

Justice against Child Abuse

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Abstract:- Children are weak and vulnerable; they depend on adults for their basic needs, security and protection, thus requiring extra protection from the law. The Government of Tanzania enacted the Law of the Child Act No.21 of 2009 which aims at protecting children's rights and establishes institutions and stake holders vested with authority for enhancing child protection. There are however, an overwhelming increase in child abuse and neglect as a result children are victim of all kinds of violence and abuse at family level, at school and in the society. The study seeks to address as to why child abuse is on increase despite the enactment of the Law of the Child Act. This article thus reveals many incidences of child abuse reported to various relevant institutions addressing children justice. However, there is great dropout of such cases to the time they reach the court. This is linked to failure of investigation for most of sexual abuse cases are perpetuated by traumatized close relatives thus law enforcers encounter poor support in investigation; hence, the need to integrate counseling in Justice System. It is unbecoming that irrespective of having laws and procedures enhancing prompt dispensation of juvenile justice without being bound by technicalities, cases still take long before they are finalized while victims are not taken care of. It can be contended that, Children are deprived of their rights irrespective of following proper mechanism; thus, justice delayed is justice denied.

Therefore, there is poor implementation of the law as envisaged due to existence of discriminatory cultural practices and values detrimental to the girl child based on gender inequality. Having the laws in place is not an end. Justice must not only be done but must be seen to have been done.

I. INTRODUCTION

Children are weak and vulnerable, they depend on adults for their basic needs, security and protection; thus requiring extra protection from the law. This study comes at a time in which the country experiences an escalating child abuse despite the efforts done so far to respect and protect children's rights against maltreatment of all forms in a benign setting by enacting the Law of the Child Act,¹ a comprehensive legislation addressing children's concern. This article therefore, examine whether the victims of child

abuse receive justice according to the spirit and purpose of the law of the Child Act.

➤ *Historical Background of the Study*

Generally, children by their nature are vulnerable thus depend on the mercies of adults in terms of their basic needs, security and protection, thus requiring extra protection from the law. Child abuse has for a long time been recorded in literature, art and science in many parts of the world. Reports of infanticide, mutilation, abandonment and other forms of violence against children, dates back to ancient civilizations.² Globally, studies reveals that exposure to violence during childhood can accelerate child vulnerability to a broad range of mental and physical health problems, ranging from depression and unwanted pregnancy to cardiovascular disease, diabetes, and sexually transmitted diseases, including human immunodeficiency virus (HIV).³

Realizing this need the United Nations General Assembly unanimously adopted the ever binding first children's rights convention or instrument, the United Nations Convention on the Rights of the Child (CRC).⁴ The Convention consolidated various provisions concerning the rights of the child which previously were found scattered in several international treaties and declarations.⁵ The Convention climaxed the international community desire to recognize and ensure the basic rights and dignity of children at global level such as the rights to survival, protection and

²See World Report on Violence and Health (2002); Child abuse and Neglect by parents and Other Caregivers. The World report on violence and health is the first comprehensive review of the problem of violence on global scale. See also HELFER ME, et al,(1997),The battered child. Chicago, IL, University of Chicago Press, p. 3–28.

³ SUMMER, Steven, et al (2015), Prevalence of Sexual Violence Against Children and Use of Social Services-Seven Countries, 2007-2013, Centre for Disease Control and Prevention, Morbidity and Mortality Weekly Report (MMWR), P.1. Available at <https://www.cdc.gov/mmwr/pdf/wk/mm6421.pdf>. Accessed on 31st Jan,2017.

⁴The CRC was adopted by the General Assembly Resolution 44/25 of 20 November 1989. By 2nd September 1990 the Convention entered into force speedily after receiving the necessary 20 states' ratification.

⁵ MAKARAMBA V. Robert (1997), Children Rights in Tanzania, Dar es Salaam, Friedrich Ebert Stiftung, p.5.

¹Law of the Child Act No. 12 of 2009.

development.⁶ Africa, in 1990, a year after adoption of the CRC, adopted its own children's rights instrument that is the African Charter on the Rights and Welfare of the Child (ACRWC).⁷ Two years later Tanzania ratified the two children's rights instruments without any reservations thereto.⁸ However Tanzania remained unyielding to contemporary international trend in promotion of the rights and dignity of a child for 19 years after the ACRWC was adopted.⁹ It was until 2009 when remarkable development in children's rights were realized when the Tanzanian parliament enacted the Child Act¹⁰ which brings together child specific provisions from a range of national laws into one document. For the first time, the Law enshrines key child rights, drawn from international and regional agreements.¹¹

There have been significant steps to ameliorate the legal framework to safeguard rights and welfare of children in Tanzania, albeit many children are still vulnerable to violence, exploitation, neglect and abuse. It is discouraging that, both institutions and individuals vested with duty to cushion children from violence such as school teachers, police, and relatives are cited as the perpetrators of the violence or abuse. In 2015 it was reported that 90% of child abuse cases cited the victim relatives as perpetrators of abuse.¹² Approximately one quarter children were found to have experienced emotional violence by adults.¹³

It has been observed that the magnitude of child abuse against children is quite overwhelming.¹⁴ Children are facing such abuse like physical abuse, sexual abuse (including rape,

⁶ *ibid*

⁷ The ACRWC entered into force on 29th November 1999. Available at https://en.wikipedia.org/wiki/African_Charter_on_the_Rights_and_Welfare_of_the_Child. Accessed on 31st Jan, 2017.

