

imprint

June 2011

Volume 3 number 4

Towards the progressive realisation of children's rights in Kenya



Protecting Children on the Internet: Everybody's Business

Editorial board

Joan Kariuki.

Margaret Kurumbu.

Rachael Wandia

Contributors

Julian Simiyu.

Margaret Kurumbu.

Jackson M. Muchiri.

Rachael Wandia

Design & Printing

Stormsky graphics Ltd.



Kenyans under the age of 18 years in the year 2009 was 19,652,000 while 23% of the entire population of Kenya is adolescents aged between 10 and 19 years. Children and young people are pioneers in adopting and adapting to new technologies. Several factors make internet an avenue used by most young people: the increase in affordable bandwidth and inexpensive storage capacity, lower access costs, mobile internet, anonymity, social networking with plenty of new tools, interactivity and user generated content, searchability, replicability and longevity of network communications among others.

The accessibility of internet provides vast opportunities for young people to learn, research and interact with friends. However it also presents major risks. In a study conducted by Plan International and the Cradle it was discovered that 30.62% of the children interviewed had encountered sexually suggestive material at least once on Facebook. 23.45% did not report the incident while 40% reported the issue but no action was taken.

It's easier for children to access computers or a mobile phone at school, in cyber cafes and at home. By September 2010, 8.6 million Kenyans had applied to Safaricom for internet subscription. The youth are the best consumers of internet and technology. Unfortunately parents are not able to move at the same pace in technology with their children hence may not be able to understand the things their children are doing and guide them accordingly.

True Story

According to the Global Times on 2nd June 2011, a young man in China wanted to have an iPad2 and a laptop. The boy could not afford it. On one occasion while browsing on the internet he was contacted by a broker who told him that he could swap one of his kidneys for the gadgets he wanted.

During an interview with Shenzhen TV the boy said, "When I surfed the internet I found an advert posted online by an agent saying they are able to pay RMB 20,000 to buy a kidney."

INTRODUCTION

By Margaret Kurumbu

The development of a child requires that the child is able to get reliable and useful information at every stage of their childhood. This information can be obtained from parents, friends, relatives, books, the media, the church, school e.t.c. The law recognizes the right of the child to access information. At the same time the law gives a child the right to privacy. However the right to privacy is subject to the child having parental guidance.

In the olden days, children could only obtain information from limited sources: they either had to be given the information by their elders and when they eventually grew up and were able to read, they would then be able to get information from the books. They would spend most of their free time playing physical games, visiting friends or helping in chores at home. There were fewer parents working full time on jobs outside the home hence children were with their parents most of the time. Times and circumstances have changed. We now have most parents working outside the home and coming home late. Children spend most of their time either in school with their teachers, with a caregiver at home or with the TV and other electronic gadgets at home. With the advent of internet and the availability of computers and sophisticated phones, the equation has changed. Children are now able to access a wide range of information from diverse sources throughout the world. According to a research conducted by Kenyatta University most children in Kenya's urban areas spend their time after school watching TV, on the computer and browsing on the internet or playing video games.

According to the UNICEF report 2010, the population of

He finalized the arrangements with the broker on the internet and on 28th April 2011 he traveled to the city of Chenzou where he met the brokers and had his kidney removed and he earned himself the iPad. The mother saw him playing with the iPad and got curious and asked him where he got it from and he disclosed that he had sold his kidney.

This case has exemplifies the problem of the insecurity of our children on the internet. The challenge is how to mitigate the risks without compromising the benefits and opportunities that the internet offers.

