



ONCE
SEXUALLY ABUSED,
TWICE VICTIMISED:
ACCESS TO JUSTICE
FOR CHILD VICTIMS
OF SEXUAL VIOLENCE
IN TANZANIA

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Abstract

This article uses empirical data to provide answers on the extent to which the justice system is accessible to child victims of sexual violence in Tanzania. It is informed by the procedural justice theory which holds that in interactions with authorities, the perceived fairness of the process may be more important than the favourability of the outcomes themselves.

It argues that despite Tanzania being a party to international treaties which guarantee access to justice and guaranteeing access to justice in its laws, the reality on the ground is that child victims of sexual violence are faced with so many hurdles to an extent that they decide to abandon the justice system in favour of out of court agreements which may not necessarily provide justice in favour of the victims. Thereafter, it is recommended that measures need to be taken in order to improve access to the justice system for child victims of sexual violence in order to protect them from being double victimised.

Key words: Access to justice, sexual violence, child victims

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Introduction

Sexual violence occurs throughout the world. Research conducted suggests that in some countries nearly one in four women may experience sexual violence by an intimate partner, and up to one-third of adolescent girls report their first sexual experience as being forced.³ Sexual violence has a profound impact on physical and mental health. Apart from causing physical injury, it is associated with an increased risk of a range of sexual and reproductive health problems, with both immediate and long-term consequences and sometimes even death. Deaths following sexual violence may be as a result of suicide, HIV infection or murder, the latter occurring either during a sexual assault or subsequently, as a murder of 'honour'. Sexual violence can also profoundly affect the social wellbeing of victims because individuals may be stigmatised and ostracised by their families and others as a consequence.⁴

Childhood sexual abuse is a major problem in Tanzania affecting 1 in 3 females and 1 in 6 males at some time before their 18th birthday.⁵ Nearly 3 out of every 10 females and 1 out of every 7 males reported at least one experience of sexual violence prior to the age of 18.⁶

Millions of children throughout the world suffer harm as a result of crime for example sexual violence and if the rights of those children have not been adequately recognised, they may suffer additional hardship when assisting in the

justice process.⁷ Arguments in favour of strengthening the rights of victims in the criminal justice process have largely been made within the framework of a human rights perspective and with a view to meeting their procedural needs and minimising their experiences of secondary victimisation.⁸ Secondary victimisation occurs when people who have been victimised experience victim-blaming, insensitive comments and statements that minimise the harm they have experienced.⁹ Victims of sexual violence in particular have been found to experience secondary victimisation, often feeling blamed, doubted and re-victimised.¹⁰ Girls are particularly vulnerable and may face discrimination at all stages of the justice system.¹¹

It is therefore important to improve the responses to child victims and witnesses of crime because this improvement can make children and their families more willing to disclose instances of victimisation and be more supportive of the justice process.¹² The procedural justice theory¹³ holds that in interactions with authorities, the perceived fairness of the process may be more important than the favourability of the outcomes themselves. This shows that it is important for people who have been victimised to be met with dignity and respect by the

3 Dahlberg, L.L., Krug, E.G., Mercy, J.A., Lozano, R., and Zwi, A.B., World Report on Violence and Health, World Health Organisation, Geneva, 2002, p. 149.

4 *Ibid*

5 UNICEF, CDC, MUHAS, Violence against Children in Tanzania Findings from a National Survey, UNICEF, Dar es salaam, 2011, p. 27.

6 *Ibid*

7 Para 7(a) of the UN Economic and Social Council (ECOSOC), UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, 22 July 2005, E/RES/2005/20, available at: <http://www.refworld.org/docid/468922c92.html> [accessed 5 July 2018 at 1810 hrs].

8 Antonsdóttir, H.F., *A Witness in My Own Case: victim-survivors' views on the criminal justice process in Iceland*, Feminist Legal Studies, 2018, available at <https://doi.org/10.1007/s10691-018-9386-z> [accessed 17 December 2018 at 1350 hrs].

9 Orth, U., *Secondary Victimization of Crime Victims by Criminal Proceedings*, Social Justice Research, 2002, Vol. 15, No. 4, pp. 313–325.

10 Campbell, R. and Raja, S., *Secondary Victimization of Rape Victims: insights from mental health professionals who treat survivors of violence*, Violence and Victims, 1999, Vol. 14, No. 3, pp. 261–275.

11 Para 7(c) of the the UN Economic and Social Council (ECOSOC), UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, 22 July 2005, E/RES/2005/20, available at: <http://www.refworld.org/docid/468922c92.html> [accessed 5 July 2018 at 1810 hrs].

12 Para 7(i), *Ibid*.

13 Lind, E.A and Tom R.T., *The Social Psychology of Procedural Justice*, Springer, New York, 1988.

police and legal professionals, to be informed about how the criminal justice system works and how their case is progressing, and to be able to participate and have a voice in the criminal justice process.¹⁴

In Tanzania, like most legal systems, a victim is simply a complainant who initiates the criminal justice process by making a complaint or bringing evidence and information about commission of a crime to the police.¹⁵ The police conducts investigations. Once investigation is completed the case will be ready for prosecution. If it is decided that there is a realistic prospect for conviction, the victim then plays an additional role as a witness for the prosecution and helping the State to give evidence in court in support of the offence the accused is charged with.¹⁶

This article investigates the ability of child victims of sexual violence to seek and obtain a remedy through formal institutions of justice in Tanzania. The article discusses briefly on why children need special provisions on the right of access to justice, on the right of the child to access justice under international law, access to justice for children in Tanzania and further examines legal and social barriers affecting child victims of sexual violence to access the formal systems and structures of the law and thereafter gives recommendations for improvements.

1.1. The Study and Methodology

This article is a product of a research study entitled *Study on Drivers of Violence against Children and Positive Change in Tanzania Mainland and Zanzibar*. The study was commissioned by UNICEF and permission has been given to publish this article. The overall aim of the study was to understand better the underlying factors that contribute to a protective environment for children.¹⁷ This aim was pursued through a dual focus on understanding better how socio-cultural norms and practices give rise to different forms of violence against children and how socio-cultural factors can help provide a protective environment for children. The study was undertaken between October 2014 and December 2015 in 10 regions across Mainland Tanzania and Zanzibar.