⁸ MASHAMBA, J. Clement, (2008), *Realizing Children's Rights in the Context of the UDHR in Tanzania*, The Justice Review, Vol 7 No.2, 2008-ISSN 1821-5181. P.101

⁹ *Ibid*

¹⁰ Law of the Child Act No. 12 of 2009

¹¹ *Ibid*

¹² LEGAL AND HUMAN RIGHTS CENTRE, (2015) *Tanzania Human Rights Report* (2015), p.146.

¹³ *Ibid*. perpetrators include friends and classmates, relatives, authority figures (such as teachers), neighbors, strangers, and dating partners.

¹⁴ UNITED REPUBLIC OF TANZANIA, (2011), shows the magnitude of child abuse, in specific sexual violence to children aged between 13-24 years, that nearly 3 out of 10 girls (27.9%) had an experience of sexual abuse prior the age of 18 in Tanzania, where else the magnitude of sexual violence to boys of the same turned to 1 out of 7 boys (13.4%) and that, about ¾ of children, both males and females prior the age of 18 have experienced physical violence.

sodomy, molestation and psychological abuse). According to the Police Force¹⁵ report, 2,873 cases of child abuse reported were in police posts and stations countrywide.¹⁶

Therefore, it can thus be properly contended that there is poor implementation in shielding the child Act as envisioned by parliament, since there is still an increased flouting of rights. This article therefore, examine whether victims of child abuse receive justice according to the purpose and spirit of the Act¹⁷ and the practical aspect of it.

II. HISTORICAL OVERVIEW

Historically children's safeguard were not recognized under common law until around the seventeenth century.¹⁸ In that period it was commonly ignored in Europe that children too enjoyed some rights, thus were justifiably treated as miniature adults subject to brutality.¹⁹ Both within the family and the society at large, children's status was deduced low, as nothing ever existed about children's rights, albeit, the principle of the best interest of the child had deep Anglo-Saxon root.²⁰ Age of criminal responsibility was seven years in which the child found guilty of crime could be imprisoned.²¹ Moreover, death penult could be inflicted upon a stubborn or rebellious son pursuant to his parent's complaint.²²

Records reveal that until late 19th century the concept of Juvenile Justice intending to rehabilitate the child rather than punishing was still an illusion since in 1708 children were subjected to death penalty by hanging.²³ Regrettably some states both in England and United States had in existence laws shielding animals from cruelty than having laws to protect children. The landmark case labeled "Mary Ellen Affair" in 1874 within the city of New York, where the parents were found guilty for mistreating their daughter by

¹⁵ Correspondence with the Police Force (Ref No.CID/HQ/C.10/8/AVOL.1/116).

¹⁶ *Ibid* as reported by the LEGAL AND HUMAN RIGHTS CENTRE, (2015) *Tanzania Human Rights Report* (2015), p.147. an opinion on the rate of violence against children.

¹⁷ No. 12 of 2009.

¹⁸ RIOS-KOHN, Rebecca, "Comparative study of the impact of the convention on the Rights of the Child: Law Reform in selected Common Law Countries" pp.34-99.

¹⁹ MASHAMBA, Clement, (2008), *Realising Children's Rights in the Context of the UDHR in Tanzania*, The Justice Review, Vol 7 No.2, 2008-ISSN 1821-5181. p. 102.

²⁰ *Ibid*, see also RIOS-KOHN, Rebecca, "Comparative study of the impact of the convention on the Rights of the Child: Law Reform in selected Common Law Countries" pp.39-40.

²¹ *Ibid*.

²² Stubborn Child Statute enacted by the State of Massachusetts in 1646.

²³ *Op cit*, fn 18, p.40.

chaining her to bed, feeding only on bread and water.²⁴The prosecution resulted to analogy of the law safeguarding animals from cruelty to cushion the child due to absence of legal protection for children²⁵ in order to defend justice against child abuse. This kind of treatment of children sparked criticism amongst children's rights reformer, subsequently in 1899 the Chicago Bar Association, persuades the Illinois parliament establish the first Juvenile court for children in conflict with the law in a more benign setting compared to criminal court.²⁶

With development of the principle of equity under common law,²⁷ "The best interest of the child was recognized by English courts as the first and paramount consideration in all custody disputes. This led to the adoption of more child-focused legislations during the nineteenth century."²⁸

The earliest reputed child-specific standard setting instrument ever adopted, was the Geneva Declaration on the Rights of the Child 1924 passed by the League of the nations, which unanimously stipulated for children protection.²⁹

At global level we have the three international instruments on human rights that is The Universal Declaration of Human Rights of 1948, The International Covenant on Civil and Political rights (ICCPR) and The International Covenant on Economic Social and Cultural Rights (ICESCR).³⁰ These instruments were adopted to include children's rights because children have been suffering human rights violations and that children are vulnerable because they have mental and physical immaturity.

