

A Legal Analysis of Sharenting: Balancing Between Parental Freedom of Expression and Minors' Right to Digital Privacy in Kenya

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Abstract

Some parents and/or guardians are actively sharing photographs, videos, and even personal details of their children across various social media platforms in Kenya to share their parental experiences. This concept has been dubbed 'sharenting.' This research will employ the interest theory of rights to examine the possible contradiction between children's ever-evolving right to privacy and parents' and/or guardians' freedom of expression on social media platforms. The study promotes a reasonable approach that prioritises the child's best interests while still acknowledging parental freedom of self-expression. The developing nature of children's rights and the possible drawbacks of unrestricted online exposure are emphasised. This work examines statutes, case laws, books, journals, and reports about these rights and their various conceptions. It will shed light on Kenya's legal framework for safeguarding children's online privacy rights and investigate the possible violations caused by parental online sharing practices. The purpose of this study is to add to the current legal and social debates in Kenya around children's rights to privacy online, and it stresses the importance of striking a balance between parental freedom of expression and the protection of children's right to privacy on digital platforms.

Keywords: *Sharenting, Digital Privacy, Freedom of Expression, Parental Responsibility, Autonomous Development.*

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I. Introduction

Article 31 of the Constitution of Kenya dictates that every person (including children) has the right to privacy,¹ and this right to privacy extends into the digital realm making consent to sharing one's images on online platforms vital to ensure there is no violation of their right to privacy.² In the case of minors, however, consent adopts a nuanced form. A minor's assent to data use pales in comparison to the decisive role of the parent or guardian who acts as the gatekeeper of their child's digital footprint.³ All Kenyans are further constitutionally guaranteed the freedom of expression, and this includes parental self-expression on their parenting experience as they seek and offer information on the matter.⁴ A parent's experience will at most times, advertently or inadvertently include the experiences of their children and thus it becomes a challenge to draw the line between the right of freedom of expression and that of privacy of children on social media platforms. The Data Protection Act frames data protection as a subset of the broader right to privacy, with specific emphasis on consent to the processing of personal data. It is vital to note that a minor's consent to the processing of their data is given by their parents or guardians.⁵ Since personal data includes any information that can identify a natural person,⁶ such as images or videos, children featured in such content become identifiable and are thus entitled to the Act's protections. This raises important concerns about parental sharing and the child's right to privacy online.

The increased digital age has witnessed an explosion of the content of children online, with parents and guardians readily sharing photographs and videos of their children across various social media platforms like YouTube, Facebook, X (previously Twitter), and TikTok in a bid to share, inter alia, their parenting experiences.⁷ This concept of sharing their parental experiences while

¹ Article 31, *Constitution of Kenya* (2010).

² Section 2, *Data Protection Act* (No. 24 of 2019).

³ Section 33, *Data Protection Act* (No. 24 of 2019).

⁴ Article 33, *Constitution of Kenya* (2010).

⁵ Section 33(1), *Data protection Act* (Act no. 24 of 2019); *Leroy Kaboi & another v Wadi Degla Club Kenya* (ODPC Complaint No. 0386 of 2024); *Moses Atela Otiende (Legal guardian of AEA minor) v DMI Education Services LTD operating as ST Joseph International Science School* (ODPC complaint No 0577 of 2024).

⁶ Section 2, *Data protection Act* (Act no. 24 of 2019).

⁷ Wangari N, 'The dangers of posting your child's photos online' *The Standard*, 2016 -< <https://www.standardmedia.co.ke/sunday-magazine/article/2000187114/dangers-of-posting-your-childs-photos-online>> on 10 December 2023; 'Sharenting: Should I post photos of my kids online?' *The Standard*, 30 October 2022 -< <https://www.standardmedia.co.ke/business/sunday-magazine/article/2001459341/sharenting-should-i-post-photos-of-my-kids-online>> on 10 December 2023;

including their children has been dubbed ‘sharenting’.⁸ There are some cases where parents commercialise their social media accounts and intentionally share content about their children to gain financial benefits.⁹ What may start as casual sharenting to connect with friends or family can evolve, especially if a post goes viral, into a more commercial endeavour, as parents realize they can profit from even the most ordinary moments in their children’s lives.¹⁰ This research work will focus on content that is specific to the sharing of parenting experiences rather than commercialised content.

Questions have been raised on violating the right to privacy of children online occasioned by such posting. Parents are obligated not only by the Constitution¹¹ but also the Children Act¹² to exercise parental responsibility in a manner that promotes the best interests of the child in all situations.¹³ A key consideration of the best interest of a child that this paper will dwell on is the right of a minor to participate in decisions that affect them.¹⁴

The right to privacy is important to allow individuals an area of autonomous development without interaction with others.¹⁵ One should be able to live their life, shaping and charting their path and the image of who they are without the prying eyes of others. Intrusion into an individual’s privacy demeans their dignity, impinging on their autonomous development.¹⁶ Freedom of expression is essential in freely exchanging ideas, thoughts, opinions and experiences. It is vital to encouraging communication and thus the building of human connections.¹⁷

Yoo J, Gehlen B, Lopez P and Weintraub A, ‘Social media posts by parents bring concerns for children’s privacy, safety’ ABC News, 6 July 2023 -< <https://abcnews.go.com/US/social-media-posts-parents-bring-concerns-childrens-privacy/story?id=100706825>> on 10 December 2023.

⁸ Cataldo I, Lieu A, Carollo A, Bornstein M.H, Gabrieli G, Lee A and Esposito G, ‘From the cradle to the web: the growth of ‘sharenting’—A scientometric perspective’ 2022(1) *Human Behavior and Emerging Technologies*, 2022, 1.

⁹ Yates C, ‘Influencing “Kidfluencing”’: Protecting children by limiting the right to profit from “sharenting”’ 25(4) *Vanderbilt Journal of Entertainment and Technology Law*, 2023, 3-4.

¹⁰ Jorge A, Maropo L, Coelho A.M & Novello L, ‘Mummy influencers and professional sharenting’ *Europeana Journal of Cultural Studies*, 2021, 851-852, -< <https://ciencia.ucp.pt/ws/portalfiles/portal/92139139/29123071.pdf>> on 15 April 2025.

¹¹ Article 53(2), *Constitution of Kenya* (2010).

¹² Section 8, *Children Act* (No. 29 of 2022).

¹³ *MAK V RMAA & 4 others* (Petition 2 of 2022) eKLR.

¹⁴ Section 8(3), First schedule paragraph 1, 4, *Children Act* (No. 29 of 2022).

¹⁵ *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

¹⁶ Rossler B, *The value of privacy*, Polity, Cambridge, 2005, 72.

¹⁷ Traber M, ‘Communication is inscribed in human nature: A philosophical enquiry into the right to communicate’ 30(1) *idoc internazionale* 1991, 249.

This research investigates how minors' right to privacy can be upheld in light of their parents and/or guardians posting their photographs and videos on various social media platforms as a manifestation of their freedom of expression. It investigates whether a balance can be struck between these two constitutionally guaranteed rights to ensure that the right to privacy of children is respected as parents and guardians exercise their freedom of expression relating to their parenting experiences. It will utilise the interest theory of rights as a theoretical framework. The underlying idea of the interest theory of rights is that every right protects an aspect of a person's welfare,¹⁸ in essence, rights exist to protect fundamental interests.¹⁹ In Kenya, the practice of sharenting raises important concerns about balancing parental freedom of expression with a child's right to privacy. The interest theory of rights provides a useful lens for addressing this tension, emphasizing that rights exist to protect fundamental interests. Children, as individuals with their own views and needs, have a legitimate interest in digital privacy, including control over their image, protection of their well-being, and the right to develop autonomously.²⁰ While parental sharenting often stems from a natural desire to connect with others and find support in the parenting journey²¹, it may inadvertently infringe upon these essential interests of the child.

Part II of this research will explore a minor's right to participate in decisions affecting their digital privacy. Part III will then focus on how parents can exercise their parental responsibility in a manner that promotes the best interest of their children while still being able to exercise their freedom of expression. Thereafter, part IV will do a comparative study between Italy, France and Kenya on laws specific to sharenting. Choosing Italy and France as comparators is due to the fact that they are the only two countries worldwide that have developed a law that is specific to this new phenomenon. France has developed a law, and Italy has a draft bill on sharenting especially commercialised sharenting. Finally, the paper will give recommendations and give a conclusion.

¹⁸ Kramer H.M, *A debate over rights*, Oxford University Press, New York, 1998, 61

¹⁹ Kramer H.M, 'Refining the interest of rights' 55(1) *The American Journal of Jurisprudence*, 2010, 32.