The framework for the study was informed by sociological theories of childhood, children's rights, ecologies of human development and principles of participatory action research. Emphasis was placed on providing opportunities for participants to engage in a process of participatory learning and reflection rather than simply offering their views. The study involved a first phase of focus groups followed by a second phase of community-based participatory research involving adults and children.

In the study, six focus groups were undertaken in each study location with boys, girls, mothers, fathers, professionals, and community leaders. This was then followed by 6 community action research workshops in each location to engage community members in a participatory inquiry process to

¹⁷ Percy-Smith, B. *et al*, Study on Drivers of Violence against Children and Positive Change in Tanzania Mainland and Zanzibar, UNICEF, Dar es salaam, forthcoming, p. 4.

¹⁴ Antonsdóttir (no. 6 above).

¹⁵ Philip, M.T., *Victims of Criminal Justice System in Tanzania –the need for radical approach in advancing juvenile justice*, A paper presented at TLS 2015 Annual General meeting at the Arusha International Conference Centre, 2015, p. 2.

¹⁶ Philip, M.T., *Victims of Criminal Justice System in Tanzania –the need for radical approach in advancing juvenile justice*, A paper presented at TLS 2015 Annual General meeting at the Arusha International Conference Centre, 2015, p. 2.

explore how socio-cultural factors give rise to violence against children and in turn how to develop a protective environment for children. Community action research was complemented by participatory research with children exploring their own experiences of, and reflections on, violence against children and their visions for a protective environment. Participatory research with children involved community mapping, drawings, time-line/diaries, letters to adults and production of newspaper front pages to present their visions of protective environments for children. Additionally three community reference group meetings were held in each location involving on average 12 participants per group to engage key local stakeholders in a process of reflection and sense making at different stages of the research and to ensure a degree of local ownership.

1.2. What is Sexual Violence

In this article, sexual violence means any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality by using coercion, by any person regardless of their relationship to the victim, in any setting.¹⁸

Coercion can cover a whole spectrum of degrees of force.¹⁹ Apart from physical force, it may involve psychological intimidation, blackmail or other threats for instance, the threat of physical harm. It may also occur when the person aggressed is unable to give consent.²⁰

1.3. What is access to justice

There is no single definition of access to justice. However, the words 'access to justice', serve to focus on two basic principles of the legal system, a system by which people may vindicate their rights and resolve their disputes under the general auspices of the state.²¹ For such to be effective, the system must first be equally accessible to all, and second, it must lead to results that are individually and socially just.²²

Over the last few decades the concept of access to justice has evolved from a right to take legal action for the violation of rights into a term that more broadly encompasses equitable and just remedies.²³ Access to justice is increasingly viewed as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process in which mechanisms are available, affordable and accountable.²⁴

It has been said that access to justice is not limited to the procedural mechanism for the resolution of disputes but includes other variables like the physical conditions of the premises where justice is dispensed, the quality of the human and material resources available thereat, the quality of justice delivered, the time it takes for the delivery of justice, the moral quality of the dispenser of justice, the observance of the general principles of the rule of law, the affordability of the cost of seeking justice in terms

18 Dahlberg (no. 1 above) p. 149.

19 *Ibid*

20 *Ibid*

21 Malunga, B., *The Rule on Corroboration in Sexual Offences and Women's Access to Justice in Malawi*, Zambia Law Journal, 2015, Vol.46, pp.121-150, at p. 126.

22 Malunga (no. 19 above) p. 126.

23 Smith Hrle, M., and Tošić, S., *Children's Equitable Access to Justice in Bosnia and Herzegovina*, UNICEF, Sarajevo, 2015, p. 24.

24 Human Rights Council, *Rights of the Child: Access to Justice for Children*, A/ HRC/25/L.10, 25 March 2014.

of time and money, the quality of the legal advisers that assist the litigants, the incorruptibility and impartiality of operators of the system.²⁵

Traditionally, access to the justice system has focused more on access to justice per se rather than on the quality of justice itself.²⁶ From the rights-based approach, access to justice system is important to protect people's rights and promote their social inclusion while barriers to access reinforce poverty and social exclusion.²⁷ Thus, access to justice system should be seen from a holistic point of view.²⁸

Access to justice is a right in itself and a prerequisite for the fulfilment of all other rights, whether social and economic or civil and political rights.²⁹ Access to justice is crucial for restoring rights that have been disregarded or violated because there is no point of having rights, if the rights are violated without a remedial course.³⁰

1. Do Children Need Special Provisions and Protection on the Right to Access Justice?

As in other areas of the law and its operation there are unspoken and often unrecognised prejudices which operate to exclude children and young people from the legal system and work against their interests.³¹ Although a human rights approach is generally accepted when dealing with adults, it is somehow deemed

to be ineffective when children are the potential client group. This is because to some extent there is a perception that children and young people are not able to make decisions in their own best interests.³² For children of tender age, particularly those under the age of five, it is true that it would be difficult to act on their behalf without obtaining further guidance from either a guardian, whether or not a parent, or someone with knowledge of child development or child psychology.³³ However, this argument cannot be considered persuasive when it comes to older children and young adults.³⁴

Consequently, children and young people do not readily seek legal advice independently because of the temptation on the part of adults to deny the competence of children and young people and to substitute their judgement for that of the child or young person in the belief that they are acting in the best interests of the child or young person.³⁵

However, the concept of the best interests of the child is problematic as it has an inconsistent history.³⁶ Until very recently most societies have interpreted the concept in a manner that was paternalistic.³⁷ Adults were able to substitute their judgement for that of the child on the basis that they possessed a greater knowledge of the world and had a better understanding of the consequences of actions. Rarely were any guidelines given to decision-makers as to the factors to be taken into account when they were making decisions

25 Gwangudi, M.I., *Problems Militating against Women's Access to Justice in Nigeria*, University of Maiduguri Law Journal, 2002, No. 5, pp. 13-14 as quoted by Okogbule, N.S., *Access to Justice and Human Rights Protection in Nigeria: Problems and prospects*, SUR International Journal on Human Rights, 2005, Vol.2 No.3, pp. 95- 113, at p. 9.