Influenced by the UDHR, in 1959 the UN, having taken up the mantle of children's rights, proclaimed the CRC,³¹ followed by the UN's declaration that 1979 was an international year of the Child. This prompted enactment of children instruments by 1070s, subsequently the adoption of the CRC on 20th November 1989,³² as the specific instrument

addressing children's rights. Among others the Convention protects the child from torture, exploitation, arbitrary detention, violence, abuse, neglect, maltreatment and unwarranted removal from parental care.³³ Moreover three protocols to the CRC have been adopted by UNGA. The first was the Optional Protocol to the CRC, on the Involvement of Children in Armed Conflict which establish the minimum age for an individual participation in armed conflict to be 18 years, was adopted in 2000.³⁴ The Second Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,³⁵ which require states parties to guarantee the child protection from being subjected to sale, prostitution and child pornography. The third being the Optional Protocol on Communication Procedure³⁶ allows individual complaint for specific contravention of children's rights. The coming into force of the third protocol in April, 2014 removes out the major setback of the Committee on the Rights of the Child on inadmissibility of individual cases where state parties are obliged to submit regular reports on implementation of the convention. However by March 2017 only 25 states had signed the protocol while 141 states including Tanzania had neither signed nor ratified.

At regional level or in Africa we have the African Charter on The Rights and Welfare of the Child (ACRWC) of 1990, as the first regional treat shielding rights of the child in Africa.³⁷ The Charter establishes the African Committee of Experts on the Rights and Welfare of the Child.³⁸ The setback for ACRWC is that there is no publicity of Communication by the Committee.³⁹

In 2009 the parliament of Tanzania enacted the Law of the Child Act⁴⁰ which in one document unifies various provisions of laws relating to children from a number to domestic laws; by drawing insights from both regional and international agreements. It defines a Child as a person below the age of 18 years. Although there are still some

³³ Ibid.

³⁴ *Op cit*

³⁵ This Optional Protocol, abbreviated as CRC-OPSC, was adopted by the UN in May 2000 and entered into force on 18 January 2002. Tanzania is a Party to this Instrument. Also see Kamuli, Raphael,(2012), *Human Rights Law, Global, Africa and Tanzanian Perspectives*, Mwanza, Inland Press, P.194.

³⁶ The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (CRC-OPIC) 2011.

³⁷ *Op cit*.

³⁸ The Committee of Experts established in 1999 under the ACRWC.

³⁹ Confidentiality is used as disguise by African states to flout human Right's mechanisms which is detrimental to the Committee's efficiency.

⁴⁰ Law of the Child Act No. 12 of 2009

²⁴ Ibid.

²⁵ *Op cit*.

²⁶ MASHAMBA, Clement,(2008), *Realizing Children's Rights in the Context of the UDHR in Tanzania*, The Justice Review, Vol 7 No.2,2008-ISSN 1821-5181. P.105.

²⁷ *ibid*

²⁸ *Op cit fn 23*, p.42.

²⁹ KAMULI, Raphael,(2012), *Human Rights Law, Global, Africa and Tanzanian Perspectives*, Mwanza, Inland Press, P.191.

³⁰ See Article 5 of the Universal Declaration of Human Rights of 1948, Article 7 of the International Covenant on Civil and Political rights (ICCPR) and The International Covenant on Economic Social and Cultural Rights (ICESCR

³¹ *Op cit, fn.4*

³² *Ibid*.

contradictions on the meaning of a child as stipulated in various statutes in Tanzania for example; under the law of marriage⁴¹, Section 13, marriages can be conducted between two persons of different sex, where the male person has to have attained the age of eighteen (18) and female person has to have attained the minimum age of 14 or 15 years.⁴²Section 5 of the Employment and Labour Relations Act, 2006 provides that no person under the age of fourteen (14) shall be hired for work.

The new Act,⁴³ stipulates for children's safeguard against all kinds of abuse and restrict child employment. It further stipulates for juvenile justice, principle of non-discrimination, care of children, protection and maintenance.

The report thus, notes that, although there are significant safeguards to cushion children's rights in Tanzania, there are still many children subjected to abuse, torture, neglect, violence and exploitation, for that reason, there exist a great need to examine the practical implementation of the said Act on whether it can effectively promote justice against child abuse.

❖ *Definitions of Concepts*

A. *Child*

According to Article 1 of the Convention on the Rights of the Child,⁴⁴the "Magna Carta" or "Bill of Rights" for children, defines a child as any person under the age of 18, unless individual nations recognize adulthood earlier. This definition is ambiguous, weak and lacks protection in terms of child labour, participation in hostility and early marriage. For example, According to Hague Convention on International Child Abductions the minimum age is 16. The ILO Convention No.138 on minimum age for marriage sets the age at fifteen and gives lee way for developing countries to a minimum age of 14.

Article 2 of the ACRWC gives a clear and precise definition that, a child mean 'every human being under 18 years' and unlike the CRC, there are no limitations or attached considerations, thus it may be applied to as a wide a number of children as possible.⁴⁵

