

Administration of Juvenile Justice In Tanzania
A study of its compatibility with
International Norms and Standards

By

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Dedication

To my parents who sent me to school

To my beloved husband Richard Wambali for his love and care, and

Lastly to my two children, Nanta and Ngeleja whom, in this challenging world, I
counsel:

Declaration

No part of this dissertation has been submitted in support of an application for any degree or qualification of this University or any other Institution of higher learning.

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Abstract

This work has been built upon the administration of juvenile justice in Tanzania. Within the title, the objective has been to examine the nature and scope of administration of Juvenile Justice in Tanzania by identifying the gap between the law and practice. Much emphasis has also been put to international standards for the administration of juvenile justice.

The formulation of this topic has been prompted on the fact that Tanzania is undergoing changes whereby more emphasis is put on human rights including the rights of children.

Although some Tanzanian laws and international standards on Administration of juvenile justice provide guidance for the children's rights, the practice of courts and other state organs defeat the purpose.

Therefore chapter one provides an introduction that narrates the background to the problem, Aim and purpose of study, scope and limitation of the study and lastly methodology and source of information.

Chapter two discusses at length analysis of the Juvenile justice system in Tanzanian. It points out the gap between the law and practice, the juvenile court system in Tanzania and its jurisdiction. The chapter goes on to discuss the child –rights principles, nature of offences committed by juveniles in Tanzania and pre-trial, trial and post trial proceedings.

Chapter three analyses the applicable international human rights instruments relevant in the field of juvenile justice system that Tanzania has ratified.

Chapter four analyses the country situation by using International human Rights standards and the last chapter discusses on how Tanzania might be able to make the best use of the principal international human rights standards concerning the rights of the child in the administration of juvenile justice.

Chapter One

1. Introduction

1.1 Background to the problem

While studying the problem of juvenile delinquents, much emphasis has always been on searching for the origin of juvenile delinquency, as well as proposing methods of curing and preventing this anti-social sort of behaviour. With regards to causes of juvenile delinquency, many criminologists tend to agree in principle that social stratification constitutes a major factor in the causation of juvenile delinquency¹.

A closer observation for our contemporary societies both in developed and developing countries reveals that juvenile delinquency is not only rampant but is actually escalating day after day. For instance it has been observed that in some countries such as Japan, United States of America and United Kingdom, juvenile offenders have been increasing rapidly ever since the end of the cold war². On the other hand, in many third world countries, such as Malawi, Namibia, South Africa Kenya and Uganda which have experienced socio-economic changes on the lines of western civilisation; there have been increasing trends of crimes, delinquencies and violence³. Whatever the cause of the problem, the effects or the consequences of delinquency in the society are more or less the same. It is a universal concern and worry that a delinquent juvenile may end up as criminal adults.

Tanzania is no exception to other developing countries as it has been undergoing a socio-economic, cultural and political change that has led to introduction of free market economy and multiparty political system. The narrowing economic base for rural substance farming, forces many rural dwellers to move to the major urban centres. Economic stagnation leaves many juveniles unable to cover their basic needs. All these tremendously affect children. In their efforts to adjust to these new situations, in many cases by themselves, it is natural to expect children to exhibit deviance, which may lead to conflicts with the law.

It is contended that to day juvenile justice has been recognised worldwide as an integral part of the national development process. Therefore, social justice system demands that a comprehensive framework for protection and maintaining young people in a peaceful and ordinary society is put in place in each country⁴.

¹ Siegfried L.J., *Social Class and Delinquency*, West Publishing Company, New York (1992) p.98

² Everson J, *Young Offenders*, General Duckworth, London, (1997) pp 17-18

³ Available at <http://www.altlawforum.org/PUBLICATION/The%20%JJ20%Act202002>

⁴ Shepherd E., *Doing Justice to Juvenile Justice*, Bar Association, Juvenile Justice Centre, 1997, P 27

There have been remarkable developments in area of juvenile justice as society at large aims to find suitable solutions to deal with juvenile offenders or delinquents. At the international level such measures, usually adopted by governments, aim at creating a framework of additional protection conducive to (children) well being⁵ and adheres to proper recognition on the special needs and universality of children as human beings. This was in 1990 when the UN Convention on the Rights of the Child came into force and Tanzania has ratified the same in 1991.

It is however evident that despite the ratification of the UNCRC, Legal and Human Rights Centre has noted that to date there has been less political commitment expressed on the need to safeguard the general welfare including the rights and interests of children in Tanzania⁶. As such it has been observed by the Committee of the Rights of the Child that Tanzanian government has failed to fully comply with the obligations imposed upon it by the CRC, which include proper administration of juvenile justice system.⁷

Therefore, the Government has yet not been able to fully identify the proper vision and strategies to meet the challenges necessary to make the administration of juvenile a reality in the country. It can thus be properly contented that the spirit and purpose of the CRC have not been fully put into practice in Tanzania. This is evident from the fact the Children and Young Persons Ordinance, Cap 13 which is the law relating to children and young persons in Tanzania has been identified as unsatisfactory in various aspects⁸. Furthermore, the provisions of the law for the protection of juvenile offenders in Tanzania have not been observed in some circumstances by the juvenile personnel⁹.

1.2 Aim and Purpose of study

This research examines the nature and scope of administration of juvenile justice in Tanzania by identifying the gap between the law and practice. In so doing, this paper will be confined to surveying appropriate international legal standards

⁵ The UN Convention on the Rights of the Child(CRC) was adopted by the UN General Assembly on the November, 1989 in recognition by the international community of the need for enhancing special safeguards and care for children, particularly by putting in place appropriate legal protection for children.

⁶ The State of Juvenile Justice”A Fact Finding Report on Legal And Practical Consideration”Legal and Humna Rights Centre,2003 p.1

⁷ Concluding Observation of the Committee on the Rights of the Child: Republic of Tanzania2001. See, www.unhchr.ch /tbs /doc .nsf. For instance, the Committee on the Rights of the Child observed that there is insufficient information provided in the state party (Tanzania) report on the situation of children in the juvenile justice system. While the Committee notes the first juvenile court has recently been established within the state party, it is concerned that the juvenile justice system still does not adequately cover all regions of the state party. Concerned is also expressed about holding of juveniles in adult detention facilities ect.

⁸ Supra note 6

⁹ Environ Care Report on Children in Conflict with the law,2000 and Legal and Human Rights Centre,The State of Juvenile Justice in Tanzania,A Fact Finnding Report on Legal and Practical Consideration

in the administration of juvenile justice and how they are implemented in Tanzania.

Thus, the main aim of this study is to underscore an overview of how the juvenile justice system in Tanzania functions, to analyse the country situation by using international human rights standards. Lastly the aim of this work is to analyse to what extent these rights are in conformity with international human rights standards, and thereby it serves as a guide in the gradual harmonisation of national law and practice with international human rights standards. It attempts to point out how Tanzania might be able to make the best use of the principal international human rights standards concerning the rights of the child in the administration of juvenile justice taking into account the political and socio-economic reality of the country, which is poor. It is therefore the purpose of this study to contribute to the discussion on the state of affairs of juvenile delinquency in Tanzania by analysing the law and practice in the administration of juvenile justice in the country.

1.3 Scope and Limitation of the Study

To enhance focus and manageability of the research area, I chose to restrict my study to Tanzania Mainland instead of the entire United Republic of Tanzania thus leaving Zanzibar. The United Republic of Tanzania is a union of two countries that is the former Republic of Tanganyika and the People's Republic of Zanzibar¹⁰. Hence, this work will be only limited to Tanzania Mainland for the following reasons; first and foremost is due to accessibility of sources of information and data, and also due to the fact that Zanzibar has its own judiciary and legislature and juvenile justice is handled separately between the two parts of the union¹¹. Thus analysing juvenile justice system for the two parts of Tanzania would have amounted to two different topics. The work is also limited to international human rights standards and national laws relating to the problem and application of juvenile justice in Tanzania.

1.4 Methodology and Source of Information

In the course of conducting for this research study, two methods were involved, namely library based research and fieldwork. Through library-based research, I conducted a general survey of the relevant literatures in the area of the administration of juvenile justice system such as textbooks, journals, articles and

¹⁰ See Section 2 of the United Republic (Declaration of Name) Act No, 22 of 1964 cap 557, articles of the union and Shivji, I The Legal Foundation of the Union in Tanganyika and Zanzibar Constitution, Dar es Salaam, Dar es Salaam University Press, 1990 p.213-214

¹¹ The Union of Tanganyika and Zanzibar was constituted by signing of a treaty called the Articles of Union by the respective heads of states Mwalimu Nyerere and Karume, it was ratified by the respective legislative bodies and became part of the municipal law. See article 4 of the Acts of the Constitution of the United Republic of Tanzania.

material from the Internet. Taking into account that juvenile justice is a relatively new field of interest and study in Tanzania, information is very scarce and also there is paucity of literature on the administration of juvenile justice in Tanzania. As part of library based research several human rights instruments and national laws have been relied upon as well. I have also referred to initial report of Tanzania to the Committee on the Rights of the Child, the Country Second Periodic Report on the implementation of the Convention on the Rights of the Child (1998-2003), The Law Reform Commission Report of 1994, The report of the Committee reviewing the Law Reform's Report on laws Relating to Children who are in conflict with the Law, 2001, The Quick Start Project Report, 2004 and Legal Sector Reform Programme Report (Medium Term Strategy) 2004.

The second method involved was fieldwork, which was done in Tanzania. In the course of fieldwork scheduled and unscheduled interviews were conducted with some juvenile personnel such as courts staff, social welfare workers, and non-governmental officers who deal with the children's rights

The Fieldwork included a tour in one juvenile remand home located at Kisutu in Dar es Salaam as well as the juvenile court located at Kisutu. For the purpose of witnessing how juvenile justice is carried out, other ordinary courts, were also visited namely, Magomeni and Kariakoo Primary courts. I have also relied on research results from Non-governmental Organisations (NGOs) in Tanzania such as the Legal and Human Rights Centre and Enviro Care both situated in Dar es Salaam but with branches in other towns of Tanzania.

Chapter Two

2. An analysis of The Juvenile Justice system in Tanzania: The Gap between the Law and Practice

*“Children and adolescents are in a period of development. What happens to them or fails to happen at each step of the way in the law enforcement process not only affect them in the here- and now but will also shape their future development for good or ill. States thus, respond to the criminal activity of minors, certainly for the sake of society and for the sake of offence”.*¹²

-Bruce Abrahamson-

This Chapter analyses the gap between the law and practice in the administration of juvenile justice in Tanzania. For a better understanding of how the juvenile justice functions, it is worth to have a basic understanding of juvenile justice system in Tanzania generally. It also imperative to point out that I have merged in the analysis of the country situation with key international standards.

2.1 The Juvenile Justice System in Tanzania

The various components of the juvenile justice system in Tanzania fall under different ministerial mandates. Children’s welfare and protection in general is dealt with by the Ministry of Labour and Youths Development and the Ministry of Community Development, Gender and Children Affairs, while the Justice system itself comes under the Ministry of Justice and Constitutional Affairs. On the other hand courts are autonomous and the Chief Justice’s Office controls the appointments of court officials and magistrates in the juvenile court.

2.1.1 A Distinct Justice system for Juveniles

The Children and Young Persons Ordinance enacted in 1937(here in after referred to as Cap 13) governs the treatment of juveniles in conflict with law, as it is the basic law regarding juvenile justice in Tanzania. Cap 13 applies to any one below the age of 16¹³. Any one who is 16 years or above is treated in Tanzania, for the purpose of criminal law, as an adult¹⁴ whereas under the Convention on the Rights of the Child states that in its juvenile justice articles,¹⁵ that a child means every human being below the age of 18 unless under the law applicable to the child majority is attained earlier¹⁶.

¹² Abramson B., in Juvenile Justice, The Unwanted Child of State Responsibility, International Network on Juvenile Justice, Defense for Children International, An Analysis of the concluding observations of the Committee on the Rights of the Child in regards to Juvenile Justice from 1993-2000

¹³ Section 2 of Cap 13

¹⁴ Ibid section 17

¹⁵ Articles 37 and 40 of the CRC

¹⁶ Article 1 of the CRC

Those who are under the age of 16 years fall into two categories that of “child” and “young person”. A “child” is any one under the age of 12 years. A “young person” is a person who is 12 years of age or upwards and under the age of 16 years.¹⁷

Apart from Cap 13, there are many laws in Tanzania touching on a juvenile but with no common stand on how a juvenile should be treated. For example, there are numerous inconsistencies in the way the child and young person are defined in different Tanzania laws. This is complicated by the fact that different statutes make reference to juveniles but using different definitions¹⁸. Furthermore, it is important to note that, Cap 13 establishes a system of juvenile justice distinct from that of adults, which has laws, procedures, authorities and institutions specifically applicable to children who are alleged as, accused of, or recognised as having infringed the Penal Law. The Children and Young Persons Ordinance is sixty-seven years old having been enacted during British colonial rule. It has undergone some amendments since then. However, the application of the law has not always been consistent and sometimes the treatment of juveniles has not been in line with what the Ordinance would require. One reason for that is the reality that the Ordinance is not well understood by law enforcers hence creating varied difficulties or problems to juvenile justice administration.

2.1.2 The Juvenile Court system in Tanzania

The court system in Tanzania is three-tiered and consists of a court of appeal, a high court and subordinate courts known as magistrates’ courts¹⁹ and ward tribunals²⁰. The children and Young Persons Ordinance²¹ establishes juvenile courts at the level of district and primary magistrate courts, for the purpose of hearing and conducting all trials against persons under the age of twelve and under sixteen years except in cases where children are charged jointly with adults. In such situation a child or young person will also have his or her case tried in an adult court²². The trial will not take into account the juvenile’s age, for example the trial will not be held in camera. The juvenile will go through the same trial process as the adult co- defendant. However, the judge will take into account the juvenile’s age when passing sentences. Thus the position of Cap 13 violates the principle of protection of the privacy of the child or young persons.

¹⁷Section 2 of Cap 13

¹⁸ For more details refer to page 17

¹⁹ Established by Magistrates Courts Act, No2 of 1984

²⁰ Established by ward Tribunals, Act No.7 of 1985 to deal with minor criminal cases such as pick pocketing, cheating, indecent assault, gambling, causing grievous harm etc

²¹ Section 2 of the CAP 13; G.N.No.640 of 1964 gives power to Chief Justice to extend jurisdiction the high court when hearing juvenile cases

²² Section 3 (1) of the Children and Young Persons Ordinance

The law in Tanzania stipulates that juvenile courts must sit in a different building or on different days or at different times from regular courts for adults and are closed to the general public.²³ Once the accused is found to be a child or young person it is mandatory that the court should immediately sit as a juvenile court and proceed to hear the case, unless it is not practicable in a room or building which is different room from that ordinarily used as court room or court house. This point was also emphasised in the case of **Mokamambogo v. Republic**,²⁴ in which the accused was a child or a young person but there was no indication in the records that the proceedings were held in a place different from an ordinary court room nor was there any indication that it was not practicable for the court to sit in a place different from an ordinary court room. It was held that: the section provides that; “ *a district court when hearing charges against children or young person shall, if practicable, unless the child or young person is charged jointly with other persons not being child or young person, sit in a different building or room from that in which the ordinary sittings of the court are held*”... *in order to comply with the above provision therefore the trial magistrate in hearing the case should if practicable, have sat in a place different from an ordinary court room* . It would appear that this requirement is mandatory by reason of the word “shall” used in the subsection (2) of the section 3 of the Children and Young Persons Ordinance.

However, all district and primary courts do not have a separate building for conducting of juvenile cases except one Juvenile court in Dar es Salaam located at Kisutu. This building is supposed to serve three district courts of Dar es Salaam namely, Ilala, Temeke and Kinondoni. However it is not clear whether the court is arranged to handle cases on the basis of districts and therefore have cases for other districts in Dar es Salaam region or only those, which have been filed directly at the Kisutu Court.

Furthermore, if a child is brought before a regular court and it becomes apparent that the person is under sixteen years of age, Cap 13 provides that the court must sit as a juvenile court without necessarily adjourning the case and the provisions of the Ordinance will apply to govern the case.²⁵ And if in a juvenile court it appears that the person charged is of the age of sixteen years or upwards, the court will proceed with the hearing and determination of the case in accordance with the provision of the Criminal Procedure Act, 1985²⁶. The

²³ Section 3(1) of the Children and Young Persons Ordinance provides that “ a district court when hearing charges against children or young persons shall if practicable, unless the child or young persons charged jointly with any other person not being a child or young person; sit in a different building or room from that of in which the ordinary sitting of the courts are held

²⁴ (1971) H.C.D.63

²⁵ Section 3(2) of CAP 13

²⁶ Ibid S. 3(3)

Ordinance does not therefore deal with problems facing 16 to 18 years old, which are left at the mercy of the mainstream court system.

So far only one separate juvenile justice court exists in Tanzania with a separate building and personnel²⁷. The Tanzanian reality like other countries, for instance Kenya, is that other regular courts also serve as and are converted into juvenile court when need arises. In such a situation the court rooms are cleared out of adults before children cases are heard, or the cases are heard in camera.²⁸ However, despite the requirement that children's cases must be heard in juvenile courts,²⁹ it is not uncommon in Tanzania for children's cases to be heard in regular open courts mixed with adults cases. Most district and primary courts appear to try juvenile cases in open court³⁰. There would be a need to issue a directive that a magistrate should try such cases in camera. Trials in camera do not necessarily mean in chambers. It could be in the same room used for other trials as long as the public is excluded and procedure followed.