26 Mece, M., *Access to Justice System as an Effective Enjoyment of Human Rights: Challenges faced by Roma minority in Albania*, Contemporary Readings in Law & Social Justice, 2016, Vol.8, No.1, pp. 215- 44, at p. 216.

27 Mece (no. 24 above) p. 216.

28 *Ibid*

29 UN Special Rapporteur on Extreme Poverty and Human Rights, *Extreme poverty and Human Rights*, A/67/278, 9 August 2012, para. 91.

30 Smith and Tošić (no. 21 above) p. 24.

31 Ustinia, D., *Justice for Children: The obligations of society, lawyers and law schools*, Flinders Journal of Law Reform, 1997, Vol.1, pp. 297- 309, at p. 298.

32 For a proposed model of decision-making which would recognise the competencies of young people, see Eekelaar, J., *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determination*, International Journal of Law, Policy and the Family, 1994, Vol. 8, No. 1, pp. 42-61.

33 Ustinia (no. 29 above) p. 299.

34 *Ibid*, p. 298.

35 Ustinia (no. 29 above) p. 303.

36 Ustinia (no. 29 above) p. 299.

37 *Ibid*

purportedly in the best interests of the child.³⁸ This conception of best interests also served to undermine the idea that children had competencies which should be respected.³⁹ This approach to the best interests principle has been brought into question by the provisions of the Convention on the Rights of the Child.⁴⁰ Increasingly, scholars are taking the view that the best interests principle should be seen in light of the purposes of the CRC, one of which is to give greater recognition to the autonomy rights of children and young people and to accord due weight to their views.⁴¹

The purpose and necessity for special children's rights is arguably that children are more vulnerable compared to adults and hence require special provision and protection by adults and special institutions.⁴² This is not disputed. However, this article emphasizes that children should be allowed to exercise these rights and conditions should be created to allow this. Children must be understood as social agents if the principle of the CRC that children are subjects of rights is to become a reality.⁴³

Therefore, the attitude that children are 'incomplete' human beings who must first develop and until then are dependent and possibly inferior on adults which is socially constructed, if allowed to be the basis of interpretation of children's rights will result into and intensify dependence.⁴⁴ This article takes the position that children's rights are a possible way to reduce socially

constructed children's independence, to strengthen their autonomy and make their agency a reality. This should be reflected in the legal provisions of access to justice so that the right conditions are created to enable children to participate directly in proceedings, air their views and their views being given due weight.

2. Right of the Child to Access Justice under International Law

The right of the child to access justice has two dimensions. A child can have rights as an alleged offender, and also a child can have rights as a victim/witness. This paper will focus on the second dimension of the right of the child to access justice as victims/ witnesses. Guideline 9 (a) of the UN Guidelines on Matters involving Child Victims and Witnesses of Crime⁴⁵ defines child victims and witnesses as 'children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or group of offenders'. Children's access to justice, as defined by United Nations (UN), is the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards (including the Convention on the Rights of the Child).⁴⁶

Access to justice for children is at the core of the protection of human rights of children and an essential prerequisite for the protection and promotion of all other human rights.⁴⁷ Children often face challenges in their efforts to seek justice

38 *Ibid*

39 *Ibid*

40 *Ibid*

41 Rayner, M., *The Right of the Child to be Heard and Participate in Legal Proceedings: Article 12 of the UN Convention on the Rights of the Child*, A paper presented to the First World Congress on Family Law and Children's Rights, Sydney, July 1993.

42 Liebel, M., *Children's Rights from Below: Cross-cultural Perspectives*, Palgrave Macmillan, Hampshire 2012, p. 85.

43 *Ibid*

44 Liebel (no. 40 above) p. 85.

45 ECOSOC Resolution 2005/20, 22 July 2005.

46 United Nations, UN Common Approach to Justice for Children, 2008, available at <https://www.wessex.ac.uk/armedcon/storyjid/UNCOMMON.pdf> [accessed 5 July, 2018 at 1532 hrs].

47 The UN Office of the High Commissioner for Human Rights (OHCHR), Opening remarks of Flavia Pansieri, Deputy High Commissioner for Human Rights on Human Rights Council Annual meeting on the Rights of the Child, 2014, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14367&LangID=E> [accessed 6 July 2018 at 12.33 hrs].

because of complex justice systems, lack of awareness about their rights, reluctance to seek justice and because in many parts of the world it was culturally and socially unacceptable for children to lodge complaints and claim redress because as discussed above, children are considered incompetent and unable to make decisions in their best interests⁴⁸

The Economic and Social Council's Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime⁴⁹ provide good practices, standards and principles relevant for effective criminal justice for children. Access to justice for children requires the legal empowerment of the children to be able to obtain a just and timely remedy for violations of their rights.⁵⁰ Access to justice also guarantees the speedy and fair administration of justice accompanied by appropriate support for children especially children with disabilities as victims of the offences through, among other things, access to relevant information, legal and other services for counselling and social assistance/support and the right to participate in criminal trials where relevant and appropriate.⁵¹ In order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles: dignity, non-discrimination, best interests of the child, protection, harmonious development and right to participation.⁵²

Therefore, there should be a child sensitive justice system to guarantee access to

justice for children. A child-sensitive justice system is the one that understands and respects the rights of children and their unique vulnerabilities and includes independent, safe, effective and easily accessible complaint mechanisms for children.⁵³ The views of children, even those of the youngest, are to be given due consideration. Furthermore, children have to be protected from manipulation, harassment, reprisals or intimidation.⁵⁴

2.1. Specific Aspects of the Right to Access Justice for Children

2.1.1. Children's Participation in Court Proceedings

Children's participation in court proceedings is an empowering experience especially if they are mature.⁵⁵ It affirms their dignity by being treated as individuals and also affirms their equality in society and under the law.⁵⁶ It may also be essential to ensure that justice is served as their testimony may provide the necessary evidence to secure a conviction.⁵⁷ However, there are many concerns about child participation in court, especially when the child has a disability, as the court environment by its nature is hostile and unfavourable to children.⁵⁸ It may involve long waiting periods, and the content of the proceedings in sexual offences by nature is traumatising and uncomfortable.⁵⁹ The court, therefore, has a duty to provide the necessary support and means of participation to

⁵³ OHCHR (no. 45 above).