In Tanzania the definition of the child still shows a clear disharmony in which various legislations pertaining children's rights define a child depending on the particular

purpose and context of each legislative scheme.⁴⁶ The Child Act defines a Child as a person below the age of 18 years. Section 13 of the law of marriage,⁴⁷ marriages can be conducted between two persons of different sex, where the male person has to have attained the age of eighteen (18) and 14 or 15 for a female person.⁴⁸ Section 5 of Employment and Labour Relations Act,⁴⁹permits persons under fourteen (14) to be hired for work.⁵⁰ The Evidence Act,⁵¹defines a child of tender age as having fourteen years. Penal Code,⁵²exempts a person under the age of seven totally from criminal responsibility, and for a person under the age of twelve has to be proved that at the time of committing the offence he had "capacity to know that he ought not to commit the offence." Under the Criminal Procedure Act,⁵³ A person under the age of sixteen years is a "juvenile". Under the Primary School (Compulsory Enrolment and Attendance) Rules,⁵⁴a child is defined as one who has attained the age of seven but has not attained the age of thirteen. This disharmony brings different interpretation and treatment in one context and the other. Regardless of the disharmony, a child in Tanzania is a person under 18 years of age. However the Law Reform Commission of Tanzania is advocating for a gradual change in achieving an omnibus age for determining who is a child in the Tanzanian context, much in keeping with international law. This calls forth for a total overhaul of all laws relating to the rights of the child in Tanzania, indeed a, rather difficult target to achieve overnight.⁵⁵

B. *Child Abuse*

Generally there are varied approaches to child abuse depending on differing standards, perception and cultural expectations on parentage in a particular society.⁵⁶Despite varied cultural values child abuse is commonly unacceptable. In 1999, the WHO Consultation on Child Abuse Prevention

⁴⁶ MAKARAMBA V. Robert (1997), Children Rights in Tanzania, Dar es Salaam, Friedrich Ebert Stiftung, p.2.

⁴⁷ Law of Marriage Act, No.5 of 1971, Cap 29 [R.E 2002].

⁴⁸ This obviously contravenes Article 2 of the CRC, Article 3 of the ACRWC and the Law of the Child Act.

⁴⁹ The Employment and Labour Relations Act, 2006

⁵⁰ Meaning that a child of above 14 years is viewed to have attained the age of majority and can be hired for work.

⁵¹ The Evidence Act, Cap 6 [R.E 2002]

⁵² The Penal Code, Cap 16 [R.E 2002]

⁵³ Criminal Procedure Act, Cap 20 [R.E 2002]

⁵⁴ Primary School (Compulsory Enrolment and Attendance) Rules, 1979, G.N. No. of 1979.

⁵⁵ *Op cit*

⁵⁶ ESTROFF SE. A cultural perspective of experiences of illness, disability, and deviance. In: HENDERSON GE et al., eds. The social medicine reader. Durham, NC, Duke University Press, 1997:6–11. Also see KORBIN JE. Cross-cultural perspectives and research directions for the 21st century. Child Abuse & Neglect, 1991, 15:67–77.

⁴¹ The Law of Marriage Act, 1971, Cap 29 [R.E 2002]

⁴² This obviously contravenes Article 2 of the CRC and Article 3 of the ACRWC.

⁴³ *Op cit*, fn. 40

⁴⁴ Of 1989

⁴⁵ KAMULI, Raphael,(2012), Human Rights Law, Global, Africa and Tanzanian Perspectives, Mwanza, Inland Press, P.196

drafted the following definition.⁵⁷ “Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child’s health, survival, development or dignity in the context of relationship of responsibility, trust or power.”

The distinction in approach to child abuse based on ground of harm inflicted or the intended outcome brings different interpretations and confusion.⁵⁸

According to the Law of the Child Act,⁵⁹ Child Abuse means contravention of the rights of the child which causes physical, moral or emotional harm including beatings, insults, discrimination, neglect, sexual abuse and exploitative labour. Thus it can be said that, child abuse consist of physical, mental, moral, emotional and psychological harm affecting a person generally.

C. Justice

Justice in this context may be understood easily when associated with law. According to Salmond, Law is a body of principles recognized and applied by the State in the administration of justice.

For proper administration of laws, justice may be defined in *Jurisprudence* as “the constant and perpetual disposition of legal matters or disputes to render every man his due.”⁶⁰ *Commutative justice* concerns obligations as between persons (e.g., in exchange of goods) and requires proportionate equality in dealings of person to person; *Distributive justice* concerns obligations of the community to the individual, and requires fair disbursement of common advantages and sharing of common burdens; *Social justice* concerns obligations of individual to community and its end is the common good.⁶¹

Justice, as a moral habit, is that tendency of the will and mode of conduct which refrains from disturbing the lives and interests of others, and, as far as possible, hinders such interference on the part of others.⁶² This virtue springs from the individual's respect for his fellows as ends in themselves

and as his co equals.⁶³ The laws thus giving rise to a corresponding number of spheres of rights, each being protected by a prohibition; to violate the rights, to interfere with the interests of others, is injustice.⁶⁴ All injustice is ultimately directed against the life of the neighbor; it is an open avowal that the latter is not an end in itself, having the same value as the individual's own life. The general formula of the duty of justice may therefore be stated as follows: Do no wrong yourself, and permit no wrong to be done, so far as lies in your power; or, expressed positively: Respect and protect the right.⁶⁵ Justice is rendering to everyone [equally, whether citizen or alien] that which is his due. It has been distinguished from equity in this respect, that while justice means merely the doing (of) what positive law demands, equity means the doing of what is fair and right in every separate case.⁶⁶

Therefore we can say Justice Against Child Abuse is to respect and protect children’ rights against maltreatment of all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power.