²⁰ *UN Committee on the Rights of the Child General Comment No 7, Implementing Child Rights in Early Childhood*, 20 September 2006; *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

²¹ Lieberman D.M, *Social: Why our brains are wired to connect*, Oxford University Press, United Kingdom, 2013, ix; Rymanowicz K, 'The importance of communicating' Michigan State University, 22 April 2016 -< https://www.canr.msu.edu/news/the_importance_of_communicating > on 2 September 2024.

II. What constitutes minors' right to privacy on social media platforms?

The right to privacy for all Kenyans is assured under Article 31 of the COK. Of relevance is Article 31 sub-article (c), which relates to information related to a person's family or private affairs.²² Children have the same human rights that adults do. They are inalienable to the person, and everyone is born with them.²³ This right to privacy is given to every person in Kenya, including children, from conception as that is when their lives begin in Kenya.²⁴ The *Data Protection Act* further buttresses Article 31 of the COK in protecting individuals' data. It was passed to give effect to Article 31(c) and (d).²⁵ It bears particular importance on the aspect of consent to the processing of personal data by an individual. Personal data is any information that relates to an identified or identifiable natural person. A person may be identified by reference to their name, identification number, location, or factors specific to their physical, physiological, genetic, mental, economic, cultural or social identity.²⁶ Posting images and videos of children online will give factors by which a person may identify them.²⁷ They are thus identifiable natural persons and are subject to the protections accorded in this act. The Children Act, which is specific to children, assures minors the right to privacy, and that the said right may not be unlawfully or unnecessarily interfered with.²⁸ The United Nations Convention on the Rights of the Child further buttresses this right in Article 16²⁹ which Kenya ratified in 1990, reiterating its applicability to Kenyan minors.³⁰

Scholars, legislation, and case law have defined the right to privacy in varying ways. Applying these definitions to children presents particular challenges. The primary concern is the inability of children (especially younger ones) to fully

²² Article 31(c), *Constitution of Kenya* (2010).

²³ Ife J, *Human rights and social work: Towards rights-based practice*, Cambridge University Press, Cambridge, 2008, 11; 'Children rights and why they matter' UNICEF, - < <https://www.unicef.org/child-rights-convention/child-rights-why-they-matter#:~:text=Children%20and%20young%20people%20have,subject%20of%20their%20own%20rights>> on 1 October 2024.

²⁴ Article 26(2), *Constitution of Kenya* (2010).

²⁵ Preamble, *Data Protection Act* (Act no. 24 of 2019).

²⁶ Section 2, *Data protection Act* (Act no. 24 of 2019).

²⁷ *Leroy Kaboi & another v Wadi Degla Club Kenya* (ODPC Complaint No. 0386 of 2024); the ODPC determined that an examination of a minor's image would result in the minor being personally identified physically and physiological.

²⁸ Section 27(1), *Children Act* (No. 29 of 2022).

²⁹ Article 16, *United Nations Convention on the Rights of the Child*.

³⁰ Zamzam M & Chatterjee S, 'Child rights in Kenya – 30 years on' UNICEF, 22 November 2019-< <https://www.unicef.org/kenya/stories/Child-rights-in-kenya-30-years-on>> on 30 September 2024.

exercise consent which is a key component of privacy. The Data Protection Act recognises this inability and thus makes it the responsibility of their parents and/or guardians.³¹ While the need for privacy frequently emerges in these definitions, this paper advances the argument that, in line with the interest theory of rights, the underlying need is self-determination. While the exercise of children's right to privacy is unique due to their age and maturity, this does not negate their entitlement to enjoying this right.

This section will attempt to give a general definition of privacy that encompasses these various definitions. We will find the need for privacy and what interest is being advanced from the definition. It will also highlight the unique nature of children's right to privacy on social media platforms, especially regarding the role of parents and/or guardians. Finally, it will give what constitutes minors' right to privacy on social media platforms in Kenya.

i. What is digital privacy, and why is it important?

Digital privacy is a subset of privacy that is within the digital realm. It has been defined as the expectation of privacy for an individual's personal information on digital platforms, unless the individual has consented to the processing of such personal information.³² It is important to note that the processing of a minor's identifiable personal information depends on the consent of their parent or guardian. This presents challenges in the context of sharenting, as it is often the parent or guardian who is responsible for processing the minor's data in ways that may be seen as violating the child's right to privacy. To understand its importance, a look into what privacy itself is and thus its importance is necessary.

In the case of *Jessica Clarice Wanjiru v Darina Aesthetics & Reconstructions Centre & others*, privacy was defined as the right of individuals to control access to their personal lives, including protection from physical intrusions and the publication of private information and any form of unwanted exposure would constitute a breach of privacy.³³ In *Kenya Human Rights Commission v Communication Authority of Kenya & 4 others*, privacy was seen as a right that protects individuals' right to autonomous development by ensuring that they have a private sphere where they can make their own choices and pursue their own interests.³⁴ The Cambridge

³¹ Section 33, *Data protection Act* (Act no. 24 of 2019).

³² Robertson L and Muirhead B, 'Digital privacy in the mainstream of education' *Systemics, Cybernetics and Informatics*, 2020, 119-<https://www.iisci.org/journal/pdv/sci/pdfs/IP099LL20.pdf> > on 12 June 2025.

³³ (2017) eKLR.

³⁴ *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

Dictionary defines privacy as ‘someone’s right to keep their personal matters and relationships secret’.³⁵ The Merriam-Webster dictionary defines privacy as freedom from unauthorised intrusion.³⁶

Several scholars have attempted to define privacy using a single concept. These include right to be left alone,³⁷ control over personal information,³⁸ intimacy, secrecy, and a sense of personhood. More modern conceptions of privacy tend to incorporate most of these aspects rather than focusing on one aspect.

All these definitions can be combined into one that encompasses all the aspects brought out. Privacy is the individual’s right to control the access, collection, use and disclosure of personal information and experiences, both physical and digital, to maintain a sense of agency, autonomy and dignity. This definition encompasses the spatial realm of privacy, informational privacy, agency and independence and dignity as concerns one’s boundaries.³⁹ Using the interest theory of rights, this research highlights that, for children, maintaining autonomy as an interest of the right to privacy is self-determination.

Privacy is thus a tool for individuals to achieve goals as part of their self-determination. It is a right that gives individuals the space to advance specific interests. A significant theme that has emerged from these various definitions of privacy is the concept of autonomy. A primary goal of the right to privacy is the maintenance of autonomy. There has been a significant focus on individuals deciding what they want to reveal about themselves and to whom. It can thus be seen that a child’s interests regarding digital privacy are controlling their image, protecting their well-being, self-determination, and appropriate autonomy online.⁴⁰ All these boil down to the importance of autonomous development where children guide their development by protecting their image and what image they portray to the public.⁴¹ They want the choice to decide what aspects of themselves they want to reveal to the world, to conceal that which they wish

³⁵ Cambridge Dictionary, 4th ed.

³⁶ Merriam Webster Dictionary 11th ed.

³⁷ Warren S & Brandeis L, ‘The Right to Privacy’ 4 *Harvard Law Review*, 1890, 193-220 -< https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html > on 21 September 2024.

³⁸ Westin AF, *Privacy and freedom*, Atheneum, New York, 1967, 7. This author’s major concern was surveillance and thus why he focuses on privacy as control over one’s information. He also viewed privacy as an individual’s right to pull away from the general society and maintain a state of anonymity.

³⁹ Ressler B, *The value of privacy*, Polity, Cambridge, 2005, 6-7.

⁴⁰ Dimopolous G, ‘A theory of children’s decisional privacy’, 11-15.

⁴¹ *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

to hide from the public on social media platforms. Children also want to make their own choices and decisions regarding intimate areas of their lives or areas they would consider secret. They would like to develop autonomously without an intrusion into their lives from people on online platforms.

This idea of autonomy was brought out in the case of *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others*,⁴² where the court stated that privacy is a necessary condition for an individual to lead an autonomous, independent life, among other things. This is why this right must be protected, and intrusion into a person's private life demeans not only the spirit and dignity of an individual but also the integrity of the society to which the individual belongs.⁴³ Intrusions into children's private lives through the consistent posting of their identifiable data impinge upon their autonomous development. Their choices will be forced to align with the image crafted through sharenting, which may not be in line with this child's desires. Minors may be constrained to behave according to the persona their parents have created for them without their (minors) involvement. The choice of what to reveal and to whom is taken away and they are expected to behave as they have been presented their whole lives on social media.⁴⁴

ii. *Manifestation of the right to digital privacy of children*

The right to privacy, particularly digital privacy, is accorded to children with all its protections. Children have every right to decide on how their personal data is to be processed online. However, their young age predisposes them to cognitive limitations.⁴⁵ They are deemed vulnerable members of society by the constitution and thus are in need of special protections.⁴⁶ Children between the ages of four and about twelve have a more challenging time applying their mental

⁴² (2015) eKLR.