I had an opportunity to visit Kariokoo and Magomeni Primary courts for purpose of observing the practice of the courts in juvenile cases³¹. The situation was unsatisfactory and not in accordance with the required procedure under the law. In a number of cases I attended and which, to my observations, included juveniles, the magistrates did not always invoke the mandatory provisions of the Children and Young Persons Ordinance and convene separate juvenile courts. In almost all instances, these children were not tried in a separate court, as the law requires.

It is partly true as the late Chief Justice, **Francis Nyalali** said in November 1996 at a seminar on 'The Child and The Courts' that until recently all courts buildings were constructed only with the adult offenders in mind, but it is important to notice also that the law has given the magistrate the mandate of converting the same building of adult courts into juvenile courts.

Emanating from the above, it seems very clear that there is an urgent need for the establishment of more separate juvenile courts throughout the country, and as observed by one senior Tanzanian judge they should be presided over by

²⁷ The juvenile court at Kisutu in Dar es Salaam was constructed by a generous grant from the Canadian Government and was officially opened by the prime Minister of the third phase government, Hon. Sumaye F; in September, 1997. The Ordinance was promulgated by the British colonial state on the 23rd April, 1937. It took independent state more than half a century and three phases of governments to realize the necessity of having a separate building for a juvenile court.

²⁸ Mbuti, J.M. The Role and Procedure in Juvenile Courts, Report of the workshop on Criminal Justice and Children held at Kenya Institute of Administration, Nairobi, April 7-11-1986, at p.46

²⁹ Section 3 of CAP 13

³⁰ The Quick Start Project Report, Faculty of Law, Dsm, University of Dar es Salaam, 2004 pg 9 unpublished

³¹ Between the days of 13th and 5th 2004

specially trained magistrate.³² Many NGOs that deal with children rights in Tanzania are also concerned over lack of enough training for magistrates, social welfare workers and public prosecutors on how to deal with special needs of children. However taking into consideration that Tanzania lacks adequate financial resources, where it is impracticable to establish separate courts, at least magistrates should ensure that children who come before them are not treated as adults This will help to safe guard the best interest and welfare of the child or young person.

2.1.3 Jurisdiction of Juvenile Courts

The jurisdiction of the juvenile court is broad and extended to any offence other than homicide³³. When a child or young person is brought before the juvenile court for any offence other than homicide the case must be finally disposed of in such courts. In addition to criminal cases, the jurisdiction of the juvenile court extends to non- criminal cases of children under the age of sixteen who are in “need” of protection or discipline.³⁴ Protection or discipline cases refers to the cases of children under the age of sixteen who are uncontrollable, parentless, deserted, destitute, beggars who fall into bad association. The Children and Young Persons Ordinance³⁵ provides instances under which a child or young person may be brought before a juvenile court. The section lists the following categories of circumstances in which a juvenile can be taken to court for necessary order:

- Found begging or receiving alms
- Found wandering and not having any home or viable means of substance and not having some one who can care for them properly (parent or guardian)
- Found destitute, is under the care of parent guardian of criminal or drunken habits, frequent the company of reputed thief or common or reputed prostitute and lastly being persistently ill treated or neglected by his parents or guardian or residing in a house used by a prostitute of or for prostitution, can be, on order from the magistrate be committed to the care of a relative or some other fit person or institution being willing to undertake such care until the child or young person attains the age of eighteen years.

³² Hon. Justice Maina W; The Ethics Commissioner(as he then was), in his paper titled “ Child as an Accused” presented at the seminar on the child and court, 1996, emphasizes on this point of the need of specially trained magistrates for juvenile courts

³³ Section of CAP 13: provides that ; where a child or young person is brought before a juvenile court for any offence other than homicide, the case shall be finally disposed of in such court

³⁴ Whereas the juvenile court has jurisdiction over cases related to ” protection or discipline” of children, it does not have jurisdiction over related charges of neglected against parents or guardians. Under section 23 of the Children and Young Persons Act of Kenya, the juvenile court has jurisdiction over related charges of neglect against parents or guardians .In Tanzania these matters fall under the provisions of the penal code on neglect and failure to provide for basic necessities of life.

³⁵ Section 25(1) of CAP 13

In the case of a girl, she can be committed to the care of a person or institutions until the age of 21. A child or young person can also be committed to an approved school if his parent or guardian brings him before a court and proves that they are unable to control the juvenile. Nevertheless, it is important to note here that the magistrates face the very real dilemma of detaining a juvenile who has committed no crime or allowing him / her to return to a potentially very damaging environment.

It can be argued that, unfortunately as there is little alternative left open to the magistrates, it is in the best interests of the child³⁶ to remove them from their current environment, even if they are placed in poor conditions of an approved school and that it may even be crucial to their survival and development that they are dealt with.³⁷

The Committee on the Rights of Child has noted that it does not accept that deprivation of liberty should be used for children in need of protection.³⁸ It has frequently criticised the use of any form of detention for children who have committed no crime but have simply been abandoned or mistreated³⁹ or are beyond parental control⁴⁰, especially in cases where such detention could take place among convicted offenders. The fact that the child or young person can be sent to approved school, when he has not committed any crime, where he will mix with juvenile offenders, is highly contentious. This practice also contravenes international human rights standards.⁴¹ This is also provided for in the Beijing Rules that “deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious offence and unless there is no other appropriate response”⁴².

However, in Tanzania as stated above a juvenile can be detained when they are neither a danger to society nor convicted of a crime. This happens when there are periodic sweeps by the police in attempts to “clear the streets”⁴³. Thus, the distinction between children charged with criminal offences and children in need of protection and discipline is obscured and the categorization is in many ways arbitrary because the legal system essentially treats them the same. Indeed most

³⁶ Article 3 CRC

³⁷ Ibid article 6

³⁸ Hodgkin, R; and Newell, P; Implementation Handbook for the Convention on the Right of the Child, UNICEF, 2001, P 499

³⁹ Child summary Records CRC/C/SR.148 see para 34-35

⁴⁰ Committee on the Rights of the Child, concluding Observations of Nigeria, CRC/C/15/ Add.61 31 December 2003 para 21

⁴¹ ICCPR A 10 (2)(a), JDL, Rule 17 “untried detainees should be separated from convicted juveniles”

⁴² Rule 16. 1. Beijing Rules

⁴³ Regional Africa Juvenile Justice Network, RAJJANET, available at http://www.africajuvelinejustice.net/justice_justice.htm

children who are brought before the juvenile court appear to be unaware of the distinction between criminal and non-criminal status offences for which they are being charged, and generally view court proceedings to which they are subjected as criminal.⁴⁴

Indeed one observes that there is a huge gap in the provision of facilities and services for children in need of protection in Tanzania which needs to be addressed too as a matter of urgency by mobilising local as well as international resources.

2.1.4 Referral of cases to Juvenile Court

Under the Children and Young Persons Ordinance any administrative officer or police officer above the rank of sub inspector may, without a warrant, apprehend and bring a child or young person before a juvenile court⁴⁵. In most cases it is the police who apprehends the children for vagrancy or upon suspicion of having committed minor criminal offences and bring them to the court. Although, the Children and Young Persons Ordinance also gives this power to administration officer, it is very rare to find them doing the “policing and prosecuting job”⁴⁶. Police officers are therefore the ones who arrest, interrogate, investigate cases of children in need of protection or discipline and finally handle them to public prosecutors for prosecution.

The fact that child welfare is dealt with the Ministry of Labour and Young Development, under the office of the Commissioner of Social Welfare, the administrative officers should perform this function instead of police as is the practice now. Among their many duties of administrative officers, it will be to take children cases to courts, and to apply for orders committing deviant children “to some other fit person or institution on willing to under take” them for rehabilitation and welfare as provided under the Children and Young Persons Ordinance.⁴⁷

2.2 The Process of Administration of Juvenile Criminal Justice

There are several laws, both penal and civil statutes that are specifically related to or protect the interest of the children in Tanzania. From the penal point of view, it is the Children and Young Persons Ordinance which apart from defining who is a child and a young person it provides the procedure in which the juvenile justice should be administered upon the suspect and convict who is a child or juvenile.

⁴⁴ Makaramba R,V.Children Rights in Tanzania ”We Owe The Children The Best ”Dar es SalaamFriedrich-Ebert-Stiftung,1997,p.59

⁴⁵ Section 25 (1) of the CAP 13

⁴⁶op.cit,Children Rights in Tanzania”We Owe The Children The Best,1997,p.63

⁴⁷ Ibid

In this part therefore, the Children and Young Persons Ordinance would be mostly referred to for the purpose of examining how the juvenile justice is carried out or at least how it ought to be administered in Tanzania. The idea is to describe the juvenile justice system functions as practiced in the light of the domestic legislation.

As is well known the administration of juvenile criminal justice in the modern state is a function of the state stemming from its assumption of sovereignty and exercised by specialised agencies. In Tanzania too, the law presumes this to hold true and assigns the task to essentially four bodies, the police, prosecutor, social welfare and the court. The respective role of each body may be summarised as the investigation, prosecution, counselling and disposition. The administration of juvenile criminal justice thus involves all these bodies and their functions in relation to a juvenile criminal case. In analysing the administration of juvenile criminal justice, as it relates to children in conflict with the law, it would be useful to broadly categorise the major actions that are involved in this process. These are commencement of the criminal proceedings and investigation (including arrest, detention, age ascertainment, trial and sentence). Each of the sub-section below presents the observations made during the assessment in relation to each of these categories, after a description of the nature of offences in which children actually are involved or suspected to be involved.

2.3 Administration of Juvenile Justice by Child-Rights Principles

2.3.1 The Age of Criminal Responsibility

Since children are immature and require special attention, specific rules applying to children in conflict with law have emerged. On the international level the most important children's rights instrument is the United Nations Convention on the Rights of the Child of 1989, signed and ratified by all member states with the exception of the US and Somalia. The Convention defines children as all human beings under the age of 18⁴⁸ unless under the law applicable to the child, majority is attained earlier, and provides special rules applicable to them. Article 2 of the Convention provides for non-discrimination principle which demands that all rights apply to children without exception. Article 3 of the Convention enshrines the paramount principle i.e. that the best interests of the child must be paramount in any decisions or actions affecting the child.

All of these articles must be taken into consideration when determining the age of criminal responsibility. The UN Committee on the Rights of the Child (UNCRC) has recommended that the age of criminal responsibility be *guided*

⁴⁸ See Article 1 of the UNCRC, Article 2 of the African Charter on the Rights and Welfare of the Child

in particular by the best interest principle. These two principles, i.e. the non-discrimination and best interest principles are also provided in the African Charter on the Right and Welfare of the Child⁴⁹.

The Convention calls for states in Article 40 (3) (a) to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. While not recommending a specific age, the Committee on the Rights of the Child has tended to criticize jurisdiction in which the minimum age is 12 or less.⁵⁰ In its concluding observation the committee on the Rights of the child expressed its concern at the low age of criminal responsibility⁵¹. There have been concerns and calls for a review of the law in Tanzania with a view to raising the minimum age of criminal responsibility in the light of principles and provisions of the United Nations Convention on the Rights of the Child.

The clearest advice given by international Human Rights standards regarding the age of criminal responsibility is the Beijing Rules (United Nations Standard Minimum Rules for the Administration of Juvenile Justice). Rule 4.1 states that “ in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”.

The commentary to the Rules explains that the age of criminal responsibility differs widely according to history and culture. The Commentary states that the modern approach is to consider whether a child can live up to the moral and psychological components of criminal responsibility. That is whether a child by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behavior. The rules advice that in general there should be a close relationship between the notions of criminal responsibility and other social rights and responsibility such as marital status, civil majority, etc⁵².

Neither of the above cited Convention nor the Beijing Rules specify a particular fixed age. The fixing of a minimum age limit is a decisive factor when determining those children in conflict with law who can be subjected to and

⁴⁹ Article 3 and 4 of the African Charter on the Rights and Welfare of the Child

⁵⁰ Malawi (crc/c/114(2002)available at <http://www.bayefsky.com/pdf/Malawi-t4-CRC.pdf>, Kenya (CRC/C/11/2001)Available at <http://www.bayefsky.com/pdf/Kenya-t4-CRC.pdf> and Committee on the Rights of the Child, Concluding Observations; Tanzania2001

⁵¹ The Committee recommended that the state revised the relevant Legislation and raised the age of criminal responsibility. See www.umn.edu/humanrts/crc/tanzania200.html

⁵² *The Age of criminal Responsibility*, see http://www.peermediation.org/policy/age_criminal_resp.doc

sentenced in criminal proceedings. For instance, some countries use puberty as an indicator of maturity, others rely on psychological assessments⁵³.

Since 1st July of 1998, the age of criminal responsibility in Tanzania has been raised from seven to ten years⁵⁴. This is based on the argument that a child of ten years old has the ability to distinguish between right and wrong. The age of criminal responsibility is statute based and governed by two common law presumptions, which are based, either fully or partially, on physical age limits. First of all, a child who is below ten years of age is presumed to be *doli incapax*, which is to lack criminal capacity⁵⁵. The child can not therefore be held criminally responsible. The second presumption is that a child between the age of ten and twelve years is rebuttably presumed to be *doli incapax*. This presumption of *doli incapax* continues to apply but can be rebutted by the prosecution on proof “beyond reasonable doubt not only that he caused an *actus reus* with *mens rea* but also he knew that the particular act was not only merely naughty or mischievous, but seriously wrong”⁵⁶.

Under this rebuttable presumption, it follows that once it is proved beyond reasonable doubt that the child knew the act to be seriously wrong, in the sense that he was not merely naughty or mischievous, the presumption of *doli incapax* will be refuted. The child will thus become *doli capax* (capable of committing a crime) and will be subjected to prosecution and conviction accordingly. There is as well a presumption on the issue of sexual offences, that male person under twelve years of age is incapable of doing sexual intercourse. A conviction therefore will depend on the prosecutions evidence of the child’s capability of doing the act. Children above twelve years of age up to sixteen years are presumed to possess criminal capacity. The evidence provided is similar to that required in ordinary cases involving adults.

As stated above the relevant age sets for the two presumptions are unrealistically low, and do not enhance the interest of children and community at large. The main argument advanced for the raising of Tanzanian’s minimum age of responsibility is the suggestion that a child between the age of ten and twelve years is too young to take full criminal responsibility for his actions and to be made subject to complex and perhaps lengthy criminal proceedings which flow from a prosecution.

It has been further argued that a person’s capacity is determined by two psychological factors: his/her ability to distinguish between right and wrong and

⁵³ Melchiorre A; At *What Age*. See [www .right-to-education .org/content/age/index. html](http://www.right-to-education.org/content/age/index.html)

⁵⁴ Sexual Offences Special Provision Act No.4 of 1998

⁵⁵ Section 15 of the Penal Code as amended by section 4 of the Sexual Offences of Special Provisions Act Number 4 of 1998

⁵⁶ Smith J; and the late B. Hogan, *Criminal Law*, London Butterworth, 1996, at p.195

conduct himself / herself in accordance with the insight into right and wrong. The test of criminal capacity for determining criminal responsibility must answer to the question of whether the wrongfulness of his/her conduct, and if the child did, then did he/she have capacity to act in accordance with such appreciation⁵⁷.

A better starting point, however, supported by international standards is the creation of a system which offers support to children based on the principle of the child's best interest. A system, which does not criminalize children but rather focuses on their needs.

2.3.2. The Best Interest Principle

In asking whether a low age of criminal responsibility is in the child's best interests, it is necessary to look at the impact of criminalization on the child's future development. Some researchers on the issue of administration of juvenile justice system demonstrate that criminalization of children tends to lead towards a criminal career. It also stigmatizes the child and alienates them from society, creates problems of self esteem, encourages them to mix with other adult offenders and creates barriers in the way of return to education or future employment⁵⁸.

While it is argued here that a low age of criminal responsibility is not in the child's best interest, it is also important to bear in mind that criminal responsibility is only one aspect of the juvenile justice process. In applying the best interests principle to the treatment of young persons who are in conflict with the law, it is important to take a holistic approach. Thus, the age of criminal responsibility cannot be viewed in isolation from the rest of the justice process. Other aspects include whether there is a separate juvenile justice system based on the children's rights and what type of measures young persons are subject to that is they are punitive, restorative or welfare.

Through the discussion above it can be noted that, in children's best interest it is important both to raise the age of criminal responsibility and in parallel to introduce and sustain a welfare –based system with the aim of supporting children who are in conflict with the law.

Moreover, Article 28 of the Convention on the Rights of the Child requires states to ensure that primary education is free and compulsory. A minimum age for completion of compulsory education is not mentioned. However, the

⁵⁷ Kaorlin J; *Child Justice in Sweden and South Africa*, International Journal of Law, Policy and the Family, Oxford University Press, vol.17 2003.p312

⁵⁸ Gregor U; *The Age of Criminal Responsibility*, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No.181(www.aic.gov.au)

Committee's Guidelines for Periodic Reports requires states to indicate the particular measures adopted to make primary education compulsory and available free for all. In Tanzania the minimum age for enrolment in primary school is seven years.

The fact that a child can be held responsible at such an early age, for example section 4 of the Sexual Offences of Special Provisions Act No.4 of 1998 often entails various measures of custody, reform, correction or protection which may or may not include adequate educational provision. Therefore the establishment of a very low minimum age for criminal responsibility could have a detrimental impact on the child and his or her educational process and development. Furthermore, assessing the developing capacity or maturity of the child is somehow subjective, and there are no agreed indicators.

