
**AN ASSESSMENT OF CHILD JUVENILE DETAINEES' ACCESS TO LEGAL AID
IN TANZANIA**

By

Charlotte Kangere Kabunga

Supervisor: Dr Rosalie Katsande

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Abstract

This study centres on the access to legal aid for child juvenile detainees in mainland Tanzania. The study aims at looking at access to legal aid by child juvenile detainees living in retention homes. Further it aims at understanding the juvenile justice system and to develop strategies for ensuring the justice system is strengthened by protecting the rights of children who come into conflict with the law. In this study, an investigation was made at the Upanga Retention Home as a starting point where children were interviewed to find out their lived experiences in accessing justice, especially free legal aid. The study also stresses that a child juvenile detainee has rights enshrined in various national and international instruments and they deserve to get free legal aid services. These rights should be realised with the help of various stakeholders. It is therefore hoped that the recommendations that have been laid out be forwarded to the relevant stakeholders and that the gaps are tackled in the realisation of access to justice for child juvenile detainees. Chapter one talks about the background of the study, the objectives of the study, the problem statement and the limitations of the study. Chapter two discusses the literature reviewed for this study and the legislative framework. It points out the gaps in the domestic regional and international human rights instruments regarding juvenile justice. The chapter identifies the rights of the child juvenile detainees and discusses some case law that discuss where the law has fallen short in realising the rights of child juvenile detainees in Tanzania. Chapter three talks about the methodology and research methods used when conducting research in the field. It discusses the grounded, human rights approach, actors and structures, and the legal aid approaches. The research methods used include the one-on-one interviews, cases study method as well as observation. Chapter four looks at the findings and analysis of the data was collected during the field research. The chapter reveals the voices of the children who are affected by the lack of legal aid as well as the voices of the government officials and legal aid providers who deal with child juvenile detainees. Chapter five talks about the conclusions and recommendations of how to improve the situation of child juvenile detainees gaining access to legal aid in Tanzania. The recommendations section outlines a recommendation for government (different ministries), legal aid providers, and police officers.

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Declaration

I, Charlotte Kangere Kabunga, declare that the work presented in this research write up is my own research and has not been submitted anywhere else or to any other university.

SIGNED.....

Date.....this.....day of.....2016

Dedication

This work is dedicated to my beloved husband Shaban Kabunga for his kindness, love and support and to my sons Japher, Tariq, Malik and Kamal whom I continue to counsel.

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List of abbreviations and acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
CHRAGG	Commission for Human Rights and Good Governance
CRC	UN Convention on the Rights of the Child
CRC Committee	UN Committee on the Rights of the Child
DPP	Director of Public Prosecution
FIDA	International Federation of Women Lawyers
ICCPR	International Covenant on Civil and Political Rights
JDL	Juvenile/s deprived of their liberty
LAP	Legal aid provider
LCA	Law of the Child Act, 2009
LHRC	Legal and Human Rights Centre
LSF	Legal Services Facility
MCLA	Ministry of Constitutional and Legal Affairs
REPOA	Research on Poverty Alleviation
SWO	Social welfare officer
The Beijing rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985
The Riyadh guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990
TLS	Tanganyika Law Society
TAWLA	Tanzania Women Lawyers Association (TAWLA)
TWCWC	Tanzania Women and Children Welfare Centre (TWCWC)
UDHR	Universal Declaration on Human Rights
UN	United Nations
WAT	Women Advancement Trust
WLAC	Women Legal Aid Centre
UNICEF	United Nations Children's Fund

List of human rights instruments

International Covenant on Civil and Political Rights, 1966 (ICCPR)

United Nations Convention on the Rights of the Child, 1989 (CRC)

United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 (the Riyadh Guidelines)

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (JDLs)

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing rules)

List of local legislation

Criminal Procedure Act, 1985

Judicial Service Act, 2005

Law of the Child Act, 2009 (LCA)

Legal Aid Criminal Proceedings Act, 2002

The United Republic of Tanzania Constitution, 1977

The Draft Constitution of Tanzania, 2013

List of cases

Gabriel George v R Criminal Appeal No. 46 of 1976, High Court of Tanzania

Mokamambogo v Republic (1971) H.C.D. 63

Republic v Tatu Shabani The Rural Primary Court in Morogoro Region; Criminal Case No. 322 of 2003

Republic v Fideelis John (1988) TRL P. 165

Republic v Mohamed Abdullah Criminal Case No. 116 of 1999

Republic v Njama Zuberi (1985) TLR 241

Transport Equipment Ltd and another v D.P. Valambhia Civil Application No. 19 of 1993, Court of Appeal of Tanzania

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Executive summary

The research investigates the access of legal aid by juvenile detainees in Tanzania. It looks at how child juvenile detainees in Tanzania face a lack of legal assistance while in retention homes. Legal aid services offered by state lawyers are often poorly managed and funded by the state thus causing problems of the quality of legal services provided. Further there is limited regulation and coordination of legal aid work undertaken by NGOs and paralegals.

This report is therefore a result of field work carried out in Dar es Salaam where the only juvenile court exists. The research covers, why child juvenile detainees' cases take long to be heard, child juvenile detainees do not receive adequate legal representation, how child juvenile detainees lack knowledge on legal aid services available. It further discusses how children are held in police stations for longer than the statutory 24 hour limited, before being brought to a court. The research also discusses whether the government has the capacity to provide legal aid services to child juvenile detainees.

The whole purpose of the research is to investigate how child juvenile detainees access legal aid in Tanzania. This arises from the fact that the laws of Tanzania provide that a person is entitled to free legal services. Children are also entitled to receiving free legal aid but this as will be shown in the research is far from reality. Free legal aid is only available to a few persons particularly in crimes like murder.

The majority of the children living in the retention home I visited have never heard of a lawyer offering their services. Children instead represent themselves in the primary and district court. The research covers access to justice by child juvenile detainees focusing on child juvenile detainees living in a retention home. The research was carried out on the assumption that child juvenile detainees receive free legal aid services. It was also assumed that these children had knowledge of the legal aid services offered by NGOs. This however is not the case as will be explained in the research.

The main methods of data collection employed were desk and field research. I employed the grounded approach using the dung beetle method to collect information from one respondent to another. I also used one-on-one interviews to collect information from the respondents who

included child juvenile detainees, social welfare officers, government officials and a representative from the Juvenile Court.

I further used the human rights approach to enable me to look at rights of the child from a human rights perspective. I was able to look at the human rights instruments to determine whether these children's human rights were being violated. The human rights approach was therefore very important in the research as it helped assess what rights were being infringed. The Legal Aid Approach was also used to investigate whether child juvenile detainees had access to legal aid assistance. Further, the actors and structures approach was employed to interrogate, assess and evaluate the involvement of state actors in ensuring that child juvenile detainees secure access to free legal aid services. Therefore in the light of the application of the above methodological choices, child juvenile detainees do not get access to free legal aid services.

To conclude, there is need for intervention to ensure that child juvenile detainees get access to legal aid services and ensure that their rights are realised because it is enshrined in the laws that a person can get free legal aid services; further, there is a need to ensure that child juvenile detainees' rights are not infringed while they are in police custody. It is therefore pertinent that the legal and policy framework in Tanzania is used in practice and does not remain on paper.

CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Background to the study

As a developing country, Tanzania has been experiencing economic and political changes that have resulted in the emergence of a free market economy and multiparty political system. The narrowing economic base has led to the migration of rural dwellers to urban cities. This has had a tremendous effect on children. For example, many children from disadvantaged homes struggling to survive end up breaking the law because when they arrive in the cities they are more likely to be forced into crimes like theft and armed robbery. Juvenile delinquency is very common. As a result, juvenile justice has become a very integral part of the national development process (Maganga, 2005). Tanzania, however, is yet to meet the challenges facing juveniles. A Ministry of Constitutional and Legal Affairs 2013 report revealed that boys are far more likely to come into conflict with the law than girls.

In the past few years the government of Tanzania has made efforts to improve the lives of children in Tanzania. However, a 2009 report conducted jointly by the Government of Tanzania, United Nations Children's Fund (UNICEF) and Research on Poverty Alleviation (REPOA) found that a 'substantial number of children in Tanzania are living in desperate conditions' (MCLA, 2013). It is however evident that despite the ratification of the United Nations Convention on the Rights of the Child (CRC), studies have shown that there is still less political will expressed on the need to safeguard the general welfare including the rights and interests of children in Tanzania. The government still has not met her obligations in ensuring the realisation of rights of a child juvenile. The spirit and purpose of the Convention on the Rights of the Child still have not been put into practice in Tanzania.

The research aims at investigating the access of legal aid by juvenile detainees in mainland Tanzania. The research was conducted in Dar es Salaam City where the only Juvenile Court in the country is situated. During the research focus was put on one retention centre, the Upanga Retention Home (Figure 1) and different stakeholders were interviewed; the voices of the child juvenile detainees themselves were also captured. Legal aid is essential in the realization of access to justice and there is a big gap between realizing the right to legal aid. The focus of the study was on children living in a retention home and by specifically

targeting this group I sought to investigate the experiences of the children, in particular, those who had gone through police stations up to the time when their case was on trial.

Figure 1: Photograph of the billboard outside Upanga Retention Home, Dar es Salaam (The translation of the logo in the background reads, ‘For the health of the children’)



According to the Tanzania Human Rights Report (2014), in Tanzania, legal aid provision has been mostly undertaken by non-governmental organizations (NGOs). This is problematic as most non-governmental organisations target urban areas. Legal aid providers fail to reach many people, even in the urban areas. Legal aid can be described as the provision of assistance to people who are unable of afford legal representation and access to court systems.

In order to deal with the shortage of lawyers, paralegals are used to reach the grassroots community to provide basic legal aid. Paralegals are individuals with certain qualifications who are trained in legal knowledge selected from communities to allow them to assist fellow community members. Paralegals are trained to deal with uncomplicated cases in which they will give advice, take statements, draft simple correspondence, court papers (as far as the law permits) and assist in negotiations and reconciliation. Data from the TLS Paralegal Baseline Survey in 2010 indicated that there are more paralegal centres offering legal advice than assisting in preparing documents. However, some NGOs providing paralegals have different mandates, some focus on women, others on civil, maintenance or inheritance issues. Paralegals cannot reach all the children in need of legal aid because of the limitation of lawyers or paralegals.

Regarding the juvenile justice system in Tanzania, the welfare of children falls under the Ministry of Health and Social Welfare while the issues regarding justice are dealt with under the Ministry of Justice and Constitutional Affairs. Tanzania still does not have a judicial system that has separate procedures for children and as a matter of fact, Tanzania has one juvenile court which results in children's cases being heard by an adult court. Children juvenile detainees are often detained in police custody for long hours. In 1997, the Tanzanian government constructed a separate Juvenile Court at Kisutu in Dar es Salaam.

According to an Impact Assessment Committee Report, it recommended an increase in the number of Juvenile Courts, remand homes as well as the expansion of the Mbeya approved school. It further recommended the training of juvenile administration officials to improve their understanding of the rights of juveniles.