III. PROTECTION OF CHILDREN FROM ABUSE

A. Reported incidences on child abuse

The study reveals that there are many incidences of child abuse which are reported at the Social welfare office compared to those reported at the police Gender and Children Desk and those cases taken to court. Available data shows that, not all incidences reported at the social welfare office were sent to the Police Gender and Children’s Desk. Additionally, only an average of 26 percent of reported incidents emanating from Social Welfare office then forwarded to the Police Children and Gender Desk reach the court, as shown in the charts below:

	Yes		No	
	Frequency	percent	Frequency	Percent
Police Officer	2	22.2	7	77.8
Social Welfare Officer	3	30	7	70

Table 1:- Reported child abuse incidences taken to the court

⁶³*ibid*

⁶⁴*ibid*

⁶⁵*ibid*

⁶⁶ Easton’s Bible Dictionary, 1996, See also <http://famguardian.org/taxfreedom/citesbytopic/justice.htm#ftn1> Accessed on 30th February, 2017.

⁵⁷*Ibid*. See also Report of the Consultation on Child Abuse Prevention, 29–31 March 1999, WHO, Geneva. Geneva, World Health Organization, 1999 (document WHO/HSC/PVI/99.1).

⁵⁸*Ibid*

⁵⁹*Op cit*

⁶⁰Black's Law Dictionary, Sixth Edition, p. 864

⁶¹*ibid*

⁶² ROSCOE, Pond,(1925), Reading on the History and System of the Common Law, 2nd Edition, Cornell University, Chipman Publishing Company, p.1.

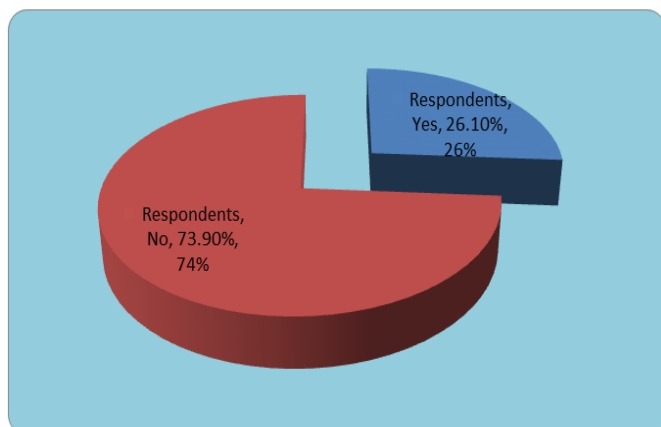


Fig 1:- The percentage of all reported child abuse incidence taken to the court

Moreover, reasons for such decline in number of cases reported at the social welfare office are that most of the cases are finalized at the social welfare office. Cases concerning Physical abuse by parents or caretakers, and cases on child neglect are within the capacity of the Social welfare office that ensure children are protected and that the office can facilitate provisions of maintenance to victims of child neglect.

It has been further observed that there is great dropout of cases at the Police Gender and Children Desk since most of sexual abuse cases are committed by close relatives who render poor support to the police officer and also there is great fear that if they provide good cooperation it is likely to cause imprisonment of a the family member who may be having some children and other dependents thus punishing him it means punishing the whole family.

It has been further revealed that most of child violence and abuse especially sexual abuse are perpetuated by traumatized people who committing offences they would have not wished to, when they were sober. Hence punishing such perpetrators without helping them increase their trauma. It is evident that, such people need counseling; otherwise they are likely to end up frustrated and re-traumatized. Thus, people choose to protect such perpetrators by declining cooperating with the police, subsequently increase dropout of cases even before they reach the court.

B. Unreasonable provision of justice

Provision of justice is said to be reasonable when there is easy access to justice, timely determination of cases, fair hearing and that the victim is redressed. It has been revealed that the process of provision of justice in Tanzania passes through various institutions and stakeholders who ensure that

an accused person is punished and victims are redressed by providing them with reasonable compensation⁶⁷.

It has been unveiled that Most of the perpetrators of child abuse pass through the hands of police officers first who are charged with the role to interrogate the suspects, investigate offence, arrest offenders and send them before the court of law where justice is administered. Needless to say, prosecution of cases in Tanzania mainland has been mandated to the Directorate of public Prosecutions (DPP)⁶⁸. The National Prosecution Service Act No. 10 of 2008 was enacted purposely for effecting separation of prosecution from investigation for proper determination of justice. However the DPP may direct the police or other organs to investigate any criminal offence.⁶⁹ It has been revealed that cases take long before they are finalized(as shown in the table below) on ground that investigation takes time, worse enough there is no separate records for cases involving children, and that there is no database concerning children cases. Thus it can be contended that justice delayed is justice denied.

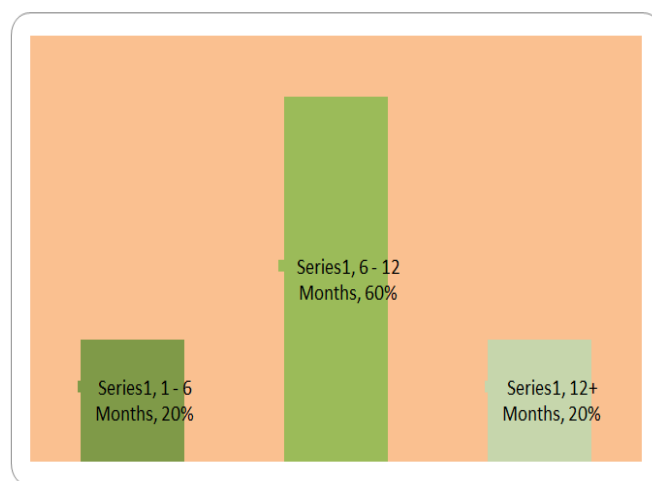


Fig 2:- Time frame on determination of child abuse cases

On the other hand, it has been observed that to ensure conducive and confidential environment in the process of provision of justice, the Police introduced Gender and Children Desk (GCD) specifically addressing vulnerable

⁶⁷ See Section 14 of the Law of the Child Act, No.21 of 2009; Sections 31 of the Penal Code, Cap 16[R.E 2002] and Section 348 of the Criminal Procedure Act, Cap 20 [R.E 2002]

⁶⁸ Article 58B of the Constitution of the United Republic of 1977. DPP's functions and powers are also provided for under the CPA, sections 2 and 4 (3) of the National Prosecution Service Act No.10 of 2008; and the Attorney General (Discharge of Duties) Act, 2005.