WHATEVER FALLS ON CHILDREN MAKES AN IMPRESSION

By Rachael Wandia

“Children are like wet cement, whatever falls on them makes an impression” - quote by Dr. Haim Ginott

The above quote by Dr. Haim shows how children’s minds are susceptible to things around them from what they see, listen to and watch. According to the UNICEF Report 2010, 23 % of Kenya’s Population is adolescents between 10 and 19 years of age. The youth and children in particular are trusting, curious and anxious to explore the world and have a tendency to pick up new trends in ICT very quickly. Children in urban areas are more affected by the changing times and according to a research conducted by Kenyatta University most children spend their time after school on the internet – listening to music, playing games, making new friends or watching TV and playing video games. Indeed, in a pioneer study conducted by Cradle and Plan international, one teacher in one of Nairobi’s best performing schools expressed concerns that the class 8 students sitting for the Kenya Certificate of Primary Education (KCPE) this year may not perform as well as they have been performing in the past years as most of them carry mobile phones to school and spend a lot of time on facebook and Twitter and other social networking sites. The magnitude of the effects of internet on Kenyan children has increased to an extent that the government through the Communications Commission of Kenya (CCK) called for a stakeholders’ forum in June this year (2011) to discuss the issue of child online protection.

The internet has a lot of advantages; it offers opportunities that go well beyond entertainment such as enhanced communication, information sharing, educational resources, E-commerce and a number of other services. However increased use of the internet by children has seen them

exposed to pornography, get lured into sexually explicit communication, cyberbullying and even cyber crime. Whereas parents may attempt to control the content that their children are xposed to on the internet this supervision does not cover access in cyber cafes or through mobile handsets.

This brings to the fore the question, what is child sexual exploitation? Child sexual exploitation can involve the following: Possession, manufacture and distribution of child pornography; online enticement of children for sexual acts; child prostitution; child sex tourism and; child sexual



molestation. Online child sexual exploitation is the sexual exploitation of a child that has an Internet component. Section 15 of the Kenya Children’s Act states: “A child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials.” With that said, do we really protect our children from what they watch or listen to? A lot of forums have been held concerning protecting our children in cyber space but as parents and guardians what steps have we taken to actually find out what our children do while on the internet?

The Communication Commission of Kenya (CCK) prepared a fact sheet last year on child safety and internet use, advising parents on steps they should take to protect their children while online. The fact sheet suggests ways in which parents can minimize the chances that their children will be victimized while they are online. These include teaching children to follow the safety rules and instructing them about both the benefits and dangers of “cyberspace.” The CCK fact sheet also recommends that parents check with their service provider to see if they offer age appropriate parental controls. If not they could consider using a software program that blocks

chat areas, news groups and web sites that are known to be inappropriate for children. Most of these programs can be configured to filter out sites that contain nudity, sexual content, hateful or violent material or that advocate the use of alcohol, drugs, or tobacco. Some can also be configured to prevent children from revealing information about themselves such as their name, address, or telephone number. One can find a directory of these filtering programs at www.getnetwise.org

According to an article by Arthur Okwemba of the Daily Nation, research done states that children as young as nine years are reading and watching pornography. Teachers who spoke to the Sunday Nation expressed concern that the internet has led to exposure of children to sex. Investigations show that pornography, obscenity and casual sex are on the increase in schools, abetted by a permissive society and carefree sections of the media. In an article in the Sunday Nation, the headmaster of St Mark's Nyabera Primary School in Kisumu's Nyalenda slums found pupils in Standard Four perusing a pornographic magazine. "What I saw left me speechless. I could not believe the children were enjoying such a magazine," said the headmaster, Mr. Dominic Wachio, a born-again Christian. The magazine had photographs of men and women having sex in different styles.

In 2004 an Internet café in Nairobi reported that 12 out of every 20 downloads from a particular server constituted pornography, with most of the computer users being children and young people (Business Daily, November 19th 2009). Children are at a greater risk of being targeted due to their innocence and will be told by the cyber criminals who the children know as 'friends' to post their photos on the web either according to what they have watched or what they may be told to do. The children will either end up posting nude photos of themselves on the web or could even meet with these people after being coaxed which puts them into much greater danger since they will be lured into sex and also abused. Apart from them being lured into sex, the children are also part of the movies that are being shot in sex dens in various parts of the country.

Just as Dr. Ginott talks of children being like wet cement, we should make sure that whatever 'falls' on our children makes the right impression and they grow up to be responsible citizens.

Poem on Cyberspace

by SOS Children's Village, Nairobi



Internet the best tool if used wisely
Internet the worst tool if used unwisely
Internet not too bad but still unsafe
Every child can be harmed if misguided
Every child can be abused but not if we are informed.

