr 1:1448-537.
[11]. Emerson ND, Bursch B. Ethical issues in providing end-of-life cancer care for transitional-aged youth. Journal of clinical psychology in medical settings. 2021 Dec;28(4):781-8.
[12]. Arend SM. Human rights and childhood: building the Convention on the Rights of the Child (1978-1989). Tempo. 2020 Nov 16;26:605-23.
[13]. Kilkelly U, Wade K. Children's Health Rights in a European Legal Context. In Children's Rights in Health Care 2018 Nov 15 (pp. 71-94). Brill Nijhoff.
[14]. Cornick R, Picken S, Wattrus C, Awotiwon A, Carkeek E, Hannington J, Spiller P, Bateman E, Doherty T, Zwarenstein M, Fairall L. The Practical Approach to Care Kit (PACK) guide: developing a clinical decision support tool to simplify, standardise and strengthen primary healthcare delivery. BMJ global health. 2018 Oct 1;3(Suppl 5):e000962.
[15]. Mantovani N, Gillard S, Mezey G, Clare F. Children and Young People "In Care" Participating in a Peer- Mentoring Relationship: An Exploration of Resilience. Journal of Research on Adolescence. 2020 Feb;30:380-90.
[16]. Hayes D, Edbrooke-Childs J, Town R, Wolpert M, Midgley N. Barriers and facilitators to shared decision making in child and youth mental health: clinician perspectives using the Theoretical Domains Framework. European child & adolescent psychiatry. 2019 May;28(5):655-66.
[17]. Zimmerman MS, Shaw Jr G. Health information seeking behaviour: a concept analysis. Health Information & Libraries Journal. 2020 Sep;37(3):173-91.
[18]. Tobin J, editor. The UN convention on the rights of the child: A commentary. OUP Oxford; 2019 Mar 28.
[19]. Marsh V, Mwangome N, Jao I, Wright K, Molyneux S, Davies A. Who should decide about children's and adolescents' participation in health research? The views of children and adults in rural Kenya. BMC medical ethics. 2019 Dec;20(1):1-6.
[20]. Sesay MG. An Examination of the Policies of the African Union and Its Regional Economic Communities. Youth-Led Social Movements and Peacebuilding in Africa. 2022 May 24.
[21]. Mezmur BD. The African Children's Charter@ 30: A distinction without a difference?. The International Journal of Children's Rights. 2020 Dec 14;28(4):693-714.
[22]. Ngira DO. interests of the child in rural Kenya. THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW. 2021;53(3):545-69.
[23]. Steitieh M. Back to School in Kenya: How 152,000 New Teen Mothers Can Resume Their Education. Kennedy School Review. 2020 Jan 1;21:117-22.
[24]. ÁFRICA D. Constitution of the Republic of South Africa, 1996. As adopted. 2020 Mar.
[25]. Mkhwanazi N, Makusha T, Blackie D, Manderson L, Hall K, Huijbregts M. Negotiating the care of children and support for caregivers. Child Fam State. 2018;70.
[26]. Bond S, van Breda A. Interaction between possible selves and the resilience of care-leavers in South Africa. Children and youth services review. 2018 Nov 1;94:88-95.
[27]. Maimela CA. Medical negligence and the res ipsa loquitur doctrine in the administration of cancer treatment in South Africa. Obiter. 2022;43(1):1-24.
[28]. Needs S, Care C, Protection C. Children's Regulatory Law Reporter. Children.;1:1-2006.

Brian Kipkoech. "Child Involvement in Clinical Decision Making In Kenya- A Case Analysis for Law Amelioration." *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 27(10), 2022, pp. 44-48.