Theories articulated by Lawrence Kohlberg, who is a leading American theorist psychologist specializing in moral development; moral judgment and reasoning have not been seriously and effectively challenged. According to Kohlberg, these moral aspects of an individual would develop in three distinct levels, which can be further subdivided into six different stages. In the "pre-conventional level"(level 1) which is generally believed to include children between the ages of four and ten years, Kohlberg argues that observance of rules and regulations is mainly based on a desire to avoid punishment. In the "conventional level" (level 2) which is generally believed to include children between the ages of ten and 13 years, Kohlberg believes that children at the lower end of this age – group are conforming to the generally acceptable norms and rules with an intent to avoid disapproval or dislike others. As they grow older within this age bracket by children begin to conform for the purposes of avoiding sanctions by legitimate authorities and finding of guilt as a result of breaking the law. At adolescence at around 13 years of age, the child proceeds to what Kohlberg has termed the "post-conventional stage"(level 3) where conformity to the law is motivated by the desire to maintain and preserve community welfare.

Kohlberg's theory suggests that conformity by a child under the age of 13 to rules and commands is generally motivated by a desire to avoid punishment or disapproval, rather than by an awareness that the conduct is seriously wrong. It is therefore, argued that it is wrong to subject a child between the age of ten and twelve to the consequences of criminal proceedings on the basis that he might be capable of appreciating the nature of his conduct. It can be argued that even if a child who is between ten and twelve is able to tell "right" from "wrong" it is doubtful whether he would be able to appreciate an

act to be a serious wrong⁵⁹. It only makes sense to provide a period of time in early adolescence to take account of the fact that children develop at different rates. These studies on child psychology point to the 14-15 years old as the most suitable age of criminal responsibility.

Based on the above discussions, it is suggested that the minimum age of criminal responsibility be raised from the age of ten to fourteen years. Bearing in mind the facts of emotional, mental and intellectual maturity of a child, one would be right to say that setting a fixed age below the age of fourteen will result in disadvantage a child with a lower development level than others. And a child who is above fourteen is rebuttably presumed to have *doli incapax*, this is to ensure that only mature children who are able to appreciate that their criminal acts are serious wrongs would be made criminally responsible

Consequently, it is my view that, in order to be fair in holding children criminally responsible for their actions, it is important that they not only know right from wrong but also that they are able to understand and foresee the consequences of their actions, and that they have control over their actions at the time.

2.3.3 Who Is A Child Under The Law

Defining legally who is an individual child or young person forms the central problem in the development of an effective system for the protection and promotion of the rights of child and young person. Both at the international and national level a child may be defined differently according to context.

Various laws in Tanzania define childhood depending on the context within which that person is referred to. The present minimum age is not consistent with general tenor of most legislative provisions involving children in Tanzania, which recognize that special provision must be made for young children to reflect their lack of maturity and judgment.

According to the Age of Majority Act⁶⁰, the age of majority is attained at 18 years, which means that any person below 18 is a minor. The Employment Ordinance⁶¹(CAP366) defines a child as a person under apparent age of 15 years and a young person as a person over 15 but the apparent age of 18 years. Under the Constitution of United Republic of Tanzania only those persons

⁵⁹ The Response of the Hong Kong Committee on Children's Rights to the Consultation paper on the Age of Criminal Responsibility in Hong Kong. See <http://www.childrenrights.org.hk/6concern.htm>

⁶⁰ Section 2 of CAP 431

⁶¹ Section 2 of CAP 366

18 years and above can vote and be elected⁶². For purposes of entering into contracts 18 years is the age at which one can have legal capacity as per the Contract Ordinance⁶³. The Law of Marriage Act, 1971⁶⁴ the minimum age for marriage is 15 for girls and 18 for boys. The Adoption Ordinance⁶⁵ defines a child to mean a person under 21 years of age, but does not include a person who is or has been married, The Children and young Persons Ordinance⁶⁶ defines a child as a person under the age of 12 and young person over 12 but under apparent age of 16. Defense Forces Regulations restricts children under 15 years to be employed in the army, The Minimum Sentence Act⁶⁷ defines a juvenile as a person under 18 years while Corporal Punishment Ordinance⁶⁸ defines a juvenile as person under the age of 16. The Criminal Procedure Act⁶⁹ provides that trials should be conducted in camera where an accused person is under 18 years of age.

Therefore, there is clearly a wide spectrum disharmony in the definition of the 'child' and 'young person' in Tanzania. The different laws stipulating different ages serve their respective interest. This occasionally may lead to the deprivation of certain categories of children of their rights and protection under the national law, as person may be deemed too young for some activities, yet old enough for others. The present of criminal responsibility at the age of 10-12 (refutable presumption) is inconsistent with a protection afforded to children by a wide range of other legal provisions which recognize that children under 15 years do not have capacity or ability to make decision with serious consequences for themselves or others.

2.4 Nature of Offences committed by Juveniles in Tanzania

The nature of the crimes committed by juveniles or are formally suspected of committing are very similar in all localities covered by my assessment and the assessment made by the NGOs, namely the Legal and Human Rights Centre in 2003 and Enviro Care in 2000. Prominent amongst these, is stealing which is the, most frequent crime committed by the juveniles. Not only that police, in almost all localities in the country reported this, but a high proportion of juveniles under detention are also incarcerated for this reason.

⁶² Article 5 of the United Republic of Tanzania Constitution 1977

⁶³ Section 2 of CAP 43

⁶⁴ Section 2 of Act No. 5 of 1971

⁶⁵ Section 2 of CAP 335

⁶⁶ Section 2(1) of CAP 13

⁶⁷ Section 3 of Act No. 1 of 1972

⁶⁸ Section 2 of CAP 17

⁶⁹ Section 186(11)(b)(ii)

However, it needs to be noted that it is not the fact that there is a high incidence of stealing committed by juvenile, but that many crimes suspected of being committed by juveniles are not stealing related. Though not as frequent as stealing, other crimes committed by children include pick/pocketing, assault, robbery, sexual offences, sodomy, burglary, house breaking, causing grievous bodily harm etc.

It should be also observed that these types of crimes are relatively more frequent in urban areas than rural areas. For instance the data collected in Mwanza, Tabora, Mbeya and Dar es Salaam reveal that the high number of cases instituted in the courts or reported in police stations is stealing cases as pointed above.

The following are the types of offences in record in Dar es Salaam, Arusha, Tabora and Mbeya regions

Tabora Region 2002
Table 1: criminal cases against juvenile delinquents in Tabora

<i>Type of offence</i>	<i>Frequency of occurrence</i>
Causing grievous harm	16
Stealing	21
Vagrancy	8
Uttering abusive language	13
Burglary	15
Arson	13
Assault	14

Source: *Tabora Urban Primary Court*⁷⁰

⁷⁰ The State of Juvenile Justice in Tanzania ” A Fact Finding Report On Legal And Practical Consideration” Legal and Human Rights Center 2003, p17

Mbeya Region 2002

Table 2: criminal cases against juveniles in Mwanjelwa

Type of offence	Frequency of occurrence
Stealing	22
Assault	12
Causing grievous harm	16
Vagrancy	9
Burglary	9
Housebreaking	17
False pretence	12

Source: Mwanjelwa Primary Court⁷¹

Table 3: Dar es Salaam Region 2002
Ilala District court.

Types of offence	Frequency of occurrence
Stealing	65
Grievous harm	16
Unnatural offence	12
Possession of narcotic drugs	6

Sources: Analysis of data obtained from the Ilala district court-Dar es Salaam

Table 4: Prevalence of juvenile delinquency in Arusha as reported at Arusha Central Police Station 2001

Types of offence	Frequency of occurrence
Rape	10
Possession of narcotic drugs	3
Stealing	39
Assault	7
Threatening to kill	4
Causing grievous harm	1

Source: Arusha Central Police Station

⁷¹ ibid p18

Based on the above figures, it is some times very difficult to exactly specify why children commit crimes, it is possible to conjecture some reasons based on literature i.e. books, articles etc. And the responses of the interviews (police, social welfare and juveniles).

In most areas, the main reasons for prevalence of these offences committed by juveniles include; many average families do have matrimonial mishaps due to economic hardships, normally resettling into broken families or single parenthood. As such, children find themselves the main victims of these hardships whereby they are either deserted or neglected by their parents or guardians. Consequently, they resort to criminal activities that, in most cases, lead them into conflict with law.⁷²

Secondly, poverty clearly seems to be at least the root cause of most crimes committed by children particularly those related to stealing. The life of only a few children illustrates this point. **Mohamed Hussein** is a 13-year-old boy who joined street life in Dar es Salaam city after both his parents died. As he is living in the street and has no one to support him and provide him with the basic necessities of life he began begging in the street and sometimes selling some items such as vegetable by collecting them from market places. However, what he earns both from begging and trading does not suffice to cover the requirement of basic necessities such as food and clothing, he resorts to stealing.⁷³

The late **Maganga**,⁷⁴ then aged 12 years engaged in criminal acts as his step – father did not provide him basic needs. Sometimes in April 2002, Maganga ganged up with some other 8 adults at their village called Ilonguru, just outside Tabora municipality, and went to commit burglary and stealing at an unnamed house hold during the night. When they arrived at the destination, the adults paved an inlet on the fence for Maganga to step into the house. When he was inside the owner woke up, and unfortunately caught Maganga, while his co-offenders ran away. The owner raised an alarm; consequently outraged villagers gathered only to subject Maganga to the injustice of the mob- justice. It was learned that Maganga used to live with his stepfather, who happened to be utterly cruel to Maganga hence, his resort to criminality.

⁷² This tendency is most rampant in Tabora and Mwanza where it is manifested in the burgling number of street children in these towns. See also supra note 31 at p. 21

⁷³ Celilia Andersson with Aki Staurou, *Youth Delinquency and The Criminal Justice System in Dar es Salaam, Tanzania*, 2000

⁷⁴ *The State of Juvenile Justice in Tanzania “A Fact Finding Report On Legal And Practical Consideration”* Legal and Human Rights Centre 2003,p.26

Unlike Mohamed and **Maganga, Benedict Simon**, 12 years old, from Temeke has got enough at his home but has resorted to stealing because his parents can not buy him decent clothing due to their poverty or unwillingness.

Taking into account the correlation between the background of the children committing the offences and the offences themselves, it is possible to argue that it is not merely lack of provisions which leads children to commit crimes but also inability of families and other communal support structures to guide the child to obtain these provisions which lead the child to the commission of crimes. One may therefore say that the role of family, School and society as a whole play a vital role in preventing children from committing crime.

2.5 Commencement of Proceedings and Investigation of Crimes committed by Juvenile

This part focuses on the procedure by which children in conflict with the law are subjected to the juvenile justice system, their arraignment; prosecution and sentencing.

2.5.1 Commencement of Proceedings

In general it is the police who directly deal with suspected juvenile offenders and that is before getting any authorisation from any court. After arrest, the offenders are charged with criminal offences or classified as being “in need of protection or discipline” and then brought before a court of law.

These children are subjected to brief hearings on their cases whereby they may be deprived of their liberty and committed for years to juvenile correctional institutions known as Approved schools. Before they are committed to approved schools, children frequently spend long periods in temporary detention centres, called juvenile remand homes or remand prison, pending adjudication of their cases⁷⁵.

2.5.2 Pre Trial Proceedings

2.5.2.1 Arrest and Notification of Parents and Guardians

Since arrest and detention represent serious curtailment of the liberty of an individual, under the Children and Young Persons Ordinance there is no a clear provision relating to procedure on how a juvenile should be dealt with upon his or her arrest. There is also lack of basic prerequisite on apprehension such as notification of parents or guardian upon arrest of juveniles. One may argue that having a clear provision of notification of parents would constitute an

⁷⁵ Makaramba R V; Children Rights in Tanzania op.cit;p.59

important aspect in the administration of juvenile justice because first, it helps the police to get the background information that can enable them to take immediate and appropriate action; secondly, it helps parents or guardians to know exactly the where about of their child, hence may take appropriate action, including bailing out the respective juvenile offender and/ or preparing for defence.

However, section 56 of the Criminal Procedure Act, 1985 obliges a police officer in charge of investigating an offence in respect of which a child is under restraint to cause a parent or guardian of the child to be informed that he is under restraint and of the offence for which he is under restraint. The police rarely observe this provision especially on street children. In Mbeya region, the police concede that, the arrest of children in possible situations involve alerting the parents or near relatives. The police, however, agreed that this is not possible in cases of street children⁷⁶.

More over, section 2 of the Probation of Offenders Ordinance⁷⁷, impliedly contains the basis for involvement of probation officers through out the trial process. Hence upon the arrest of a juvenile offender the probation officers are occasionally notified as required by the law and in a very rare cases they attend the court proceedings involving a juvenile. This problem was also confirmed by Mr. **P. Oduke**⁷⁸ who is the head of the Dar es salaam Remand Home at Kisutu that sometimes police fail to notify the probation officers upon the arrest of a juvenile offender either due to lack of awareness of that provision in the Criminal Procedure Act,1985 and the Probation of Offenders Ordinance.

Having said so, it can be argued that it would be expected CAP 13, being the leading procedural law on juvenile justice in the country, could contain those principles so as to safeguard the best interest of the child .This omission has compelled law enforcement agencies to resort to the use of general procedure of apprehension of adult offenders as provided for in the Criminal Procedure Act,1985 for cases involving children and young persons. This tendency has led untrained police officers in the administration of juvenile justice to treat young offenders in the same manner as adult offenders.

⁷⁶ Enviro Care Report,2000,p.23

⁷⁷ CAP 247

⁷⁸ Interview with the head of the Dar es Salaam Remand Home at Kisutu on 24th of September 2003 from 2:30-3:30 pm.

2.5.2.2 Police Custody and Pre Trial Detention

Like apprehension of juvenile offenders and notification of parents or guardian, CAP 13 does not have specific provisions relating to detention of juvenile offenders while pending trial in the court of law. However, the Criminal Procedure Act, provides that any person arrested by the police are detained in police facilities for the purpose of investigation then his or her the case should be reported to the court within 24 hours.⁷⁹ This law is also applicable to arrested juvenile offenders. Indeed detention of juvenile is seen by the law as one that can be employed only as a last resort and for the shortest time. This ideal law is frequently violated either deliberate or out of lack of awareness of the law and resources. Juveniles accused of committing a crime in some areas are kept in police custody for longer than legally prescribed time. This is due to lack of transport between the institutions including police stations and the courts. Children are also likely to stay more days in police detention because children cases where the complaints are usually not very much interested in pursuing the cases, but only to have children detained only, and would not offer assistance in order to pursue cases.⁸⁰

There are incidents where juvenile offenders are not only detained for longer period in the police custody but also in some places are detained in the same lockups with adult offenders. As the court rightly stated in this case, **Njama Zuberi**⁸¹ a boy of tender years, aged about ten years, stood charged with the capital offence of murder contrary to section 196 of the Penal Code. He was being held in custody at Handeni since 1982 where there were no facilities for keeping juvenile offenders, pending the holding of preliminary inquiry and the subsequent trial before high court. The accused was, at the time of incident, living with his parents who were able, willing and prepared to look after the accused and produce him before the court as and whenever directed but the police refused. In his decision the High Court Judge held that, “ *in the interest of the juvenile accused it is necessary to remove him from custody where is likely to associate with adult offenders and other undesirable influences/*”.

It needs to be stressed that despite the absence of a provision in CAP 13 relating to detention of juvenile offenders, the law directs that juveniles should not associate with adults in custody.⁸² “The law states that it shall be the duty of Commissioner of police to make arrangements for preventing so far as possible, a child or young person while in custody, from associating with an adult, other than a relative, charged with an offence”.

⁷⁹ Section 33 of the Criminal Procedure Act No.9 of 1985

⁸⁰ Enviro Care Report on Children In Conflict with the Law, 2000

⁸¹ Republic V. Njama Zuberi (1985) TLR 241

⁸² Section 5 of CAP 13

By this we see recognition through legislation that children and young suspects should not be associated with other adult suspects while in police custody. On the other hand the phrase “ as far as possible” gives room for children and young persons to be mixed with other adult offenders .For instance, according to the findings of Legal Human Rights Centre that in some areas, such as Ngara Police station, and Dodoma Central police station, the police do separate juveniles from adult offenders while in most areas, like Mwanza and Lindi Central Police stations, they are placed in the same custodial placements with adults⁸³.

The law further provides that offenders who are 12 years of age or upwards and under the age of 16 years are to be kept in remand homes if they fail to secure bail, while waiting for trials and conclusion of their cases⁸⁴. It is worthy mentioning that, there are five remand homes in Tanzania built and expected to cater for the regions there are situated in as well as their neighbouring regions, some thing which is logistically difficult⁸⁵. Thus, in areas where there are no remand homes, children and young suspects are sent to adult remand prisons instead. These remand prisons have negative impact on juvenile offenders such as:

- They do not get special care from people trained to deal with children or young persons particularly those in conflict with the law
- The environment is not child friendly and not beneficial to young offenders/ suspects
- Young suspects are prone to being abused particularly sexually by adults inmates

Due to lack of facilities in most regions, such as remand homes, approved schools, separate cells for juveniles at the police stations and lack of awareness of the law, the rights of juvenile offenders are being violated by the law enforcement officers with regard to pre-trial process⁸⁶.