Internet one of the best networking adventures,
One of the best sources of entertainment.
But be warned of Facebooking, Pornography Videos, conmen and women here in.
Parents, teachers and guardians teach children about internet safety so that they can be safe too.

Chasing our daily dream; all is not lost
Generations after generations are e-learning and academically excelling via internet,
Men and women are busy shopping, paying bills, booking their flights via internet.
Fresh graduates are being interviewed and getting jobs via internet.
What a privilege; what an opportunity cyberspace creates internationally;
Let us all bind in one accord to safe our beautiful children.

HARMFUL EFFECTS OF INTERNET PORNOGRAPHY ON CHILDREN

By Julian Simiyu

Pornography refers to printed or audio-visual materials containing explicit description or display of sexual organs or activity. Pornography comes in many forms and is ideally meant for adult consumption; however as sad as it is the number of children getting exposed to pornography either accidentally or by design is on the increase. This is a result of the mushrooming video dens in neighborhoods and availability of internet in homes, schools and libraries as well as the usual perpetrator “cybercafés”



The internet in particular has become a powerful social network tool where the young and old use it to interact; share ideas and information on almost everything for positive purposes. On the other hand it's also a monster that propagates social ills among them pornography which has detrimental effects on adults as well and not only children. Video dens and in particular the internet are notorious propagators of pornography. At the press of a button; a child's innocence could be ruined due to the explicit exposure to the adult like sexual activity world.

Minimum exposure to soft core pornography such as what is shown on television “soap operas” could be considered healthy especially for curious and experimental teenagers growing into adults. However due to inadequate or lack of parental supervision, sex education and other protection mechanisms, the same cannot be said for internet pornography. This is because children tend to go overboard and explore more and in the end become enslaved to not only pornography

per se but “hard core” pornography hence there lies danger in addiction and consequences as a result of exposure.

As such the advent of internet or “ICT” era has led to the thriving business of child trafficking and child pornography industries all over the world; vices that have overwhelmed the efforts put in place by governments and civil societies to fight against them in order to protect and uphold human rights. Although there could be more than one reason why children are trafficked the main reason is for sexual and cheap labour purposes which eventually borders on child prostitution. More than ten decades ago child traffickers had a difficult time inventing creative ways of doing their business. However, this has changed since the internet has made it all too easy for them to accomplish their objectives in faster ways.

In effect, the child pornography industry has grown in bounds. All one has to do is to buy a cheap child porn movie sit down and watch unlike the pre-internet era where one would have to ask or coerce a child for sexual favours in person. Child pornography as an industry has been made possible by the indecent exposure of children by sexual predators who exchange pictures and movies of sexual exploited children and luring of innocent children into internet porn without the full knowledge of what they are getting into. Other risks include security threats to the child and/or his/her family. There have been cases where strangers pose as children on the internet and arrange for meetings with a child which could risk the child's life or that of family members. There are also cases of children disclosing details of themselves, their parents and close relatives. Some disclose their parent's credit card numbers leading to cases of loss of money and other related risks.

Besides these risk factors, there are other negative effects once children get exposed to excessive internet pornography and other forms which make them vulnerable thus interfering with their well being in terms of physical and mental health. In the long run their growth and development in many aspects of life is affected. As such exposure to pornography threatens to make children victims of sexual violence. Children tend to act out what they read, see and hear. For instance, internet pedophiles trick innocent children in sexual acts by engaging them in sex conversations and showing pictures of other children involved in such acts. Eventually this leads to

defilement, child molestation and at worst death.

Research and studies have proven that early exposure to pornography incites children to commit sexual atrocities against other children and it's easy to use coercion on younger children since they are weak and gullible. Lack of timely intervention for such children predicts more doom than chances are high of them becoming rapists, defilers and child molesters in adulthood. Early exposure to pornography could be the reason why there are reoccurring incidences of children defiling their own in Kenyan high schools.