⁶⁹ Section 16 and 17 of the National Prosecution Service Act No. 10 of 2008.

victims including women and children. Hence no complaints concerning child abuse reaches the court before it has been referred first to Gender and Children Desk; who ensure children are safe and free to express incidences of abuse in a conducive and confidential manner as expressed by the Officer at the GCD in Arusha. "We take the victim in a friendly way, ask some questions friendly, take the victim to hospital, open the case and arrest offenders guided by the Law of the Child Act of 2009." This helps children to feel free and secure. However it has been revealed that, there exist intimidating environment at the court since there is no separate court building from the ordinary courts, children mix with adult offenders who in most cases are guarded by armed police officer. These threaten the child and increase stress and re-traumatize the child victim.

This study has further revealed that some victims of child abuse whose perpetrators are family members or relatives find themselves forced to live in orphanage or with people who are strangers to them. Where is justice if other victims are forced to stay in orphanage while waiting for the determination of their cases? What a traumatizing experience? One of the Police officer at the GCD said that, sometimes the social welfare officers take victims of child abuse to Orphanage centers while other arrangements are going on. This may sound as proper ground per the requirement of the law of the child on children who need care and protection per section 16⁷⁰ however this may have negative implication (childhood trauma) caused by separation from his family and friends and being mistaken as an orphan while their parents are still alive.

Because of these facts, there is a need to rectify the exiting procedure to include counseling both victim and perpetrator in order to avoid re-traumatizing them instead of enhancing justice and compensation to victims.

Besides, justice may be hampered in court room by technicalities involving the children who are witness. Before amendment to section 127(2) of TEA⁷¹ .The court was supposed to first conduct *voir dire* examination.⁷² The condition is that child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court

⁷⁰*Ibid.*

⁷¹ as amended under Act.No.2 of 2016.

⁷²*Voir dire* examination is means the examination conducted by court in order to test the capacity of a child of tender years to understand questions put to him or her and to give rational answers. Also examination is conducted to test the capacity of a child of tender years to understand the difference between truth and false hood as per section 127(2) of The Evidence Act. See also the case of **Nguza Vicking and Others v. R.** Cri. App. Case No 84 of 2004.

and not to tell any lies per section 127 (2) of The Evidence Act as reinforced in **Kimbutu Otiniel v. Republic**⁷³. Which quoted the case of **R. v. Barker**⁷⁴ the Court of Appeal of England and Wales pertinently stated: (para.38):

"The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood he is not".

It was opined that *voire dire* is highly desirable and not mandatory and its omission does not render the evidence valueless. This view takes account that Tanzania is a secular state per Article 3(1)⁷⁵ and the guarantee of freedom of religion and conscious of an individual per Article 19(1) there of; since *voire dire* is the test which among others insist on questioning a child witness on his or her individual religion belief or practice as a qualification of competency.

Thus the need to relax the rules of evidence by taking into account the right of the victim of child abuse, often committed in private under the threats and intimidation of the victim as the only witness without being tied by rules of evidence.

C. Children who are culprits of child abuse

It is well known that children are the most vulnerable to abuse at the same time they have capacity to commit offences,⁷⁶ that's why the term juvenile justice comes in to address complaints concerning children alleged to have committed offences with the aim of rehabilitating them that they can resume functioning normally in the society.

Study reveals that 72.6 percent of children are victims while only 27.4 percent are offenders as shown below:

⁷³*Kimbutu Otiniel v. Republic*⁷³ Criminal Appeal No. 300 of 2011.

⁷⁴*R. v. Barker* (2010) EWCA Crim 4, para 36

⁷⁵ The Constitution of the United Republic of Tanzania of 1977 as amended.

⁷⁶ The Law of the Child Act No.21 of 2009 recognizes two categories of children namely child in contact with the law (victim and witnesses in both civil and criminal offences) and a child in conflict with the law (an accuse d child)

Respondents	Yes	No
Social Welfare	70%	30%
Police	77.80%	22.20%
Judicial	70%	30%

Table 2:- There are more children who are victims of child abuse than culprits

Research shows further that 80 percent of children offenders are boys while only 20 percent of children offenders are girls.