2.5.2.3 Bail

Bail is categorised into two types that is police bail and court bail. Where children and young persons find themselves in conflict with the law are apprehended by police , the law⁸⁷ provides for their release on police bail on condition that the offence charged is not homicide , nor it is punishable

⁸³ The State of Juvenile Justice in Tanzania A Fact Finding Report On Legal And Practical Consideration ,Legal and Human Rights Center 2003

⁸⁴ Section 7 (2) of CAP 13

⁸⁵ Is a place where juvenile offenders are kept while they wait for the date of their trial

⁸⁶ United Republic Of Tanzania Legal Reform Programme,Medium Term Strategy December 2004 Volume1 P. 21

⁸⁷ Section 4 of CAP 13, article 15(2) of the Tanzanian Constitution

with a term of imprisonment exceeding seven years. Police bail can also be provided where it is in the interest of the young offender to be removed from association with undesirable persons or where the interest of justice will be defeated if the young person is kept in custody. If the circumstances do not fall within any of the above, then the child/ young offender is not released on bail instead he is kept in custody until the committal of the court or until the beginning of trial, whichever is applicable. For the purpose of bail, ordinary procedure like those for adults are applied to persons of fifteen years and above⁸⁸.

The spirit portrayed by the law is that where children and young persons are concerned, bail as a rule should be granted and only in specific instances should it be refused.⁸⁹The practice shows that most children and young persons in conflict with the law are denied bail⁹⁰. The main reason for the denial is due to the fact that in most cases these children and young persons lack relatives/ parents who would enter into recognizance for them. This is so because some of them are street children, whose parents, whereabouts are not known and others are those whose families have no interest in them⁹¹ They are therefore at very high risk of being committed to remand home. For instance, most of the remandees at the Dar es Salaam Remand Home were there because they could not post bail or be released to their parents⁹².

On the other hand, CAP 13 does not provide comprehensive principles relating to bail during trial hence courts do resort to the use of the provisions of section 148 of the Criminal Procedure Act, 1985. Subsection (1) of section 148 provides that where a person appears or is brought before a court, and such person appeared before the court to be given bail, the court may, subject to certain restrictions, admit that person to bail or release him on his executing a bond, with or without sureties, for his appearance at his trial or resumption of the trial at a given time and place. These provisions of the Criminal Procedure Act, 1985 which are of general application can be extended in application to cover young offenders as well and grant them bail.

2.5.3 Trial Proceedings

2.5.3.1 Trial of a juvenile offender

When a juvenile is arrested, he or she is brought before the juvenile court for arraignment. At the arraignment, the presiding magistrate must first determine whether the court has jurisdiction by ascertaining the child's age. As pointed out

⁸⁸ Section 64(3) of the Criminal Procedure Act 1985

⁸⁹ Itemba J.M., *The Law Relating to Bail in Tanzania*, 1991, p.72

⁹⁰ Report of the Research on children in conflict with the law, *Enviro Care, DSM*, Oct, 2000 p25

⁹¹ *ibid*, p.24

⁹² According to interview held at Dar es Salaam Remand Home with the head of Dar es Salaam Remand home on 24th of September 2004

earlier, trial court would have to determine the age of criminal responsibility in terms of section 15⁹³.

The person under the age of 10 years according to the law, is not criminally responsible for any act or omission and a person under the age of twelve years would only be criminally responsible for an act or omission, if it is proved that at the time of doing the act or making omission he had the capacity to know that he ought not to do the act or make omission.

When the accused juvenile does not know his age (usually appears on the charge sheet provided by the police to the court) or where that age is deliberately concealed, the court will determine the age in terms of section 16 of the Ordinance. It states that;

“where a person, whether charged of an offence or not, is brought before any court or otherwise than for purpose of giving evidence, and it appears to the court that he is a child or young person, the court shall make due inquiry as to the age of that person and make a finding thereon and for that purpose shall take such evidence at the hearing of the case (which may include medical evidence) as it is pertinent and may receive such proof of birth (whether of a documentary nature or otherwise) as appears to such court to be worth of belief, according to value thereof”.

The above section gives a wide discretion to the court which evidence to rely on determining the age of an accused juvenile. Problems have occurred in some areas whereby in the absence of birth certificate, the court have heavily relied on medical evidence such that the High Court of Tanzania in the case of **Emanuel Kibona**⁹⁴ had to clarify the matter. In this case Emanuel Kibona and three others (appellants) were being convicted of robbery with violence and sentenced by the trial court under the Minimum Sentences Act 1972. Under section 2 of the Act, the provisions of the Act shall not apply to a juvenile, and under section 3 of the same Act, “juvenile” means any person under the apparent age of 18 years. The appeal court considered the propriety of the sentence in light of the age of the appellants. A medical report had said that all the appellants were adults. The appellants challenged the assessment of their ages by the medical doctor. Their parents submitted, *inter alia*, baptism certificates to enable the court assess the ages of the appellants. It was held by the High Court that: *evidence of a parent is better than that of a medical doctor as regards that parent’s child’s age*

Emanating from the above section and holding of the case, the whole process of determining age, in practice, is very difficult. First of all, it happens that some parents do not know their children’s age or conceal their age to enjoy lesser

⁹³ Penal Code, CAP 16, as amended by Sexual Special Offences Provisions Act No.4 1998

⁹⁴ (1995)TLR p241

punishment. It also creates problems for young offenders who do not have parents who can ascertain their age before the court of law especially children who are in need of protection such as street children.

Secondly, the recording of births is governed by the Registration of Birth and Death Ordinance, cap 108. The law requires that a parent has to register the birth of his or her child at the office under the Administrator General which deals with the registration of Birth and Death. However there are some parents still do not observe this requirement. Thus some of Children particularly those born at home and those living in rural communities do not have birth certificates. In its concluding observation, The **Committee on the Rights of the Child** in light of article 7 and 8 of the Convention calls upon the government to undertake appropriate measures, including awareness raising among government officers, midwives, community and religious leaders, and parents themselves to ensure that all children are registered at the birth. The Committee encourages the government to introduce practical measures to facilitate birth registration, such as the introduction of birth registration units.⁹⁵

Thirdly, the problem of relying on medical examination to ascertain age is that, in many places where there are no such medical institutions, this involves accosting a child to the next big town. The cost will not normally be borne by the victims of the crime or by the police constrained with budget limitation and shortage of manpower, it is easy to understand the lack of promptness by the police to have the medical examination done swiftly. Furthermore, sometimes-medical institutions do not see examining the age of possible culprit as a priority in the overworked and overcrowded environment they work. Thus, the examination may take couple of days.

Lastly, there is no standard procedure used in the medical examination to ascertain age. In many areas,(especially in rural areas) where there are only health centres and clinics, the examination is nothing more than an observation of physical appearance of the examinee.

Notably, there are other forms of evidence that would be equally reliable such as a hospital birth notification, baptismal certificate, a school register, records kept by authorities or other institutions on the juveniles.

2.5.3.2 Trials in Camera

As a general rule in the court of law, court hearings are in public. However, the proceedings of cases involving a juvenile should be held in a different court room from that in which the ordinarily sittings of the court are held, unless the

⁹⁵ Committee on the Right of the Child, Concluding observation : Tanzania. (CRC/C/15/ Add), of O7/07/2001

juvenile is charged with adult persons.⁹⁶ By virtue of section 3(5) of the Ordinance, no person other than the members and officers of the court, the relatives of the accused and parties to the case, their advocates or other directly concerned in the case, shall, except by leave of the court, be allowed to attend in a juvenile court.

It is appropriate to say here that through my observation and assessments made by NGO that, although CAP 13 and the Criminal Procedure Act, expressly stipulate the procedure on how criminal offences involving juveniles should be conducted, yet most magistrates are influenced and affected by the procedure applicable to adults, which seemingly, causes a lot of injustice to children⁹⁷.

My visits on different days to Magomeni and Kariokoo Magistrate Courts in Dar es Salaam where I attended court sessions, revealed that juveniles brought before the courts in some cases did not enjoy such rights as they are prosecuted with adults in public hearings.⁹⁸ Thus, violating the principle of protection of the privacy of the child or young person. The Enviro Care researchers also observed this. In their report, they stated that in all five regions⁹⁹ where they conducted the research all the resident magistrates interviewed in the five regions attested that children must have their special court. As all these regions do not have juvenile courts, they have to conduct proceedings in camera. However it is also a practice in some areas that due to lack of chambers, it is only the children under 13 years of age whose cases have to proceed strictly in camera. But for those who are above 13 years of age, their cases are tried in the open court but the size of the audience is to be limited¹⁰⁰. Despite these initiatives by magistrates to create “semi-juvenile courts” it is still an infringement of juvenile offenders rights to have their trials conducted in camera.

It can be fairly concluded that trying juveniles in regular courts may not serve the best interest of the child. They can not represent or defend themselves because of the intimidating court atmosphere particularly where the audience in the court room is not familiar to the juvenile offender as required by the law. They feel shy and end up crying or feeling helpless. This is not the case at

⁹⁶ Section 3(1) of CAP 13, see also section 20 of the Sexual Offences Special Provisions Act, No. 4 of 1998

⁹⁷ ENVIRO CARE on their report of the children in conflict with the law 2000 and Legal and Human Right Centre, The State of Juvenile Justice in Tanzania ;A Fact finding Report On The Legal And Practical Consideration” , 2003 at p 34.

⁹⁸ Between the days of 13th September and 5th October 2004

⁹⁹ Tabora, Moshi, Arusha, Ininga and Mbeya regions.

¹⁰⁰ Supra note 127 at 27

Kisumu juvenile court where juvenile offenders enjoy the protection given to them by the law and are tried in a court with friendly atmosphere¹⁰¹

2.5.3.3 Parent Presence in Court

Parents and guardians are permitted to be present in the court room in accordance with section 15 of the Ordinance¹⁰². The law provides that; “ *where a child or young person is charged with any offence, the court may in its discretion require the attendance of his parents or guardian and make such orders as are necessary for the purpose*”.

In practice, however, there are still some parents who do not always attend court sessions with their children “ the disinclination of parents / guardian ... centres on their view that the offender ought to be taught a severe lesson for an offence for which he only stands accused of.”¹⁰³. Furthermore given the level of poverty amongst parents particularly in rural areas, very few parents can afford to come to court, let alone afford to hire an advocate for their children¹⁰⁴. The absence of the parents means that they are not available to render other forms of assistance to their children when the court is disposed to grant one leaving their children more at risk of being given a custodian sentence .

Furthermore, sometime, it is very difficult to have attendance of parents because most of the children who appear in court are street children or have been neglected or abandoned by their parents. Therefore tracing either parent is very difficult and is rarely undertaken by probation officers. It should be noted that parents or guardians participation is a crucial matter which should not be left to the discretion of the court and which should commence once the child is in conflict with the law; i.e. from investigation stage throughout the trial processes.¹⁰⁵. Their participations are for:-

- General psychological and emotional assistance to the juvenile
- Provision of relevant background information or evidence on the issue e.g. age life, environment etc.

Certainly, CAP 13 has added another layer warranting their participation of parents, normally to assist their juvenile in examination in chief, cross

¹⁰¹ Makaramba R.V; and Wieler V;, Construction of Juvenile Courts: impact and needs assessments,2001 p.32

¹⁰² Section 11(1) of CAP 13 as amended by Act No. 5 of 1980; this right is enshrined in article 40(2)(b)(iii) CRC

¹⁰³ Hon Justice Maina, The ethics Commissioner, In his paper titled “Child as an accused” presented at the seminar on the Child and Court held at the British council conference Hall from 26th ...27th of November 1996, Dar es Salaam

¹⁰⁴ Makarama R.V,Fredrick Ebert Stiflung, 1997The Children Rights in Tanzania” We Owe The Child The Best”

¹⁰⁵ Rule 10 and 15 of the Beijing Rules

examination and re-examination¹⁰⁶. This addition is based on understanding that a juvenile may not be able to tender evidence or examine a witness unless assisted by a lawyer or parent. This is a good development but the role is still misunderstood by most court officials and prosecutors. Therefore there is need for the law to regulate the parent/ guardian involvement and participation in cases involving their children especially where such children are unrepresented. For instance, under the Sierra Leone legislation, the court can make an order to require the attendance of the parents or guardians¹⁰⁷ and impose fine on parents or guardians that fail to attend¹⁰⁸.

In the absence of either parents or guardians, Non Governmental Organizations that deal specifically with children's rights should be allowed to appear and speak on behalf of juvenile offenders in juvenile courts.

2.5.3.4 Communication of the Charge

It is the duty of the juvenile court to read out the charges to the child or young person very carefully and in simple language, the substance of the offence which accused is alleged to have committed. The charges should then be explained to the child and he should be asked whether he has understood what the complaint has complained against him and what he has to say about the charge. This is clearly stipulated in the Children and Young Persons Ordinance that;

*“ After explaining the substance of the alleged offence, the court shall ask the child or young person what he has to say in explanation thereby, and whether he has any cause to show why he should not be convicted”.*¹⁰⁹

If the juvenile statement amounts to a plea of guilty, the court may convict him, and if the explanation is a denial of the charge, the court will enter a plea of not guilty. This explanation by the accused essentially serves as his defence to the charge.

According to Tanzanian law, it is mandatory for the proceedings to be in Kiswahili for primary courts.¹¹⁰ In the case of courts of resident and district magistrates the language must be in Kiswahili or English, except for the record, which has to be in English.¹¹¹ However, in case of a juvenile offender who can not speak neither language and there is no court officer to interpret¹¹²,

¹⁰⁶ Section 11 of CAP 13

¹⁰⁷ Section 17 of the Sierra Leone Criminal Procedure Act

¹⁰⁸ *ibid* section 23 (2)

¹⁰⁹ Section 8, 9 and 10 of CP 13

¹¹⁰ Section 13 of the Magistrates Courts Act No. 2 of 1984 which provides that :
The language of primary courts shall be in Kiswahili

¹¹¹ *ibid* s.13(2)

¹¹² Article 40(2)(6)(iv) of the CRC contains the right to “have the free assistance of an interpreter if the child cannot understand or speak the language used”

it might be very confusing to the child thus violates the right to be heard. The Ordinance is silent on the right to have free assistance of an interpreter if the child does not understand the language of the court.

2.5.3.5 Legal Representation

On the issue of legal representation, CAP 13 is also silent. Indeed, the involvement of advocates as defence counsel in criminal cases even for adult suspects is very minimal in Tanzania. This is because; it is only for those who can afford to engage advocates. The provision of legal aid assistance where the state assigns a lawyer for the criminal accused is limited to very serious cases such as murder or man slaughter and treason. Children will get this service if only they are charged with capital offences or whose parents or guardians can afford to engage an advocate. Hence the absence of lawyer representing the interest of the suspect juvenile may not only lead to violation of the fundamental rights of the accused but also possible violation of the outcome of the investigation itself and the decision of the trial court. The omission of this right from the Ordinance is tantamount to defeating the purpose of the juvenile justice system that is to protect the best interest of the child.

Due to the fact that there is only one juvenile court and most of juvenile offenders who usually commit minors offences, are normally tried in the primary court proceeding of which, is governed by the Magistrate Courts Act¹¹³. This Act bars lawyers from court proceedings. Therefore, due to this provision in the Act juvenile offenders are deprived of their right to legal representation in the primary courts proceedings.

One may argue that lack of legal counsel has in some instances caused trial magistrates to make improper decisions. An outstanding example is the case of **Republic v. Tatu Shabani**¹¹⁴. In this case Tatu was a pupil of the Mkuyuni primary school in Morogoro, who was expelled from the school after being found pregnant. She was charged with an offence of refusing to attend school, convicted and sentenced to 6 months or to pay Tsh 10,000. However, the relevant law criminalizes deliberate non-attendance of a pupil which is not the issue in this case. Tatu did not refuse to go to school, but she was acting to the disciplinary order given by the school. It is worth noting that if this court were to be assisted by legal counsel in its findings, the court could have not reached on that wrongful conclusion.

¹¹³ Act No.4 of 1984

¹¹⁴ The Rural Primary Court in Morogoro Region; Criminal Case No.322 of 2003

2.5.4 The Treatment of Juvenile Offenders

It has been critically remarked that the term ‘treatment’ in criminology is essentially a euphemistic label of the grand term ‘penology’¹¹⁵. Although treatment may sometimes extend to institutions like care and community homes, hospitals and guardianship orders; “treatment” in this research is applied in the sense of juvenile criminal proceeding only. In Tanzania treatment of young offenders refers to various rehabilitative measures of curbing juveniles delinquency, which are actually in most cases “punitive” in nature. These include probation order, approved school, imprisonment, corporal punishment and other penalties, as well as conditional discharge and repatriation order.

The primary aim of treatment measures is an attempt to ‘correct’ or ‘rectify’ the behaviour of juvenile delinquents. However, the major shortcomings of this type of treatment is that not all delinquents are apprehended, and even for those apprehended, not all of them are taken to court.

2.5.4.1 Disposition of juveniles’ cases:

The following discussion is basically focused on disposition of juveniles’ cases.

2.5.4.2 Sentencing

The Ordinance provides for varieties of punishment, which can be imposed on juvenile offender. These are non-custodial and custodial measures as discussed bellow.

(A) Non Custodial Measures

There are several non-custodial measures as follows:

(i) Probation Orders

One mode of punishment of children or young persons convicted of any offence other than homicide is a probation order. This is an order which releases the offender on his entering into a recognisance, with or without sureties, by which he is bound for a given period (not exceeding three years) to be of good behaviour, and to appear for sentence where called upon at any time during such period. Besides, a suitable person who is willing to undertake the task, will be named in the order and to be required to supervise the offender on such conditions as may be specified in such order¹¹⁶. Should the offender’s conduct be satisfactory, the order may be discharged before the normal expiry¹¹⁷. But should the offender fail to observe the conditions of such order, he may be brought before the court and be dealt with for the original offence¹¹⁸.