⁴³ *Coalition for reform and democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

⁴⁴ Rutledge P, 'How holiday sharenting can put your kids at risk?' Fielding Graduate University, 21 December 2023-<https://www.fielding.edu/how-holiday-sharenting-can-put-your-kids-at-risk/#:~:text=Excessively%20sharented%20kids%20can%20have,images%20are%20permanent%20and%20searchable.> > on 1 October 2024.

⁴⁵ Cognitive skills are the mental processes that our brains use to acquire, process, and apply information from the outside world. These skills are essential for thinking, learning, reading, remembering, reasoning, and attention, and they underlie our ability to complete everyday tasks. Cognitive limitations are constraints to these mental processes and may be brought about by things like age and biases. For children it tends to be their age and maturity that brings about these cognitive limitations; *CMM (Suing as the next friend of and behalf of CWM) & 6 others v Standard Group & 4 others* (2023) eKLR.

⁴⁶ Article 21(3), *Constitution of Kenya* (2010).

skills to a more extensive problem-solving process; they cannot apply reason to hypothetical situations.⁴⁷ They do not know the value of probabilities in situations⁴⁸ and thus, they cannot indeed weigh the risks and benefits of different situations.⁴⁹ The difference between decision-making by adults and that of adolescents is evident in the ability of adults to act and think more responsibly, resist impulses and consider a much broader context of their choices.⁵⁰ Adults have the advantage of a much more developed brain and life experiences to learn from when making decisions.⁵¹ Due to these factors, minors will need some guidance in decision-making or having someone else decide how their information will be disseminated to persons on social media. Their parents and guardians are the default in determining what is best for their children while they are online, as they are the bearers of parental responsibility.⁵²

Various risks are posed to children on social media platforms. These risks manifest themselves differently based on how the minor got onto the internet as a participant or a recipient of information on the social media platform. They include content risks, contact risks and conduct risks.⁵³ Contact risks are associated with children actively participating in online interactions, particularly those initiated by adults. They include cyberbullying, sexual exploitation by adults and engaging with adults who may have harmful intentions.⁵⁴ Content risks are associated with children as passive recipients of dangerous or inappropriate content. They include exposure to websites that promote unhealthy behaviours, encountering hate speech or extremist content and viewing violent or gruesome images.⁵⁵ Conduct risks address the risks where children engage in harmful

⁴⁷ Hein I, Troost P, Broersma A, Vries M, Daams J & Lindauer R, 'Why is it hard to make progress in assessing children's decision-making competence?' 16(1) *BMC Medical Ethics*, 2015, 3.

⁴⁸ Lang A & Betsch T, 'Children's neglect of probabilities in decision making with and without feedback' 19 *Frontiers in Psychology*, 2018-< <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5835113/> > on 2 October 2024.

⁴⁹ Broome M, 'Consent (Assent) for research with paediatric patients' 15(2) *Seminars in Oncology Nursing*, 1999, 102.

⁵⁰ Piker A, 'Balancing liberation and protection: a moderate approach to adolescent health care decision-making' 25(4) *Bioethics*, 2011, 204-205.

⁵¹ Hein I *et al*, 'Why is it hard to make progress in assessing children's decision-making competence?', 3.

⁵² Section 31, *Children Act* (Act no. 29 of 2022).

⁵³ Graafland HJ, 'New technologies and 21st century children: Recent trends and outcomes' Organisation for Economic Co-operation and Development, OECD Education Working Paper Number 179, 2018, 13 -14-< [https://one.oecd.org/document/EDU/WKP\(2018\)15/en/pdf](https://one.oecd.org/document/EDU/WKP(2018)15/en/pdf) > on 22 September 2024.

⁵⁴ Fourie L, 'Protecting children in the digital society' in Grobbelaar J and Jones C *Childhood vulnerabilities in South Africa: Some ethical perspectives*, African Sun Media, SUN Press, Stellenbosch, 2020, 240.

⁵⁵ UNICEF, *The State of the World's Children 2017: Children in a digital world*, December 2017, 72.

behaviours towards others. These include cyberbullying of peers, sharing inappropriate content and engaging in hostile peer activities.⁵⁶

Parents and guardians are better placed to understand these risks than children are. However, this does not mean they are perfect at internalising the risks since they still actively share. A significant risk posed is commercial harvesting and misuse of data of these children due to the current algorithm systems that exist.⁵⁷ The data obtained from this child will create a particular image of this child as they continue to grow and develop. This removes the freedom to craft their own image and life paths. Specific algorithms will learn who this child is based on how the parent and/or guardian has decided to show them. Therefore, any interests pushed towards them will be based on a created persona, not a genuine version of this person, even as they head into adulthood. Even marketing will be crafted for this persona that has been made.⁵⁸ This is the biggest risk that sharenting poses to autonomous development of children.

iii. Parental role in the right to digital privacy of minors

There is a need to reconceptualize the role of parents in safeguarding their children's privacy in a way that prioritizes the child's best interests. The Data Protection Act provides that a parent or any person with parental responsibility is responsible for consenting to the processing of a minor's data.⁵⁹ The best interest of the child comprises principles that are vital for a child's right to survival, protection, participation and development.⁶⁰ The court in the case of *MAA v ROO* (2013) stated that there is no legal definition of the best interest of the child; 'This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time.'⁶¹ However, there are certain factors that should be taken into consideration to determine what is best for the child.⁶² Different factors are considered depending

⁵⁶ Fourie L, 'Protecting children in the digital society', 243 – 245.

⁵⁷ UNICEF, *The State of the World's Children 2017*,

⁵⁸ Aranda FJ, 'Social and legal risks of sharenting when forming a child's digital identity in social networks' 2(2) *Journal of Digital Technologies and Law*, 2024, 399-400.

⁵⁹ Section 33, *Data protection Act* (Act no. 24 of 2019); *Leroy Kaboi & another v Wadi Degla Club Kenya* (ODPC Complaint No. 0386 of 2024); *Moses Atela Otiende (Legal guardian of AEA minor) v DMI Education Services LTD operating as ST Joseph International Science School* (ODPC complaint No 0577 of 2024).

⁶⁰ *MAK V RMAA & 4 others* (Petition 2 of 2022) eKLR.

⁶¹ *MAA v ROO* (2013) eKLR.

⁶² First schedule *Children Act* (No. 29 of 2022).

on the context.⁶³ Paragraph 18 of the first schedule of the Children Act opens up room for ‘any other factor which may have a direct or indirect effect on the physical and psychological well-being of the child’.⁶⁴ In the context of sharenting, a child’s future development and their emerging sense of identity and reputation are important factors that should be taken into account. Respecting the child’s autonomy means involving them, as appropriate for their age and maturity, in the decision-making process around sharenting. A more detailed discussion of the parents’ role in this process follows below.

Shannon Sorensen’s work ‘Protecting Children’s Right to Privacy in the Digital Age: Parents as Trustees of Children’s Rights’ offers an interesting perspective of a parent’s role regarding their child’s rights. They highlight the prevalent misconception of children as incapable of autonomous decision-making due to developmental factors necessitating intervention from their parents. They also challenge the notion of children as parental property, which diminishes their role in life-affecting decisions.⁶⁵ The view of children as property would mean that one could claim absolute control over them and may do whatever they so wish with these children without any kind of accountability.⁶⁶ Sharenting under this context of viewing children as parental property would thus be allowable as a parent has full control over their child without needing to consider their interests or opinions. This is a dehumanisation of the child as they are equated to property like land, vehicles or even livestock.⁶⁷

To address the issue of parents’ excessive control over children’s lives, Sorensen proposes a shift from a property-based view to a fiduciary one. Under a fiduciary relationship, parents would be obligated to act as trustees, safeguarding their children’s rights until they can exercise them independently. This entails a more profound responsibility to protect children’s privacy on social media platforms. By framing children’s privacy as akin to adults’, Sorensen advocates for a parental duty to act consistently in the child’s best interests. She frames children as rights-holders with evolving capacities for self-determination.⁶⁸

⁶³ For custody cases, ‘the capacity of each parent or guardian to allow and encourage frequent and continuing contact between the child and the other parent and/or guardian(s), including physical access’ is a considered factor. In terms of healthcare ‘distinct special needs (if any) arising from chronic ailment or disability’ is a factor that courts will consider.

⁶⁴ First schedule paragraph 18, *Children Act* (No. 29 of 2022).

⁶⁵ Sorensen S, ‘Protecting children’s right to privacy in the digital age: parents as trustees of children’s rights’ 36(3) *Children’s Legal Rights Journal*, 2016, 156, 165.