Further, in 2001 the government of Tanzania established the Commission for Human Rights and Good Governance (CHRAGG). The functions of this commission include investigating whether children's rights are being violated. The UN Convention of the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) entail the rights of juveniles and treatment and care of children who are in all forms of detention. Tanzania has ratified these treaties and therefore has an obligation to ensure that they are implemented. As a result of ratification, the Parliament of Tanzania domesticated the Law of the Child Act (LCA) in 2009.

Tanzania has signed and ratified both the CRC and the ACRWC, but has not yet changed its laws as laid out in the treaties in order for their practical application. However, it should be noted that Tanzania enacted all its legislation dealing with children before the ratification of the CRC. Further, the legislation on children still falls short and is not sufficiently comprehensive. There are no state provided defence lawyers in the Juvenile Court and the majority of the youth are required to defend themselves especially in the magistrates and district courts. Children do not have ready access to trained legal advice and advocacy before being unnecessarily sentenced, or forced to endure weeks or months of pre-trial incarceration.

According to the Baseline study, in July 2011 a contract was signed between the Government of Tanzania and the Government of Denmark to establish a Legal Aid Basket Fund through the Legal Services Facility (LSF). The function of the LSF was to ensure access to justice for

vulnerable people in both mainland Tanzania and Zanzibar. The LSF had the mandate to ensure quality legal aid services, support efforts for the recognition of paralegals, and support the capacity building of legal aid service providers in Tanzania.

In accessing justice much still has to be done to ensure that real access to justice is achieved and there is a need to continue to work to bring more comprehensive and effective legal services to all (Lang, 1976). There is still very little knowledge on domestic laws and most of the people working in the juvenile justice system are not knowledgeable about the international standards required when administering juvenile justice. Furthermore, in cases where free legal aid is offered, it is only limited to serious cases such as murder or treason.

It should be noted that to date, the legal systems in Africa still face a challenge. Today, many formal legal systems in Africa are in crisis. There is corruption within the judiciary in most countries (Penal Reform International, 2007).

It should also be noted that the government has the responsibility of ensuring adequate legal assistance for all. In addition governments should ensure basic human rights for all as well as ensuring legal aid for persons who need it.

1.2 Objectives of the study

- To assess why child juvenile detainees' cases take a long time to be heard
- To investigate why child juvenile detainees do not receive adequate legal representation
- To assess why child juvenile detainees in retention homes are not aware of legal aid services offered by NGOs
- To investigate why child juvenile detainees are being held in police stations for longer than 24 hours before being brought to court
- To investigate whether the Ministry of Justice and Constitutional Affairs has the capacity to provide legal aid services to child juvenile detainees

1.3 Statement of the problem

Tanzania's Legal Aid (Criminal Proceedings) Act (Cap 21 R.E 2002) provides that an accused should have legal aid services. The Law of the Child Act enshrines the rights of

children and under section 99(1)(f) it provides that a child shall have the right to be represented by an advocate. Other legislation such as the Penal Code and the Criminal Procedure Act 1985 provide for the protection of children's rights and governs how they are to be treated when they come into conflict with the law.

Access to justice is a right but not all child juvenile detainees enjoy it. The majority of children who have come into conflict with the law go through the judicial system with their rights being violated and may never realise their right to free legal aid. Some of the factors that lead to a child not realising their rights include ignorance of the law by police officers, absence of defined systems in the justice system, corruption, intentional delays of children's cases by police officers and lack of knowledge of legal aid services by children who come into conflict with the law.

Child juvenile detainees in Tanzania face a lack of legal aid assistance while in retention homes. Services offered by state lawyers are often poorly managed and funded by the state causing problems of the quality of legal services provided. There is limited regulation and coordination of legal aid work undertaken by NGOs and paralegals.

1.4 Research assumptions

1. Child juvenile detainees' cases take a long time to be heard because of the inadequacy of legal aid services.
2. Child juvenile detainees do not receive adequate legal representation and when they do it is of poor quality because it is a free service.
3. Child juvenile detainees in retention homes are not aware of legal aid services offered by NGOs.
4. Children are being held in police stations for longer than 24 hours before being brought to court because they lack legal representation.
5. The Ministry of Justice and Constitutional Affairs does not have the capacity to provide legal aid services to child juvenile detainees.

1.5 Research questions

1. Do cases of child juvenile detainees take a long time to be heard?
2. Do child juvenile detainees lack access to adequate legal representation?

3. Are child juvenile detainees aware of legal aid services offered by NGOs and paralegals?
4. Are child juvenile detainees held in police stations for longer than 24 hours without any legal representation?
5. Does the Ministry of Justice and Constitutional Affairs have the capacity to provide legal aid services to child juvenile detainees?

The assumptions of the research are meant, through the research questions, to critically investigate the plight faced by child juvenile detainees in accessing free legal aid services from the government and other legal aid providers in Tanzania.

1.6 Definition of terms

'Advocate' is a term used for admitted members of the bar who are allowed to represent clients in all courts except the primary courts while lawyers is a general term for a holder of a legal degree but not necessarily admitted to the bar.

'Child' under the Law of the Child Act refers to all persons below the age of 18 years.

The word *'juvenile'* is derived from the Latin word *juvenus* meaning a young person. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing rules) do not set a fixed age but state that for the purposes of that instrument[a] juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult (rule 2.2.a).

'Legal Aid' - The Lilongwe Declaration defines 'legal aid' as including 'legal advice, assistance, representation, education and mechanisms for alternative dispute resolution; and as including a wide range of stakeholders, such as non-governmental organizations, professional bodies and academic institutions.'

'Legal assistance' offered varies from clients to clients according to the individual case.

'Services', which could actually be considered as legal aid, include:

- i. Giving legal advice and counselling;

- ii. Offering legal assistance to individuals so that they can represent themselves in court;
- iii. Offering legal representation in court, whereby advocates represent selected clients;
- iv. Facilitating mediation and reconciliation;
- v. Assisting with the preparation of legal documents, i.e., drafting wills, contracts, writing letters to officials, filling court documents necessary to institute a case;
- vi. Assisting in filing applications and other documents in the court or tribunal;
- vii. Following up of legal issues with institutions or individuals such as Attorney General's Chambers, companies, and ministries;
- viii. Pursuing court remedies such as appeals, reviews and revisions;
- ix. Conducting strategic and public interest litigation;
- x. Executing decrees or orders;
- xi. Any other service connected or incidental to the services mentioned above;
- xii. Coaching.

A '*paralegal*' is defined as a person who has some education in law and assists a lawyer in duties related to the practice of law but who is not a licensed attorney (Black's Law Dictionary, 9th Edition).

'Retention home' – In terms of section 3 of the Law of the Child Act, a 'retention home' means a 'place where a child is safely accommodated while his case is being considered'.

1.7 Limitations of the study

I decided to restrict my research to mainland Tanzania instead of the entire United Republic of Tanzania thus leaving out Zanzibar in order to focus my study and for purposes of manageability. The following are the difficulties concerning inaccessibility I encountered during my research.

1.7.1 Inaccessibility of data

I was not able to recover enough data from my respondents especially the social welfare officer (SWO) at the Juvenile Court. This caused a problem because data was crucial for my research. Instead she referred me to the legal aid provider (LAP) who was handling child juvenile cases at the Juvenile Court. The LAP could only offer me a 2013 report.

1.7.2 Inaccessibility of girl child

During my research I was not able to get to interview many girls compared to boys because I focused my study on one remand home which only had 3 girls. It was therefore difficult for me to sample how the girl child is accessing legal aid.

1.8 Conclusion

This chapter was an introduction and background to the study and revealed that child juvenile detainees experience permanent delays of their cases, stay for long periods of time on remand and further do not have access to legal representation. Although juvenile justice in Tanzania is governed by the Law of the Child Act, 2009, these fundamental rights are still being violated in reality.

The next chapter will discuss the background of the study and discuss more about what has led to child juvenile detainees not accessing legal aid services in Tanzania.

CHAPTER TWO

2.0 LITERATURE REVIEW AND LEGISLATIVE FRAMEWORK

2.1 Desk research

Child friendly legal aid entails legal assistance which meets the unique legal and social needs faced by children (UNICEF, UNDOC, 2011). International and regional conventions, declarations, and rules contain references to states' obligations to provide legal assistance to children, however, they do not discuss the unique attributes of the children and are therefore not child friendly.

According to a Law Reform Commission Report (1994), a juvenile means a person below the age of eighteen, and this includes a young person from 12 to 16 years and a child below twelve years and a child under the Law of the Child Act is a person below the age of 18. Some of the factors leading to juvenile delinquency include the poor economic standing of parents, unemployment, generally having inadequate means of subsistence, inadequate family provisions such as shelter, food, clothing, education, influence of anti-social behaviour which leads to criminal acts such as theft, prostitution, robbery. Children may also suffer due to unhappy, unstable and broken homes which cause mental suffering to the children particularly in cases of separated or divorced parents. According to a FIDA Nigeria (1986) publication, a vacuum is created by the feeling of a lack of security and love and protection in the lives of these children. There are also oversized families with little and inadequate financial resources. This becomes a push factor for children to be involved in crime.

A study by the Ministry of Constitutional and Legal Affairs in 2013 revealed that the most common offences committed by children were theft, sexual offences, including rape, disorderly conduct, murder or manslaughter. Further the report indicated juvenile offenders were suffering poverty and a lack of parental care. The June 2011 Commission for Human Rights and Good Governance Report revealed that most of the children who have come into conflict with the law are being arrested for crimes including rape, assault, grievous bodily harm, unnatural offences and possession of illicit drugs as well as burglary.

In Tanzania juvenile offenders may be dealt with through probation orders; a parent or guardian may pay fines or compensation on their behalf; the child may be discharged,

repatriated at the cost of the Government to his home or district or admitted into an appropriate institution, or an approved school order.

Children and youth who come into conflict with the law are treated as adults, thus violating children's rights. According to a 2011 UNICEF report, it was estimated that over 1,400 children were held in adult prisons, 75 percent of whom were awaiting trial. There are few alternatives available apart from detention (UNICEF, 2009). Children who have committed crimes do not have their rights guaranteed and are frequently treated in a manner that is inconsistent with a child's sense of dignity and worth, despite Tanzania being a party to the Convention on the Rights of the Child (Policy Brief Nr 08, September 2009, Institute for Security Studies).

According to the Policy Brief Number 08, September 2009, during the period 2003-2005, 515 boys and 79 girls were charged with various crimes in Dar es Salaam. In Tanzania, it was found that adults are required to be separated from juveniles while in detention but this was not possible due to limited accommodation for inmates.

Upon arrest, a child should be kept away from adults and should be treated in friendly manner and handled with care until brought before a Juvenile Court. In addition, detention should be used as a solution of last resort. Further, children being mixed up with adults while in detention should not happen because children get exposed to conditions that are degrading and children might be ill-treated while in detention together with adults. A child while in police custody has the right to bail which should be exercised by their parents or relatives. However the following offences are not bailable, murder, treason, armed robbery, defilement of a child under 18 years, illicit trafficking in drugs worth Tanzania shillings 10 million, money laundering, an act of terrorism and human trafficking.