⁵⁴ *Ibid*

⁵⁵ See generally Ross, I. et al, Child Participation in Court, available at <http://www.law.umich.edu/centersandprograms/pcl/ljohnsonworkshop/Documents/Child%20Participation20in%20Court.pdf> [accessed 5 July, 2018 at 1751 hrs].

⁵⁶ ECOSOC (no. 5 above).

⁵⁷ Malunga, B., Kanyongolo, N.R. and Mbano-Mweso, N., *Access to Justice of Children with Disabilities in Defilement Cases in Malawi*, African Disability Rights Year Book, 2017, Vol. 5, No. 1, pp. 25 – 39, at p.36.

⁵⁸ Ross (no. 53 above).

⁵⁹ See Firth, H. et al, *Psychopathology of Sexual Abuse in Young People with Intellectual Disability*, Journal of Intellectual Disability Research, 2001, Vol. 45, No. 3, pp. 244-252; Gail, S., et al, *Testifying in a Criminal Court: Emotional effect on child sexual assault victim*, Monographs of the Society for Research in Child Development, 1992, Vol. 57, pp. 1-159.

⁴⁸ OHCHR (no. 45 above).

⁴⁹ United Nations Office on Drugs and Crime Vienna, Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary, United Nations, New York, 2009.

⁵⁰ UN (no. 44 above).

⁵¹ OHCHR, Access to Justice for Children: Report of the UN High Commissioner for Human Rights, A/HRC/25/35, UN General Assembly, New York, 2013.

⁵² ECOSOC (no. 5 above) para 8.

children so as to ensure effective access to justice.⁶⁰ As vulnerable witnesses, there must be special measures and other reasonable accommodations according to the personal needs of the child.⁶¹

Article 12 of the CRC gives children the right to express their views freely in all matters affecting them. The article places a legal obligation on State parties to make sure that a child who can form her/his own views has the right to express those views freely in all matters and that these views are given due weight in accordance with the age and maturity of the child. Even more explicitly, article 12(2) of the CRC provides that children in particular shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The United Nations Human Rights Council has noted with concern that children are rarely seriously consulted and that states must ensure that children are provided the opportunity to be heard in any judicial or administrative proceeding affecting them, either directly or through a representative or an appropriate body, in accordance with article 12 of the CRC.⁶² This requires giving children the opportunity to participate meaningfully; the opportunity to express themselves if capable of forming views; information about processes in which they are involved, adapted to their age, maturity and circumstances, in a language they understand and in a gender and culture sensitive manner; and explanation of the consequences of decisions affecting

them. It also necessitates taking an overarching child-sensitive approach, which is adapted to the child's individual needs and circumstances.⁶³

The CRC and the African Charter on the Rights and Welfare of the Child (ACRWC) provide for legal and other appropriate assistance but the presence of parents or legal guardian when a child is being heard is an additional requirement provided for only under the CRC.⁶⁴ The presence of parents or legal guardians may be waived if this is not in the best interest of the child and the child's age and situation are taken into consideration.⁶⁵

2.1.2. Non-discrimination

The non-discrimination principles found in international human rights law are particularly important for children, because as discussed above, they can face discrimination based on their age as well as a particular vulnerability or status.⁶⁶

Article 26 of the International Covenant on Civil and Political Rights (ICCPR)⁶⁷ reaffirms the principle of non-discrimination and equality before the law, stating that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The ICCPR includes a broad non-discrimination provision⁶⁸ as well as a more specific provision affirming equality before the law, equal protection by the law and non-discrimination.⁶⁹

63 *Ibid*

64 CRC Article 40(2)(b)(iii).

65 CRC Article 40(2)(b)(iii).

66 Smith and Tošić (no. 21 above) p. 28.

67 1966.

68 Article 2.

69 Article 26.

60 Malunga (no. 55 above) p. 36.

61 *Ibid*

62 United Nations, Human Rights Council Resolution A/HRC/25/L.10, United Nations, Geneva, 25 March 2014, para. 7.

Specifically for child victims and witnesses, they should have access to a justice process that protects them from discrimination based on the child's, parent's or legal guardian's race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.⁷⁰

Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allows the giving of intelligible and credible testimony, with or without communication aids and other assistance.⁷¹

2.1.3. Effective Remedy

Article 2(3) of the ICCPR requires States parties to provide an effective remedy to those whose rights or freedoms are violated. This may entail judicial, administrative and legislative measures. Claims must be determined by a competent judicial, administrative or legislative authority, or by any other competent authority provided for by the legal framework of the state. Claims that have been granted must be enforced. The Human Rights Committee has further noted in relation to article 2(3) that remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.⁷²

The Committee on the Rights of the Child has also stated that for rights to have meaning, effective remedies must be available to redress violations. And that this requirement is implicit in the CRC ... Children's special and dependent status creates real difficulties for them to pursue remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy and access to independent complaints procedures and to the courts with necessary legal and other assistance.⁷³

Article 39 of the CRC recognises a right to reparation and obliges States parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. The child's right to reparation, depending on the nature of the injury or violation of rights suffered, may include the right to assistance in repairing the consequences of a wrong or injury and/or financial and/or moral compensation.⁷⁴

The Guidelines in Matters Involving Child Victims and Witnesses of Crimes adds that child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and

⁷³ United Nations Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, United Nations, Geneva, 27 November 2003, para. 24.

⁷⁴ See, for example: United Nations Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, United Nations, Geneva, 27 November 2003, para. 24; and United Nations Human Rights Committee, General Comment No.31[80], The nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, United Nations, New York, 26 May 2004, para. 15.

⁷⁰ ECOSOC (no. 5 above) para 15.