⁶⁶ Vissing Y, ‘Are children parental property?’ in Vissing Y (ed) *Children’s Human Rights in the USA*, Springer Cham, Switzerland, 2023, 246-248.

⁶⁷ Montgomery J, ‘Children as property?’ 51(3) *The Modern Law Review*, 1988, 342.

⁶⁸ Sorensen S, ‘Protecting children’s right to privacy in the digital age’, 171-173.

A fiduciary relationship is primarily associated with commercial law; however, it can be applied in parent-child relationships, as the law surrounding these relationships does not adequately offer explicit guidance on how a parent is to consider the child's best interests. Fiduciaries are obligated to serve their principals' interests and place them above their own interests. This does not mean, however, that the interest of parents would not be taken into consideration, just that those of the child should ideally take precedence over their own.⁶⁹

This is a relationship of great trust and confidence with minimal supervision of the principal on the fiduciary.⁷⁰ In parent-child relationships involving sharenting, children are often unaware of the potential consequences of their parents' online activities. They trust their parents to make responsible decisions and protect their privacy. It is expected that an agent will act in the best interests of the principal due to the duty of loyalty under a fiduciary relationship.⁷¹ This duty of loyalty depends on good faith. It is breached when an agent has a conscious disregard of responsibility.⁷² Regarding digital privacy; parents are expected to protect their children's data and consciously sharenting may constitute a breach of this responsibility.

A higher duty of care on the parents would mean that they are to act in line with the interests of their children. A focus on the interests of the child would require a certain level of participation of the child in decisions that will ultimately alter their future. A minor's involvement is crucial because it allows the parent and/or guardian involved to know the expectations of this child as regards their social media presence, and it also helps legitimise the decision that is finally made regarding the matter.⁷³

iv. Age-appropriate inclusion

This participation, however, must follow the age and maturity of the child. As per the Children Act, children who are capable of forming their views on the matter should be allowed to express these views freely.⁷⁴ This has also been

⁶⁹ Smith L, 'Parenthood is a fiduciary relationship' 70(4) *University of Toronto Law Journal*, 2020, 400-401.

⁷⁰ Scott E & Scott R, 'Parents as Fiduciaries' 81(8) *Virginia Law Review*, 1995, 2427.

⁷¹ Scott E & Scott R, 'Parents as Fiduciaries', 2420.

⁷² Harrod C, 'No child left online: Influencer 'Sharenting' as a breach of fiduciary duty' 45(4) *Cardozo Law Review*, 2023, 1236-1237.

⁷³ Correia D, Eduardo JF, Marques J and Teixeira L, 'Participatory methodology guidelines to promote citizens participation in decision-making: Evidence based on a Portuguese case study' *Elsevier*, 2023, 1 -<<https://doi.org/10.1016/j.cities.2023.104213>> on 20 September 2024.

⁷⁴ Section 8(3), *Children Act* (Act no. 29 of 2022).

described in Article 12 of the CRC.⁷⁵ Furthermore, the Children Act states that the exercise of parental responsibility must take into account the evolving capacities of the child.⁷⁶

Studies have shown that a child develops rational thought at seven. This is called the ‘age of reason’ where a child is now capable of common sense and maturity in their thought processes.⁷⁷ This term was first described in ‘Latency Revisited: The Age of 7, Plus or Minus 1’ in 1976 by child psychiatrists Theodore Shapiro and Richard Perry.⁷⁸ At this age, children exhibit a sufficient level of common sense, awareness, sensibility or intelligence⁷⁹ and can thus reasonably understand their data being shared with people online. From around age seven, children have the mental capacity to be brought into conversations surrounding their right to digital privacy (and thus sharenting and what it is) as they are capable of reasoning and giving a relatively rational opinion as compared to before they developed reasoning.⁸⁰

It is advisable that once children show maturity in comprehending digital footprints, they should play an active role in such decisions. For children aged between seven and twelve, parents must give all the necessary information to have a basic understanding of sharing so that this child can provide a more informed opinion on what they want.

The older a child gets, the better their reasoning capacity. Teenagers think more logically and are able to consider hypothetical possibilities of an action before they undertake such an action.⁸¹ By this logic, teenagers would therefore have a much better grasp of sharenting, especially the risks involved and thus obtaining their opinions on the matter would be much easier. They can even state how they want to be portrayed on social media if they want their information to

⁷⁵ Article 12, *United Nations Convention on the Rights of the Child*.

⁷⁶ Section 31(1), *Children Act* (Act no. 29 of 2022).

⁷⁷ Piaget J, *Judgement and reasoning in the child*, Routledge, Britain, 2002; Zander M, ‘A milestone developmental stage: The age of reason’ Scholastic, 12 April 2019- < <https://www.scholastic.com/parents/family-life/social-emotional-learning/development-milestones/age-reason.html> > on 1 October 2024.

⁷⁸ Shapiro T & Perry R, ‘Latency revisited: The age of 7 plus or minus 1’ 31(1) *The Psychoanalytic Study of the Child*, 1976, 81.

⁷⁹ Rogoff B, Sellers MJ, Pirrotta S, Fox N & White SH, ‘Age of assignment of roles and responsibilities to children: A cross-cultural survey’ 18(5) *Human Development*, 1975, 359.

⁸⁰ Tooley U.A, Park A, Leonard J, Boroshok A, McDermott C, Tisdall M, Basset D & Mackey A, ‘The age of reason: Functional brain network development during childhood’ 42(44) *The Journal of Neuroscience*, 2022, 8247.

⁸¹ Lang D, Cone N, Lally M, Valentine-French S, Jones T and Lumen L, ‘Cognitive development in adolescence’ in Lang D (eds) *Individual and family development, health, and well-being*, Iowa State University Digital Press, Iowa, 2022, 350.

be shared. For much younger children, a parent must consider their best interests since this child may not be able to express their interests rationally due to lower maturity levels. This would mean that a parent must not jeopardise entitlement to autonomous development as they share content about their children. A parent must look at this child not just as a person under their control but as a trustee of this right and, therefore, must ensure that they cause no harm in how they choose to exercise this right.

v. *The right to digital privacy of minors*

The right to digital privacy of children is, therefore, the freedom of children to decide what they want to share on social media platforms in line with age-appropriate maturity while being guided by their parents and/or guardians who have internalised the risks involved and who have given due respect to the wishes and interests of their children as agents of these children. This definition brings out the aspects of autonomy of children, internalisation of risks, involvement of children in decisions affecting their digital privacy, and a reconceptualisation of the role of parents and/or guardians.

III. Balancing parental freedom of expression and parental responsibility

The freedom of expression is guaranteed in Article 33 of the COK.⁸² It is a limited right with particular reference to Article 33(3) of the COK, which states that the exercise of this freedom must be done with due regard to the rights and reputation of other people.⁸³ The right is also guaranteed in Article 19(2) of the ICCPR⁸⁴ and is further limited by Article 19(3)(a)⁸⁵ of the same statute; all expressions should take into consideration the rights of other people. Children are also guaranteed parental responsibility in Article 53(1)(e)⁸⁶ of the COK, which must be exercised in line with the best interests of the child.⁸⁷ Parents who wish to express themselves on social media must weigh between their freedom of expression and their parental responsibility to their children. Parents must, therefore, pay due regard to the rights and reputation of their children as they share their data on social media platforms.

⁸² Article 33, *Constitution of Kenya* (2010).

⁸³ Article 33(3), *Constitution of Kenya* (2010).

⁸⁴ Article 19(2), *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

⁸⁵ Article 19(3)(a), *International Covenant on Civil and Political Rights*.

⁸⁶ Article 53(1)(e), *Constitution of Kenya* (2010); Section 31(1), *Children Act* (Act No. 29 of 2022).

⁸⁷ Article 53(2), *Constitution of Kenya* (2010); Section 8, *Children Act* (Act No. 29 of 2022).

This section will discuss how parents are expected to balance out parental responsibility and the freedom of expression guaranteed in the COK. It will highlight freedom of expression and how parents manifest it through sharenting, bringing out an excellent motivator for parents to sharent. It will also use Goffman's presentation theory to explain why parents are sharenting. Furthermore, it will also look into parental responsibility, considering the higher duty of care imposed in the preceding section and, thus, what should take precedence in balancing these rights.

i. Freedom of expression and sharenting

Freedom of expression includes the freedom to seek, receive or impart information or ideas⁸⁸ which is essentially the freedom to communicate with people.⁸⁹ Communication is rooted in man's social nature, which seeks connections with others; these connections are formed through various means of communication.⁹⁰ Communication happens through different media, one of them being social media, with an upwards of 13.05 million people using social media platforms by January 2024.⁹¹ This is about 41.9% of Kenya's population.⁹² The right to freedom of expression is limited under Article 33(2) of the COK⁹³ with Article 33(3) emphasising the need to uphold the rights of other people as one exercises their freedom of expression.⁹⁴

Some parents have opted to express themselves through social media platforms. They share their parenting experiences with other people for various reasons. Some want to have a community to help them in their parenting journey, others want to show off how great their families are and how great they are at parenting, and others want to build up a potential future career for their children

⁸⁸ Article 33(1), *Constitution of Kenya* (2010).