For the majority of children, alternative sanctions should be used other than detention and the best interests of the child should be a primary consideration throughout the criminal justice process. However, as a matter of practice juvenile offenders are not treated cautiously and the law is not taken into consideration and when they do, the law is outdated, further there are funding challenges and a lack of knowledge among officials who handle child juvenile offenders.

There is also a problem of inadequate detention facilities for juveniles. In addition there are no trained policemen who specifically deal with children who come in conflict with the law. In Tanzania children are handled under the Police Gender and Child Desk which is not specific for children.

2.1.1 Police detention of child juvenile detainees for longer than 24 hours

Legal assistance is rarely provided at police stations (United Nations, 2011). Legal aid is a matter for court so as a matter of practice lawyers appear in court. The Lilongwe Declaration highlights the importance of ‘providing legal aid at all stages of the criminal justice process.’ This includes investigation, arrest, pre-trial detention and bail hearings, in addition to trial and appeal processes. The Lilongwe Declaration states that accused persons and detainees should have access to legal assistance upon arrest.

According to a study done in June 2011 by the Commission for Human Rights and Good Governance (CHRAAG), the statutory 24 hour limit is not being observed and children continue to be held in police stations. Further when children are arrested they are not made aware of the crime they are alleged to have committed because the policemen do not inform them. According to Antieaut, the first essential of judicial fairness is that the person brought into court be given a clear understanding of the claims of society against him (Antieaut, 1961).

Studies have revealed that in practice police do not always adhere to the 24 hour limit on police detention. The 2011 CHRAGG study further revealed that 37% of the 179 children who were interviewed were held in detention in police stations for more than four days. Further another 33% were held between two and three days (CHRAGG Report, 31-32). In addition, the study revealed that 57 out of 179 (32%) of the children interviewed during inspection visits said that they had legal representation whilst they were held in police detention while 92 (51%) said they did not.

According to an SOS Village report (2012) findings revealed that children’s rights are excessively violated when kept together with adults in detention or police custody and this amounts to degrading and inhuman treatment. Findings further revealed that children are treated badly while in detention. Children remain in detention and remands homes for long periods of time without being sent to court. Some of the detention homes are too small and

cannot accommodate the large numbers of children. They are also said to have poor hygienic conditions which are violation of the children's rights.

2.1.2 Delay in the hearing of child juvenile cases

The 2011 CHRAGG report found that child juvenile detainees are being kept on remand for up to two years especially those charged with offences including murder and armed robbery. They are kept on remand waiting for the hearing of their cases. Some of the reasons given for this delay include: the lack of transportation to bring the children to court from the remand homes; insufficient evidence for the cases; delays in the investigations of cases so the child cannot be brought to court, or adjournment of cases because there is no magistrate available to adjudicate the case. It should be noted in most cases there is only one magistrate assigned to children's cases.

A study conducted by the Ministry of Constitutional and Legal Affairs (2012) indicated that investigation takes a long time to conduct especially for grave offences and in order for an investigation to be completed the child offender is held either in police custody or a retention home.

Children were also not permitted to see family members during police detention which is in violation of international law. Conditions in police detention also did not meet international standards and are a health hazard to children.

2.1.3 Lack of awareness of legal aid services by child juvenile detainees

According to UNICEF there is a need to access the justice system without being aware of one's legally protected rights and knowledgeable about the mechanisms available to claim those rights (UNICEF, UNDOC, 2011). In addition children in Africa live in impoverished areas and therefore find it difficult to access legal services and most of them are not aware of these services.

People may lack the knowledge and voice and the means to fulfil their rights because of challenges of poverty, disability, social status gender or technical barriers such as language distance to justice systems, corruption or court technicalities (UNDP, 2013). According to the MCLA 2012 report, the research found that people had no knowledge of their rights to be represented by a lawyer or their rights to contact their relatives on arrest. None of the children

interviewed had access to a lawyer during questioning and none reported having a social welfare officer during questioning. According to the CHRAGG 2011 report, a visit was made to the Upanga Retention Home and it was found that no child had had any form of legal representation or had the services of a lawyer.

Further according to Hamilton and Barnes (2011), half of the children interviewed admitted that it was difficult to get legal advice. The study further revealed that not all NGOs working on children's issues had a copy of the Law of the Child Act nor had they been trained on its usage and the copies were not available in Kiswahili.

Children who have come into conflict with the law have extremely limited access to legal assistance. The children do not have access to bail because their parents cannot afford the high cost of legal fees and have no access to a lawyer. In addition, legal aid providers do not approach those in detention, instead they wait to be approached (Women's Legal Aid Centre (WLAC), 2012/2013).

The draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide that legal aid is an obligation for states and they should put a comprehensive legal aid system in place. International standards therefore require that a child has access to legal assistance at all times.

It is a well known fact that one who is not aware of their legal rights is unable to realise them and therefore vulnerable to abuse in the criminal justice system. There is a need to ensure that child juvenile detainees are made aware of their rights.

2.1.4 Lack of legal aid representation of child juvenile detainees

The need for legal aid is particularly acute for the growing population of prisoners worldwide.¹ It is estimated that over nine million people are in prison worldwide and that legal aid providers cannot reach all the children. International laws provide that a child should be afforded legal assistance throughout their journey through the justice system, right from their arrest till they are arraigned in court and finally placed in a retention home.

¹ International Center for Prison Studies, World Prison Population List, <http://www.kcl.ac.uk/depsta/rel/icps/world-prison-population-list-2005.pdf>.

Children who have been charged with murder usually have no access to any legal assistance in preparing their defence. Although legal aid is an essential element of the criminal justice system it still remains a huge challenge in Tanzania and the majority of children in conflict with the law receive no legal assistance at any stage of the criminal justice system right from the time of their arrest.

Legal aid can be described to mean provision of legal advice and representation free of charge. It is a challenge for child juvenile detainees to make an application to court to defend themselves against a criminal charge because they do not know how. This is especially a problem if they do not have legal representation or services of a lawyer especially free legal aid. Children often have limited resources. Children who do not have access to a lawyer are accompanied by a social welfare officer to court.

According to the report by the Ministry of Constitutional and legal Affairs 2013, in many areas in Tanzania, justice for children does not conform to international standards. Court proceedings failed to meet international standards and were at risk of revictimising the child. The majority of children are without adequate access to justice. In addition, their rights are violated throughout the justice process. Studies have further showed there is limited legal aid, legal representation and other legal services offered to children in conflict with the law. A few stakeholders have ample knowledge of the law as they have limited access to the Law of the Child Act.

It should be noted that if people are aware of their rights and know how to access them then they are able to realise their human rights and in addition, if they are knowledgeable it enables them to access these rights easily (UNDP, 2013).

According to Penal Reform International, a legal aid program should be put in place for the purpose of ensuring that at all stages of the criminal process legal assistance is accessed during investigating, pre-trial detention, bail hearings, trials and appeals. This is meant to ensure human rights are protected (Penal Reform International, 2007). The legal aid programme should also be devised to address child juvenile detainees to ensure that a person is able to immediately on arrest or detention access legal assistance or representation.

2.1.5 Capacity of the Ministry of Justice and Constitutional Affairs to provide legal aid services to juvenile detainees

Tanzania has a strategy on child justice and a report by the Child Justice Forum 2013 found that there is a lack of special juvenile institutions, a lack of knowledge and coordination among professionals dealing with juveniles on how to handle their cases. In addition, child juvenile offenders do not have access to legal representation or any assistance at police stations in the preparation of their cases or during court proceedings. Children also continue to be mixed with adults during police detention.

There is a need for officials who deal with children to be properly trained and ensure that they are aware of international child rights standards and aware of domestic criminal justice laws. Child juvenile offenders should be treated in a child friendly manner at all stages of the proceedings including at the police station and throughout their trials until their cases are finalised.

The challenges faced by children in ensuring justice include the following. There is only one Juvenile Court and as a result many of the children's cases are heard in regular courts and generally the country's laws do not provide for specific child-friendly officials to carry out investigations and prosecutions of their cases involving. Another challenge is that there are no designated police officials to deal strictly with children who come into conflict with the law. For instance, currently children's issues are handled by the Police Gender and Children's Desk at police stations. There is a big shortage of Social Welfare Officers (SWOs) and 40% of the districts have not recruited them. Existing SWOs do not seem to be conversant with their role in the juvenile justice system. There are also insufficient juvenile detention facilities. At the moment only five retention homes exist in five regions and many justice officials do not have any knowledge about how to handle juvenile offenders and are also not aware of the international standards that apply to the treatment of them and their cases. SWOs are not accessible to most children to assist them during court proceedings.

Further the 2012 MCLA Report reveals there is a significant shortage of lawyers coupled with not enough funds for legal aid in all cases of children who come into conflict with the law. It is a fact that persons charged with murder have the availability of legal aid services during their trial process.

Although legal aid providers assist in the provision of legal aid, not all children have the opportunity to have legal aid for their cases. Child juvenile offenders are not aware of how to secure the services of a lawyer. Legal aid providers are not proactive enough to visit police detention facilities to find out if there are children who need their services.

The 2012 MCLA Report further shows that there is a lack of coordination between professionals working on juvenile justice issues. This lack of cooperation becomes a barrier to the institutions implementing the Law of the Child Act and for the children in conflict with the law's realisation of their rights enshrined in the Act.

There is a need to ensure that policemen who are trained on children's issues handle children's matters. There is also a need to train child supporters to ensure assistance is provided them at police stations, and further, paralegals should be used to ensure that these children are getting support during questioning at police stations and during their detention there. In addition, there are currently only five detention homes in the whole of Tanzania and these are situated in Arusha, Dar es Salaam, Mbeya, Moshi and Tanga regions and there is only one approved school. Most children are not taken to the approved school but end up in prison.

In addition since the majority of the cases by juvenile offenders are minor they are often tried in the Magistrates Courts where no legal representation is required and this deprives them of the chance to be represented by an advocate in primary court proceedings. This may result in Magistrates making improper decisions as described in the case of *Republic v Tatu Shabani* (The Rural Primary Court in Morogoro Region; Criminal Case No. 322 of 2003). In this case Tatu was a pupil who was expelled from school for being pregnant and then she was charged with the offence of refusing to attend school. Tatu however did not refuse to go to school but was rather acting in accordance with the order forbidding her to attend school. In this case, had Tatu been represented by a lawyer, it is unlikely that the court would have arrived at the conclusion that she had deliberately refused to attend school.