⁷¹ *Ibid*, para 18

⁷² United Nations Human Rights Committee, General Comment No. 31 [80]: The nature of the general legal obligation imposed on states parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, United Nations, New York, 26 May 2004, para. 15.

recovery. Also, procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.⁷⁵

2.1.4. Privacy

The Committee on the Rights of the Child has stated that there is a need to have easy access to individual complaint systems as well as judicial and appropriate non-judicial redress mechanisms that guarantee fair and due process, with special attention to the right to privacy.⁷⁶

The right of the child to privacy is guaranteed in both the CRC and the ACRWC.⁷⁷ It seeks to protect the honour and reputation of the child by limiting publicity in child justice. Both the Committee on the Rights of the Child and the Beijing Rules have recommended that privacy should be respected to avoid undue publicity or labelling.⁷⁸ The Guidelines in Matters Involving Child Victims and Witnesses of Crimes have recommended that respect for a child's dignity should be a matter of primary importance for child victims and witnesses.⁷⁹

In order to ensure respect for the right to privacy, it is recommended that cases involving children should be heard in camera and anonymity maintained,⁸⁰ and that court documents, such as court orders and judgments, should not disclose children's names.⁸¹ In addition, any information that may lead to the identification of a child should also not be published.⁸²

⁷⁵ Para 35.

⁷⁶ United Nations Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4, United Nations, Geneva, 17 March 2003, para. 9.

⁷⁷ 175Article 40 (2) (b) (vii) CRC; art 17(2) (d) ACRWC.

⁷⁸ United Nations Committee on the Rights of the Child, CRC General Comment No 10: Children's rights in juvenile justice, CRC/C/GC/10, United Nations, Geneva, 25 April 2007, Para 64; Beijing Rules, rule 8.

⁷⁹ ECOSOC (no. 5 above) para 8 (a).

⁸⁰ ECOSOC (no. 5 above) paras 27, 28; UN CRC (no. 76 above) para 64.

⁸¹ ECOSOC (no. 5 above).

⁸² *Ibid*

2.1.5. The Right to Safety

In order to encourage children and their families to be more willing to disclose instances of victimisation and spearhead the prosecution process, the safety of the child victims should be guaranteed. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.⁸³ Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.⁸⁴ Furthermore, professionals should be trained in recognising and preventing intimidation, threats and harm to child victims and witnesses.

Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child.⁸⁵ Such safeguards can include avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process, restraining orders and bail restrictions for the alleged offender.⁸⁶

2.1.6. Expedited Trials

Furthermore, States are to ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited.⁸⁷

⁸³ ECOSOC (no. 5 above), para 32.

⁸⁴ *Ibid*, para 33.

⁸⁵ *Ibid*, para 34.

⁸⁶ *Ibid*

⁸⁷ *Ibid*, para 30 (c).

3. The Law on Access to Justice for Children in Tanzania

Access to justice for all is a constitutional right guaranteed by article 13(1) of the Constitution of United Republic of Tanzania. The provision guarantees equality before the law and equal protection before the law for all. It means that children are covered by the provision as well. The Constitution also provides for the right to be heard for all including children.⁸⁸ The Law of the Child Act (LCA) also provides for the right to be heard in judicial proceedings for children.⁸⁹

The matter of a child as a witness is covered by section 115 of the LCA. In this provision, the courts have been given the mandate to convict on the basis of a testimony of a child for sexual offences even if that testimony is not corroborated.⁹⁰ However, they can only do this after establishing the credibility of the child victim of sexual violence. This was also the position in the case of *Saasita Mwanamaganga vs. R.*⁹¹ The same way for other offences, in criminal proceedings, the court may receive and act on uncorroborated evidence of a child of tender age after satisfying itself that the child is telling nothing but the truth and recording its reasons for that satisfaction in the proceedings. This position is reflected in section 127(8) Evidence Act as amended by the Written Laws (Miscellaneous Amendments) Act.⁹²

The importance of the right to be heard for children was underscored in the case of *Kimbuta Otiniel v the Republic*⁹³ whereby the court held that the right to be heard is pivotal to the protection of the best interests of the child in the administration of justice. The court proceeded to state that the right to participate in judicial proceedings particularly for child victims of sexual violence is clearly entrenched in our laws.

4. Legal Efforts to Address Sexual Violence against Children in Tanzania

Each child has the right to his or her physical and personal integrity, and protection from all forms of violence.⁹⁴ Children, as human beings, are entitled to enjoy all the rights guaranteed by the international human rights treaties that have developed from the Universal Declaration of Human Rights.⁹⁵ However, childhood sexual abuse is a major problem in Tanzania affecting 1 in 3 females and 1 in 6 males at some time before their 18th birthday.⁹⁶ Nearly 3 out of every 10 females and 1 out of every 7 males reported at least one experience of sexual violence prior to the age of 18.⁹⁷

Several efforts especially legal ones have been made in order to deal with the frightening statistics of sexual violence against women and children in particular in Tanzania. The Penal Code⁹⁸ was amended in 1998 by the Special Offences Special Provisions Act (SOSPA).⁹⁹ The SOSPA amended several written laws, making special provisions in those laws

93 Criminal Appeal No 300 of 2011 (unreported) Dar es Salaam (CA) 74.

94 Pinheiro, P.S., World Report on Violence Against Children, The United Nations Secretary-General's Study on Violence against Children, Geneva, 2006, p. 31.

95 1948.

96 UNICEF, CDC, MUHAS, Violence against Children in Tanzania Findings from a National Survey, UNICEF, Dar es salaam, 2011, p. 27.

97 *Ibid*

98 Cap 16 R.E 2002.

99 Act no. 4 of 1998.

88 Article 13(6)(a).

89 Section 99(1).

90 This position is also reflected in section 127 of the Evidence Act (Cap. 6 R.E 2002).

91 (Criminal Appeal No. 65 of 2005).