⁸⁹ The definition of communication according to the Oxford dictionary is the imparting or the exchange of information by speaking, writing, or using some other medium. This is similar to what has been expressed in the COK as to what constitutes the freedom of expression.

⁹⁰ Lieberman D.M, *Social: Why our brains are wired to connect*, Oxford University Press, United Kingdom, 2013, xv; Rymanowicz K, 'The importance of communicating' Michigan State University, 22 April 2016 -< https://www.canr.msu.edu/news/the_importance_of_communicating > on 2 September 2024.

⁹¹ -<<https://www.statista.com/statistics/1304674/number-of-social-media-users-in-kenya/> > on 28 November 2024.

⁹² Kemp S, 'Digital 2024: Kenya' Datareportal, 23 February 2024-<<https://datareportal.com/reports/digital-2024-kenya#:~:text=Meanwhile%2C%20data%20published%20in%20the,and%20above%20at%20that%20time.> > on 28 November 2024.

⁹³ Article 33(2), *Constitution of Kenya* (2010).

⁹⁴ Article 33(3), *Constitution of Kenya* (2010).

as influencers or models.⁹⁵ Therefore, parents' interest in sharenting is the desire to express themselves and connect with others in their parental experiences.⁹⁶ Through these connections, they can enhance their parenting skills by learning from others and building a supportive community to guide them through their parenting journey.

Sharenting comes with several risks and benefits. The primary benefit to parents is forming connections and building up a future career for their children. The risks involved (discussed in the preceding section), however, outweigh these benefits. A risk that has a particular impact on children's autonomous development, especially on their image, is the risk of creating a picture of the child that may not represent them as they are.⁹⁷ Parents may craft an image that is more acceptable to audiences to ensure maximum engagement on social media platforms. This maximised engagement, in some instances, leads to financial gain.

When parents share data on social media, they may present themselves in a certain way to make themselves more acceptable in the online parenting community and even the general society outside of social media. Social interactions can be viewed as a performance where individuals present themselves in specific ways to create desired impressions.⁹⁸ Parents want to create an image of themselves through their children and their parenting experiences and will thus share particular images and videos of their children that best generate this image. This can be further explained through Goffman Erving's self-presentation theory.

Goffman's Self-Presentation Theory, using a dramaturgical lens, views everyday life as a stage where individuals perform roles to shape how others perceive them.⁹⁹ In the context of sharenting, parents use their children as extensions of their own identity, presenting a curated version of themselves

⁹⁵ Blum-Ross A and Livingstone S, 'Sharenting: parent blogging and the boundaries of the digital self'.

⁹⁶ Parenting experiences in this paper is essentially the joys and challenges of parenting as well as documentation of the lives of their child; Siibak A, 'The dark sides of sharenting' *Catalan Journal of Communication and Cultural Studies*, 2019, 115 -<[10.1386/cjcs.11.1.115_1](https://doi.org/10.1386/cjcs.11.1.115_1)> on 29 April 2025.

⁹⁷ Rutledge P, 'How holiday sharenting can put your kids at risk' Fielding Graduate University, 21 December 2023-<<https://www.fielding.edu/how-holiday-sharenting-can-put-your-kids-at-risk/#:~:text=Excessively%20sharented%20kids%20can%20have,images%20are%20permanent%20and%20searchable.>> on 1 October 2024.

⁹⁸ Blum-Ross A and Livingstone S, 'Sharenting: parent blogging and the boundaries of the digital self', 4.

⁹⁹ Blum-Ross A and Livingstone S, 'Sharenting: parent blogging and the boundaries of the digital self' Taylor & Francis, 2017-<https://web.archive.org/web/20190427173437id_/http://eprints.lse.ac.uk/67380/1/Blum-Ross_Sharenting_revised_2nd%20version_2017.pdf> on 15 December 2023; Goffman E, 'The arts of impression management' in Goffman E *The presentation of self in everyday life*, University of Edinburgh, George Square Edinburgh, 1956, 132-151.

to an online audience.¹⁰⁰ By sharing intimate parent-child content, they aim to build trust and foster emotional connections with their followers. As engagement grows, parents may feel compelled to share even more personal content to maintain their crafted image.¹⁰¹ This leads to impression management, where all aspects of the online persona must be carefully controlled.¹⁰² Children, often unwillingly, may be drawn into this performance, expected to play roles that support the parent's online image. This can result in pressure, overwork, and a lack of genuine consent from the child, raising ethical concerns about autonomy and exploitation.¹⁰³

Most of the time, children whose data is shared do not have much of a say in what they will record and post.¹⁰⁴ This manifestation of freedom of expression actively infringes upon the right to privacy of these children as their wishes are not considered. They are forced to portray themselves as their parents wish and must share deeply intimate parts of themselves to encourage more engagement with audiences.¹⁰⁵

Furthermore, there is a risk to the future reputation of the child. The reputation of a person is a vital part of their dignity as a person. Reputation is defined as the 'respect or admiration someone or something receives, based on past behaviour or character' according to the Cambridge Dictionary.¹⁰⁶ Once a child becomes an adult and decides how they want to live their life, they may have a different level of respect due to the massive exposure they got when they were younger. Reputation is the public's estimation of the worth or value of a person.¹⁰⁷ This public worth forms the basis of several decisions in society, from whom to employ or work for, whom to promote and even whom to do

¹⁰⁰ Walrave M, Verswijvel K, Ouvrein G, Staes L, Hallam L, & Hardies K, 'The limits of sharenting: exploring parents' and adolescents' sharenting boundaries through the lens of communication privacy management theory' *Frontiers in Education*, 2022, 7-<10.3389/feduc.2022.803393> on 18 July 2024.

¹⁰¹ Vizcaíno-Verdú A, De-Casas-Moreno P & Jaramillo-Dent D, 'Thanks for joining our life: Intimacy as performativity on YouTube parenting vlogs' 31(4) *Profesional de la información*, 2022, 3.

¹⁰² Goffman, 'The arts of impression management', 133.

¹⁰³ Nottingham E, 'Dad! Cut that part out!'. Children's rights to privacy in the age of 'generation tagged': Sharenting, digital kidnapping and the child micro-celebrity' in Murray J, Swadener B & Smith K (eds) *The Routledge international handbook of young children's rights*, Routledge, New York, 2019, 183-190.

¹⁰⁴ Kopecky K, Sztokowski R, Aznar-Díaz I, Romero-Rodríguez J, 'The phenomenon of sharenting and its risks in the online environment. Experiences from Czech Republic and Spain' *Children and Youth Services Review*, 2020 -<<https://doi.org/10.1016/j.childyouth.2020.104812>> on 30 April 2025.

¹⁰⁵ Siibak A, 'The dark sides of sharenting', 116.

¹⁰⁶ Cambridge Dictionary, 4th ed.

¹⁰⁷ *King'ori v Royal Media Services* (2024) 5994 KLR.

business with.¹⁰⁸ This minor loses the opportunity to shape their reputation as their parents actively shaped it.

ii. Parental responsibility

Parental responsibility constitutes the duties, rights, powers, obligations, and authority that a parent has by law about their child.¹⁰⁹ It is mandatory for all parents.¹¹⁰ Holders of parental responsibility over the child are the ones to exercise consent to the processing of the child's data.¹¹¹ Parents therefore have the authority to post their children on social media platforms. They are obligated to exercise this authority in the best interest of their children which as has been stated, in the context of sharenting should, be done in consideration of their child's autonomous development; their child should be able to control what future image they want to portray about themselves. Article 53(2) of the COK dictates that the best interest of the child is paramount in all matters that concern the child¹¹², thus parental responsibility must be exercised in accordance with this paramountcy principle.

In the exercise of their constitutionally guaranteed freedom of expression through sharenting, parents must assess the risk they run regarding their child's future image and personality. They are responsible for protecting their children from harm,¹¹³ and since they have a better understanding of risks posed to the child in the digital realm, they should actively find ways to keep their child safe. It is therefore reasonable to state that parental responsibility will be an additional limitation that is specific to parents in the exercise of their freedom of expression. The Children Act requires that minors who are able to express their opinions on decisions affecting them do so and those opinions should be given due weight in coming up with decisions.¹¹⁴

A popular Kenyan family YouTube channel 'The Green Calabash' that had amassed over fourteen million views was taken down in consideration of the right to privacy of the children involved. Speaking in an interview back in 2022,

¹⁰⁸ *Reynolds v Times Newspapers Ltd* (2001), The United Kingdom House of Lords.