As the saying goes "too much of anything is poisonous" so is excessive exposure to pornography which conveys to children that sex without responsibility is acceptable and desirable. There is a strong link between pornography and sexually transmitted infections among the youth and what's more shocking children as well. Early exposure to pornography makes children become sexually active hence the desire to seek gratification at an early age without full knowledge of the consequences. Apart from infections, there are other effects to deal with like early pregnancies, prospects of parenthood, disruption of education, poor prospects of livelihood, stigma and rejection to deal with and so the list goes on.

Pornography alters the attitudes of children for the worst as they could grow up to be lenient towards sexual abuse, have distorted perceptions about sexuality, devalue the importance of monogamy in relationships and view non-monogamous relations as normal. In addition excessive consumption of pornography during adolescence distorts the normal personality development process and mis-informs a child about his or her sexuality, sense of self and body that leave the child confused.

Children who are affected by excessive exposure to pornography tend to exhibit symptoms of sexual disturbance such as sexual pre-occupation, age inappropriate sexualized behaviour, age inappropriate partners and use coercion. Such children are excessively curious about sexuality and some expose their genitals to others. Some may display sexual knowledge and behavior beyond that which is appropriate for their age. Very young children may act out adult sexual scenarios and behaviors in their play with other children or with their dolls and stuffed animals.

Children who are affected by pornography need therapeutic support and there is general need for enhanced extensive supervision and control by parents, guardians, school

authorities, owners of video dens & websites on internet used by children. This could be done through use of filtering programs among other means to keep children safe. On top of this parents need to create time for their children because one gets to know what their favourite sites are, what new internet tricks they have learnt and generally what they do on the internet.

Placing the computer in a family room also tends to ensure that your child can only access friendly information. Parents and guardians have a primary role in ensuring they avail sex education to their children which is important since it imparts authentic and accurate information on sex and hence ensures that children acquire positive values, attitudes and behaviour towards sexuality as they become adults.

PROTECTING CHILDREN FROM PORNOGRAPHY ON THE INTERNET

By Margaret Kurumbu

Parental responsibility to protect children

Parents have been placed on the front line of protecting children from abuse on the internet. It has been observed that most of the children who are addicted to the internet have absentee parents. The parents leave home early to go to work and come home late at night and never have sufficient time to be with their children. Children use their free time to play computer games and browse on the internet. They are bombarded with huge loads of information that they are unable to manage. They are unable to identify, assess and manage the potential risks. Many children do not get on a computer with the intention of watching pornographic movies. They are caught online by predators and pedophiles and get abused. Once the child develops the habit of viewing pornography on the internet it eventually graduates to an addiction which will be difficult to detach from.

According to an article by Beatrice Gachenge of the Business Daily, she outlined a few safety steps of how to limit child exposure to the Internet vice. These include:

- Educating children on how to use the internet positively and to never give personal information such as contact details, parent's work details or the name and location of their school without parents consent.

- Check with your service provider for age appropriate parental control devices
- Bookmark websites that are child friendly and seek help from internet providers on how to block other unfriendly sites.
- Know children's friend and who they interact with while online
- Teach children about the dangers of accepting someone they don't know in social networks and chat rooms and never to reply to a suspicious looking email or click on a web link contained in one

Parents should build closer relationships with their children and be willing to grow together with their children. They should be interested in what their child is doing and be free and friendly so that the child would be willing to share with them what they encounter on the internet. While the child



has a right to privacy, the parent has a responsibility to guide and protect the child. Parents should not abdicate their responsibility to guide the child under the guise of allowing their children to have privacy. Children do not come into the world with a right to privacy. They earn it by growing up responsibly which they may not do if they are left to their own devices all the time by misguided parents.

The government

Currently, there is no national data on the issue of child online protection. As part of the policy development process, the government together with all the stakeholders should undertake a survey on the area of child online protection, document the findings and use it as a basis for policy development. Adequate resources should be allocated for child protection.

We must acknowledge that pornography on the internet

is a global problem. No individual person or country can curb it comprehensively on its own. The internet is a queer source of information as no one owns it and it is boundless. No particular state can claim to have exclusive jurisdiction to deal with a case of information that is deemed inappropriate when it is obtained from the internet.