92 Evidence Act [cap. 6 R.E 2002] as amended by section 26 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016.

with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children.¹⁰⁰ SOSPA as a regulatory framework provides severe penalty for anybody found guilty of a sexual offense. However, some argue that, this severity of the law that has created unintended problems in the legal proceedings including inadequate prosecution and a low rate of convicting perpetrators.¹⁰¹ This is partly due to an unrealistic demand by magistrates for evidence convincing them beyond reasonable doubt that the accused committed the crime.¹⁰²

5. Factors Affecting Access to Justice for Child Victims of Sexual Violence in Tanzania

Even though the law clearly provides for the right to access justice, the reality on ground is somewhat different. The process of access to justice especially for child victims of sexual violence is characterised with many hurdles. The study revealed some factors which impede access to justice for child victims of sexual violence as follows:

5.1. Social Norms

Considerable stigma and stereotypes concerning sexual violence persist in Tanzania, and the perception that girls/women who are sexually assaulted are to blame is common. This results into the failure of the girls to report sexual violence against them. Furthermore, the view that family matters should be resolved privately, by and within the family, are a pervasive factor in reducing

recourse to justice in situations of sexual violence especially in cases where the perpetrator is a family member.

Therefore, there is a preference to settle these cases out of court mostly at the family level.¹⁰³ In these cases, elders, parents or traditional leaders will carry out the settlement.¹⁰⁴ The assailant will mainly be asked to pay a small sum of money to the elders or the parents or husband of the victim.¹⁰⁵ In most occasions parents only report when they do not like the young man or after the girl has become pregnant or when the boy refuses to marry her.¹⁰⁶ For example in the case of *Galus Kitaya v. Republic*,¹⁰⁷ part of the appellant's defence was that even though he was involved sexually with the complainant who was below the age of 18 years, when the parents became aware, the father of the complainant demanded an amount of Tanzanian shillings 400,000/= as dowry. He was only reported to the police after his failure to pay the sum. The preference to settle out of court is fuelled by the perceived ineffectiveness of the justice system in upholding their duties in enforcing laws and bringing perpetrators to justice.¹⁰⁸ The general view is that there is corruption in the police and judiciary and therefore their cases will not get to court and even when they do, the perpetrator will be let off.¹⁰⁹

100 Mwenegoha H.O., *Violence Against Women In Tanzania: A call for an anti-domestic violence legislation*, Institute of Judicial Administration Journal, 2017, Vol. 1, No. 1, pp. 34 – 49, at p. 38.
101 Bali T.A.L., *Child Sexual Abuse Laws and Cultural Adjustments: case of Tanzania*, Unpublished MA Thesis, University of Connecticut, Storrs, 2006.
102 Bali T.A.L., *Understanding Strengthening Administration of Justice through Experiences of Child Sexual Abuse Victims in Tanzania*, Journal of Law, Policy & Globalization, 2014, Vol. 24, pp. 95 – 104, at p. 98.

103 Percy-Smith (no. 15 above) p. 101.
104 Pearce, S., *Violence against Women and HIV/AIDS in Sub Saharan Africa: The enforcement of rape laws in Tanzania, Zimbabwe and South Africa*, p.19, available at https://www.law.utoronto.ca/documents/ihrp/HIV_pearce.doc [accessed 11 June 2018 at 20:10 hrs].
105 *Ibid*
106 The Law Reform Commission of Tanzania, Report on the Review and Drafting of the Proposed Provisions for the Amendment of the Sexual Offences Laws as Amended by SOSPA 1998, The Law Reform Commission, Dar es salaam, 2009, p. 75.
107 Criminal Appeal No. 196 of 2015.
108 Percy-Smith (no. 15 above) p.169.
109 *Ibid*

Simultaneously, many participants explained that sexual violence is often an implicit part of the social fabric. The case of *Francis Nguza alias Babu Seya and others v. R*¹¹⁰ is a good case to elucidate this point. The appellants in this case were charged with eleven counts of raping and sodomising eleven standard one primary school pupils for several months in 2003 at Sinza, Dar es Salaam using threats to kill them if they refuse or told anyone about it. Eventually, two of the charged perpetrators were acquitted while the first and second appellants were convicted and sentenced to life imprisonment. Each of the appellants was also ordered to pay a compensation of Tanzania shillings two million to each of the ten complainants. Unfortunately, in 2017, the appellants who are famous musicians were pardoned by the President of the United Republic of Tanzania.¹¹¹ Faiza Mohamed who is the director of the rights group *Equality Now* is of the opinion that the President's decision to pardon convicted child rapists signifies that Tanzania's leaders are promoting and normalising a culture of human rights violations in which young victims of sexual violence are being punished while perpetrators are going free.¹¹²

5.2. Traditional and cultural practices

This research revealed that sexual violence is mainly committed by men and appears to be justified by socio-cultural beliefs and practices that appear to privilege 'male entitlement.' Child sexual violence is therefore a product of gender inequalities. Participants reflected that the prevailing social attitude is that women are created just to please and fulfil a male desire and nothing else. Witchcraft also causes sexual violence through advocating to men seeking wealth to engage in sexual relations with daughters / young girls. There is also a belief that young girls are safe from HIV and that young girls will cleanse men of HIV. Accordingly, children are subjected to sexual violence as a result of among other things, cultural beliefs and practices, and their access to justice is impeded by traditional and cultural practices as well.

Chagga of Hai District for example have specific traditional and cultural practices which result into a restriction for victims of sexual violence to access justice.¹¹³ The Chagga have several traditional methods of solving disputes especially when the perpetrator is a family member.¹¹⁴ These traditional ways of solving disputes include apologising through alcohol gatherings, apologising by touching the private parts of the victim or victim's mother and also by the presentation of a leaf known as *isale*. When someone has committed sexual violence against a child and the perpetrator presents to the parents or a guardian of the child this leaf of apology known as *isale*, the parents/guardian have to accept it or else they believe that they will be cursed.

110 Nguza Viking @ Babu Seya and others vs. Republic (CA), Criminal Appeal no 56 of 2005

111 Their world, *Outcry as Tanzania 'Punishes' School Girl Victims of Sexual Violence*, available at <https://theirworld.org/news/tanzania-outcry-president-magafuli-pardon-rape-schoolgirls-pregnancy> [accessed 17 July 2018 at 1615 hrs].