¹⁰⁹ Section 31(1), *Children Act* (Act No. 29 of 2022); Article 53(1)(e), *Constitution of Kenya* (2010).

¹¹⁰ *T.P.J v J.K.R* [2015] eKLR.

¹¹¹ Section 33(1)(a), *Data Protection Act* (No. 24 of 2019).

¹¹² Article 53(2), *Constitution of Kenya* (2010).

¹¹³ Marcus P, 'Parental responsibilities: Reformulating the paradigm for parent-child relationships Part 2: Who has responsibilities to children and what are these responsibilities?' 14(2-3) *Journal of Child Custody*, 2017, 118.

¹¹⁴ Section 8(3), *Children Act* (No. 29 of 2022).

the father popularly known as Ramzzy (Ramadhani Oluoch), stated that he and the mother of his children (Shiko Nguru) decided to take down the channel to respect their children's right to privacy and to allow them to live their lives without his name attached to them.¹¹⁵ He further sent a cease and desist to Shiko Nguru's new boyfriend when he posted his children on social media platforms to stop the boyfriend's actions. He believed that this was a breach of his children's right to privacy and must be immediately stopped.¹¹⁶ This is an example of a parent who ensured that they protected their children's right to privacy on social media platforms. This is however not the case in general as there are still several YouTube channels dedicated to people's family life with their children constantly appearing. A very popular channel is the WaJesus Family that has amassed eight hundred and fourteen thousand subscribers and happens to be one of the top 100 YouTube channels in Kenya.¹¹⁷

Parental responsibility should involve finding the best ways to express their parenting journey including their children without infringing on their rights to privacy. There are various ways to do this and several factors to be considered. Mindful sharenting is one way to do this. There are several less invasive ways for parents to post their children. A quantitative study on a group of millennial parents showed that parents can share content with their children without overexposing their children. It brings about a potential way to share as a parent while protecting your child.¹¹⁸ Some of the strategies that these parents adopt include blurring their children's faces, focusing on a body part like the child's hand which would not be easily identifiable, putting emojis on the child's face, taking pictures or videos from a distance, shielding recognisable body parts and referring to the child without a photograph of the child.¹¹⁹ This would allow parents to include their children in their videos and photos while maintaining some form of anonymity so that the future reputation of the child is protected and to ensure that they do not infringe upon the child's right to privacy.

Mindful sharenting also includes actively involving children in sharenting to ensure that their views are expressed and respected. The *Children Act* states

¹¹⁵ Jerotich S, 'Ramzzy: Why we deleted 'The Green Calabash' from YouTube' Citizen Digital, 1 March 2022 -<<https://www.citizen.digital/entertainment/rama-says-he-was-protecting-his-kids-amid-deleting-green-calabashyoutube-page-n293516> > on 20 November 2024.

¹¹⁶ -<https://x.com/RaMbuzZy_/status/1745101760417464376 > on 25 November 2024.

¹¹⁷ -<<https://www.youtube.com/@THEWAJESUSFAMILY> > on 25 November 2024.

¹¹⁸ Walrave M, Robbe S, States L & Hallam L, 'Mindful sharenting: how millennial parents balance between sharing and protecting' *Frontiers in Psychology*, 2023, 1 -<[10.3389/fpsyg.2023.1171611](https://doi.org/10.3389/fpsyg.2023.1171611)> on 18 July 2024.

¹¹⁹ Walrave M, Robbe S, States L & Hallam L, 'Mindful sharenting', 9.

that one of the considerations of the best interests of the child is age, maturity and stage of development of a child.¹²⁰ These are vital when a child expresses their opinion on matters affecting them, especially when the child is at an age where they can comprehend risks and benefits of sharenting. Withholding important identifiable information about children is also a key consideration in mindful sharenting. This is provided for by the Data Protection Act under 'pseudonymisation'.¹²¹ A parent can choose to use a nickname to refer to their child.

IV. Comparative study on sharenting in the France and Italy versus in Kenya

Sharenting is a worldwide phenomenon that has raised issues of the privacy rights of the children involved. In Australia, about 7% of parents who engage in sharenting have reported having been requested to share child abuse material of their children by people who view their content.¹²² A 2021 study conducted in the United States of America showed that out of 1,000 parents surveyed, about 75% of them shared their children's data on social media platforms, and more than 80% of them used their children's real names online.¹²³ Countries like France and Italy have come up with laws against the phenomenon due to the gross violations of children's right to privacy.¹²⁴ Kenya is also one of the countries deeply affected by the phenomenon. Parents readily share their children's data on social media platforms like YouTube, Facebook, X (previously Twitter), and TikTok.¹²⁵

Different countries are choosing other ways to address the matter. This study will study a French law on sharenting as well as an Italian bill that is set to regulate sharenting especially where there is a commercial aspect. This research works studies these two countries because they are currently the only two countries that have made an attempt to legally deal with sharenting. France's law aims to

¹²⁰ First schedule para 1, *Children Act* (Act No. 29 of 2022).

¹²¹ Section 2, *Data Protection Act* (No. 24 of 2019).

¹²² Butler J, 'Parents who share photos of children online more likely to be approached for sexual images of them' *The Guardian*, 2 May 2024 -< <https://www.theguardian.com/media/2024/may/02/parents-share-photo-kids-online-identity-aic-report-sharenting> > on 5 December 2024.

¹²³ Security.org, *Parents' Social Media Habits: 2021*, 2021, -< <https://www.security.org/digital-safety/parenting-social-media-report/> > on 5 December 2024.

¹²⁴ Castro C, 'Italy considers law against sharenting to protect children's privacy' *Techradar*, 5 April 2024-< <https://www.techradar.com/computing/cyber-security/italy-considers-law-against-sharenting-to-protect-childrens-privacy> > on 5 December 2024.

¹²⁵ Wangari N, 'The dangers of posting your child's photos online' *The Standard*; 'Sharenting: Should I post photos of my kids online?' *The Standard*.

guarantee respect for the image rights of children.¹²⁶ Italy's draft bill, which is still being deliberated upon, seeks to specifically address the matter of sharing and even its economic aspect when money is made out of sharing activities.¹²⁷ This section will begin by drawing parallels between the GDPR and the Kenyan Data protection act to determine how sharenting is legally handled, then it will look into France's law against sharenting and Italy's draft bill against the same. From this analysis, the study will highlight the best practices that Kenya can adopt.

i. *Parallels between Kenya's Data Protection Act and the GDPR as regards minors' digital privacy*

i. The GDPR was passed in 2016 to protect people's privacy rights. It has been seen as a law that would raise the bar for data protection worldwide. It has great flexibility to allow for necessary changes based on prevailing circumstances and greater opportunities for global cooperation due to the global nature of data flows. Trust that data controllers will treat personal information responsibly and that rules will be effectively enforced are the cornerstones of the GDPR.¹²⁸ It has also introduced protective measures specific to minors, thus increasing protections to their right to privacy.¹²⁹

a. *Parental role in a minor's digital privacy*

The GDPR affords children special protections, making it such that holders of parental responsibility over the child are the ones to exercise consent to process the child's data.¹³⁰ This provision assumes that parents are responsible enough to know how best to exercise consent to processing their children's data. This is similar to Kenya's *Data Protection Act* (hereinafter 'Act'), which also allows for the processing of minor's data by consent given through their parents. The use of parents and guardians as the determinant of consent for minors forgets the fact that different parents deem their role as parents in various ways. Most of the time, what a child needs or requires is based on the parent's perception of their best interests.¹³¹ Chapter 2 highlighted the different ways parenting can

¹²⁶ Law number 2024-120 of 19 February 2024.

¹²⁷ Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.

¹²⁸ Buttarelli G, 'The EU GDPR as a clarion call for a new global digital standard' 6(2) *International Data Privacy Law*, 2016, 77-78.

¹²⁹ Donovan S, 'Sharenting: The forgotten children of the GDPR', 52.

¹³⁰ Article 8, *GDPR*, 2016.