We need to come up with a definition of internet risks locally and globally. Once this is done it would be helpful for all the nations of the world to endeavor to draft and ratify a treaty that governs the internet. This may take a long time but it is worth the effort. The UNCRC is one such treaty governing the issues of the rights of the child and is ratified by all the UN states except the United States and Somalia. There are however many ways that individuals and states can deal with the problem.

The government through parliament should enact laws that protect children's internet safety. Currently the legal framework regulates and prohibits publication of obscene materials under section 84D of the Kenya Information and Communications Act. The Children Act provides under section 15 that children should be protected from obscene materials. So far, what the law prohibits is obscene materials but there is no law on cybercrime. The government should enact laws that are watertight especially on the area of cyber crime.

The Jurisdictional Challenge

The law on cyber crime would have to be governed by international law since cyber crime is an offence that traverses many jurisdictions. There five general theories of international jurisdiction.

1. The nationality principle- allows a state jurisdiction over their citizens regardless of where they are. E.g. if a Kenyan citizen who lives in Uganda commits an act that amounts to an offence under Kenyan law, Kenya has authority to exercise authority over that person just because he/she is a Kenyan.
2. The pure territoriality principle- states can make laws that operate in their own territory. This means that even if Kenya passed a law to prohibit public cyber cafes from hosting pornographic sites, this law will only work within Kenya.
3. The objective territoriality principle whereby a state may enact laws to regulate conduct which may occur outside its territory but which has an effect on the nation. This

principle is an extension of principle 2 above. It allows a country's laws to go beyond the physical boundaries to cover acts done outside the state's territory but whose effect is felt within.

4. The protective principle- allows a state to have jurisdiction over acts done outside the jurisdiction but which threatens the nation's security so long as the conduct forbidden is deemed illegal in the other country(s) involved.
5. The universality principle which recognizes that some acts are so dangerous that all states are required to punish them wherever they occur.

The definition of cyber crime can be very wide including not only the act committed but also the site of transmission, the point and mode of delivery, any area which the transmission passes through among others. In some cases, no state can claim to have jurisdiction to the exclusion of others. This could lead to forum shopping by perpetrators of crime so that they can be tried in a country where the laws are lenient.

Extradition treaties are very helpful in enforcement of international law but they only work if the act committed is a crime in both countries. The method that may work would be to come up with a form of international internet consensus through a convention in the hope of drafting an international treaty to criminalize certain activities on the internet.

Kenya should endeavor to be part of all upcoming regional and upcoming conventions that aim to regulate the use of internet.

CONFLICTING RIGHTS: THE FREEDOM OF EXPRESSION & PRIVACY VS. CHILD PROTECTION

By Jackson M. Muchiri

Children's Rights are normally not highly agitated as compared to the Rights of adults. This is partly because childhood is a transitional stage in the growth and development of a human being. Therefore, being a temporary stage many obvious violations of Children's rights may go unnoticed. This coupled with age and economic disadvantages of children limit a sustainable agitation and protection of their rights.

The Constitution of Kenya under the Bill of Rights has elaborate

and expresses provisions concerning the protection of human and children's rights.

The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state. In fact, the Bill of Rights does not exclude other rights and fundamental freedoms not in the Bill but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights.

In this regard, the freedom of expression is a right guaranteed under the Constitution of Kenya. The freedom of expression includes among other things the right to seek, receive and impart information and ideas. The constitution further provides that, in the exercise of this right to freedom of expression every person shall respect the rights and reputation of others.

The Kenyan constitution provides that every child has a right to be protected from abuse, neglect, and all forms of violence. Indeed, every child has inherent dignity and the right to have that dignity respected and protected. What would be the ideal situation that would guarantee the social and moral development of the child holistically?

This article will seek to interrogate these competing interests in an effort to establish what the best interests of the child would be in the circumstances.

The Right of Expression

Every child has a right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas.

Article 12 of the Convention on the Rights of the child adopted by the United Nations in 1989 (hereinafter referred to as, 'the Convention'), provides that;

'State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

The Convention on the Rights of the Child is based on four basic principles, namely: survival, Development, Protection and Participation.