¹¹⁵ West, D.J., *The Young Offenders*, Gerald Duck Worth, London, 1968 p207

¹¹⁶ Section 18 of CAP 13

¹¹⁷ *ibid* section 19

¹¹⁸ *Ibid* section 20

It should be emphasised however that, before a court makes a probation order, it must first explain to the offender, in ordinary language, the effect of the order proposed to be made and the consequences of his failure to comply with the condition and period fixed by the court. This must be stated in such order and the court must make sure that the probation order must not be combined with other punishment such as fine, corporal punishment and imprisonment as it was pointed out by the High Court in the case of **R V. Patrick Matala** that;¹¹⁹

“the purpose of probation is to release a prisoner without punishment where the court regards it expedient to do so, taking into account the circumstances of the case and the character of the accused. It is improper to impose a sentence in addition to an order of probation”

It is a legitimate concern that all juvenile offenders due to shortage of probation officers do not enjoy this right. The probation officers who are considerably few, do not always appear in the court, unless they have got direct interests or until they are summoned by the courts to assist certain juveniles. As a result of their non-appearance, the magistrates are compelled to determine cases to the detriment of juvenile offenders without considering social investigation reports¹²⁰ which are crucial to the court in arriving at just decision with regard to juvenile cases¹²¹.

(ii) **Compensation, Fine or Costs**

In certain circumstances, the court may be obliged to order compensation, fine or costs for the offence committed by a child. The Child and Young Persons Ordinance stipulates clearly that;

“ if the offence committed is one in which a fine , compensation or costs may be imposed, and the court is of the opinion that justice would be best done that way, the court may impose a fine, compensation or costs which must be paid by the parents or guardians^{122,}”

The above provision in essence imposes liability and requires the parents or guardians to be more responsible to his child or young person. However, it should be emphasized that, such an order must not be made before a parent or guardian has been given an opportunity of being heard and it should not be made, where the court has been satisfied that such parent or guardian can not be found or he has not contributed to the commission of the offence by his neglect to exercise due care of the child or young person .

¹¹⁹ (1967)HCD 413

¹²⁰ ”SOCIAL INQUIRY”These are reports given by either a probation officer or social welfare officer to the court. These reports are intended to examine the child’s back ground in order to assist the magistrate in choice of sentencing options.

¹²¹ Legal and Human Rights Centre The State Of Juvenile Justice in Tanzania, ‘ A Fact- Finding Report on Legal and Practical Consideration 2003 p.49

¹²² Section 21 CAP 13

This position was also affirmed in the case of **Marcelabarthzar V. Hussein Rajab**¹²³ the court held that:

- (i) a compensation order in respect of convicted juveniles may in an appropriate case only be made against a parent or guardian of the child or young person, it can not be made against the juvenile
- (ii) a parent or guardian against whom a compensation order in respect of a convicted juvenile is made, must be given an opportunity to heard.

From the cited decision of the court and the above provision prohibit imposition of either a fine or compensation to the juvenile offender. However, one may argue that this principle subjects parents to unnecessary hardships caused by their children.

(iii) Discharge or Repatriation

This is one of the alternative punishment in certain circumstances which is provided by the law. The law provides that; if the offender is convicted of an offence other than homicide or one which is punishable with imprisonment exceeding seven years, the court may discharge him absolutely, or order that he be sent to his home or district of origin, or that he be handed over to the care of a fit person or institution willing to undertake such care¹²⁴.

(iv) Imprisonment

The prevailing opinion among penologists that although imprisonment should be available, it should, however, be regarded not as panacea, but only one of many measures and it should be applied to “young offenders” only in specific cases, where after careful examination, it is expected to do good¹²⁵. This view is based on the general experience that, persons and especially young persons, who are sent to prison do not necessarily improve, but very often become more crime prone than they were before, through the influence of bad elements to which they are exposed in prison¹²⁶. Indeed this observation tallies with legislative provisions regulating the imprisonment of juveniles in Tanzania.

Thus, subsection (1) of section 22 of the Ordinance clearly provides that no child, that is, a person under the age of twelve years, must be sentenced to imprisonment, and this regardless of the aggravating circumstances. This again underscores the necessity of inquiring into the age of the accused and coming to a definite finding as to his age; otherwise there may be a miscarriage of justice. However, the same ordinance stipulates that, a child or young person

¹²³ (1986) TLR .p8

¹²⁴ Section 23 of CAP 13

¹²⁵ Juvenile Crime, Juvenile Justice, Panel on Juvenile Crime: Presentation, Treatment and Control, National Academy Press, Washington D.C. ,2001 p.154

¹²⁶ Ibid

may be sentenced to imprisonment when the court considers that none of the other methods in which the case may be legally dealt with by the provisions of the Ordinance or any other law is suitable. In other words a child or young person shall be only sentenced to imprisonment as a measure of last resort. This was emphasized by Mzavas, J. (as he then was) in the case of **Gabriel George v. R**¹²⁷ where states that;

“This court has on countless said that youthful offenders such as Gabriel who was just upon the definition of a child given under S. 2 of the Children and Young Persons Ordinance should not be sent to prison, unless there is no other alternatives sentence.....the offence perpetrated was no doubt a serious one and called for a coding sentence, but Gabriel tender age and his unblemished record mitigated against a severe sentence. Person sentenced could have effect of making him a more formidable criminal when he comes out of jail than when he first went in”.

This position was also affirmed in the case of **Republic v. Fideelis John**¹²⁸ that

(i) *No young person below the age of 16 years should be sentenced to imprisonment if there are other measures of dealing with him.*

(ii) *The trial court had no legal justification to sentence the accused to imprisonment.*

In this case the accused was charged in the District court at Moshi with the offence of escaping from lawful custody contrary to section 116 of the Penal Code. He pleaded guilty to the charge whereupon he was convicted and sentenced to 6 months imprisonment and 6 strokes of cane.

It is important to note that in most cases, magistrates do not observe the above legal principles of sentencing young offenders as observed also in the case of **Republic v. Mohamed Abdullah**¹²⁹. Mohamed a nine year old child, was charged with offence of rape contrary to section 130 (1) and (2)(e) and section 131(2)(a) of the Penal Code as repealed and replaced by the Sexual Offences Special Provisions Act, 1998. Mohamed was alleged to have unlawfully procured sexual intercourse with one girl aged five years old. The accused was convicted on his plea of guilty to the charge and sentenced to life imprisonment.

Furthermore, scheduled offences, such as murder are subject to death penalty. Since juveniles cannot be sentenced to death, those convicted or murder are given indeterminate sentence and detained at what is known as the “pleasure of the President”.¹³⁰

¹²⁷ Criminal Appeal No.46 of 1976, High Court of Tanzania

¹²⁸ (1988) TRL P.165

¹²⁹ Criminal case No.116 of 1999

¹³⁰ Section 26(2) “ sentence of death shall not be pronounced on or recorded against any person who , in the opinion of the court, is under 18 years of age, but in lieu thereof the court shall sentence such person

(v) Corporal Punishment

For lesser offences, and where any other mode of punishment would be unsuitable or unnecessary, the child or young person may be ordered to undergo a certain number of strokes of the cane. It will be noted that, corporal punishment is not mentioned at all in CAP 13, although it is still popular punishment meted out to juveniles by the juvenile courts. Justification for its application appears to be based on the three following grounds. Firstly, in some statutes, some offences carry corporal punishment provisions, for example sexual offences under (the Sexual Offences Special Provisions Act, No. 4 of 1998). For juvenile first offender i.e. below 18 years, it is mandatory to order corporal punishment only.

Secondly, the Case law¹³¹, tends to favour corporal punishment as an ideal non-custodial punishment fit for juveniles. This punishment is officially the celebrated punishment for juveniles to date. It is considered to be the cheapest and most convenient to administer. But is it the most appropriate way of dealing with juvenile offenders or is it indispensable? Indeed Corporal punishment is a technique that can easily be abused leading to physical injuries. Evidence indicates that corporal punishment negatively affects the social, psychological and educational development of juveniles and contributes to the cycle of child abuse and pro-violence attitudes of youth¹³². Hence, most of juveniles facing the punishment are never made to learn and regret for the wrongs they have done.

Thirdly, the Corporal Punishment Ordinance Cap 17¹³³ specifically provides that: *“any juvenile convicted of any offence under the Penal Code, other than an offence punishable with death, or any offence punishable under any other law with imprisonment shall be liable to corporal punishment in lieu of any other punishment to which he may be liable for such offence”*

It is important to note however, that section 2 of Corporal Punishment Ordinance defines a court as any person who is empowered to order corporal punishment, whereas the Children and Young Persons Ordinance does not empower the juvenile court to order corporal punishment. This means

to be detained during the president's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the minister for the time being responsible for legal affairs may direct, and whilst so detained shall be deemed to be in legal custody

¹³¹ The Republic v. John Gillied (1984)TLR. The court held that the trial magistrate must be guided by the provisions of section 22(2) of CAP 13, which provides that, ‘no young person shall be sentenced to imprisonment, unless the court considers that none of the other methods in which the case may be legally dealt with by the provisions of this or any other ordinance, is suitable. The court thus, spelt out several methods as options of dealing with juvenile offenders, upon conviction, one of them is imposition of corporal punishment not exceeding twelve strokes

¹³² Available at www.nasponline.org/information/pospaper_corppunish.html

¹³³ Section 6 of CAP 17

corporal punishment with regards to juveniles would be restricted to juveniles who are between 16 and 18 years and under a law that allows the court to order corporal punishment.

There is therefore, this controversial situation where CAP 13 avoids corporal punishment which is nevertheless provided for in other statutes not specifically addressed to juveniles. However, considering the general controversy surrounding the application of corporal punishment in the present era, it should be advisable for courts to stick to the correctional provisions of CAP 13.

The following tables show the conclusions of cases.
Kisutu juvenile court:-

Table 5
The following sentences/ outcomes for the years 2001- 2003

	2001	2002	2003	
Sentence				Total
Strokes of the cane	20	40	23	83
Conditional discharge	8	13	14	35
probation	14	16	0	30
repatriation	3	7	0	10
Approved school	6	3	0	9
Compensation	4	0	0	4
Fine	0	1	2	3
Charge withdrawn	76	38	20	134
Total	131	118	59	308

Source: Kisutu juvenile court

Table 6: sentence/out come for the years, 1998-2000 in Iringa region
 Total number of cases =237

Release			Convictions				
Type of release	No. of persons	% out of 237	Type of sentence	No of persons	%out of 237	Type of pending	No. of persons
Withdrawal of charges v/s 98 and 224of cpa	95	40	Stroke	36	15	Committed to high court	6
Dismissal of case v/s222 and 2335 of the coa	22	9	Imprisonment to approved school	22	9	Court...	4
Dismissal of cases v/s 230 of cpa	1	4	Discharged condition	9	4		
Nolle prosequere	3	1	Fines	8	3		
Acquittal	26	11	Placement under probation	4	2		
Total	147	628		80	342		10

The following table indicates that 332 of the total cases determined by the Mbeya Resident magistrate's court, in 2000, the juveniles were condemned to corporal punishment.

Table 7¹³⁴: types of sentences imposed by the Resident magistrate's court in Mbeya, 1999-2000.

No	accused	Offence	punishment
1	A9/ 2000: Ally Juma Mwakabambili,	Defilement	Withdraw c/s 225 CPA,1998
2	s51/2000 Saidi Musa Nangumba 14	Rape	8 stroke
3	-555/2000MohamedIbrahimMukashkashi	Unnatural offence	8stroke
4	0 72/2000 4 accused persons, 3 were juvenile aged 17, Adili Mohamad Naku	Unlawful stay in Tanzania	Fine or 6 months in jail, both fine each 70..... later all paid fine
5	Sief Pendeka –16 years	Threatening use of violence c/s 89 penal code, cap 16	Charge withdrawn as neglected by the Republic
6	-Michaw Omar Mbaga, 17 years	Rape	Accused acquitted

Source: Mbeya Resident Magistrate's court Register

Information portrayed in the above figures discloses that the punishment of stroke of the cane still ordered by the trial magistrates. They seem to think that the infliction of pain by this form of punishment upon the convicted juvenile, serves as a deterrent for would be juvenile offender; and fortiori, the courts can also be assumed to envisage or intend reformation of the punished juveniles for fear of going through the same painful process a second time.

The success and failure of corporal punishment can easily determined by the degree of reformation on the one hand, are reflected in the rate of recidivism; and on the other hand the deterrent effect, as reflected in the wave of juvenile offenders.As a matter of fact it has been learnt that even for the juveniles

¹³⁴ Adopted from the report prepared by the Enviro Care, The Children in Conflict with the Law, 2000

who normally never intend to relapse into crime after going through the painful sentences of corporal punishment, many of them still become recidivists. The reason of this is, by and large, obvious. After being punished most juveniles still find themselves in the very same conditions which drove them into crime, the slum; bad company, family strife, indifferent parents, unequal opportunity to social success, and above all, poverty destitution and economic competition. Needless to say, in the absence of substantive change of the original conditions which drives juveniles into delinquency, corporal punishment will hardly be able to curb the problem of juvenile delinquency.

(B) Custodial Measures

(i) Approved School Order.

Under Children and Young Persons Ordinance, an approved school is defined as a school established by a minister or any place or institution declared to be an approved school.¹³⁵ The Ordinance provides circumstances under which an approved school order may be made, that; *where a child or young person is convicted of an offence punishable in the case of an adult with imprisonment, the court may order that he or she be committed in custody to an approved school*¹³⁶. The maximum period of detention in an approved school is three years or until the juvenile attains the age of eighteen years, whichever is the earlier¹³⁷ Hence in the absence of any follow-up, it is very hard to tell whether in such a case reformation has been really affected or not especially for those who are between the age of seventeen and eighteen .

So far only one approved school exists in Tanzania to serve the whole country¹³⁸. The situation is thus difficult to handle especially when children and young persons are supposed to be sent to the said approved school as the capacity of the approved school is three hundred persons. This school serves boys only. That means there is no approved school for girls in Tanzania. Thus, if convicted, girls remain in remand homes or are sent to prison for women.

The school comprises of two independent institutions; a primary school and a home. The home is administered by trained social workers under the Ministry of Labour and Youth Development while the primary school is administered during ordinary school hours of the day by ordinarily primary school teachers under the Ministry of Education. The two therefore operate with different budgets, ethics, regulations and approaches. It was therefore found that the institution as a whole does not function as a coherent system¹³⁹. Due to this duality in the

¹³⁵ section 2 and 26 of the Children and Young Persons Ordinance ,Cap 13

¹³⁶ *ibid* section 24(1)

¹³⁷ *Ibid* section 29(4)

¹³⁸ An approved school is where juvenile delinquents/who are in need of protection are sent to live/reformation and study

¹³⁹ ENVIRON CARE 200, p.56

administration of approved school, the main objective behind the entire programme and policy of approved school that is desirable for the reformation of juvenile offenders who are suffering from serious emotional and behaviour problems to readjust themselves for their return to the community, will be far fetched¹⁴⁰.

In reality the practice shows that the goals of approved school are very much thwarted by several factors, for instance;¹⁴¹

- Children/ young persons are treated as prisoners; they are being mistreated and given plenty of work to do on workers' private farm/homes
- They are punished by whips and beatings
- No complaints from juveniles are allowed
- Primary school teachers discriminate reformees against other ordinary pupils from neighbourhood
- There is a general negative attitude towards children and young reformates by teachers, as well as the surrounding inhabitants which is damaging to the reformates
- Primary schoolteachers do not receive training on how to deal with delinquent children so they tend to mistreat the reformates visibly.

Despite the fact that the law¹⁴² provides vocational training school to those who completed primary school education. It is said that all tools and machines for the practical training such as carpentry, shoe making, sewing, and mechanical agriculture are out of order due to various reasons including lack of maintenance¹⁴³. Therefore children go out of the approved school without much gain. In this situation there is little likelihood, that they will have saved from temptation of backsliding into delinquency or even criminal life after their release.

Lastly, as noted above, there are no special facilities for girl offenders. As a result Kingolwira prison for women in Morogoro region serves for girls too. The prison accommodates female convicts that come from all over Tanzania. Hence, girls, are admitted to prison cells with other older criminals, separated only from pregnant women and nursing mothers.

¹⁴⁰ Probation Practice Guide lines for social workers in Tanzania and section 29 (iv) and 34 of CAP 13. other objectives are to offer primary school education to inmates who had to complete primary school education, to offer self-reliance education both in theory and practice, to temporarily remove the children from dangerous environment i.e. the victims or the family of victims and offer guidance and counseling

¹⁴¹ ENVIRO CARE, 2000 p 60

¹⁴² Section 29(1) of CAP 13

¹⁴³ Hon Maina W, The Ethics Commissioner, The Child and Court op.cit;p15

From the forgoing discussion shows a reflection of imperfect system of administration of juvenile justice. The condition of approved school is not favourable for the best interest of the child at all and lack of such facilities for girls show that they suffer more compared to boys.