¹³¹ Institute of Law and Internet, *The law behind sharenting: Children's rights when guardians publish pictures or other information about their child on the internet*, 2021, 12.

be viewed, emphasising the need to move past looking at children as property and rather understanding parental responsibility as a fiduciary role with a higher duty of care from parents to their children. A parent may choose to overshare personal information regarding their child because they see the child as property that they own so they can do whatever they wish. However, a more responsible parent would see their role as one of protecting their child's privacy and thus would avoid sharenting or may limit how much of their children's data that they share.

b. Evolving capacities of the child

A unique difference in consent between the two legislations is that the GDPR recommends that minors above the age of 16 can consent to processing their data. This age of 16 can go as low as 13 years of age such that minors aged 13 and above can give consent to the processing of their data.¹³² This directly takes into consideration the evolving capacities of children. Kenya's Act does not make this distinction.¹³³ However, this does not mean that the child's evolving capacities are not recognised. The Act states that processing of the minor's data must be in the best interests of the child¹³⁴ which will also be inclusive of the capacity of the child as per the *Children Act*.¹³⁵

The GDPR further explicitly recognises children's unique vulnerabilities regarding their personal data in Recital 38. It acknowledges the fact that children are less aware of risks, consequences and safeguards that are related to the processing of their personal data.¹³⁶ Adults have the benefit of greater cognitive maturity and life experiences to learn from when making decisions regarding such processing of data, unlike children.¹³⁷ Furthermore, Recital 58, on the principle of transparency, requires that any information and communication on data processing addressed to a child be in clear and plain language that the child can easily understand. The Act does not do this explicitly but still recognises the need to protect children through their parents when exercising consent.

¹³² Article 8(1), *GDPR*, 2016.

¹³³ Section 33(1)(a), *Data Protection Act* (No. 24 of 2019), a child becomes an adult once they obtain the age of 18 in Kenya, thus parents have this right to exercise their children's consent until the child is 18 years of age.

¹³⁴ Section 33(1)(b), *Data Protection Act* (No. 24 of 2019).

¹³⁵ First Schedule, *Children Act* (2022).

¹³⁶ Recital 38, *GDPR*, 2016.

¹³⁷ Hein I *et al*, 'Why is it hard to make progress in assessing children's decision-making competence?', 3.

c. Sharenting

Recital 18 would seem to be incompatible with Recital 38 as it removes household and personal online activities (which tend to be content that parents share with their children) from its purview.¹³⁸ This would then mean that sharing would not be regulated under the GDPR, allowing parents to post as much personal data on social media as they want.¹³⁹ No provision under the Act explicitly removes sharenting from its purview; neither is there a provision that explicitly includes sharenting as something regulated by law. It would be open to interpretation of the Act itself to determine its applicability to sharenting.

Posting pictures and videos on social media platforms can be considered data processing under the Act. This is because uploading such content includes collecting and disseminating personal data to audiences on these social media platforms. Collection and dissemination of data are actions that fall under the definition of processing as per Section 2 of the Act.¹⁴⁰ The Act (in the same section) further defines a data processor as one who undertakes the processing of personal data. It includes natural persons. A natural person, as defined by the Mozley & Whitelely's Law Dictionary, means a person in the ordinary sense of the word; a human being.¹⁴¹ A parent is a natural person and can thus be deemed data processors when sharing their children's data on social media platforms. As a data processor, a parent needs to follow the principles of data processing espoused in Section 25 of the Act, one of which is the respect of a data subject's right to privacy.¹⁴² Minors are data subjects since they are identifiable natural persons¹⁴³ and thus must have their privacy rights respected in the face of sharenting by their parents. Sharenting can thus be regulated under the Act even though it is not directly stated as such.

d. Right to be forgotten

The right to be forgotten is the right to have one's data deleted by a data controller or a data processor.¹⁴⁴ It emanates from the right to privacy. The ECtHR decision in *Google Spain SL, Google Inc. v Agencia Española de Protección*

¹³⁸ Recital 18, *GDPR*, 2016.

¹³⁹ Donovan S, 'Sharenting: The forgotten children of the GDPR', 39.

¹⁴⁰ Section 2, *Data Protection Act* (No. 24 of 2019).

¹⁴¹ Mozley & Whitelely's Law Dictionary, 12th ed; *Craft Silicon Limited v Republic; Namai & 5 others* (Criminal Revision E30 of 2021) (2022) KEHC 424 (KLR).

¹⁴² Section 25(a), *Data Protection Act* (No. 24 of 2019).

¹⁴³ Section 2, *Data Protection Act* (No. 24 of 2019).

¹⁴⁴ Wolford B, 'Everything you need to know about the 'Right to be forgotten' GDPR, -< <https://gdpr.eu/right-to-be-forgotten/> > on 3 December 2024.

de Datos (AEPD), *Mario Costeja González*¹⁴⁵, set a precedent for this right which is now found in right in Article 17 of the GDPR¹⁴⁶, and it is further bolstered by Recital 65(3) for children. The legislation states that this right is particularly important for minors who gave consent at a point in their lives when they were not fully aware of the risks involved in processing the data. They can choose to have this data erased and no longer processed for reasons such as withdrawal of consent, or if the processing of the data is in contravention with the GDPR, or if the processing of the personal data is no longer necessary in relation to the reason why it was first collected or processed.¹⁴⁷ The Act does not distinguish between adults and minors in this right. It simply highlights the right and the fact that a data processor or controller is expected to erase or destroy personal data of a data subject without undue delay.¹⁴⁸ Public opinion about a person can be greatly informed by content on social media platforms¹⁴⁹ about that person and thus the need to take down information that may not represent them. Decisions about a person may be based on their reputation and available information online.

ii. Countries with sharenting specific laws

a. France

France recently enacted a law that targets sharenting; *Law number 2024-120 of 19 February 2024 aimed to ensure respect for children's image rights*. It amends specific parts of its *Civil Code*, the *Penal Code* and *Law Number 78-17 of January 1978 relating to information technology, files and freedoms* to be more respectful of children's image rights.¹⁵⁰

Law number 2024-120 has amended Article 371-1 of the *Civil Code* on parental authority to include the private life of a child as something that parents have authority over.¹⁵¹ However, the law also amends the *Civil Code* to ensure that if they misuse this authority and share images of their children that are detrimental to their children's dignity or moral integrity, then it will be given to somebody else.¹⁵² Parental authority as per the Article 372-1 of the *Civil Code*

¹⁴⁵ *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, ECtHR Judgement 13 May 2014.

¹⁴⁶ Article 17, *GDPR*, 2016.

¹⁴⁷ Recital 65(3), *GDPR*, 2016.

¹⁴⁸ Section 40(1)(a), *Data Protection Act* (No. 24 of 2019).

¹⁴⁹ *King'ori v Royal Media Services* (2024) 5994 KLR; *Reynolds v Times Newspapers Ltd* (2001), The United Kingdom House of Lords.

¹⁵⁰ <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000049163317> > on 2 December 2024.

¹⁵¹ Article 1, *Law number 2024-120 of 19 February 2024*.

¹⁵² Article 377, *Civil Code*.

has been amended to include the joint responsibility of parents in ensuring they safeguard children's private life.

There is also a requirement to involve children in decisions of digital privacy following the maturity and age of the child.¹⁵³ If consent from a child is not in line with the requirements of the *Civil Code*, then whoever has processed a minor's data is liable to pay a fine of 45,000 Euros.¹⁵⁴ This includes parents who fail to obtain consent to share their children's images in line with the provisions of the law. The law also allows for a family court judge to prohibit the dissemination of a child's images by one parent when there is a disagreement between the parents on the child's image rights.¹⁵⁵ This is in line with the parents' joint responsibility to protect their children's image rights. The law further creates more protections for minors by amending the *Law relating to information technology, files and freedoms* to ensure that when a minor's data is not being processed or deleted in line with the data protection laws then the regulatory authority can take immediate legal action to safeguard the child's rights.¹⁵⁶

b. Italy's draft bill.

A draft bill to regulate 'baby influencers' and sharenting was recently proposed in Italy. Baby influencers are children who generate revenue through fame acquired from their online presence. It distinguishes sharenting as more of a social issue than a matter of commercialising children's images. However, it is worth noting that such lines may sometimes blur when sharing becomes a more commercialised issue with a parent using the child to generate revenue.¹⁵⁷ This Bill restricts the dissemination of a child's news or multimedia content if it does not directly benefit the child.¹⁵⁸ The main objective of such dissemination must be the child's interests, which is in line with the Treviso Charter that gives guidelines to journalists and media professionals when reporting on minors. They must do so in the best interest of the child.¹⁵⁹

This bill bears great similarity to the French law in the aspect of joint parental

¹⁵³ Article 372-1, *Civil Code*.

¹⁵⁴ Article 226-1, *Penal Code*.

¹⁵⁵ Article 373-2-6, *Civil Code*.

¹⁵⁶ Article 21, *Law relating to information technology, files and freedoms*.

¹⁵⁷ *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors*.

¹⁵⁸ Article 2(1), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors*

¹⁵⁹ The Charter of Treviso (1990).

responsibility over the child's image rights and the need for a child's participation in matters of consent as regards their digital privacy. Consent as regards a minor would, therefore, be obtained from holders of parental responsibility who have taken into account the minor's best interest as well as giving due weight to the minor's opinion.¹⁶⁰ Without obtaining consent in such a manner, a minor's image cannot be processed.¹⁶¹ This is a direct limitation to sharenting as parents must ensure that they follow the guidelines on the consent set forth lest they lose the freedom to share their children's data.