It is a fact that there are very few cases in which advocates act as defence counsel in criminal cases in Tanzania. However, the courts have been keen to ensure that children are not sentenced to imprisonment and if they are, it is only as a last resort. This was emphasized by Mzavas, J. (as he then was) in the case of *Gabriel George v R* Criminal Appeal No. 46 of

1976, High Court of Tanzania in which the Court held that youthful offenders should not be sent to prison unless there is no alternative punishment. This position was affirmed in the case of *Republic v Fideelis John* (1988) TRL P. 165 in which it was held that a young person below the age of 16 should not be sentenced to prison unless there is no alternative means of punishing them.

Furthermore, most magistrates are unaware of and often fail to observe the legal principles that apply to the sentencing of young offenders as observed in the case of *Republic v Mohamed Abdullah* (Criminal Case No. 116 of 1999). In this case, a nine year old child was charged with the offence of rape and he was alleged to have had sexual intercourse with a five year old girl. The boy was convicted of rape and sentenced to life imprisonment.

There is a need for children to be promptly notified of the fact of their arrest. A number of various international human rights instrument stipulate this right. Article 40(2)(b)(ii) of the CRC provides for the right of a child to be informed promptly of charges against him on arrest. Article 9(2) of the ICCPR and article 17(2) of the African Charter on the Rights and Welfare of the Child also refer to the same.

The 2013 MCLA Report also found cases of allegations being fabricated against children who are without parental care. Police officers arrest and detain these children without further investigation. There have been reports of police being suspected of accepting bribes sometimes in exchange for holding a child in detention (MCLA, 2013).

Article 37(b) of the CRC provides that detention must be in conformity with the law while rule 17 of the Beijing rules adds to this provision by stating that detention should not be imposed unless it is a serious act of violence against another person. Section 119 of the LCA prohibits the imprisonment of a child.

Currently in Tanzania, there is only one Juvenile Court located at Kisutu. It is a building set apart from the other ordinary courts. In the case of *Mokamambogo v Republic* (1971) H.C.D. 63, the accused was a child and there was no evidence of the proceedings against the child having been held in a place other than an ordinary court room. It was held that a court hearing charges against children should sit in a building or room different from the ordinary hearings of the court.

In addition, one of the challenges facing the Legal Aid Department under the Ministry of Justice and Constitutional Affairs are the lack of enough funds. As a result, the quality of legal aid services has been substandard. In addition the lawyers are overwhelmed by the excessive work load and the quality of their services have been compromised.

Further, access to justice remains problematic in Tanzania. According to the Danish Institute for Human Rights Report (2011), one informant notes:

‘The situation of access to justice in Tanzania depicts a picture with many unpleasant features.’

2.2 Legal framework

2.2.1 Domestic legislation

2.2.1.1 The Constitution

Article 13 of the Constitution of the United Republic of Tanzania of 1977 provides for equality before the law and it further provides for the right to a fair trial. Children in detention are therefore protected by this article in that they deserve a fair trial. However the opposite happens in reality in that children are not given a free trial and trials are often postponed as a result of technicalities (such as lack of sufficient evidence).

Article 39 of the draft Constitution of Tanzania, 2013 provides for the rights of detainees and that a person has a right to be told why he or she has been arrested. However, this does not happen in reality and child juveniles are arrested by police and detained without their knowing what crime they are alleged to have committed.

The 1977 Constitution talks about equality before the law and the right to a fair trial. This right is ensured in the law but in reality child juvenile detainees do not have access to a fair trial. There is a delay in the hearing of most cases and the fact that there is often not enough evidence for trials to commence causes unfairness in accessing justice.

2.2.1.2 The Law of the Child Act, 2009

The Law of the Child Act, 2009 is an important law regarding the rights of the child in Tanzania. However, the Act does not cover all aspects of the criminal justice system. It does stipulate that a child shall have the right to be represented in the Juvenile Court by an

advocate. Section 94 of the Act gives a duty to the local government authorities to promote the welfare of children. Section 99(1)(f) of the Act provides for the right of a child to representation by an advocate. It gives children the right to free legal aid. Section 101 provides for police bail where a child cannot immediately be brought before a Court. However, this is not the case in reality in that children are kept in police custody for many days while the police carry out their investigations and bail is not an option to child juvenile detainees in most cases. Although section 102 provides that children should be separated from adults while in police custody, the fact is that they are often detained with adults because police stations do not have enough space to comply with this provision.

2.2.1.3 The Criminal Procedure Act, 1985 and other relevant Acts

The Criminal Procedure Act 1985 (which was amended in 1998) has a few provisions that specifically provide for children. Section 33 of the Act provides if a person is detained in police facilities for investigation then his or her case should be reported to the court within 24 hours. This law is often violated and it is a fact that children are held in police stations for longer than 24 hours.

Section 56(1) of the Act provides that the parents of a child who has been arrested should be duly informed. However, this does not happen in reality and children are not informed of why they are being arrested and often their parents are notified at a much later stage.

Section 310 of the Act provides a person shall be entitled to be defended by an advocate. This section gives a person the right to legal representation, in other words under this section child juvenile detainees are also entitled to free legal aid.

Section 225(4)(a) of the Judicial Service Act requires a magistrate or a judge to pronounce a judgment within 60 days. Child juvenile detainees' cases ought to be adjudicated within 60 days. This, however, does not occur in reality and their cases are delayed for sometimes as much as up to two years, as will be shown later in the findings chapter of this paper. This is therefore a violation of the child juveniles' rights.

Section 31(5) of the Police Force and Auxiliary Service Act, Cap 322 provides that the police should ensure that a suspect is aware of his right to bail. Section 21(1) of the Criminal Procedure Act requires an accused person should be made aware of the reasons he/she is being arrested. In reality, child juvenile detainees are often not informed of their right to bail,

nor are they informed of the offence they are alleged to have committed when they are arrested.

2.2.3 Regional instruments

2.2.3.1 African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the Organisation of African Union in 1990 and entered into force in 1999. Article 17(1) of the ACRWC requires that a child accused of infringing a penal law shall have the right to special treatment. Children are however in reality not given special treatment while in custody and they are subjected to inhumane treatment while in detention. Further, article 17(2)(c)(iii) provides that minors should be afforded legal and other appropriate assistance.

However, child juvenile detainees are in reality not afforded legal assistance for their cases, as the provision above requires children deserve legal assistance in preparation of their defence but the majority of children cannot afford legal services and those who can access free legal assistance are limited.

The ACRWC also provides that a criminal case against a child should be determined speedily.

2.2.3.2 The African Charter on Human and Peoples' Rights (ACHPR)

Article 6 of African Charter on Human and Peoples' Rights (ACHPR) provides that no one should be deprived of their freedom or be detained arbitrarily. This law applies to child juvenile detainees as they have a right not to be arbitrarily detained and should be brought before a court of law within a reasonable time. Child juvenile detainees however face delays and cases take long to be heard because of the inadequacy of legal aid services.

The government is given an obligation under this Charter to ensure that persons are afforded legal assistance and free legal assistance to those who cannot afford it. However, child juvenile detainees do not receive adequate legal representation because the government has failed to deliver these services.

2.2.3.3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)

Tanzania has signed the Maputo Protocol and, among other things, it promotes women's rights in relation to legal aid. Article 8 provides for access to justice and equal protection before the law. This article is relevant for the girl child who has come into conflict with the law. Girl child juvenile detainees are protected under this provision with the entitlement to have access to judicial and legal services including legal aid.

2.2.4 International legislation

Tanzania is a signatory to international and regional child rights instruments which guarantee the right to legal aid for children and has therefore committed itself to upholding the right to legal aid to legal assistance or other appropriate assistance for children. To some extent, free legal aid in criminal proceedings involving indigent persons is regulated under the Legal Aid (Criminal Proceedings) Act (Cap. 21 R.E.2002).

2.2.4.1 UN Convention on the Rights of the Child (CRC)

The UN Convention on the Rights of the Child (CRC) binds all countries, including Tanzania, that have signed and ratified it. The state parties are expected to send a report every two years, and then five years to the UN CRC Committee on the Rights of the Child (the CRC Committee). Article 3 of the Convention talks about the best interest of the child principle. Article 37(c) of the CRC provides that children should be separated from adults. Despite this provision however child juvenile detainees in Tanzania are often detained with adults in police custody. Article 37(d) of the Convention provides for promptness to access legal assistance. Under Article 40(2)(b)(iii) the state is duty bound to ensure a fair trial with the provision of legal assistance.

CRC Committee General Comment No. 10 recommends that the period of pre-trial detention before a child is charged (i.e., the period when the child is under investigation) should not exceed 30 days. This however does not happen in reality, and children are often kept in police detention while investigations are conducted for longer than 30 days.

A child is a person below the age of 18 according to section 2 of the Age of Majority Act, Cap 431. Section 186(11)(b)(ii) of the Criminal Procedure Act provides that trials should be conducted *in camera* where an accused person is under 18 years of age. This law provides for

children's cases to be conducted *in camera* and is relevant for child juvenile detainees because they are below the age of 18 years.

2.2.4.2 UN Committee on the Rights of the Child (the CRC Committee)

Article 3 of the CRC talks about the best interests of the child principle and article 12 requires governments to take into consideration the views of children. The CRC Committee, during its periodic review of the Tanzanian government, recommended that the government of Tanzania should see to it that children below the age of 18 have access to legal aid (UN Committee on the Rights of the Child, Concluding Observations: United Republic of Tanzania, UNCRC/C/TZA/CO/2, 21 June 2006, para. 70).

2.2.4.3 International Covenant on Civil and Political Rights (ICCPR)

Tanzania ratified the International Covenant on Civil and Political Rights (ICCPR) in June 1976. Article 9(3) of the ICCPR requires that a person arrested be promptly brought before a court. This however, does not happen in reality in Tanzania and child juvenile detainees are not promptly brought before a judge and this violates their right enshrined in this provision. This is reiterated in paragraph 4 of article 9 of the ICCPR.

This right is further emphasized by the Human Rights Committee in that when a person is arrested they are required to be promptly brought before a judge or other officer authorised by law to exercise judicial power.

Article 10(2)(b) requires that an accused juvenile person must be separated from adults. This is far from reality in practice in that children are mixed up with adults while in police custody and sometimes this can last more than a month.

Article 14 talks about the right to a speedy trial and article 14(3)(b) of the ICCPR provides for the right to have facilities for the preparation of one's defence. This article provides for timely justice but this does not happen in reality as justice for child juvenile detainees is often delayed because of on-going investigations of their cases and this violates their rights.

Article 14(3)(d) of the ICCPR provides that a child is entitled to free legal assistance if their parent does not have sufficient means to pay a lawyer. General Comment No.10, CRC/C/GC/10 has recommended that such assistance be provided free of charge. This however, does not

happen in reality, as child juvenile detainees do not access free legal aid because the state cannot reach all the children who are in need of legal aid.

2.2.4.4 The Universal Declaration of Human Rights (UDHR)

Tanzania has ratified the Universal Declaration on Human Rights (UDHR) (1948) and article 7 provides that all people are entitled to equal protection of the law, without any discrimination. Article 11(1) of the UDHR provides that anyone charged with a penal offence shall have the right to be presumed innocent until proved guilty.