Chapter Three

“Children are not made human beings, they are born human beings”
Janusz Korczak

3.1 Applicable International Human Rights Instruments

This chapter analyses the applicable international human rights instruments relevant in the field of juvenile justice system. Attention is focused on international human rights instruments that Tanzania has ratified. This also includes the regional human rights instruments such as the African Charter on the Rights and Welfare of the Child. Tanzania has undertaken several obligations at the international level by ratifying human rights instruments that have a close bearing on the rights of children in conflict with the law¹⁴⁴.

3.2 Convention on the Rights of the Child, 1989

The UN Convention on the Rights of the Child was unanimously adopted by the United Nations General Assembly on 20th November 1989¹⁴⁵. The Convention has become in a relatively short period of the time, the single most important international instrument on the rights of the child. Partly by its widespread ratification¹⁴⁶, it has been made the primary international legal instrument on the rights of the child¹⁴⁷.

The standards of the Convention are binding upon states, which have signed and ratified it. This legal obligation on the part of state parties of CRC shall take actions to implement the provisions of the Convention. Each state party is expected to send a report after two years and then every five years to the Committee on the Rights of the Child, which acts as an international monitoring

¹⁴⁴ International Covenant on Civil and Political Rights (acceded on 11th June 1976), Convention on the Rights Child (Acceded in 1990), African Charter on Human and Peoples' Rights, African Charter on Rights and Welfare of the Child signed in 1998 and ratified in 2003, see www.achpr.org

¹⁴⁵ General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990

¹⁴⁶ As of March 2003, it had been ratified by all countries in the world except the two: the United States of America which has signed but not ratified; and Somalia which does not have recognized government able to ratify it.

¹⁴⁷ Authors share the same opinion: see: Leblanc L.J.; “the Convention on the Rights of the Child”, *Leiden Journal of International Law*, Vol.4, No.2 1991, P.283; McGadrick D; “the United Nations Convention on the Rights of the Child”; *International Journal of the Law and Family* 5 (1991), P.133; Ruiz-Gimenez J, “the Human Rights of the Child”, in *International Commission of Jurists....*

body on the Convention. This pressure of the UN scrutiny has galvanised many state parties to enact legislations and adopt legal measures.

The CRC stipulated basic minimum standards, benchmarks, against which national laws, policies, programmes, measures must be tested. If national implementation is lower than the standards of the CRC, they need to be improved. For example may imply the need to review and reform laws, policies, programmes, measures, practices and related mechanisms. Thus, state parties are responsible for bringing their domestic law in practice into conformity with the obligations under them to protect human rights.

3.3 The African Charter on the Rights and Welfare of the Child,1990

The African Charter on the Rights of the Child was adopted by the Organisation of African Union in 1990 and entered into force in 1999. It is a first regional binding instrument that identifies the child as possessor of certain rights and makes it possible for the child to assert those rights in domestic, judicial or administrative proceedings.

The obligation of states parties created under the Charter are two- fold., namely to “recognize the rights , freedom and duties enshrined in this Charter” and to “undertake the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may necessary to give effect to the provisions of this charter”¹⁴⁸. Due to the ratification of the Charter recently by Tanzania, it is the obligation of the government to promote and protect such rights.

3.4 Comparison between the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child Regarding provisions on Juvenile Justice

The African Charter was concluded and adopted after the Convention on the Rights of the Child. First and foremost regarding to the enforcement, the Charter entrusts the functions of promotion and protection of its provisions to the Committee of Experts on the Rights and Welfare of the Child¹⁴⁹. This Committee has wider powers than CRC’s. Not only does it have power to examine state reports, it also has power to receive individual and inter-state communications¹⁵⁰, and to conduct investigations¹⁵¹. In case of violation of

¹⁴⁸ Article 1 of the ACRWC

¹⁴⁹ Article 32 of ACRWC

¹⁵⁰ *ibid* article 44

¹⁵¹ *ibid* 45

those rights, any person, group or non-governmental organization recognized by AU may lodge the communication to the Committee.

In contrast, the only mandatory monitoring procedure provided for the implementation of the rights provided in the Convention is state reporting¹⁵². Nonetheless, this mechanism is far from being effective, because of the failure of states to regularly report to the Committee. It is unfortunate that the Committee on the Rights of the Child can not deal with individual complaints of violation of protected rights – a procedure that would have given the Committee better opportunity to develop and further elaborate the relevant articles dealing with the administration of juvenile justice and other provisions through its case law¹⁵³.

Further, the definition of the concept of childhood, and therefore the persons to whom the rights of African Charter apply, is contained in article 2. It is one of the most advanced features of the Charter that this definition, which is crucial for the proper application of the Charter's provisions, is very clear and does not allow for any limitations. Every person under the age of 18 is regarded as child falling within the scope of the Charter. The Charter protection is therefore more comprehensive and inclusive. Whereas the Convention restricts its application by including the phrase “unless majority is attained earlier” unlike the Convention, the Charter therefore applies to every person below the age of 18.

With regards to the best interests principle which is a fundamental principle that governs disputes affecting children. The human rights of children are underpinned by this principle, and must be interpreted in conjunction with this principle. Article 4 of the Charter provides that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be primary consideration. The Charter follows the CRC in codifying this principle. It, however, goes a step ahead of the CRC by stating that the best interest of the child must be “the primary consideration” in all actions concerning the child. This offers better protection for children since the best interest principle under the Charter is the overriding consideration. In contrast, the CRC regards the principle as “a primary consideration” meaning that other considerations are equally determined.

The most striking feature of the Charter in the field of juvenile justice is the omission of a guarantee for the child's liberty, the Charter does not guarantee for the child's liberty. The Convention proclaims in its article 37(b) that “no child shall be deprived of his or her liberty unlawfully or arbitrary”. The Charter is absolutely silent on this point and does not repeat the provision or its substantive

¹⁵² Article 44 of the CRC

¹⁵³ Articles 37,39 and 40 of the CRC

content in any of its articles. One may argue that the omission of such right in the Charter creates chances of a child being deprived of his or her liberty unlawfully or arbitrarily.

Moreover, article 37(a) and (b) of the Convention provide that the arrest, detention or imprisonment of a child shall be used only as a last resort and for the shortest appropriate period of time and life imprisonment without the possibility of release is prohibited with regard to children. In contrast, the provision that the arrest, detention or imprisonment of a child shall be used as a last resort and for the shortest period is missing. This is retrogressive considering that other international human rights instruments expressly contain these provisions¹⁵⁴, and importance of protecting children from the adverse effects of criminal proceedings and sanctions.

Moreover, the Charter does not provide for alternative measures of dealing with children to criminal proceedings. Unlike the convention under article 40(3)(b) which relates to the possibility of dealing with a child without resorting to judicial proceedings, and article 40(4) that provides for a range of possible actions to be taken to ensure that children are being dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence.

Despite the omission of certain rights in the Charter, it still breaks new ground for the protection of children's rights in many aspects. First, the Charter requires that a criminal case against a child must be determined as "speedily as possible" which is much stronger than the phrase used in the CRC "without delay". This entails a pace that is over and above that applicable to adults. Secondly, the Charter expressly provides that rehabilitation of the child must be the essential aim of treatment of the child during trial and after conviction. This provision does not come out clearly in the CRC.

Besides the difference between the Convention and the Charter, there are however, similarities in guaranteeing certain rights of children. Notably, the right to have legal and other appropriate assistance in the preparation and presentation of his or her defence. The formulation of this right in the Charter is not qualified in any way and finds no comparison in any other human rights instruments. African states will implement this right then they will have developed it a standard to be emulated by other legal instruments. Another similarity is the right to have free assistance of an interpreter if he or she cannot understand the language of the court and right to privacy.

¹⁵⁴ For example article 37(b) and 40(3)(b) of the CRC, article 11 of the Beijing Rules

Like the Convention, the Charter is predicated on four cardinal principles which are meant to help with the interpretation of the Charter as a whole and thereby guide national programmes of implementation. These principles are non-discrimination, best interest of the child, right to life, survival and development and the views of the child.

In addition to the above rights, both the Convention and the Charter provide the right of children to be separated from adults in detention or imprisonment. Article 17(2) (b) provides for the separation of imprisoned or detained children from imprisoned or detained adults. Unlike Article 37(c) of the Convention, it does not allow for exceptions where it would be in the best interest of the child to remain with adults. This could be interpreted in a way that, even in cases where a child has been imprisoned and has family members serving a sentence in the same prison, it would not be allowed to house them together.

Furthermore, both instruments prohibit absolutely inhuman or degrading treatment or punishment of children. It is important to note that, no justification or extenuating circumstances may be invoked to excuse a violation of this right for any reason.

In conclusion, it should be noted that the specific provisions that the Charter contains in relation to juvenile justice as concerned (Article 17) one notes that the Charter's text is largely based on blueprint of the Convention.

Chapter Four

Analysis of the Country Situation by Using International Human Rights Standards

“Children must be granted the same rights as adults at all relevant stages of the criminal procedure”¹⁵⁵

-Anonymous-

4.1 Some Fundamental Procedural Rights

There are various international human rights instruments as discussed in chapter three that contain a number of human rights entitlements that are applicable whenever the process of administration of juvenile justice is carried out. Every individual be an accused juvenile affected by this process is entitled to these rights provided under the law. It is the obligation of the states to ensure that these rights are respected, fulfilled and protected. Hence, the rights of juvenile offenders or delinquents are essential through out this process and law enforcement officials must act according to the stipulated standards. Because of the peculiarities of juvenile justice, the procedural safeguards take an additional importance since they must, inter *alia*, protect the best interest of the child and ensure respect for its rights to be heard and promote social reintegration.

In this chapter some of the most fundamental rights of the accused juvenile will be discussed. Emphasis will be laid on those rules that are derived from the specific needs of the accused juvenile. Every child alleged as, or accused of, having infringed the penal law shall have, as a very minimum, the guarantees enumerated in the Convention on the Rights of the Child. While some of these guarantees are principles generally established in international human rights treaties, others are designed to meet the specific needs and interests of the child. At the same time it must be borne in mind that, whenever relevant, the procedural rights contained in other international instruments must also be ensured during the administration of juvenile justice.

4.2 Right to Prompt Notification of Arrest

The right to prompt notification is embodied in various international human rights instruments. Article 40(2)(b)(ii) of CRC proclaims the right of the child to be informed promptly and directly of the charges against him or her, and if

¹⁵⁵ Available at http://www.bayefsky.com/./pdf/nicaragua_t4_crc.pdf

appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of her or his defence. This right is also stipulated in the International Covenant on Civil and Political rights¹⁵⁶ and the African Charter on the Rights and Welfare of the Child¹⁵⁷. It has been noted that, the Human Rights Committee that monitors the implementation of ICCPR has emphasised this principle in its concluding observation of the Sierra Leone that “ the arrested person, including juvenile, shall have an opportunity immediately to inform a family member about the arrest and place of detention¹⁵⁸”.

It is important to mention in this juncture that, neither the primary law governing juvenile justice in the country contains such right, nor the law enforcement officials in some cases observe provision of notification provided in the Criminal Procedure Act, 1985.

4.3 Deprivation of Liberty

Deprivation of the liberty¹⁵⁹ of a juvenile poses a special problem in that the juvenile, who is at a very sensitive stage of development, may suffer serious and even irreversible adverse psychological effects if removed from his or her family for purposes of detention. For this reason, international human rights instruments try to reduce the deprivation of children to a minimum. In order to mitigate the negative effects of the deprivation of liberty when it occurs, international instruments likewise provide special rules based on the best interest of the child concerned¹⁶⁰.

It is provided under International Covenant on Civil and Political Rights that any one who is deprived of his or her liberty shall be produced before a court of law without due delay¹⁶¹. This right is also emphasised by the Human Rights Committee that “ in criminal cases any person arrested or detained has to be brought ‘promptly’ before a judge or other officer authorised by law to exercise judicial power. The Human Rights Committee goes on to state that the pre-trial detention should be an exception and as short as possible. Likewise article 37 (b) of the Convention on the Rights of the Child requires that the arrest, detention or imprisonment of a child shall be in conformity with the law and

¹⁵⁶ Article 9(2) of the ICCPR

¹⁵⁷ Article 17(2)(3) of the ACRWC

¹⁵⁸ <http://www.essex.ac.uk/armedcon/story-id/00013.htm>

¹⁵⁹ According to Rule 11 (b) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty “The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.”; the rules are “applicable to all forms of deprivation of liberty in whatever type of institution the deprivation of liberty occurs”.

¹⁶⁰ Human Rights in the Administration of Justice; A manual on Human Rights For Judges, Prosecutors and lawyers, available at <http://www.ohchr.org/english/about/publications/docs/titlepage.pdf>

¹⁶¹ Paragraph 4 of article 9 of the ICCPR

shall be used only as a measure of last resort and for the shortest appropriate of time.

Perhaps the most stricken feature of the African Charter on the Rights and Welfare of the Child in the field of juvenile justice is the omission of a guarantee for the child's liberty¹⁶². However, article 6 of African Charter on Human and Peoples' Rights provides that no one may be deprived of his or her freedom or arbitrary detained except in accordance with the law and be tried within a reasonable time by an impartial court.¹⁶³

Furthermore, article 37(c) of CRC provides that every child deprived of liberty shall be separated from adults is qualified that is, unless it is considered in the child's best interest not to do so. Whereas in the ICCPR, article 10(2)(b) requires that accused juvenile person shall be separated from adults and brought as speedily as possible for adjudication." Similarly phrased like CRC and ICCPR, the ACWRC reiterated that children under detention should be separated from detained adults¹⁶⁴.

Contrary to the forgoing discussion, CAP 13 omits to provide specific safeguards for juveniles under detention while pending trial. Due to this omission, in most cases children are likely to stay longer in police detentions for lack of peoples' interest to pursue their cases, but only to have them detained. More over, despite the fact that laws¹⁶⁵ clearly stipulate that juveniles should not be mixed with adults, due to lack of facilities in some regions in the country, arrested juveniles continued to be locked up with adults in police detention and remand homes/ prisons. It is observed that juveniles above 16 but are below 18 years of age may be kept in normal prisons. As discussed in chapter two of this work that the Ordinance does not cover young persons who are between the age of 16 and 18 years. The Committee also expresses this concern on the Rights of the Child in its concluding observation on Tanzania about the holding of minor in adult detention facilities, the poor conditions in detention facilities and the lack of adequate facilities for children in conflict with law¹⁶⁶.

¹⁶² Gose, M; *The African Charter on the Rights and Welfare of the Child; An Assessment of the Legal Value of its Substantive provisions by Means of a Direct Comparison to the Convention on the Rights of the Child*, Community Law Centre, South Africa, 2002 p 67

¹⁶³ Article 7 of the African Charter on Human and Peoples' Rights, 1981

¹⁶⁴ Article 17(2)(b) of ACWRC

¹⁶⁵ Section 5 of CAP 13 & section 33 Criminal Procedure Act, 1985

¹⁶⁶ Concluding Observation of the Committee on the Rights of the Child: Republic of Tanzania, see unhchr.ch/tbs/doc.nsf

It is my submission that, it is extremely important for the wellbeing of juveniles in detention to be kept separate from adults offenders, and this requires a policy decision to build and maintain more detention facilities. Failure to comply with article 37(c) of the CRC is an indicator that the practice is not in accordance with the spirit of the Convention.

4.4 The Right to Privacy

The accused juvenile has the right “to have his or her privacy fully respected at all stages of the proceedings”¹⁶⁷The Beijing Rules expands this rights in its rule 8(1)(2) that “the juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published”. As explained in the Commentary, this rule “stresses the importance of the protection of the juvenile’s rights to privacy. Young persons are particularly susceptible to stigmatisation.

Further more, for the purpose of a fair and just trial for juvenile offender the Beijing Rules provides that “ all the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding which shall allow the juvenile to participate therein and express herself or himself freely. Article 17(2) (d) of the African Charter on the Rights and Welfare of the Child categorically affirms that the States parties “shall prohibit the press and the public from attending the trial of a child accused of having infringed the law”.

As discussed in chapter two, the right to privacy is not adequately implemented in Tanzania. Despite the legal requirements that children’s cases be heard in juvenile courts i.e. in camera, some law enforcement officials commonly overlook or neglect to enforce this requirement. They fail to convert regular courts into juvenile courts; likewise this right is violated when a juvenile offender stands trial with an adult offender.¹⁶⁸

4.5 The Right to Free Assistance of an Interpreter

According to the Convention on the Rights of the Child every child has the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used¹⁶⁹. The same rule is contained in article 17(2)(c)(ii) of the African Charter on the Rights and Welfare of the child. This is yet another

¹⁶⁷ Article 40(2)(b)(vii) Of CRC and article 14(1) of the ICCPR

¹⁶⁸ Section 3 of CAP 13

¹⁶⁹ Article 40(2)(b)(vi) of CRC

rule that also exists in other international human right treaties, such as article 14(3) (f) of the International Covenant on Civil and Political Right. No doubt this rule is important for children who cannot speak language used by the court. Commenting on article 14, the Human Rights Committee observed that the right to have an interpreter is independent of the out come of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence. This principle is also affirmed in the case of *Guesdon v. France*¹⁷⁰ that “...if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.

Having stated so, it is worthy to note that CAP 13 is silent on the right of juvenile to have free assistance of an interpreter if she or he does not understand the official language of the court. As explained in chapter two the official language of the court in Tanzania is either Kiswahili or English. Besides English and Kiswahili, there are other tribal languages spoken in the country. And it might happen in some cases children are not conversant with the official language of the court. In such cases it is imperative that CAP 13 to have a clear provision for free assistance of an interpreter. Lack of this provision in the Ordinance(i.e. failure to follow the court proceedings) amounts to violation of the best interest of the child which should be the primary consideration in all action concerning them including court proceedings.