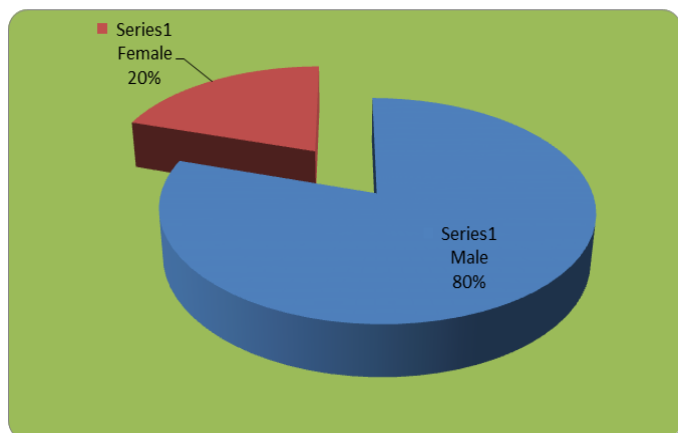


Fig 3:- Gender of children who are culprits of child abuse

Additionally, most abuses committed against boys are sexual abuse. Boys from poor families are given chips and a drink that in turn they end up by being abused sexually to the extent of endangering their lives. Children who were interrogated could not respond to the call of nature normally thus requiring special medical attention.

D. Implementation of the Law of the Child Act in promoting justice against child abuse.

Essentially, the law of the child Act provide for the reform and consolidation of all laws relating to children, stipulate rights of the child, promote, protect and maintain the welfare of a child without discrimination ⁷⁷ in all circumstances including both victims and children on conflict with the law. ⁷⁸ However practice has revealed poor implementation of the said Act more so on fostering the principles of the best interest of the child and that of non-discrimination since there still in existence some other laws which affect the implementation of the said Act. ⁷⁹ Consequently we experience disharmony when

⁷⁷ Section 5 of the Law of the Child Act No.21 of 2009.

⁷⁸ See PART II and PART IX of the law of the child Act, No.21 of 2009.

⁷⁹ The Law of Marriage Act under Section 13, marriages can be conducted between two persons of different sex, where the male person has to have attained the age of eighteen (18) and

implementing matters affecting children in all aspects such as administration of justice, marriage and labour.

Study has further revealed that there still exist discriminatory cultural practices and values that are detrimental to the girl child such as female genital mutilation. One of the respondents expressed that since the government is working hard to end FGM the society especially Maasai are trying to invent some other way of embracing the practice by incorporating customary marriage ceremonies with FGM to girls freely without being suspected. Moreover, girls themselves desire it since girls who are not mutilated are exposed to social exclusion thus, cannot get spouses to marry. This hampers the implementation of the Law of the Child especial on the principle of Non-Discrimination.

Moreover, existence of discriminatory provisions is evident in the definition of 'rape' under the Penal Code,⁸⁰ which protect girls and women from rape but leaves out boys and men who may also be victims of forced sex by women in certain circumstances. It should be noted that, there are several instances where minor males and minor females who had consensual sex either resulting in pregnancy or not but only boys are charged and convicted under the Penal Code while girls go scotch free. There is a feeling that the law seems to be overly protective of female children at the expense of male children⁸¹ thus the aim envisaged under the Law of the Child Act of reforming and consolidating laws relating to children even after the lapse of almost seven (7) years now since the Act came into operation in 2009 is yet to be realized.

On top of that, the Act stipulate for basic procedural safeguards for a fair and just trial⁸² for protection of a child in conflict of the law to ensure fair trial that will restore the child's belief in the justice system by establishing a special court to be known as Juvenile Court⁸³ which sits in a different building from the building used by ordinary

female person has to have attained the minimum age of 14 or 15 years. The Employment and Labour Relations Act, where under Section 5, provides that no person under the age of fourteen (14) shall be hired for work. The Evidence Act, defines a child of tender years as the one below the apparent age of fourteen years. Under the Criminal Procedure Act. A child is a person under the age of sixteen years, so is a "juvenile".

⁸⁰ The Penal Code, Cap. 16

⁸¹ *ibid*

⁸² Section 99 of the Law of the Child Act, No.21 of 2009. Fair trial include presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to legal counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses, and the right to appeal to a higher authority

⁸³ Section 97 of the law of the child Act, No.21 of 2009.

courts.⁸⁴ The Act require that in any proceeding by Juvenile Court there should be timely disposal of cases and that a social welfare officer shall be present to assist the accused.⁸⁵ Despite these provisions it has been revealed that sometimes the social welfare may not even know the hearing date, and it is in rare cases the social welfare attends. A social welfare officer asserted, “It has happen several times I missed hearing because I was occupied with other work since we have very few personnel.” Thus the need to employ more social welfare officer in order to safeguard fair trial as envisaged under the Act.

Where else, it has been observed that law stipulates for the establishment of a special court for purposes of hearing and determining matters relating to children.⁸⁶ However, it is unfortunate that for so many years we have only one premise in the country that sits exclusively as a Juvenile Court, the Kisumu Juvenile Court which was established in 1997.

Moreover, the Act as per section 100(1-3)⁸⁷ Preliminary hearing in the Juvenile Court is conducted according to the provisions of the Magistrates Court Act⁸⁸ and the Criminal Procedure Act⁸⁹ and emphasized in the Juvenile Court Rules.⁹⁰ That before Preliminary hearing the prosecution should disclose prosecution case under Rule 36⁹¹ and to submit two copies to the Court of prosecutor material which includes the charge sheet, statement of facts of prosecution case, record of previous conviction and any document or extract on which the case will be based on. Despite this requirement copies of charge sheet are not given to the defense but to the Social Welfare Officer present in court thus child's right to be notified of the charge is denied.