The UDHR gives equal protection to all people including child juvenile detainees. This however, this does not happen in practice in the adjudication of all cases. Child juveniles are not given equal protection of the law and most of their rights are violated. Further when some children are arrested they are treated as though they are guilty of the offence they are alleged to have committed before they are even tried for it by a court of law.

2.2.5 Other legislation

2.2.5.1 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana rules)

Rule 11(b) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) (the Havana rules) describes deprivation of liberty to mean any form of detention in imprisonment. The rules talk about juveniles not being mixed up with adults in detention and their classification according to age, sex and type of offence committed. They further provide for specific principles that apply to all juveniles held in detention. The rules also explain various aspects of detention, including physical environment and accommodation, medical care, education, recreation, religion, contact with the outside world, inspections and return to the community.

The Havana rules recommend that children in detention are handled according to international standards and are detained for the shortest time possible. They also provide that juveniles who are at a sensitive stage in development will be psychologically affected if removed from their homes and put in detention and therefore international human rights instruments provide that the deprivation of their liberty should be reduced to a minimum. They provide that children should be separated from adults. The rules provide for creating

establishments that reduce the negative effects of incarceration. The detention officials should be trained on how to handle the detainees in a child friendly manner.

2.2.5.2 United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh guidelines)

Rules 11, 12, 13 and 14 of the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh guidelines) provide that family should be educated about children in conflict with the law and that it is the duty of the state to provide this education. Under rule 23 children and their families should be informed about the law and their rights and responsibilities under the law, as well as the universal value system including United Nations instruments.

2.2.5.3 United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing rules)

Rule 26(2) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing rules) provides that juveniles should be given meaningful activities to promote health and self-respect. Rule 10.1 provides that a juvenile's parent ought to be notified on arrest of their child. This however, does not happen in reality and parents of child juvenile detainees are not informed in time that their children have been arrested.

2.2.6 *Soft law instruments*

The United Republic of Tanzania has committed herself to declarations and soft laws which are not legally binding but indicate the commitment of the nation to recognize and support human rights. These legal instruments include the Dakar, Lilongwe and the Kyiv Declarations.

The Dakar Declaration on the Right to a Fair Trial and Legal Assistance in Africa (1999) emphasizes the importance of access to justice as part of the right to a fair trial, and places the primary responsibility for ensuring legal aid in criminal cases on the government.

Section 1 of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) basically recognizes and supports the right to legal aid in criminal justice. Section 8 encourages provision of legal aid by lawyers. It recognizes that the legal profession has a responsibility to promote legal aid services.

The Kyiv Declaration on the Right to Legal Aid (2007) provides that the poor and vulnerable have a right to legal aid, and stipulates that the state has the primary responsibility for creating legal aid schemes. The Declaration encourages governments to cooperate with other legal aid providers.

2.3 Conclusion

This chapter reviewed the laws regarding children while some laws touched on issues affecting child juvenile detainees. The domestic laws reviewed the Constitutional right to a fair trial as well as laying out the right to free legal aid in criminal proceedings as stated in the Legal Aid (Criminal Proceedings) Act (Cap 21 RE 2002). Further, international laws on access to justice revealed the rights of the child as enshrined in the Convention on the Rights of the Child and specifically dealt with the right to appropriate legal assistance for a child.

In my next chapter I will discuss the methodologies used in obtaining information during the field research. It will also discuss the research methods used in obtaining information.

CHAPTER THREE

3.0 METHODOLOGY AND RESEARCH METHODS

3.1 Introduction

During the course of this research study, two methods were involved, namely library based research and fieldwork. I conducted a general survey of the relevant literature on the topic of juvenile detainees including textbooks, journals, articles and material from the Internet. I took into account the fact that the field of juvenile justice is a sensitive field of study. I discovered that Tanzania had ratified most of the international instruments concerning juvenile justice. As part of library based research I relied on these human rights instruments as well as national laws.

Field work conducted in Dar es Salaam city. During the course of the field work, scheduled interviews were undertaken with government officials, non-governmental legal aid providers, social workers at the retention home, Juvenile Court social welfare officer, personnel and children at the Upanga Retention Home. These all deal with children in conflict with the law in one way or another.

My field work included a tour of the Upanga Retention Home which is located at Kisutu with the purpose of witnessing how juvenile justice is carried out, interviewing the children and seeing the conditions under which they are kept at the home. I also relied on research from legal aid providers who offer services to the children living in the retention home. I also made a visit to the Oyster Bay police station and made a tour of the cells to see the living conditions for a child when they are in police custody.

3.2 Research methodologies

3.2.1 Grounded approach

I used the grounded approach throughout the research to understand the lived realities of the children. I was able to discover that the government has the mandate to ensure that all the rights enshrined in the Law of the Child Act are adhered to and further that the rights in the international instruments that are ratified by Tanzania should be upheld. However the opposite is happening in reality in that children are detained for longer than 24 hours, and

children have no knowledge of legal aid assistance and do not receive any legal aid assistance especially from the government.

I interacted with the children using one-on-one interviews in order to understand what they have gone through since the time of their arrest. I found that in fact most of their rights are violated while in police custody in that they stay in unfit conditions which are not good for their health, for up to 2 weeks and most of the time they are detained with adults. This method was very crucial for my research as it opened up an array of issues concerning these children's welfare and their rights.

I used the dung beetle method of collecting information where one government official I interviewed referred me to another. I was also able to visit a social welfare officer at the Kisutu Juvenile Court who referred me to legal aid providers with whom they are working. The legal aid providers were an eye opener informing me that they offer legal aid to children but they cannot reach all of them. The Women and Legal Aid Centre which is a legal aid provider, was providing court representation to the children in the retention home but TAWLA another legal aid provider does not provide court representation, they only offer legal advice and counselling to the children. This showed me that there is still a gap when it comes to legal aid provision in Tanzania.

3.2.2 Human rights approach

The human rights approach enabled me to look at rights of the child from a human rights perspective. It is worth noting that Tanzania has ratified the international human rights instruments including the UN Convention on the Rights of the Child. This enabled me to see how the state is failing its obligations as children's rights are still being violated. I used the different human rights instruments related to children to investigate the ten children that I interviewed. This approach was useful to me as it gave me insights into the various human rights instruments that enshrine children's rights, for instance, the best interest of the child criterion which is the guiding principle behind the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

3.2.3 Actors and structures

I used this approach to interview my key informants who included government officials and non-governmental organisations from the Kisutu Juvenile Court, the Ministry of Justice and

Constitutional Affairs and the Ministry of Health and Social Welfare with whom I had one-on-one interviews. Government officials were the main actors as they have the mandate to ensure these rights are realised by the children. My aim was to capture information on how children access legal aid services from the justice system in Tanzania starting from the time of arrest until they are brought before a court of law. I used actors to find out the length of time children spent in detention, if they have any legal aid assistance and how much knowledge they have about legal aid providers in Tanzania. This approach was very useful to me as it gave me insights into the fact that children often go without legal aid assistance because of a number of factors. I also used this approach to interact with government officials and representatives of NGOs to investigate if they work together in ensuring these children are afforded their rights as enshrined in the Law of the Child Act of Tanzania.

3.2.4 Legal aid approach

I used this approach to investigate if children have any access to legal aid assistance once they come into conflict with the law. For this case I interacted one-on-one with the children in the Upanga Retention Home and asked if they had received any access to legal aid assistance during the trial of their cases. I also investigate further with the non-governmental organisations that are providing legal aid services to these children which provided me with information on how legal aid providers interact with these children. The approach was useful to me as I was able to interact with 17 people in total about legal aid assistance for child juvenile detainees.

3.3 Research methods

3.3.1 One-on-one interviews

Juvenile justice professionals were interviewed and these included police officers, Government officials, including Ministry of Health and Social Welfare and Ministry of Justice and Constitutional Affairs, Lawyers from NGOs offering legal aid services to children in conflict with the law, Retention Home staff, social welfare officers from the Juvenile Justice Court. The children were interviewed on a one-on-one basis. I was given a private room in which to talk privately to the children and each child was able to respond to the questions in a free environment to talk. I interviewed them one after the other in privacy. This method enabled me to collect the vital information regarding legal aid assistance to juvenile detainees. Table 1 shows the key informants I interviewed.

Table 1: Showing key informants interviewed

Persons interviewed	Sex
Child juveniles in Upanga Retention Home	7 males, 3 females
Officer in Charge, Upanga Retention Home	Male
Social Welfare Officer, Child Juvenile Court	Female
Advocate, Women and Legal Aid Centre (WLAC)	Male
Assistant Commissioner, Juvenile Justice and Correctional Services, Ministry of Health and Social Welfare Department	Male
Project officer, Tanzania Women Lawyers' Association (TAWLA)	Male
Head Legal Aid, Public Services Division, Ministry of Justice and Constitutional Affairs	Female
Gender Desk Officer, Oyster Bay Police Station	Female

3.3.2 Case study method

This method assisted me in focusing my research on the main key informants. I focused my study on the Upanga Retention Home because I wanted to get the views of the children. The home has a total number of 31 children but I chose to focus on only 10 children, being 7 boys and the only 3 girls who were residing at the retention home. This enabled me to trace the 10 children's experiences right from the time of their arrest, through their police detention until they reached the law courts. I used the case study method because it would enable me to focus closely on child juvenile detainees. I did this in order to compare the situation of the 3 girls with a credible sample of the rest of the children. I chose one retention home, the

Upanga Retention Home in Dar es Salaam, as my focus because I was not financially able to visit all the retention homes which are situated in the other regions of the country.

3.3.3 *Observation*

I carried out observations during site visits to find out about the treatment of children while in detention and to see the conditions under which the children are held at the police stations. I sought to discover how rights and duties are adhered to in connection with laws and regulations and international standards. I visited the Upanga Retention Home and interviewed the children and also visited their rooms to have an idea of their accommodation to see if they are up to standard but I found they were unhygienic and congested. I also observed the extent to which children's human rights were being adhered to.

I also made a site visit to the Oyster Bay Police Station where I interviewed the Gender Desk officer who also gave me the opportunity to visit the police cells where children are held and I found that children are detained together with women in a very small space. The impact of this on my research is that I was able to determine that children are held in unhygienic conditions in a very small space together with adults.

3.4 Conclusion

This chapter aimed at discussing the methodologies used while in the field and the methods used in collecting data. It discussed the one-on-one interviews which I conducted which were crucial in ensuring the confidentiality of the children I interviewed. I also explained the grounded, human rights and legal aid approaches to obtain information for the study.

In the next chapter I will discuss the findings from the research, revealing the voices captured during the field research from child juvenile detainees, legal aid providers, government officials as well as a representative from the Juvenile Court.