4.6 The Right to Legal Assistance

Article 37(d) of the CRC specifically provides children with the right appropriate legal and other assistance¹⁷¹ and to challenge any deprivation of liberty before a court or similar body. Similarly, the African Charter on the Rights and Welfare of the Child provides in this respect that every child accused of infringing penal law shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence¹⁷².

As discussed earlier that the right to legal aid assistance in Tanzania is provided in serious offences only¹⁷³. On the other hand, most of the offences committed

¹⁷⁰ Communication No. 219/1986, UN Doc. CCPR/C/39/D/219/1986 (1990)

¹⁷¹ The reference to “other appropriate assistance” makes it possible for a child to have his or her defence assured by non lawyers, including parents or legal guardians. Article 40 of the CRC adds to the child’s established right to legal and other appropriate assistance, the principle that the child’s parent or legal guardians should be present ‘ unless it is considered not to be in the best interest of the child’ the article implies that parents or legal guardians can be required to be present, and can be excluded in certain cases. This is also emphasised in rule 15(2) of the Beijing Rules.

¹⁷² Article 17(2)©(ii) of ACRWC

¹⁷³ The Constitution of the united Republic of Tanzania, 1977 and the Criminal Procedure Act, 1985 provide certain protection to any person accused of a criminal offence. They include the rights :to defend himself

by the juveniles are tried by the primary courts, proceedings of which, bars lawyers to render their services¹⁷⁴. It is a cardinal principle that an accused juvenile should have legal representation at all stages of proceedings, lack of this service amounts to violation of the right to fair trial.

From the above discussion, it is my contention that for the best interest of the child the government needs to ensure respect for all juvenile justice standards including the rights of children during arrest, detention procedures, minimum condition of detention, to legal representation and free interpreter where needed and other relevant assistance .

4.7 Adjudication of Juvenile Cases

International human rights standards provide basic guidelines on the adjudication and disposition of juvenile cases. The following discussion is focused on some of these guidelines.

4.7.1 Probation Orders

It is a fundamental requirement that in all cases involving criminal offence, before the competent authority renders a final disposition prior to sentencing, the background of a juvenile offender should be presented. This is in the form of social inquiry report in which the juvenile is living or the condition under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority¹⁷⁵. In other words, the magistrates should determine the sentence and its duration by following the recommendation of the welfare officer or probation officer in their investigation or pre-sentencing report.

Due to lack of enough probation officers in the country, few juvenile offenders enjoy this right. The committee on the Rights of the Child has expressed its concern about limited numbers of trained personnel in the country to work with children in the administration of juvenile justice¹⁷⁶.

4.7.2 Penal Sanctions

4.7.2.1 Imprisonment

International human rights instruments set certain limits on the kind of penal sanctions that can be imposed on a juvenile found guilty of having committed a criminal offence. Article 37(a) of the Convention on the Rights of the Child

of herself in court through a legal representative of his or her choice, to examine in person or by legal counsel

¹⁷⁴ Act No.4 Of 1984

¹⁷⁵ Rule 16 of the Beijing Rules

¹⁷⁶ Concluding Observation of the Committee on the Rights of the Child of Tanzania 2001

stipulates that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

With regard to the prohibition of life imprisonment without the possibility of release, article 37(b) of the Convention on the Rights of the Child provides that detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. A life imprisonment would ipso facto be contrary to this rule and also to the notion of the best interest of the child, which implies that a child shall be given a chance of psychological recovery for the purposes of social reintegration.

Despite the fact that the laws in the country prohibit the life imprisonment to juvenile offenders, it is observed that life imprisonment is still imposed in some juvenile cases for example as it was in the case of **R v Mohamed Abdullah¹⁷⁷ and Republic versus Nguza Vicking@Babu Sea and 4 others¹⁷⁸**.

4.7.2.2 Corporal Punishment

It should be noted that, corporal punishment always violates the child's physical integrity, it demonstrates disrespect for his or her human dignity and it undermines self-esteem¹⁷⁹. In addition, corporal punishment often amounts to cruel, inhuman or degrading punishment, and in a significant number of cases it is the right cause of death¹⁸⁰.

CRC in its paragraph (a) of article 37 stipulates that no child shall be subjected to torture or other cruel or inhuman or degrading treatment or punishment. Likewise, African Charter on Human and Peoples' Rights¹⁸¹ and African Charter on the Rights and Welfare of the Child¹⁸² prohibit any act which may lead to inhuman or degrading treatment or punishment. Furthermore, the United Nations Rules and Guidelines strictly prohibit any disciplinary measures constituting cruel, inhuman or degrading treatment including corporal punishment¹⁸³.

Although international human rights instruments and the Constitution of the United Republic of Tanzania¹⁸⁴ prohibit any act that may amount to inhuman or

¹⁷⁷ Criminal Case No.116 of 1999

¹⁷⁸ Criminal Case No 555 of 2003

¹⁷⁹ Article 13 (5) (e) of the Constitution of the United Republic of Tanzania

¹⁸⁰ Fottrell Deirdre, *Revisiting Children's Rights*, Kluwer law International, The Hague, 2000, p114

¹⁸¹ Article 5 of the Charter

¹⁸² Article 17(2)(a) of ACRWC

¹⁸³ Rule 17.3 Of the Beijing Rules, Rule 67 of PJDL and paragraph 21 (h) and paragraph 54 of the Riyadh Guidelines

¹⁸⁴ Article 13 of the Constitution

degrading, treatment, as discussed in chapter two of this work. Some of the statutes in the country contain provisions for corporal punishment for juveniles. On the same line the Committee on the Rights of the Child notes with regret that the law does not prohibit the use of corporal punishment as a sentence for children and youth in the juvenile justice system, hence it recommends that the government must take legislative measures to prohibit all forms of physical and mental violence, including corporal punishment within the juvenile justice system, schools and care institutions as well as families¹⁸⁵.

4.8 Conditions of Institutions to which Children deprived of their Liberty are committed

Deprivation of liberty is defined as any form of detention or imprisonment or the placement of person in public custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or public authority. The approved school certainly falls into that category of deprivation of liberty and while it is an alternative to adult prisons, it should still only be used as a last resort and for the minimum period possible¹⁸⁶.

When a child or a young person is taken into state custody, the government is obligated to meet certain minimum requirement under international human rights standards. That means measures to promote physical and psychological recovery and social reintegration of a child should be taken into account.

In addition to the above discussion, the UN Rules for the Protection of Juveniles detail the parameters of the right to education, vocational training, and work for children deprived of their liberty¹⁸⁷. Children of compulsory school age have the right to education which should be designed to prepare him or her for return to society¹⁸⁸. Juveniles above compulsory school age who wish to continue their education should be permitted to do so, and every effort should be made to provide them with access to appropriate educational programmes¹⁸⁹. According to the Beijing Rules, the objective of institutional treatment of children are to provide educational and vocational skills with a view to assisting them to assume socially constructive and productive roles in society¹⁹⁰ and to ensuring that they do not leave the institution at an educational disadvantage¹⁹¹.

¹⁸⁵ Concluding Observation of the Committee on the Rights of the Child: Republic of Tanzania 2001, see www.unhchr.ch/tbs/doc..nsf

¹⁸⁶ Rule II (11)(b) of JDL

¹⁸⁷ Rules 38-46

¹⁸⁸ *ibid* Rule 38

¹⁸⁹ *ibid* Rule 39

¹⁹⁰ Rule 26.1 of the Beijing Rules

¹⁹¹ *Ibid.* Rule 26.6

It is my submission that, the institutionalisation of children in Tanzania fails on two counts. It fails to address the root problem that leads to deluge of children to engage in criminal acts. It also lacks remedial measure to provide children with the rehabilitation, support, and education required to enable children in custody to live in the outside world as responsible and capable members of society. Likewise there is insufficiency of facilities and programmes for the physical and psychological recovery and social reintegration for girl offenders.

From the foregoing discussion one may conclude that, international human rights instruments promote a number of rules and principles which constitute a basis of juvenile justice system and provide the accused juvenile with a large amount of protection and guarantees throughout the process of administration of juvenile justice. These principles should be observed, respected, fulfilled and protected by the law enforcement officials.

Chapter Five

5.1 Harmonisation of the country Situation with International Human Rights Standards

5.2 Harmonisation of the Law and Practice

Harmonisation of laws entails conflicts between different laws that are applicable in a country on the same subject matter. Different pieces of national legislation may be providing different standards and procedures on the same aspect and therefore creating confusion and inconsistencies that lead to unequal treatment of equal parties when they approach different forums.

Also harmonisation of laws becomes necessary when a country becomes a party to an international convention or treaty and there is a discrepancy between the norms and standards in the international agreements and the national legislation. In such a situation the country is required to take legislative measures to ensure that national legislation conforms to the international standards that the country has agreed to be bound with.

It needs to be underscored that international instruments require state parties to adhere to them after ratification. This is due to the fact that once a state party ratifies an instrument then it becomes binding and under the international principle of *pacta sunt servanda* a country must fulfil its obligations. Ratification in countries where international instruments are not self-executing the state parties are responsible for bringing their domestic law and practice into conformity with the obligations under them in this case to ensure that the juvenile justice system in Tanzania is compatible with international standards. That means that every state has the responsibility to remove any inconsistency between international instruments binding on it on the one hand the national legislation on the other hand.

It is relevant here to briefly delve on treaty practice in Tanzania. The United Republic of Tanzania follows dualistic system where ratification of a treaty does not automatically transform that instrument into a piece of national law. International Instruments are not self-executing at the national level although at the international level the state is bound and must respect it. The citizens or other people living in a country cannot go to a national court to enforce an international instrument unless it has been transformed into a national piece of legislation. That means that countries that follow dualistic system like Tanzania the legislature must pass a law specifically adopting the instrument or its provisions in order for it have a force of law in the municipal setting. Courts

cannot directly enforce international instruments unless their provisions are locally enacted or incorporated into domestic law.¹⁹²

This position is affirmed by the Court of Appeal of Tanzania in the case of *Transport Equipment Ltd and another v. D.P. Valambhia*¹⁹³ where it was held by Ramadhani, J.A. that though Tanzania has ratified the International Covenant of Civil and Political Rights, admittedly, the legal position is that, these instruments are not self-executing. There has to be an Act of Parliament to make them operative. According to the Constitution of the United Republic of Tanzania, 1977 it is the Parliament that ratifies international instruments be they treaties, conventions or protocols. Article 63 (3) (e) of the Constitution states that:

“For the purpose of discharging its functions the National Assembly may deliberate upon and ratify all treaties and arrangements to which the United Republic is a party and the provision of which require ratification”

Then Tanzania has to incorporate the provisions of the international instrument she has ratified into national law. The process of enacting such a law to adopt the provisions of an international instrument follows the normal procedure for making any law in Tanzania. In this case a Bill has to be proposed by the Cabinet and be drafted by the Chief Parliamentary Draftsman in the Attorney General’s Chambers. Then the Bill has to be published in the Government Gazette before being tabled in Parliament. It will then go for first, second and third reading in Parliament before it is passed as an Act of Parliament. For it to become law it must receive the Presidential assent and finally be published in the Government Gazette as an Act of Parliament.

The other avenue for harmonisation is through court judgments. However that route is long and depends very much on the judge. It has become a practice by courts in Tanzania where the country has ratified an instrument but has not incorporated into domestic law to use the instrument as an interpretation aid of the existing national instrument. The courts as it was in the case of *Transport Equipment Ltd & Another v D.P. Valambhia* have held that so long as the state has ratified the instrument then it signifies that it intends to fulfil the legal obligation provided under that instrument.¹⁹⁴

Therefore it is upon the Ministry of Justice and Constitutional Affairs as well as the Ministry of Community Development, Children and Gender to come prepare

¹⁹² Kabudi, P.J., *Human Rights Jurisprudence in East Africa: A Comparative Study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda*, Baden-Baden, Nomos Verlagsgesellschaft, 1995, p. 29; Makaramba, R.V, *Children Rights in Tanzania*, op. cit., p. 9; Seaton, E.E. & Maliti, S.T., *Tanzania Treaty Practice*, Nairobi, Oxford University Press, 1973, pp. 107 – 110.

¹⁹³ Civil Application No. 19 of 1993, Court of Appeal of Tanzania, at Dar Es Salaam (unreported).

¹⁹⁴ *Ibid*

proposals in a Cabinet Paper to be tabled before Cabinet requesting the Government to prepare and submit a Bill in Parliament that will harmonise the provisions of juvenile justice in Tanzania with international standards and norms. In other words, by incorporating the norms into national legislation, the government would be making a clear commitment to implementing international human rights in respect of juvenile justice.

For the purpose of complying with international human rights standards, the government has taken several initiatives to improve the system of juvenile justice in the country.

5.3 Initiatives Taken by the Government to Improve Juvenile Justice System

The government, through the Law Reform Commission, which is under the Ministry of Justice and Constitutional Affairs, conducted a study of various laws on children to see whether children's rights have been adequately safeguarded as per the stipulations of the Convention on the Rights of the Child¹⁹⁵. This study looked at different aspects of all laws affecting children such as, definitions of the term child, inheritance, succession, maintenance and custody of children, child labour, children in conflict with the law and other issues affecting children's welfare as a whole¹⁹⁶.

The Commission has observed in its report that;

The children and Young Persons Ordinance does not distinguish the procedure for dealing with children needing protection and the procedure that must be followed when a child has committed an offence. The commission therefore, recommended that the two sets of procedures should be distinguished and appear in different parts of the piece of legislation. The part on protection should be clearly provided to protect children. It should not appear as if needing protection is an offence in itself. This is what seems to be the case with the present section 25 of the Ordinance. The part related to the procedure followed in cases where children have committed an offence, would be distinct from the one on protection in as much as it will provide for apprehension, bail, detention pending appearance before the court.

¹⁹⁵ Law Reform Commission, Report on the Laws Relating to Children in Tanzania, Government Printer, Dar Es Salaam, April, 1994, The report of the Committee for reviewing the Law Reform's Report on laws relating to Children in conflict with the Law, 2001, The United Republic of Tanzania, Department of the Judiciary Quick Start Project Report prepared by the University of Dar es Salaam, unpublished, 2004 and United Republic of Tanzania Legal Sector Reform Programme, Medium Term Strategy December 2004 Vol. 1 Government Printers Dar es Salaam

¹⁹⁶ Committee on the Rights of the Child, Initial Report of Tanzania (CRC/C/8/Add.14/Rev 1), of 25th September 2000, paras 58-64

Also the Commission noted that CAP 13 still maintains provisions on convictions whose effect to children could be damaging. It has therefore recommended that all provisions suggesting conviction status should be reframed to do away with the said status, which gives children and young persons a permanent criminal label. The conviction of any person while a juvenile should not be taken into account in his records during his adulthood.

The Commission observed in its findings that borstal schools are non-existent in Tanzania. Accordingly it recommended that there is need to establish borstal schools to cater for young adults, between 16-18 who are not covered by the Ordinance.

With regard to enforcement, the Commission noted that the law is not very clear on various roles of officers concerned that are from apprehension stage until relevant orders are made. For instance the role of apprehension officer and matters relating to notification of arrest, the role of social welfare officers upon apprehension, during hearing, remand homes and approved school. It was therefore felt by the Commission, that there ought to be elaborate provisions in CAP 13 on among other things, the exact roles of social welfare officers for the best interest of juveniles. Besides the Children and Young Persons Ordinance, there are other laws, which are usually referred to in tackling children problems. Since the Ordinance is not only the single legislation, which is resorted to in every case, there is danger of victimisation if there is not much clarity on how to handle children related cases.

Lastly, the Commission noted that, the starting point of handling children cases is through a court order. However, there have been some children cases, which have been dealt with outside the normal court procedures. This has always been happening since a very long time ago. There is a need to give legal recognition and supervision of such methods.

The Ministry of Justice and Constitutional Affairs in 2001 formed a committee for reviewing the report submitted to the Minister by the Law Reform Commission. The Review Committee in its general observation on laws relating to children has generally agreed with the findings and recommendations on the Law Reform Commission. The Committee took note of the fact that laws relating to children are inconsistent and fragmented across various statutes. This brings a lot of difficulties in interpretation and in definition of similar terms, which might be used, in different legislation and in different context. The Committee was also of the view that consolidated children legislation will bring changes and improvement into the law and would provide a single and consistent legal regime in matters relating to children. This will consequently improve the care, upbringing and protection of the child.

For the purpose of improving juvenile justice in the country, in 1997 the government constructed a separate juvenile court building at Kisutu in Dar es Salaam. In January 2001 an Impact Assessment Committee set by the government on Kisutu juvenile court revealed that the court, to great extent had achieved its purpose¹⁹⁷. The assessment recommended strengthening of juvenile justice through increasing the number of juvenile courts, remand homes and expansion of Mbeya Approved School as well as training juvenile justice administration officials on their roles and basic rights of juveniles.

For further improvement of the administration of juvenile justice system in the country, in 1999 the Government launched the Legal Sector Reform Programme, Medium Term Strategy and Action Plan (2000-2005) and is currently implementing a Quick Start Project within the strategy¹⁹⁸. The project objectives include development of an Action Plan for enhancing juvenile justice administration system in Tanzania. The project has also supported interim measures on the pressing needs of juvenile justice administration. These include training court staff, police, prison and probation officers in best practices of administration of juvenile justice and construction of juvenile courts in Mtwara and Mbeya.