112 Their World (no. 109 above).

113 Percy-Smith (no. 15 above) p.145.

114 *Ibid*

In Magu District, there is a practice known as *misango* whereby if a man impregnates a girl he will be required to pay compensation to the girl's parents to 'cleanse the girl of the mischief.'¹¹⁵ Here also, the parents are obliged to accept which means according to tradition, no other measures are needed. Another socio-cultural practice in situations where young girls become pregnant is to expect the man and girl to marry, even though the girl has been raped. These practices reduce the possibility of reporting the violence to the appropriate authorities.

Furthermore, the research revealed that having the culture of protection of extended family members and other people with whom they have personal relations affects access to justice for child victims of sexual violence. This is because when sexual violence is committed by a family member or a close friend, the parents do not report the perpetrator who has abused their child to initiate criminal investigation fearing breakage of personal or family relationship. This was termed as 'social corruption' by a respondent in Pemba. The respondent stated that community members live a communal life in which they help each other in different situations. This develops relations which makes it harder for the victims' families to report perpetrators to legal organs. This is known in local language as *rushwa muhali*.

These traditional methods as well as the decision not to report go against the notion that children are right holders as provided by the CRC and that they have a right to have an opinion in matters affecting them taking into account the

evolving capacities of a child as per article 12 of the CRC. This is because the decisions not to report are taken by parents and/or guardians and the mechanisms to solve out of court involve the participation of parents or guardians rather than the child victim.

5.3. Corruption

Accounts of corruption within the administration of justice in Tanzania are normal.¹¹⁶ Although efforts have been made by the Government to address the problem, it continues to give rise to a general lack of faith in the justice system and a tendency to avoid contact with law enforcement authorities and recourse to the courts.

Many respondents perceive police and the justice system in general to be corrupt with the likelihood that perpetrators will be released without trial or will be acquitted so see no point in reporting. Corruption was noted in all regions and was manifested in expressions of despair and demoralisation in some cases. For example in Kisarawe, one respondent gave an example of a case which he believed to have been tainted by corruption. The case involved an uncle who was alleged to have sodomised a boy. However, the medical doctor who examined the boy did not give evidence in court and no one bothered to explain to the family why the doctor was not called by the prosecution and why some evidence to support the prosecution was deleted from the court files. The result was that the suspect was acquitted due to lack of evidence.

115 *Ibid.*, p.105.

116 See Transparency International, The Corruption Perceptions Index 2017, available at www.transparency.org/country/TZA [accessed 17 July, 2018 at 1558 hrs].

All in all, the research revealed that there is a widespread lack of trust and belief in the efficacy of the justice system. As a result, incidences of sexual violence against children are not being reported to formal institutions of justice.

5.4. When another Child is the Offender

International law of the child discourages imprisonment as an appropriate sentence for child offenders. Article 37(b) of the CRC provides that states parties shall ensure that arrest, detention or imprisonment shall be in conformity with the law and shall be used **only** as a measure of last resort and for the shortest appropriate period of time.¹¹⁷

The United Nations Standards Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules)¹¹⁸ also seek to promote the use of non-custodial measures and the respect of human rights where measures other than imprisonment have been adopted.¹¹⁹ They complement the idea of social reintegration in the CRC¹²⁰ by seeking to promote among offenders the sense of responsibility towards the community.¹²¹ In the spirit of international law, section 19 of the Law of the Child Act also states that a child shall not be sentenced to imprisonment.

Ideally, this provision serves to promote the rehabilitation of a child offender who has entered the criminal justice system to make sure that the child does not come out worse than before. However, on the part of the participants of this research, this provision was mentioned as one of the factors which limit justice for child

victims of sexual violence. An example was given by the police who work at the district gender and children's desk¹²² that a 10 year old girl was raped by a 17 year old boy and the boy was found guilty by the court. The boy was consequently sentenced to corporal punishment which was executed and was released back to the community whereby also the victim lives.

Unfortunately for the girl victim, she underwent such physical trauma that doctors had to perform a hysterectomy on her to save her life. After being released from the hospital she had to endure living in the same community with the perpetrator who was not in the least remorseful. The perpetrator actually went around their community boasting how he only got a slap on the wrist. Therefore, according to participants, when the perpetrator is also a child who commits sexual violence against another child and gets a lenient sentence, it discourages child victims from reporting to the authorities about the violence which limits access to justice.

5.5. Nature of the Criminal Justice System

The nature of the criminal justice system also discourages attempts of victims of sexual violence to access justice. The criminal justice system in Tanzania is characterised with delays. The delays and the feeling that the criminal justice system would be ineffective in prosecuting the offender, destroys the confidence victims have in the criminal justice system even to report what has happened to them.¹²³

117 Article 37(b).

118 GA Res 45/110, Annex, 45 UN GAOR Supp (No 49A) 197, UN Doc A/45/49 (1990).

119 Item I: general principles:1 fundamental aims and Item 2: scope of non-custodial measures: para 2.2.

120 Article 40 (1).

121 Tokyo Rules item 1 fundamental aim para 10.1.

122 Gender and Children's Desks refer to established confidential spaces in police stations where victims of gender violence can file their complaints to specially trained female officers as part of the authorities' efforts to tackle gender violence. They were firstly established in 2008 in a few police stations but with the intention of having them in all police stations.

123 Philip (no. 14 above) p. 4.

Delays in the criminal justice system are caused by various factors for example legal technicalities and formalities,¹²⁴ prosecution delays, bulkiness of cases due to an inadequate number of judges and magistrates, lack of judicial diligence on the side of judges and magistrates and also limited resources.¹²⁵ Delays in the justice system coupled with long distances to courts and resource constraints discourage victims and parents of victims from taking the formal justice recourse and encourage private agreements. Parents argue that it is better for them to enter into private agreements with the perpetrators because at least through these agreements they manage to get some money or marry off their child unlike pursuing formal justice institutions where they have to spend a lot of money in form of fare to and from the court, sometimes for years without a guarantee that that they will get justice from the courts.