CHAPTER FOUR

4.0 FINDINGS

‘There is no keener revelation of a society’s soul than the way in which it treats its children.’
(Nelson Mandela, former President of South Africa)

4.1 Introduction

This chapter intends to reveal the voices of the children who are affected by the lack of legal aid as well as the views of government officials and legal aid providers who provide the legal aid in reality. I wanted to get the views of role players in ensuring that child juvenile detainees get access to legal aid in Tanzania. Most of the voices were the children who gave me their experience from the time of arrest up to their stay in the retention home. I interviewed them on their views of legal aid assistance and if they had received any. I interviewed 7 boys and the only 3 girls that were staying in Upanga Retention Home. The chapter also reveals the views of the conditions while in police custody as well as the views of the Gender Desk Officer at the police station where these children are held. It intends to show that children’s rights are being violated right from the time of arrest until they are brought to court to answer the charges brought against them.

My assumptions for this study were:

1. Child juvenile detainees’ cases take a long time to be heard because of the inadequacy of legal aid services.
2. Child juvenile detainees do not receive adequate legal representation and when they do it is of poor quality because it is a free service.
3. Child juvenile detainees in retention homes are not aware of legal aid services offered by NGOs.
4. Children are being held in police stations for longer than 24 hours before being brought to court because they lack legal representation.
5. The Ministry of Justice and Constitutional Affairs does not have the capacity to provide legal aid services to child juvenile detainees.

4.1 Child juvenile detainees' cases take a long time to be heard because of the inadequacy of legal aid services

'I have a case of armed robbery; I did not commit the crime. I was selling CDs and police *jamii* just showed up and arrested me. I am friends with the robbers and the police are still investigating the case. The other co-accused is in an adult prison. There is delay in this case because I am accused along with two adults. My case is taking longer because of this.'

Sections 45 and 46 of the Judicial Service Act require a magistrate or judge to pronounce a judgment within 60 days. Therefore, a child is required to be tried other than in some cases, within 60 days, and section 103(2) of the Law of the Child Act further provides that for any offence, other than homicide, the case shall be disposed of by the court on that day.

I found that some cases take too long and children have been kept in the retention home even after completion of their case. In one incident involving the theft of two million shillings the case had been going on for two years and she was still staying in the retention home. She said:

'My case has been in court for years now and it has been completed but I am still being held in the remand home because there is no transport for me to leave the retention home' (Upanga Retention Home, 27 October 2016).

Other cases keep being postponed in court so children stay longer than one year on remand. There are also delays of cases because according to one incident, the child aged 16 was convicted along with 2 adults so collecting evidence took a long time which means he has already spent a period of 2 years in the retention home. The reasons for delay in hearing cases included on-going investigations and not enough witnesses have been gathered for the case. One child respondent said:

'I was working as a housemaid and a child of 3 years fell in a well between 10 and 11 a.m. and died and I was accused of intentionally killing the child. My case has taken over year because they say they are still looking for evidence.'

4.1.1 Lack of a quorum to hear cases

Cases take a long time to be heard and this might be because it requires a quorum before a case can be heard and the quorum includes a judge, a social welfare officer, a plain clothes policeman. In most cases one of these officials is missing and therefore the case cannot

proceed. A shortage of magistrates also caused a problem of delays of children's cases. Further, the Juvenile Court in Kisumu sits with only one magistrate from 7 a.m. to 9 a.m. Monday to Friday and the magistrate also has to attend to other cases. One child respondent shared:

'I have been in this retention home for a long time, because my case keeps being postponed and it is usually because the magistrate is busy with other cases so I am told my case has been postponed.'

Another reason for postponing cases against juvenile offenders is if not enough witnesses have been gathered, as one of the juvenile respondents claimed:

'My case keeps being postponed because there are not enough witnesses in court so I have been in this retention home for many months because they are still collecting witnesses for my case.'

4.1.2 Nature of the case

A social welfare officer at the retention home admitted:

'Children's cases take long to be heard and for those cases such as murder which are unbailable they stay in for a longer period. Some cases also take long because there are usually delays in collecting evidence' (Upanga Retention Home, 29 October 2015).

4.1.3 Lack of witnesses

There are also delays in getting witnesses together and for instance in rape cases doctors do not come in time. Robbery and murder cases also typically take a longer time. In murder cases the post mortem may take as long as 3 to 4 years. Homicide cases also take particularly longer than others. This is what one juvenile respondent revealed:

'I am accused of murder and my case has taken long to be heard because there are no witnesses.'

4.1.4 Technical issues

There also technical issues that lead to delayed hearings. In some instances witnesses also do not come to court on time. Some of the children admitted as follows:

‘Yes, cases delay to be heard, I have been in detention for 1 year and in my case there has not been enough evidence collected for my cases to carry on so am still in waiting’ (Upanga Retention Home, 27 October 2015).

‘I was a sales boy at Kimara when I was accused of raping a young girl at 10.00 a.m. My case has taken long to be heard and has been on-going in court for 1 year now’ (Upanga Retention Home, 27 October 2015).

The cases therefore take longer than expected because of the investigation machinery being slow. In addition, children who are charged with others also usually experience more delays with their cases. There are excessive delays in justice as admitted by one child:

‘My case has taken 2 years on trial every time my case is called it is adjourned because they are not enough witnesses or they are still collecting evidence; am accused of theft of 2,000,000 shillings. I was also held in a police station for one month before I was brought to this retention home.’

I also found that most of the children have stayed in detention for a long time for being accused of stealing minor things. Another finding is that most detained children cases were not instituted at the Kisutu Juvenile Court but at the District Courts or Primary Courts. In the case of children with cases in the Primary and District Courts they are only provided with legal information, legal advice and coaching but no court representation.

4.1.5 Only one Juvenile Court

There is only one Juvenile Court in Tanzania and it is located in Dar es Salaam. The Court cannot handle all the child juvenile cases so it also causes delays in their hearings. In addition there is only one magistrate who handles children’s cases so this is also the cause of slow trials leading to children staying in retention homes for long periods. According to one legal aid provider:

‘Yes, there is currently one juvenile court in Dar es Salaam and another one is still in construction in Mbeya. Legal representation is only available to juvenile detainees in Dar es Salaam and not in other regions where there are neither juvenile courts nor remand homes.’

A social welfare officer who was interviewed admitted that children with cases in the primary courts do not get any representation because advocates are not allowed to appear in the

primary courts. When I questioned a social welfare officer as to why the children do not get legal representation she informed me:

‘There are lawyers who represent a child in court so they have legal representation. However, they cannot reach all the children.’

4.2 Lack of adequate legal representation for child juvenile detainees

Article 37(d) of the CRC provides that a child shall have the right to prompt access to legal assistance. Article 40(2)(b)(ii) further provides that every child shall have legal or other appropriate assistance in the preparation and presentation of his or her defence.

Based on my interviews with them, 8 out of the 10 children admitted they were not aware of legal representation as they always appeared in court on their own. (However in some instances these were cases in the Primary Court where one does not require representation). One of the children admitted:

‘I am not aware of any legal representation as I appeared in court on my own in the Kibaha District Court’ (Upanga Retention Home, 27 October 2015).

Furthermore, 5 out of the 10 children were not aware of other legal representation, save for one legal aid provider, an NGO called Women and Legal Aid Centre (WLAC). Some children in the retention home admitted they had never received any form of legal representation. In other instances, legal aid providers provided counselling and legal advice but not court representation. Others admitted that there is some legal assistance once your case is at the Kisumu Juvenile Court where there are lawyers who assist with court representation. 2 out of the 10 children informed that there is no legal aid because the contract between the retention home and the legal aid service providers had expired, especially the lawyers who were assisting with their cases. However during the course of the research I found that the contract had been renewed. One of the children interviewed informed me:

‘I must admit there is not enough legal representation as there are not enough lawyers and I have never heard of any NGOs giving legal aid since I came to this retention home. I personally have a case of armed robbery because I stole clothes from a shop but I have no representation in court.’

Some of the children did not receive any legal representation for their cases and admitted that their cases also take a long time to be heard because they do not have a lawyer. The children also informed me that for some cases that are in the Juvenile Court they have the representation of a lawyer.

In practice, legal assistance and representation is only available for free to defendants accused of murder and capital offences, such as treason. A number of legal aid providers provide their services but these services are not enough to go around the whole country, there is also a shortage of lawyers and the ones available offer their services in big cities like Dar es Salaam.

In addition, court sessions where there is no Juvenile Court sometimes function as other ordinary courts, normal court procedures are followed regardless the nature of the case and parties. This puts children at a disadvantage as they are easily intimidated and do not always respond as they would in a Juvenile Court which is child friendly. A small number of children admitted to receiving legal representation from legal aid providers.

As I interviewed the officer in charge of the retention home, he informed me that the children have legal representation although the contract with the previous contractor has expired; at that time they were in the process of renewing the contract. The contract is with a legal aid provider called the Women and Legal Aid Centre who are supported by UNICEF.

4.3 Lack of knowledge of legal aid services offered to juvenile detainees

Children in Upanga Retention Home were not aware of any legal aid services offered by legal aid providers although some have had a visit from one NGO the Women and Legal Aid Centre (WLAC). Others have never heard of any legal aid providers. Some admitted they were aware of support from UNICEF and some lawyers who come to give legal assistance. Others admitted that there is only one representative who represents some of their cases but that is not the case for every child in the retention home and said:

‘There is a representative from WLAC who assists some of us by representing us at the Kisutu Juvenile Court’ (Upanga Retention Home, 28 October 2015).

In addition, the children interviewed were not aware of any legal aid services offered and have never heard of them. They admitted as follows:

‘I have never heard of any organization that provides legal aid to children’ (Upanga Retention Home, 28 October 2015).

‘NGOs come and listen to the cases but do not offer any help’ (Upanga Retention Home, 28 October 2015).

The children generally showed a lack of knowledge of legal aid services being offered to child juvenile detainees. 8 out of the 10 children interviewed have never heard of any legal aid providers offering them assistance of legal representation in court.

The officer in charge of Upanga Retention Home informed me that there are some legal aid providers who approach the children only to give them legal advice and counselling but they do not represent them in court. Therefore as a matter of fact children are not aware of legal aid providers because there is only one legal aid provider that is providing services to the Upanga Retention Home. Further according to one service provider on whether children have knowledge on legal aid services offered by NGOs, he stated:

‘Not all. In places where there are no remand homes child juvenile detainees are not aware of legal aid services. Some of the children kept in remand homes are aware because they get frequent services offered by NGOs and paralegals as they often visit the children in the centres. However not all children are aware.’

Children may have been approached by some organizations such as TAWLA but do not offer the children court representation but rather have offered counselling and observe proceedings in court. Social counselling is also offered by the Department of Social Welfare. Psycho-social advice is also offered. Some children are given a non-custodial sentence where they are allowed to serve their sentence at home.

The legal profession in mainland Tanzania has not adopted an information or outreach strategy, and little is done in practice to inform the public of the legal aid services provided by lawyers (Danish Institute for Human Rights, 2011). However it should be noted that efforts have been made by the Ministry of Justice and the TLS to inform Tanzanians on the

Legal Aid Day. This however, is still not sufficient to send information to all who need legal aid services.