The freedom of expression and opinion falls under the participatory rights of the child. The Convention which is part of the International Law that Kenya is a signatory to, recognizes the right of a child to have an opinion and to have that opinion considered in all decisions affecting the child.

Article 13 of the Convention further provides for the right of the child to express him/herself through views and ideas. The right of expression also encompasses the right to access appropriate information. This provision under article 17 of the Convention recognizes the important role of the media in disseminating the right and appropriate information and ideas to children.

Right to Appropriate Information

The media, print, electronic including the internet have a very important role to play in the development of children who are educated and informed. The media contains information of cultural and social benefit and can be used as a key educational tool. Every child has a right to seek, receive and impart information. Children rights defenders therefore have a duty to ensure that children have access to information from national and international sources. The information should be available for the promotion of the child's physical and mental growth. The information should promote the child's social and moral well-being.

However, the material and information that the child may be exposed to may be injurious to its social and moral well being. In the recent past, websites and published materials have been developed targeted at the adult audience. Some of these materials are not appropriate for children. It is therefore the mandate of the parents, the government and other children rights defenders to ensure that the children are shielded from such material that may be detrimental to their social and moral well-being.

This should be an exception to the rights of the publishers and website owners to impart information and ideas. The media also plays an important role in educating people about children's rights and report any violations that may occur.

The Child's Right to privacy

The right to privacy is a right expressly provided for under the Convention and other international human rights instruments. Article 17 of the International Covenant on Civil and Political Rights of the United Nations of 1966 recognizes the right to privacy.

The rights of privacy to children are guaranteed under the Constitution of Kenya and qualified by the Children's Act. Due to the delicate nature of children in their formative stages and the potential of ruining their entire lives the expectation of privacy would be higher.

The rights guaranteed in any constitution are not absolute. There are usually qualifications in strict application of any given right or fundamental freedom. The boundaries are set by the rights of others and the legitimate needs of the society.

In this regard, section 19 of the Children's Act provides that every child shall have a right to privacy subject to parental guidance. Privacy is paramount in helping a child get his/her identity. The limiting factor here is parental guidance which has not been defined under the act. This I presume was left by the legislature as a matter of interpretation by the court. The information protected as private with regard to a child may include details of a child's health, communication, property and relations especially where the child or his/her parents or guardians are adversely mentioned. Then what is parental guidance as regards privacy of the child?

Parental Guidance

Parents have an obligation to the children's welfare, health and development. Parents also struggle with the limits of their children's privacy. Rights are usually interrelated. For instance, as much as a child has a right to privacy, it is also the duty of the parent to care for and prevent any form of abuse being meted on the child.

Where there is a cause of concern or alarm, it would be prudent for a parent to find out even if in the process the child's right to privacy is infringed. The safety, well-being and development of the child should be the primary concern. The best interests of the child must be upheld at all times. A parent should be able to forge a strong relationship with the child so as to be able to monitor and notice any peculiar changes. For instance, a parent would be able to know when a child is depressed or on drugs.

One way of being able to monitor a child is by spending time with the child. This will provide an opportunity for the child to share their experiences freely. Listening skills and observation of non-verbal communication are vital in parental guidance. Therefore, a child's privacy should be respected unless there is strong suspicion that something is wrong. However, open communication should be given priority.

The primary goal should be to open up the sharing of concerns and to improve the trust. The parents should of course be ready to take firm action where dire consequences may result otherwise. This may even include peeping through the diary or private journal of the child.

Protection of Children from Sexual Exploitation and Obscene materials

The Children's Act number 8 of 2001 under Section 15 provides that a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscene materials.

The internet for instance has become a safe haven for pedophiles, predators and child molesters. These are sex offenders who may use the internet to locate their next victims. The potential danger of the child falling a victim is real unless proper information, guidance and protection are applied. The internet is not a safe medium and communication can be intercepted.

It is the responsibility of the government and family to ensure the survival and development of children. A child cannot develop into a reliable and resourceful person if their social and moral foundations are wrong. In all actions concerning children, the best interest of the child shall be a primary consideration.