It is important to note that, the implementation of the project has so far achieved the training of juvenile justice personnel in best practices in administration of juvenile justice. The training identified key issues for enhancing juvenile justice as the enabling policies and regulatory frame work, weak capacities in the juvenile justice administration agencies and lack of appropriate training programme in juvenile justice training. It is also worth noting that the training programme was only for training of trainers of induction training for juvenile court staff. Other initiatives include, designing juvenile courts in Mtwara and Mbeya and alteration and rehabilitation of Kisutu Juvenile and provision of key reference materials on juvenile justice administration.

Moreover, in 2001 the Government established the Commission for Human Rights and Good Governance¹⁹⁹ among other duties it also monitors investigates and refers abuses of children's rights and non-compliance with the provisions of the Conventions. However, complementary mechanisms for ensuring such compliance, such as the institution of a Child Rights Committee or Children's ombudsman, is under consideration by the Ministry of Community Development, Women Affairs and Children²⁰⁰.

¹⁹⁷ Makaramba, R V; and Virginia Wieler Construction on Juvenile Courts Impact and Needs Assessments, 2001 unpublished

¹⁹⁸ The Quick Start Report University of Dar es Salaam, Faculty of Law, 2004 unpublished

¹⁹⁹ Established by the Act No.3 of 2001

²⁰⁰ CRC/C/C8/Add.14/Rev.1 2000

The above-mentioned initiatives taken by the government are good, recommendable aimed at achieving countrywide improvement in the administration of juvenile justice. Coordinated, comprehensive, participatory, effective, focused programme, which also involve all juvenile justice stakeholders in the country are needed.

Although, the government is willing to improve the situation, its capacity to translate international human rights law into practice is constrained by economic and social factors. This is due to the fact that Tanzania is among the UN least Developed Countries facing economic hardship²⁰¹. This is one of the obstacles in complying with the provisions of international human rights treaties in the administration of juvenile justice in the country. It has to be noted that there is no country in the world that could say that it has fully implemented all human rights obligations.

5.4 What still Needs to be Done

Despite the efforts and initiatives taken by the government to improve the administration of juvenile justice system in the country, this study has observed that there are still problems in the system that need to be improved in order to achieve minimum standards set by the international human rights treaties.

As stated earlier, the law and practice in the administration of juvenile justice in Tanzania are not fully in line with international human rights standards. Hence, this part is an attempt to contribute to the initiatives and efforts taken by the government to improve of the juvenile justice system in the country.

First and foremost, the findings of this research reveal that, there are weaknesses in the legal framework that governs juvenile matters. There are many laws touching on a juvenile but with no common stand on how a juvenile should be treated. It is therefore recommended that the country enacts a comprehensive Act that pulls together all the disparate laws related to children, that it up-dates all the existing, outdated laws reflecting and incorporate the principles of the Convention on the Rights of the Child and the African Charter.

It has been found in this research that there are procedural weaknesses in CAP 13 relating to apprehension of children and young persons and bringing them to court. Presently, there is lack of requirements as to notification of parents or guardians after a child or young person is apprehended. Although, this requirement is provided under section 56 of the CPA, it is observed that the

²⁰¹ The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child,1998-2003

police rarely observe this requirement. Therefore there is a need of conducting regular training session to police officers in the need for notification.

There is therefore a need of amending CAP 13 to include a specific provision for notification of parents. Furthermore, there is a legal requirement that parents should attend court proceedings involving their children, in practice not all parents adhere to this provision. Hence there is need for the law to regulate the parents/ guardians involvement and participation in cases involving their children especially where such children are unrepresented²⁰² and for the poor parents who can not afford to come to court the state can assist them in covering costs.

As noted earlier in this work, for obvious reasons the law directs that juveniles should not be associated with adults while in custody. But due to the scarcity or non-availability of juvenile remand homes and approved schools in most regions in Tanzania, juveniles are some times mixed with adult offenders or suspects while in police lockup or prisons. In order for the government to comply with article 37 (c) of the Convention and article 17 (2)(b) of the ACRWC, it is recommended that the Government should establish separate detention facilities at police stations for juveniles and increases the number of remand homes and approved schools through out the country for the best interest of juveniles.

Another example of weakness in the juvenile justice system is that children in some cases are tried in regular courts, which is contrary to the law. According to CAP 13 a juvenile court must sit in a separate building or room. Since there is only one juvenile court in the country, any court hearing a juvenile case has to sit as a juvenile court. In other words, all trials involving juveniles should be in camera. Despite this requirement, it is not uncommon in primary courts to try juvenile cases in open courts.

Hence, there would be a need for the judiciary to issue a directive to magistrates that they should try such cases in camera. This should go hand in hand with establishment of more separate juvenile courts throughout the country, presided over by specially trained magistrates.

On appearance of advocates in courts section 33(1) of the Magistrates' Court Act, 1984 bars advocates from primary courts proceedings. Because of the absence of professional defence, many of the juvenile offenders tried in primary courts, some not necessarily criminal offenders, for instance, truants have been at times punished without gaining any lesson from the punishment. Therefore the said provision should be omitted so that advocates can also appear in

²⁰² Rule 10 and 15 of the Beijing Rules

primary courts and represent juvenile offenders. In the alternative, there may be established a system that can allow paralegals or any other interested persons or institutions to represent juveniles who come into conflict with the law in the country's criminal justice. This in effect, will safeguard the best interests of young offenders in our criminal justice. Also extension of legal aid services by NGOS to regions and districts instead of urban areas only.

Lack of legal defence in juvenile criminal court proceedings has greatly impaired the right of juvenile offenders to due process of law. First and foremost the very act of not being represented by a legal counsel in juvenile court proceedings is in itself a denial of due process. It is therefore recommended that a legal aid scheme for juveniles should be established. But considering the limited number of such schemes and their present constraints, it would still be more ideal if social welfare officers and parents/ guardians/ relatives were more effectively used to assist juvenile offenders and that the juvenile court itself should be less of technicalities.

The government could also get some inspiration from Uganda's experience that it is now a requirement that before the annual renewal of practicing certificate for lawyers in private practice such lawyers must have done at least four or more cases (voluntary aid) which includes children's cases²⁰³.

Furthermore the government should design and implement a well regulated and managed country wide programme which will monitor and build up a legal aid network for the legal aid institutions through a consultative process. This shall include establishing a fund to provide grants to legal aid implemented by NGO or voluntary associations'. The funds can be raised through budgetary allocation and voluntary contribution as well as donation from within Tanzania and from donor agencies.

In addition to the above mentioned problems, not all juvenile offenders enjoy the right to have social investigation reports prepared by the probation officers before the court passes sentence. This is due to the insufficient number of probation officers in the districts to attend juvenile cases. It is recommended that the number of probation officers should be increased and there should be provisions in CAP 13 for the establishment of probation services for juveniles throughout the country. All districts should be declared probation areas for this purpose and local government authorities should be required to fund such programmes.

²⁰³ Available at http://www.penalreform.org/english/voln_jjuganda.htm

More over, this study has shown that in many cases children or young persons are denied bail for lack of sureties, thereby necessitating the child remaining in detention. This is due to the fact that some of them are street children whose parents' whereabouts are not known .Furthermore Tanzania is a poorly resourced country and therefore the requirement for cash surety is a real hinderance, as probably parents or guardians genuinely fail to raise the required amounts and would therefore fear coming to court. An option to be considered in addressing that problem is that monetary payments of bail as a condition of pre-trial release should not be imposed in such cases. Conditional release should remain an option, but could be linked to other conditions of release, such as reporting to a probation officer or other officials who deal with children. Existing options could be developed innovatively, for example by including curfews or school attendance. This problem can be addressed by following an example of Malawi whereby the promise of the child or his/her parents or guardians that the child will return to court when required can be specified as a sufficient surety²⁰⁴.

The findings of this research further reveal that, in some cases magistrates impose long-term sentences on juveniles, which does not serve the best interest of the child. This could be due to the absence of guidelines and regulations for the better carrying out of the purposes and provisions of the Children and Young Persons Ordinance. In order to address this situation, sentencing guidelines, based on international rules, should be drafted to assist magistrates in the juvenile courts. It is my view that other methods of rehabilitating juveniles should be resorted to such as diversion options.

These options have several advantages namely, to avoid unnecessary entry of juvenile into the juvenile court system whenever possible, to avoid formal trial and convictions that are very traumatising experiences to the juvenile and instead use diversion options. Children of any age in need of care and protection should not normally be brought before a court but rather dealt with by social services agencies. In order to safeguard the interest of juveniles, there is a need for Cap 13 to clearly provide for diversion. This should apply where the magistrate or social welfare officer is satisfied that the case is fit for diversion, and he or she should so direct.

There should be also a provision for the police to have power to divert cases when it is deemed necessary as it has been practiced in Uganda²⁰⁵ and Zambia²⁰⁶.In these countries the police have been empowered to deliver a

²⁰⁴ South Africa Law Commission ,Issue Paper 106,Juvenile Justice,available at www.law.wits.ac.za/salc/salc.htm

²⁰⁵ Available at http://www.csvr.org.za/papers/pap_kampala.htm

²⁰⁶ Child Justice in Africa ,A guide To Good Practice, Community Law Centre University of the Western Cape, available at <http://www.law.wits.ac.za/salc/issue/ip9.html>

caution at the point of arrest and let the child go. The police may also dispose of the case themselves without recourse of formal proceedings. Thus the practice implements the principle of diversion at the point of first contact itself in line with the mandate of the Beijing Rules. If the police are convinced that the case is not a fit case for diversion and the child cannot be immediately taken before the court, the police can release the child on a personal bond or bond entered into by his or her parent or guardian. Apart from police diversion, courts are also obliged to release an accused if the case has not been brought to trial within a certain period of time.

Tanzania can consider an example of South Africa whereby a person (including juvenile offender) who has committed a non-serious offence and who has acknowledged guilt or responsibility for the act, can be diverted from the courts. The prosecution evaluates the case and suspends the prosecution or withdraws the case on certain conditions. These may include conditions that the offender successfully completes the programme; the prosecution is notified and withdraws the case. It is further suggested to introduce a procedure known as the preliminary inquiry, which aims at ensuring that a case of each child is carefully considered and each child is given maximum opportunity of being diverted out of the system. Those proceeding to trial will therefore be better protected from the risk of pre-trial detention. The envisaged system is balanced in such a way that the majority of children will be afforded the opportunity to be held accountable outside the criminal justice system.²⁰⁷

As it has been practiced in Malawi, Uganda²⁰⁸ and Ghana²⁰⁹ that they have established village courts at the village level authority, Tanzania should use ward tribunals that were established and spread through out the country. The tribunals will use informal procedure to entertain minor criminal cases. The court's sentencing jurisdiction will be limited to reconciliation, compensation, restitution, apology or caution. This implies that many children will not enter the formal criminal option and their cases will be heard and dealt with in the local contexts in which the offences are committed. This also improves the child's access to justice and reduces congestion in places of custody.

Another inconsistency of administration of juvenile justice practice in the country with international human rights standards is the imposition of corporal punishment on juvenile offenders. Corporal punishment is still incorporated in our laws as punishment that can be given to children and young offenders²¹⁰. It should be advisable for courts to stick to the correction provisions of CAP 13 as

²⁰⁷ Ibid

²⁰⁸ http://www.penalreform.org/english/vuln_jjuganda.htm

²⁰⁹ Child Justice in Africa, A guide To Good Practice, Community Law Centre University of the Western Cape, available at <http://www.laq.wits.ac.za/salc/issue/ip9.html>

²¹⁰ Corporal Punishment Ordinance, Cap 17 and the Sexual Offences Special Provision Act, Act no.4 of 1998

noted earlier that corporal punishment is not mentioned at all in CAP 13 which is the primary law governing children in conflict with the law.

There is a provision in the Ordinance for social inquiry reports, or probationers' reports to be submitted in juvenile courts in cases involving children. These reports help the court to determine the appropriate disposition measure against any child appearing before it. But few of these reports are submitted to the courts by probation or social welfare officers. This is due to the fact that there are not enough probation and social welfare officers in the country. As results of that shortage; juvenile courts hear and dispose of many cases without assistance of such reports. This certainly results in some injustice and inappropriate disposition of some matters by the juvenile courts.

In order to address this situation, it is proposed that the government should encourage people to pursue this field. Thereafter there should be a government appointed probation officer or social worker based at or connected to every juvenile court who would be involved in a number of functions relating to the child, including the preparation of social inquiry reports on children appearing in the court.

It is also a fact that only one approved school exists in Tanzania. As a result children from many different backgrounds who are sent to the school for diverse reasons are mixed together. Under the circumstances offenders may negatively influence other children who are there simply because they are homeless or abandoned. Besides, juvenile offenders at the approved school do not have access to vocational training due to lack of facilities which would enable them to be self reliant after serving their sentence.

It is obvious that the present single approved school does not suffice the present wave of juvenile delinquency for the whole country. More approved schools are therefore needed in order to achieve its objective of educating, re-integrating and rehabilitating children with a view of assisting them to assume socially constructive and productive roles in society, instead of condemning them to institutions without making any efforts to restore their wellbeing and moral development, with the greatest support for long time solutions. And there should be legal provisions to ensure proper treatment of juveniles returning from such institutions. The group of juveniles with problems returning from approved school must be properly handled by those who know and understand their needs, so that the entire professionals receive them back in a community. This would include the co-operation of schools, private agencies, job placement resources and other means that can be opened to receive the rehabilitated offenders.

As observed in this study some violations of children rights are due to the lack of human rights education to the law enforcement officials. The rights and needs of child victims, juvenile offenders and vulnerable groups of children would be better protected and provided for if training on children's rights and issues is given to those working with these groups of children and in particular to law enforcement officials. In other words, there should be put in place a systematic and highly coordinated training programme of human rights education for juvenile justice personnel. The training should include police and other law enforcement officials; judges and magistrates, prosecutors, lawyers and administrators; prison officers and other professionals working in institutions where children are deprived of their liberty as well as health personnel, social workers and other professionals concern with juvenile justice. This task, however, cannot be attained by the Government alone. It is proper for other non-government agencies, like NGOs and local communities be closely involved. NGOs play an important role in the promotion of human rights by among others; increasing public awareness²¹¹ of human rights issues, conducting human rights education and the promotion and protection of all human rights and fundamental freedoms.

One of the biggest challenges facing the administration of juvenile justice in Tanzania is the fact that most children who find themselves in trouble with the law are not offenders in the strict sense of the word, but rather in need of care and protection²¹². In order to combat this problem there is need for the establishment of a strategic alliance spearheaded by the Department of children's services. This comprises relevant government departments and the judiciary as well as international and national NGOS.

Emulating an example of Kenya, police desks should be established at police stations, manned by specially trained police officers with proper facilities to manage children arrested for committing offences or in need of care and protection.

Furthermore, like the Uganda, Kenya and Namibia statutes, Tanzania needs to enact a separate law which will serve only matters of children who are in need of care and protection.²¹³

²¹¹ In order for a society to take its responsibility, there is a need to sensitise the public about juvenile delinquency, its consequences and impacts.

²¹² ²¹² Anderson C; with Staurou A; Youth Delinquency and The Criminal Justice System in Dar es Salaam, Tanzania, 2000

²¹³ Odongo O G; Child Justice Law Reform Development in Africa and International Standards on the Rights of the Child, unpublished

5.5 Conclusion

In this work I have explored at length the various legal rights of a juvenile offender in Tanzania. Although the laws guarantee some basic rights for them, Tanzania has still a long way to go towards reforming and upgrading the juvenile justice administration to achieve the minimum standards set by the international human rights instruments. Hence, there is an imperative need to undertake immediate legal reforms, awareness creation and institutional development in the manner set by the international human rights instruments.

The existing juvenile justice system targets only the individual child or young person in conflict with the law and not the rights and justice of the system as a whole. The trend has been to condemn children and young persons to state institutions without making any effort to restore their well being and moral development. Therefore the state should have established a new system which will have to aim at long-term measures such as reform school instead of approved school, individual counselling and rehabilitation or treatment programmes.

Juvenile offenders are in need of rehabilitation. Many of juvenile offenders may have been victims of abuse within their families, subject to harassment, violence and may well be troubled by substance abuse. Rehabilitation and counselling responses must be based on helping the juveniles to see themselves as legitimate members of society with the rights and responsibilities of citizen. In other words the legitimate goal of every phase of the juvenile justice system must be reintegrate the juvenile offenders successfully back into community and to help them lead productive lives in future.

Although girls constitute a small number of the juvenile offender population, the punitive, less rehabilitative juvenile justice system in Tanzania is essentially not adopted to the particular problems that girl offenders encounter. Improving programmes for girls in the juvenile justice system, as well as providing better social programmes for girls at risk of entering the system is essential.

Furthermore, the police force, detention facilities, prisons and court system are functions of central government. Local authorities seldom have control over the full range of procedures related to juvenile justice. But a number of municipal governments in other parts of the world are developing alternatives where juvenile offenders may be handled by the local welfare system rather than the penal system, giving the local authorities a more significant role. The government should also request aid and technical assistance from the international institutions.

Consequently, the reform of the sector of administration of juvenile justice is not an easy task. Justice is a right enshrined in the Constitution of the United Republic of Tanzania and cuts across all types of organizations and all classes of individuals. We therefore need to take on board other stakeholders in the delivery of justice. If we do not work together, there will be no timely justice to the juvenile offenders that can be attained.

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