4.4 Detention of children in police stations for longer than 24 hours before being brought to court

Article 37(b) of the CRC provides detention of a child by police should be used as a last resort. The procedure for arrest of offenders is regulated by the Criminal Procedure Act, 1985 (CPA). Section 12 of the CPA prohibits forceful and arbitrary arrest. Further, article 9(3) of the ICCPR also provides promptness in bringing an accused person before a court within 24 hours.

Children admitted to personally being detained in police custody for one week. Others stayed one month without any help before appearing to court and being transferred to the retention home. Others spent 3 weeks while others stayed one month and 4 days in police custody. Others interviewed revealed they had stayed 2 months, 2 weeks and 20 days at the police station.

‘Yes, I stayed in police custody for one month before I was transferred to the retention home’ (Upanga Retention Home, 27 October 2015).

‘I have stayed in police custody for one month and 4 days before being released and being brought to this retention home.’

The officer in charge of the Upanga Retention Home admitted:

‘All the children that have stayed in the retention home have been held in police custody for more than 24 hours. This is due to the delay to provide evidence by the DPP’s case, enough to bring the matter to a court of law.’

Section 101 of the Law of the Child Act provides:

‘Where a child is apprehended and cannot be brought before a juvenile court, that child shall be released unless it is a case of homicide.’

Detaining children in police custody for more than 24 hours has been happening due to procedural requirements. The law requires that a charge should be filed against the child

before the court only when investigations are complete. So when the child is brought to the police station, and there is no retention home nearby, the child may stay at the police station for many hours or days. One of the children interviewed informed me:

‘Yes I have stayed beyond 24 hours in police custody. I stayed for 9 days while others have stayed for 2 months’ (Upanga Retention Home, 27 October 2015).

The officer in charge of the retention home informed me that all the children that have stayed in the retention home have been held in police custody for more than 24 hours. This is due to the delay in providing enough evidence for the DPP to bring the matter to court. The Social Welfare Officer at the retention home further informed me:

‘Children are held in police stations for a long time and do not observe the 24 hour rule. This is usually to gather evidence on the case before submitting the file to the DPPs’ office’ (Upanga Retention Home, 29 October 2015).

Children’s cases are handled by the Police Gender and Children Desk which also handles other cases as well. There are no specific police officers to handle children’s cases while they are in police custody and ensure that they are treated in accordance with the law.

Section 33 of the Criminal Procedure Act 1985 provides that an officer in charge report within 24 hours to the nearest magistrate of persons arrested. However, according to Maganga (2005), this law is often violated either deliberately or out of lack of awareness of its existence. Further, according to the Criminal Procedure Act, a child is required to be brought as soon as practicable before a court.

Section 67(2) of the Criminal Procedure Act provides that a person charged with an offence who fails to be granted bail shall be brought before a magistrate. This is relevant to child juvenile offenders because they are often kept in police custody and are not granted bail.

Section 53 of the Criminal Procedure Act, 1985 requires the arresting police officer to identify his/her name and rank to the arrested person. The research found that police officers do not identify themselves to the children they are arresting. Article 9(2) of the ICCPR provides that anyone arrested should be informed of the reasons of arrest. This article is also relevant to children. Article 40(2)(b)(ii) of the CRC and article 9(2) of the ICCPR require that

a child should be informed of the charges against him or her. Section 53 of the CPA also obliges the police officer to inform the person arrested of his or her rights. The children interviewed complained to me that they were not aware of why they had been arrested and were retained by the police men without informing them of the reasons for arrest.

The research further revealed that while in police custody, parents or guardians are not notified of their children's arrest and detention. Parents are often unaware of their children's arrest and are unable to communicate with their parents as a result, children remain in detention for longer periods of time than is necessary and/or receive custodial sentences because they were unable to communicate with their parents. It also becomes difficult for these children to benefit from their right to bail.

Rule 10.1 of the Beijing rules provides that a child's parents should be notified of their arrest and further General Comment 10 of the CRC Committee provides that parents should be involved in the proceedings. Further, section 56(1) of the Criminal Procedure Act provides that the police investigating a crime against a child to inform their parents.

As mentioned earlier, the legal aid provider revealed that withholding children in detention for a period longer than the statutory 24 hours has been happening due to procedural requirements. In addition if there is no retention home nearby, the children are likely to be held at a police station until investigations of their case is complete.

Other reasons for delay include:

- Intentional delays by police officers
- Absence of defined referral network/system/mechanism
- Ignorance of the law by police officers
- Corruption

According to the field research undertaken, I found that child juvenile detainees are kept in police custody for longer than the statutory 24 hour limit. Children are likely to stay in police detention for longer periods and are most commonly held together with adults. I agree with the court's ruling in *Republic v Njama Zuberi* (1985) TLR 241 in which a boy aged ten was

charged with murder and held where there were no facilities to keep juvenile offenders. The accused had been living with his parents who were willing to look after him but the police refused. The Court held that he be released from custody ‘where he is likely to associate with adult offenders and other undesirable influences.’

4.5 The government’s lack of capacity to provide legal aid

The Department of Public Legal Services under the Ministry of Justice and Constitutional Affairs has three sections which deal with public complaints, legal services and legal aid which was separated from the Attorney General’s Chambers. The Legal Aid Section has the following duties:

- To coordinate and regulate the provision of legal aid
- To carry out research on provision of legal aid services and advise
- To prepare a framework, standards, guidelines and criteria for the provision of legal aid to the needy and indigent and monitor and evaluate their expectations
- To scrutinize requests for legal aid and advice
- To develop and operationalise a scheme for the efficient and proper functioning of legal aid services
- To educate the public on legal aid services

The Commission for Human Rights and Good Governance (CHRAGG) was established under the Constitution. In 2006 CHRAGG received a recommendation from the Attorney General to conduct a consultation into violations of children’s rights. This led to the creation of a Children’s Desk.

A task force was formed in 2010 including members of the central government, academia and civil society. These included the Attorney General’s Chambers, Legal Aid Committee of the University of Dar es Salaam, Tanganyika Law Society (TLS), Tanzania Women Lawyers’ Association (TAWLA), Women’s Legal Aid Centre, and the Legal and Human Rights Centre (LHRC). The Open University and the University of Dar es Salaam both run legal aid clinics providing legal information and legal advice and the University of Dar es Salaam provides legal representation. However these services may prove to be costly as the TLS requires the person to be earning below the minimum wage before legal aid can be granted as the criteria

for receiving legal aid. This however proves to be an obstacle for those who cannot afford it as it is based on the applicant's level of income because there is still an amount that needs to be paid.

Although attempts have been made by the government to improve the provision of legal aid services they have still faced failure because the reality on the ground is that children are still not receiving legal aid assistance. For example, the Upanga Retention Home that was my focus of research had never had any government intervention to provide legal aid to the children living in that home. In addition, the services of the government are still not up to international standards and as I have mentioned before children are still being subject to inhuman and degrading treatment at police stations where they are held in detention for long periods.

In addition, according to the concluding remarks of the Committee the government of Tanzania has not fully complied with the obligations of the CRC and this includes improper administration of juvenile justice system (Maganga, 2005).

According to Hamilton and Barnes (2011), the government has the following obligations in ensuring access to justice for children: legal advice, representation, a right to consult with his or her lawyer. Further according to Principle 9 of the draft UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, the Government has a responsibility under its international commitments to allocate necessary and sustainable resources to the legal aid system.

The only statutory body in Tanzania offering legal aid is the Tanganyika Law Society (TLS) which is a statutory body (regulated by the Tanganyika Law Society Act, 2002) and it represents advocates. The TLS is the main body under the Legal Sector Reform Programme mentioned earlier and is responsible for establishing a Legal Aid Secretariat to manage funds and select NGOs who provide legal aid in Tanzania.

The TLS has reported a small number of children applying for legal aid services. The TLS has established a *pro bono* system, where lawyers are in principle obliged to offer legal advice and representation free of charge. Furthermore, clinics have been established by NGOs, where in-house staff, consisting mostly of jurists and paralegals (but also a limited

number of lawyers), provide a variety of legal aid services. In addition, other than the state-funded criminal legal aid scheme, there are 2 key categories of legal aid providers existing in mainland Tanzania. The first category relates to institutions whose main objective is legal aid. These include legal aid clinics connected to higher learning institutions, such as the School of Law of the University of Dar es Salaam. The second category includes institutions including the TLS. Legal aid providers in this category include full-time in-house employed lawyers, jurists and paralegals and private lawyers who are recruited for specific tasks and lawyers offering *pro bono* services on an *ad hoc* basis in connection with the programmes established by these organisations (Danish Human Rights Institute, 2011). There is no national policy or bill on legal aid in mainland Tanzania.

The government has outsourced its duties to provide legal aid to legal aid providers through the Legal Aid Secretariat, however, there are still obstacles to children realising their right to free legal aid in Tanzania.

Retention home officials informed me that the Department of Social Welfare has the capacity to handle the children in Dar es Salaam but not in other regions. This remains a challenge for children who are outside Dar es Salaam who cannot get legal aid services. Some of the barriers for children in accessing legal aid include lack of knowledge by the children that their rights have been violated and one could get legal assistance for the crime committed. Further there are few legal aid services that target children. Children are not aware of how to get access to legal representation. Children are held in police stations without any legal assistance being offered. As a result, most children in conflict with the law go through proceedings without any legal advice or representation (Hamilton and Barnes, 2011).

I found that the Department of Social Welfare did not have the capacity to handle the children as they faced a number of challenges like insufficient staff or resources to run the retention home. The Department of Social Welfare does not have the capacity to give services to the children kept in remand homes although the officials admitted they had the capacity. They may have the ability to take care and nurture the children in remand homes but do not have enough resources to afford legal expertise for all the children in the retention home. Only a few children living in the retention home get the services of a lawyer. According to the Officer in Charge of Upanga Retention Home:

‘The retention home continues to receive children even if it has reached capacity if the number is big we make the necessary adjustments like adding mattresses. We have a capacity to taken in 50 people but even if the number is bigger we will follow the order of the court.’

There are still as a matter of fact many challenges being faced by the government in ensuring all children access legal aid. I found that on ground it is the non-governmental organisations that are the key players in providing legal aid services to children.

Finally, the government has failed in its role of providing free legal aid services to children in Tanzania because by outsourcing the function to a Legal Aid Secretariat that is composed of legal aid providers a number of challenges are faced by legal aid providers like a shortage of lawyers or not enough resources to reach all the children in Tanzania in conflict with law who require free legal aid. International standards of human rights are not being adhered to in reality and the conditions under which these children are kept right from the time of their arrest by the police up to when they appear before court and further in the retention home, amount to torture.

Article 37(a) of the CRC provides that n child should be subjected to degrading treatment. This mirrors the provision in article 7 of the ICCPR, article 5 of the ACHPR and article 16 of the ACRWC. Torture is clearly prohibited under national law too. Article 13(6)(e) of the 1877 Constitution, prohibits torture. However, the reality on ground is that children are being subjected to inhuman and degrading treatment while in detention in police cells and this amounts to torture. The government has failed in its role of ensuring that children are not subjected to inhumane and degrading treatment or ensuring that they afford free legal aid services.