The responsibility of Children

Children have a duty to respect authority including their parents. They should follow instructions and obey their parents. Rights and obligations are usually intertwined. The Children Act stipulates the duties of the child and provides that it shall be the duty of the child to work for the cohesion of the family, respect his parents, superiors and elders at all times, serve his national community, preserve and strengthen social and national solidarity and preserve and strengthen the positive cultural values of his community in his relations with other members of the community. However in giving the child the duties above one must consider the age and ability of the child and parental guidance should be available to the child at all times.

Conclusion

Children have inherent rights to participate in issues and decisions that directly affect them. For a child to enjoy the freedom of expression, it follows that he/she must be able to receive appropriate information. The freedom of expression and opinion is an essential right that ensures that children participate in decisions that affect them. The children must not only be heard but also their opinion should be given due weight in the decision making process.

Children should also be able to access accurate age

appropriate and reliable information through media. In this regard publishers and media owners have a moral and legal duty to produce child-friendly materials. Children have a right to religion and appropriate information for their social, mental and moral development.

The role of the parents and guardians in the growth and development of a child is critical. A parent should be able to forge a close relationship with the child to be able to monitor the child in a friendly rather than a confrontational way. The child's right to privacy is therefore not absolute.

CASE STUDY: AMERICA

By Margaret Kurumbu

The conflict between the interest to protect children from obscene materials and the individual's Freedom of speech and expression

The government of the United States attempted to regulate the internet in response to a public outcry that American Children were being exposed to obscene and indecent materials on the internet and needed to be protected. Congress passed the Communications Decency Act (CDA) which was signed by President Clinton in 1996. The Act provided criminal penalties for knowingly transmitting any communication that is accessible to minors which is found to be "obscene, lewd, lascivious, filthy or indecent." Punishment included a sentence of up to 2 years in prison and a fine of \$100,000. The Act also provided penalties for online services which serve as a conduit for such transmissions.

Immediately after the CDA was passed, the American Civil Liberties Union (ACLU) and other internet service providers went to court to court and filed motions for preliminary injunctions to challenge the Act on constitutional grounds.

Sable Communications Vs. Federal Communications Commission (FCC) 492 US 115 (1989)

In this case, the court when dealing with the constitutionality of the CDA held that although the protection of minors from access to indecent material is a compelling state interest it is not enough that the government's ends are compelling, the means must be carefully tailored to achieve the ends.

In an earlier case relating to the same Act,

Pacifica Foundation Vs, Federal Communications Commission 438 US 726 (1978),

the Pacifica court allowed FCC to regulate the use of certain language during specific hours of the day when children are likely to be exposed to the mediums of communication. The court reasoned that certain mediums of expression e.g. radio and T.V are pervasive in that all a child needs to do is turn them on in order to be potentially subjected to indecent language. This decision classified TV, radio and telephone as pervasive mediums of expression.

The Sable court had different views from the Pacifica court. The Sable court argued that the finding of pervasiveness was narrow and irrelevant to other media e.g. telephone services and internet. The court was of the opinion that telephone was not a pervasive medium because the user must perform certain affirmative steps in order to gain access to any form of speech. They found that internet, like the telephone was not a pervasive medium of expression because an internet user must take affirmative steps and actively look for the material sought. The court concluded that the FCC could not apply restrictions on indecent expressions on internet on the basis of pervasiveness.

ACLU Vs. Reno 1929 F.Supp 824 E.D p.a 1996

In this case the American Civil Liberties Union (ACLU) argued that the CDA violated the First Amendment Rights of free speech in that it would limit adult's rights to view or receive information which may be indecent or patently offensive. ACLU argued that the Act was not specifically tailored to protect children and would amount to infringement of the individual's right to free speech and expression. The Act was also challenged for allowing federal authorities to intrude upon private communications and information used by individuals. The Court agreed with ACLU's argument and found the CDA to be unconstitutional. The Attorney General appealed to the Supreme Court. The Supreme Court in a 7-2 vote upheld the decision of the lower court and overturned the CDA.

These three cases amplify the many challenges that face the attempts to regulate the use of internet. Any law that seeks to regulate the use of internet must not only be specifically and narrowly tailored to protect children but must also ensure

that such protection does not jeopardize or limit the rights of other users and/ or limit the benefits that internet offers.