Proceedings before the Juvenile Court are conducted as mentioned above and the court environment is expected to be child friendly. Uniforms or formal robes are not allowed in the Juvenile Court. The seating arrangement is also arranged in manner that a child will be comfortable and at ease to ensure his full participation during hearing of his case. However, the researcher observed police officer in Uniforms and formal robes and children who appeared dressed in school uniform. This creates a threatening environment which is likely to traumatize the child. One of the Police officer was quoted commenting on the character of child who had been subjected to sexual abuse “this child contributed to his abuse, instead of going to school he went to meet the

perpetuator” The perpetrator was an adult man who used to offer chips and soda to the boy after satisfying his sexual urge. This portrays how harsh the justice system can be irrespective of having institutions and laws aiming at creating a friendly and safe environment to a child to avoid re-victimization.

IV. CONCLUSION

Generally, very few incidents of child abuse are taken to court for determination since some cases are finalised at the Social Welfare Office. Moreover there is great dropout of cases at the Police Gender and Children Desk especially for cases whose perpetrators are close relative for lack of cooperation during investigation for the fear that they can create enmity.

Furthermore, Child abuse and violence especially sexual abuses are perpetuated by traumatized people who committing offences they would have not wished to, when they were sober. Hence punishing such perpetrators without helping them increase their trauma.

It has been noted that, despite having in place laws and procedures to enhance prompt dispensation of justice to the contrary cases take long before they are finalized on ground that investigation takes time thus, justice delayed is justice denied. Thus having the laws in place is not an end, justice must be seen to have been done.

Surprisingly, there exist intimidating environment at the court since there is no separate court building from the ordinary courts, children mix with adult offenders who in most cases are guarded by armed police officer, thus threatening the child and increase the stress and re-traumatize the child victim.

It is evident that the process of rescuing children from continued abuse is likely to be detrimental to the victim as some children find themselves forced to live in orphanage or with people who are strangers to them. Section 16⁹² provide for grounds for care orders to children who have been abused by their own parents or relatives. However this may cause childhood trauma because of separation from his family and friends and been treated and mistaken as an orphan while their parents are still alive.

Besides, there are more victims of child abuse compared to children who are offenders. This is because children are the most vulnerable to abuse, and that boys children have higher delinquency than girls.

That justice is hampered by technicalities during proceedings reinforcing the rules of evidence involving

⁸⁴ Sections 98(3) and 100 *ibid*

⁸⁵ Section 108(2) *ibid*

⁸⁶ Section 97(2) *ibid*

⁸⁷ *Ibid*

⁸⁸ The Magistrates Court Act, Cap 11 [RE: 2002]

⁸⁹ Section 192 of the Criminal Procedure Cap 20 [R.E 2002]

⁹⁰ Rule 37 of the Law of a Child (Juvenile Court Procedure) Rules GN. No. 251 of 2014

⁹¹ *ibid*

⁹² The Law of the Child Act, No.21 of 2009.

children who are witnesses. Despite the facts that most of sexual abuses are committed in privacy, it is likely that the victim may be the only witness in his or her case. Thus, the need to relax the rules of evidence.

Moreover, there is poor implementation of the law of the child Act. The Act require that in any proceeding by Juvenile Court there should be timely disposal of cases and that a social welfare officer shall be present to assist the accused.⁹³ Despite these provisions it has been revealed that sometimes the social welfare may not even know the hearing date, and it is in rare cases the social welfare attends.

Furthermore, there still exist discriminatory cultural practices and values that are detrimental to the girl child such as female genital mutilation (FGM) which is based on gender inequality, the need to control women's sexuality which hampers the implementation of the Act. Maasai societies are trying to invent some other way of embracing the practice of FGM these include incorporating FGM ceremonies under customary marriage ceremonies freely without being suspected by the government.

Over and above that, there exist discriminatory provisions. The Penal Code,⁹⁴ protect girls and women from rape but leaves out boys and men who may also be victims of forced sex by women in certain circumstances as the law seems to be overly protective of female children at the expense of male children thus; the aim envisaged under the Law of the Child Act of reforming and consolidating laws relating to children has not been realized.

RECOMMENDATIONS

Therefore there is a need to revisit the procedures on child abuse investigations especially where perpetrators are close relative of the victim to ensure relevant evidence is given for justice to be done and minimise withdrawal of cases for lack of evidence.

It is further necessary to incorporate counselling to both perpetrators and victims of child abuse. This will prevent re-traumatisation.

Withal, the process involving children must be speeded to prompt and fair determination of justice. There should be database on cases involving children to monitoring and evaluation to minimise delay in finalisation of cases.

There is a need for the society and the Government to prevent boy's delinquency by ensuring that children especially boy are in proper place, doing legal activity at the

proper time since study shows that boys have higher delinquency than girls.

It is necessary to relax the rules of evidence by taking into account the right of the victim of child abuse, often committed in privacy under the threats and intimidation of the victim as the only witness without being tied by rules of evidence.

Likewise, the Government should improve the budget to the Judiciary to ensure implementation of the Law of the child Act. Such as constructing separate juvenile courts, medication for victims of abuse pending determination of their cases, sensitization on children's rights at schools, institutions taking care of children, villages and societies which still practice and embrace discriminatory cultural practices.

All laws addressing children concerns should be reformed and harmonised to correspond with the principles envisaged under the Law of the child Act and be enforced effectively.

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