4.6 Conclusion

This chapter dealt with the voices of the child juvenile detainees who are living in Upanga Retention Home. It is clear from the above discussion the lack of access to justice for these children who are on remand. The majority of them have never had access to a lawyer and have not received any legal aid. The government has failed in its role of providing free legal aid services as clearly their services have not reached the majority of the children interviewed. In the light of this the next chapter will seek to discuss the recommendations to improve the access to legal aid services by child juvenile detainees.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

Children in conflict with the law in Tanzania have limited access to legal aid services throughout the justice system. The majority of the children are unaware of their rights and their entitlements to the law right from the time of their arrest. There is a need to strengthen the legal framework to make legal aid accessible to children in retention homes. Although the government has taken positive steps in realising the rights of children, there are still violations going on in regarding to children accessing justice in Tanzania. The Law of the Child Act has also a progressive law in realising the rights of children but the Act is not being implemented to the full. The main obstacles to children's access to justice have been laid out in this research paper. The challenges include: lack of enough magistrates to adjudicate children's cases, lack of legal advice and representation in court, lack of knowledge by children of legal aid services provided, lack of Juvenile Courts (there is only one Juvenile Court in the whole country so it causes delays of cases). Tanzania also lacks a specialised system to cater for administering justice to juvenile. For instance, although a Police Gender and Children's Desk was introduced it does not specifically deal with children and the police who handle children's cases are not trained on juvenile matters. Further, ensuring access to justice for child juveniles requires a multi-disciplinary approach involving ministries, administrative, judicial and executive bodies, lawyers, social workers, paralegals, civil society organisations, communities, parents and children themselves. All these should function well together to ensure that a child's best interest is considered first and foremost.

According to the research findings in relation to my assumptions, it can be concluded that child juvenile detainees' cases take a long time to be heard because of the inadequacy of legal aid services. Further, child juvenile detainees do not receive adequate legal representation and when they do it is of poor quality because it is a free service. In addition, it was can be said that child juvenile detainees living in retention homes are not aware of legal aid services offered by legal aid providers. Furthermore, the research found that children are being held in police stations for longer than 24 hours before being brought to court because they lack legal representation. Lastly, the Ministry of Justice and Constitutional Affairs does not have the capacity to provide legal aid services to child juvenile detainees because this role has been

outsourced to legal aid providers who face a number of challenges in delivering legal aid services.

5.2 Recommendations

- Although the government has made some efforts towards improving the juvenile justice system in the country, the research has showed there are still problems in the system that are weak and need to be improved to achieve the minimum international legal standards. There is also a need to update the existing legislation and bring it into line with international standards.
- There is need to appoint more Magistrates in the Juvenile Court in order to speed up the trials of child juvenile detainees. There should be specialised training on the Convention on the Rights of the Child. There is further need to ensure that the judiciary has up to date information about children living in retention homes, to ensure that children are not held for a long time during the course of their trial.
- Children's cases need to handle children's cases expeditiously and ensure periodic reviews of children's cases. There should be a mechanism that ensures access to legal representation for children who have come into conflict with the law.
- As it is a fact that lacking legal representation in juvenile criminal court proceedings has greatly led to the violation of the rights of the children, there is therefore a need to establish a legal aid scheme for juveniles that is functional.
- The government needs to ensure that they develop a mechanism that every child gets access to legal aid and gets free legal advice or other appropriate assistance from the time of arrest through the initial hearing to the time of trial and sentencing. As was discovered during this research children do not have any information either about why they are being arrested or legal aid services.

- Since there is poor knowledge about children's rights and there is a lack of general information about legal aid providers, there is a need to develop a national information package that will ensure communities get information on legal aid services so parents can request legal aid on behalf of their children. Further it should ensure the package is widely available for the public to access and be made widely available to the community. Information should be circulated on how to access legal aid providers. This information should be shared through schools, the radio and television and newspapers. Further, information should be made available through police stations, retention homes, in courts and at approved schools.
- The government needs to strengthen their cooperation with legal aid providers/non-governmental organisations who offers legal assistance to children who are in conflict with the law in order to facilitate their access to legal help during their court trial. The government currently has a task force of a few legal aid providers who offer legal aid services.
- There is a need to improve on the provision of information by legal aid providers to the community, this will ensure that community members are aware of their services and be able to access legal representation when required.
- There is need to put in place a mechanism that ensures that children have legal access while they are in police custody after being arrested. This will assist in ensuring that children are not detained at the police station for longer than 24 hours which is the statutory time.
- Police officers should be provided training on child rights issues and especially the Law of the Child Act and be trained on friendly methods of dealing with children.
- The Government needs to comply with article 37(c) of the CRC and article 17 (2)(b) of the ACRWC, which recommended that the Government should

establish separate detention facilities at police stations for juveniles and increase the number of retention homes and approved schools throughout the country for the best interest of juveniles.

- There is a need to review the law which restricts legal aid to those charged with capital offences (murder and treason) and to allow it to extend to those charged with other offences as well.
- The Ministry of Home Affairs needs to work to improve the conditions in police detention to ensure that they are up to international standards and are regularly monitored and ensure that the rights of children are not violated while in detention.
- The government should work to develop special units within the police that deal exclusively with children who come in conflict with the law other than the Gender and Child Police Desk which serves both women and children and is not specifically meant for children.
- There is a further need to build the capacity of police officers for child protection response for children in conflict with the law. There is need for a trained liaison police officer at each police post equipped to handle children's cases and who maintains good links with social welfare officers.
- Children should be allowed access to family members while in detention and the conditions at the police station should be such that child offenders are detained separately from adults.
- There is a need for the Social Welfare Department in the Ministry of Health to improve its capacity to provide facilities for juvenile detainees and acquire adequate equipment and facilities according to international standards.
- The Social Welfare Department should provide/allocate enough resources to ensure that children are transported from retention homes to court, so that their

cases are reviewed and dealt with within the statutory time limits. There have been reported delays of children living in the retention home for lack of transportation.

- The Ministry of Health and Social Welfare should ensure that retention homes are established in every region as there are currently only 5 retention homes in 5 regions.
- The Ministry of Health and Social Welfare should ensure that there are enough social welfare officers in each region as at the moment there is a shortage of them.
- There is a need to ensure that there are enough prosecutors in each district exclusively to prosecute juvenile cases. This will assist in speedy trials and ensure that a child is accorded their right to a fair trial and hearing.
- Social welfare officers should be appointed and specially trained in juvenile justice to carry out the duties as laid out in the Law of the Child Act 2009 to ensure that child juvenile detainees get the necessary support and their rights in the criminal justice system are not violated.
- Social welfare officers should be trained on their obligations under the Law of the Child Act 2009 to ensure that they understand and implement them in the best interests of the juvenile offenders under their care.
- Children under the age of 12 who come into conflict with law should not be exposed to the criminal justice system. The Ministry of Health and Social Welfare together with the Ministry of Home Affairs should develop a protocol for dealing with such children to avoid exposing them to the justice system.
- The Tanzania government should put in place a mechanism where advocates take up *pro bono* cases specifically for children's cases. There is a need to create incentives to increase the number of lawyers offering legal aid services.

- In addition, the government could build up a well designed legal aid country wide programme which will develop a legal aid network for legal aid providers. The current task force that works with a selected number of legal aid providers is not sufficient to cover the whole country. It should also establish a fund to provide grants to legal aid providers including non-governmental organisations and these can be raised from donor agencies.
- The Ministry of Justice and Constitutional Affairs should develop a mechanism where children who come into conflict with the law are given free legal assistance right from the time of arrest to when they appear before a court of law as not all children currently access the legal aid programme by the Ministry of Justice and Constitutional Affairs.

Bibliography

Antieaut C 1961, Constitutional rights in Juvenile Courts, Cornell Law Quarterly, vol 46, spring 1961

Child Trends (2014) Juvenile detention available at <http://www.childtrends.org/?indicators=juvenile-detention> accessed on 26th February 2016

Danish Institute for Human Rights (2011) Access to Justice and Legal Aid in East Africa A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors, Copenhagen

Hamilton C and Barnes R (2011) Assessment of the Access to Justice System for under -18s in Tanzania, Colchester, UK ,Coram Children's legal centre

International Federation of Women Lawyers (FIDA) (1986) Proceedings and papers of a Symposium "Society and The Child", Fourth Dimension Publishers, Enugu, Nigeria

Institute for Security Studies (ISSAfrica), (2009) Failing young offenders, Juvenile Justice in Sierra Leone, Tanzania and Zambia, in ISS Policy Brief Nr 08, September 2009)

Lang O (1976), Access to Justice, Chitty's Law Journal, Vol 24, Issue 1 (January 1976)

Legal assistance for children in conflict with the law available at <http://www.oijj.org/legal/situation.php?c=1&p=173> accessed on 26th February 2016

Legal Services Facility (2012) Baseline Survey on mainland Tanzania and Zanzibar for Legal Services Facility, Dar es Salaam, Tanzania

Maganga C (2005) Administration of Juvenile Justice In Tanzania A study of its compatibility with International Norms and Standards (Un published), A dissertation submitted in partial fulfilment of the requirements for the Degree of LL.M in International Human Rights Law, Lund University, Sweden

Penal Reform International (2007), Access to Justice in Africa and Beyond, Making the rule of law a reality, Bluhm Legal Clinic of the Northwestern University School of Law Chicago, Illinois

SOS Children' Village Tanzania (2012) Status of Children in Tanzania

Tanzania Ministry of Constitutional and Legal Affairs (2012), Analysis of the situation of children in conflict with the law in Tanzania (2012)

Tanzania Ministry of Constitutional and Legal Affairs (2013), Child Justice, A Five year strategy for progressive reform 2013-2017

Tanzania Commission for Human Rights and Good Governance (CHRAGG) (2011), Inspection Report for Children in Detention Facilities in Tanzania

Tanzania Law Reform Commission (1994) Report of the Commission on the law relating to children in Tanzania

Tanzania Women Lawyers Association (2012), Children in Detention Manual; Discussing the rights of children in detention and those in child labour, Dar es Salaam

Women's Legal Aid Centre (2012/2013), Legal Aid Programme for Children in Conflict with the law, Women's Legal Aid Centre, Dar es Salaam

UNICEF (2009) Child Protection and Justice- Justice for children available at http://www.unicef.org/tanzania/6908_10616.html accessed on 26th February 2016

UNICEF, Juvenile Justice available at <http://www.unicef-irc.org/publications/pdf/digest3e.pdf> accessed on 29th February 2016

UNICEF, UNDOC (2011), Child friendly Legal Aid in Africa, Dakar

UNDP (2013) Rule of law and access to justice in Eastern and Southern Africa, UNDP Addis Ababa, Ethiopia

United Nations (2011) Access to legal aid in criminal justice systems in Africa: Survey Report, United Nations Office on Drugs and Crime, Vienna