Furthermore, if the Bill is adopted into law, then digital platforms will be required to encourage reporting of content that amounts to a violation of a minor's dignity or moral or physical integrity by users of the platform to protect minors' right to privacy further.¹⁶² It also ensures to address the sensitisation of the public on the risks involved in sharing images and personal information of minors online. Such sensitisation will also empower minors on their rights and how to safeguard these rights.¹⁶³

The Italian Bill goes into greater depth in addressing the issue of sharenting and how to deal with it in a manner that promotes the child's rights while still allowing parents to express themselves freely. It offers a lot more insights into the prevalence of sharenting, even addressing the commercial aspect of it as some of these minors end up becoming influencers who make money and must thus be protected through employment laws. It is a more deliberate way of dealing with sharenting considering the General Data Protection Regulation does not consider it something it will regulate.¹⁶⁴ Both the Italian bill and the French law are a step in the right direction when protecting minor's digital privacy in the face of their parents.

¹⁶⁰ Article 2(2), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors*

¹⁶¹ Article 2(3), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.*

¹⁶² Article 3(2)(c), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.*

¹⁶³ Article 3(3), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.*

¹⁶⁴ Recital 18, *GDPR, 2016*; Donovan S, 'Sharenting: The forgotten children of the GDPR' 4(1) *Peace Human Rights Governance*, 2020, 36; Recital 18 of the General Data Protection Regulation removes household and personal online activities (which tend to be content that parents share with their children) from its purview, essentially removing sharenting from things that it regulates.

iii. Lessons for Kenya

France's law provides special protections for minors in the realm of digital privacy. This is very similar to Kenyan law, as such provisions are found within the laws of Kenya, albeit not explicitly. Kenya's best lesson from the French law is the part about fining parents who fail to respect the right to privacy of their children by failing to seek consent from them or by seeking consent in a manner that contravenes their *Civil Code*.

Italy's draft bill considers the commercialisation of a minor's image and thus earns money through these digital platforms. It considers the labour implications of such actions and thus seeks to protect a minor doing such labour. Kenya's *Employment Act* states that minors can only perform labour that does not harm their health or development and does not affect their attendance at school or other educational programs that they are involved in.¹⁶⁵ The labour is not specified as in the draft bill. This means that sharenting, which makes money for the minor or the parent could also be a form of labour that is recognised under the *Employment Act*. This limitation on labour applies to minors aged at least 13 years old. Younger children are not spoken about under protections in the *Employment Act* other than the fact that they may not work.¹⁶⁶ However, sharenting involves minors of all ages from as young as newborns; therefore, a clear gap in their protection, especially under Kenya's labour laws exists. Kenyan laws should thus fill in this gap either through legislation or interpretation of the law to further protect minors in the digital space.

The Italian Bill also stipulates that sharing a minor's image must be of direct benefit to the minor rather than the parent sharing it. Section 3 of this work highlighted the interests of a parent involved in sharenting. Sharenting tends to benefit the parent rather than the minor directly. Kenya's laws stipulate that everything done should be in the best interest of the minor, which would also be inclusive of sharenting that directly benefits a minor. This would then mean that the child's best interest will be a direct limitation to sharenting.

Under Italy's draft bill, social media platforms would be expected to encourage people to report content that contravenes a minor's right to privacy. This is not a legal requirement in Kenya; however, social media applications still

¹⁶⁵ Section 56(2), *Employment Act* (Act no 11 of 2007).

¹⁶⁶ The African Network for the Prevention and Protection Against Child Abuse and Neglect, *Strengthening the worldwide movement for the protection of children from violence at work: a review of laws, policies and programmes for the elimination of child labour and violence against children in Kenya*, 2018, 13.

have ways for one to report content that may infringe on a minor's rights.¹⁶⁷ Something of great importance that Kenya should consider adopting, which has been highlighted in Italy's draft bill, is sensitisation of the public on sharenting, its risks, benefits and how minors should safeguard their rights to privacy in case they feel aggrieved when their parents share their data online.

The differences between Kenya's Act and the GDPR are quite small and can potentially be resolved by interpreting the laws. Kenya's law is currently open enough in interpretation to include sharenting and thus would not necessarily need a sharenting-specific law. The current legal framework in Kenya around sharenting is, therefore, adequate to protect the digital privacy of minors in light of their parents' sharing practices. However, the passing of law shows the gravity of the situation around sharenting and the potential infringement of children's right to privacy.

V. Recommendations

i. Sensitisation on sharenting

Considering the Italian draft bill, public awareness campaigns should be launched to educate the general public about sharenting, while highlighting its risks and benefits. This can be done through the Ministry of Education, the Ministry of Information and Communication Technology as well as the Office of the Data Protection Commissioner (ODPC) working together to roll out a multi-level public awareness campaign on digital child privacy and responsible digital parenting. This campaign should be disseminated through schools, health clinics, community centres, as well as digital platforms. Furthermore, digital literacy and child data protection modules should be incorporated into schools' curricula, targeting both learners and their caregivers. Content should include the implications of sharenting, strategies for privacy-preserving sharing, and the long-term reputational risks associated with oversharing.

As many social media platform users as possible should know that they can report content that may violate minors' right to privacy and should be aware of the process of such reporting. Parents and guardians should receive specific guidance on minors' right to privacy as espoused in law. They must also be guided appropriately on their role in protecting this right and how to exercise consent

¹⁶⁷ <<https://support.tiktok.com/en/safety-hc/report-a-problem/report-a-video> > on 10 December 2024; <<https://help.instagram.com/2922067214679225> > on 12 December 2024; <<https://help.x.com/en/rules-and-policies/x-report-violation> > on 12 December 2024.

to data processing of their children by ensuring that due weight has been given to their children's views. They must actively weigh between their freedom of expression and the right to privacy of their children as a part of their parental responsibility. Mindful sharenting should also be encouraged at this point to ensure that parents practise data minimisation in line with Section 25(d) of the Data Protection Act.

ii. Creation of a child digital privacy Ombudsman unit

To enhance the protection of children's personal data online, a Child Digital Privacy Ombudsman Unit should be established within the ODPC. This specialised unit would be tasked with overseeing, investigating, and advocating for the digital privacy rights of minors in Kenya, addressing the widening gap between legal protections and the practical realities of parental oversharing and institutional data misuse.

The Ombudsman Unit would carry out several critical functions. First, it would handle complaints and initiate investigations into suspected breaches of children's digital rights, including in school or religious group settings where privacy standards may be neglected. It would also have the authority to act *suo motu*, investigating incidents where no formal complaint has been lodged but harm is likely. Secondly, the unit would have an enforcement and advisory role, empowered to issue binding compliance notices to parents, schools, platforms, or other entities that violate children's privacy rights. It would work collaboratively with law enforcement and regulators where criminal conduct such as grooming or exploitation is suspected. In line with children rights law, the unit must be accessible to children, providing age-appropriate channels for minors to report concerns or participate in decisions affecting their online privacy. Moreover, the Ombudsman would publish annual reports on the state of children's digital privacy in Kenya, offering anonymised data, case outcomes, and policy recommendations for legislative or institutional reform. Finally, the unit would play a role in public sensitisation of sharenting.

For these recommendations to be effective, regular evaluation and feedback from the parties involved are essential. These recommendations call for creating safer online environments for minors with proper guidance from parents and guardians.

VI. Conclusion

This research has proven that a balance can be struck between minors' right to privacy and parents' freedom of expression on social media platforms in Kenya, albeit one right may need to take precedence over the other. In this case, minors' right to privacy will take precedence over the freedom of expression of parents and/or guardians. Parents and guardians must bear the burden of limiting their freedom of expression to protect their children's right to privacy. The law recognises that minors are vulnerable members of the society, thus the need to have extra protections for them. This research work advocates for additional protections for these minors in Kenya, allowing them to autonomously develop, form their own personalities and shape how people perceive them without it being predetermined through their parents' sharenting practices.

This study, however, does not advocate for the prohibition of sharenting; rather, a more limited version of sharenting. Parents are free to express themselves given that benefits such as early childhood careers for their children and even a deeper understanding of digital literacy exist. Mindful sharenting should take the fore as parents ensure that they protect as much of their children's digital privacy as possible. This approach strikes a balance between competing rights thus allowing both parents and children to benefit from the arrangement.

This research aims to inspire future research on sharenting and how best to ensure that the right to privacy of minors is upheld while also allowing for parents and/or guardians to express themselves and share their parenting experiences with other people.