The jurisdictional challenge also presents a major wall for regulatory bodies to scale. At the end of the day interest of the government to protect minors must be weighed against the constitutional rights of the individual and the risk of foregoing the benefits offered by the internet.

USEFUL REFERENCES

1. The Children Act 2001
2. The Constitution of Kenya
3. Kenya Information & Communications Act Cap 411
4. The United Nations Convention on the Rights of the Child
5. European Convention on Human Rights
6. UNICEF Report 2010
7. "The Policy, Legal and Regulatory Frameworks for Child Online Protection: The Status in Kenya" Paper presented by Mrs. Mercy Njau during a workshop organized by the Communications Commission of Kenya on 8th and 9th June 2011 at Hotel Intercontinental.
8. Pollack, Robyn & Forman; Temple International & Comparative LAW Journal 1996 :Creating Standards for a Global community- Regulating Ponorgraphy on the Internet- and International Concern"
9. American Psychiatric Press
10. www.cck.go.ke
11. www.protectkids.com
12. <http://www.ifla.org.sg>
13. <http://osakalaw.miami.edu>
14. www.getnetwise.org
15. <http://legal-dictionary.thefreedictionary.co./child+pornography>
16. Warren & Brandeis, "The Right to Privacy" 4 Harvard Law Review 193 (1890)
17. Dean Prosser, "Privacy" (1960) 48 California Law Review 383
18. Karen M. "Tell Me! The Right of the Child to Information" The Hague; NLBC 1996
19. Daily Nation Friday 6th May 2011 page 2&3
20. Daily Nation 5th September 2009
21. Business Daily, Thursday November 19th 2009

Youth Alive! Kenya

Youth Alive! Kenya is an independent national youth-led non-governmental organisation committed to the empowerment of young people in Kenya to take active responsibility for their lives to shape their destiny. Founded in late 1998 and registered as a community-based organisation in 1999 then a national NGO in December 2003, Youth Alive! Kenya has a vision of a free, just and equitable world where young people are able to translate their aspirations and potential into productive and fulfilling life. To this end, our mission is to provide a platform where young people and their communities share skills and explore innate abilities towards lasting development. Working in the areas of Health, Justice & Human Rights, Democracy & Governance and Environment & Livelihoods, we facilitate learning and innovation through partnerships, advocacy, research and public education.

The policy brief is a project component under the Youth Alive! Kenya Justice & Human Rights Programme (JHR). JHR seeks to ensure access to justice by the most vulnerable and most marginalised and to promote the respect for and the protection of human rights in Kenya.

The programme has specialised projects that aid in realisation of the above objectives. One of these projects is the Juvenile Justice Project that seeks to promote an effective juvenile justice system in Kenya bent on restoration of young offenders by improving the quality of rehabilitation provided by government institutions while strengthening community capacity and linkages to support reintegration of discharged child offenders. The project operates in the districts of Nairobi and Kisumu and is implemented in partnership with the Department of Children's Services, the Ministry of Gender, Children and Social Services and the Prisons department.

As part of this process, the project works to foster development of appropriate laws, policies and practices concerning children and the justice system in Kenya and in this end one of the mechanisms adopted for the actualisation of the above is the use of quarterly briefs that will facilitate dialogue and promote reform of policy, legislation and practice around children's rights.



This publication was made possible by the generous funding of the Finnish NGO Foundation for Human Rights (KIOS).

Published by Youth Alive! Kenya

Copyright © 2011 Youth Alive! Kenya

The views expressed in this publication are in all cases those of the writers concerned and do not in any way reflect the views of the Finnish NGO Foundation for Human Rights (KIOS) or Youth Alive! Kenya.



Youth Alive Kenya

Princess Park Flats 2nd Floor

Kabarnet Road off Ngong Road, behind the embassy of the Republic of Yemen

P.O. Box 5844 00100 Nairobi

Tel: +254 (0) 20 386 2871 / +254 (0) 20 205 2494

Fax: +254 (0) 20 386 2871

Email: info@youthalivekenya.org

Website: www.youthalivekenya.org