In most occasions parents only report when they do not like the young man who abused their daughter or after the girl has become pregnant or when the boy refuses to marry her.¹²⁶ For example, in the case of *Galus Kitaya* when the parents became aware that the alleged offender was sexually involved with their minor child, the father of the complainant demanded a specific amount of money as dowry. He only reported to the police after the failure of the alleged offender to pay the sum. As discussed above, the preference to settle out of court is fuelled by the perceived ineffectiveness

of the judicial system in upholding their duties in enforcing laws and bringing perpetrators to justice.¹²⁷ The general view being that there is corruption in the police and judiciary and therefore their cases will not get to court and even when they do, the perpetrator will be let off.¹²⁸

5.6. Nature of the Law

Tanzania has adopted and acceded several international¹²⁹ and regional¹³⁰ conventions and recognised declarations which address violence against women and children. Through the adopted conventions and declarations, Tanzania was able to undergo criminal and civil justice reforms under the Legal Sector Reform Programme (LSRP).¹³¹ This resulted into amendment and enactment of several laws some of which address the issue of violence against women and children. Such laws are for example the Sexual Offences Special Provision Act (SOSPA)¹³² which amended several laws such as the Penal Code, the Evidence Act and the Criminal Procedure Act intending to offer more protection to women and children.¹³³ Some of the new offences created by the Penal Code include trafficking of persons especially children, sexual exploitation of children, cruelty to children (criminalising Female Genital Mutilation to persons under eighteen years), statutory rape, sexual harassment and qualified marital rape (being his wife who is separated from him without her consenting to it at the

124 See for example *Mbushuu Dominic Mnyaroge V. R* (1995) TLR 97, *Cooper Motors Corporation V. Arusha International Conference Centre* Court of Appeal Tanzania at Arusha Civil Appeal no 42 of 1997 and *Total Tanzania Ltd V. Yahya Ahmed* Court of Appeal of Tanzania at Arusha Civil Appeal no.41 of 1997.

125 Maina, C.P. and Kijo- Bisimba, H., Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal, Mkuki na Nyota, Dar es salaam, 2007, p. 207.

126 The Law Reform Commission of Tanzania, Report on the Review and Drafting of the Proposed Provisions for the Amendment of the Sexual Offences Laws as Amended by SOSPA 1998, 2009, p. 75.

127 Percy-Smith (no. 15 above) p. 169.

128 *Ibid*

129 The Government of the United Republic of Tanzania has ratified CEDAW of 1979 in 1985, the Optional Protocol to CEDAW in February 2004, it has also ratified the CRC on 10th June 1991 and its two protocols in 2003 and 2004 respectively.

130 Tanzania is also signatory to the African Charter on Human and People's Rights and its Optional Protocol on the Rights of Women in Africa. The Protocol was adopted on 11th July 2003. Tanzania has also ratified the African Charter on the Rights and Welfare of the Child on 16th March, 2003.

131 Mwenegoha, H.O., *Violence Against Women in Tanzania: A call for an anti-domestic violence legislation*, Institute of Judicial Administration Journal, 2017, Vol. 1 No. 1, pp. 34 – 49, at p. 36.

132 No. of 1998 R.E. 2002.

133 Mwenegoha (no. 129 above) p.36.

time of the sexual intercourse). The amended provisions in the Evidence Act took into account Tanzania's adversarial system by removing the requirement for corroboration in sexual offences and a similar provision is also included in the Law of a Child Act as discussed above. However, despite these improvements which have been done, our laws still have gaps which result into a limit to access justice for child victims of sexual violence.

Some notable gaps include the failure to amend the Law of Marriage Act (LMA)¹³⁴ which provides for the minimum age for marriage. Section 13 of the LMA allows for girls of the age 15 to get married with the consent of parents or a guardian as provided for under section 17 of the same. Despite outcry against this law, the government has failed to amend it. Even the law of the Child Act which was enacted in 2009 failed to incorporate a specific provision to repeal this law. When questioned on the failure to amend the LMA and change the minimum age for marriage in Tanzania by the CEDAW Committee, the government responded that reviewing the age of marriage has been a challenge for years due to some cultural and religious stands considering that the issue of marriage touches on certain religious and cultural beliefs.¹³⁵ In 2016, the provisions allowing child marriage were challenged in court in the case of *Rebecca Gyumi v. Attorney General*.¹³⁶ The court in this landmark decision ruled that the provision was unconstitutional as it contravenes articles

12, 13 and 18 of the Constitution of the United Republic of Tanzania, which give people equal rights before the law and the right not to be discriminated against. The court stated that it was unfair to subject a girl aged 15 to marriage and that such a child has no wide understanding and could hardly comprehend her responsibilities and obligations as a married person. And that, the law was discriminatory and unfair as it subjected a girl child to be married at 15 years old, while the same law stated that a male person could only marry when he was aged 18 years. The Court as required by law directed the Parliament to amend the law as required by the Constitution since 2016 but Parliament has yet to do that.¹³⁷

The Penal Code as amended by SOSPA also supports the LMA because it created the offence of statutory rape but made an exception in situations where a woman is a wife who is fifteen or more years of age and is not separated from the man who married her.¹³⁸ Therefore, these provisions promote child marriage and eliminate the recourse to justice for these girls who are subjected to such marriages.

Another legal gap is the fact that marital rape is not criminalised in Tanzania. Therefore, considering that a child can be married in Tanzania, the marriage eliminates her chances of seeking justice for rape that occurs within the marriage unless there is separation.

134 Cap 29 R.E 2002.

135 UN Committee on the Elimination of Discrimination Against Women (CEDAW), Consideration of Reports Submitted by States Parties under Article 18 of the Convention, seventh and eighth periodic reports of States parties due in 2014 : United Republic of Tanzania, 3 December 2014, CEDAW/C/TZA/7-8, available at: <http://www.refworld.org/docid/56a88e944.html> [accessed 6 March 2018 at 1800 hrs], para 14.

136 Misc. Civil Cause no. 05 of 2016. It is common place that there is an appeal by the Attorney General pending in the Court of Appeal against this decision of the High Court.

137 Warioba I.M, *Child Marriage in Tanzania: A human rights perspective*, Journal of Law, Social Justice and Global Development, 2019, No. 23, pp.1-18, at p. 8. It is common place that there is an appeal against the decision of the High Court

138 S.130(2)(e) of the Penal Code (Cap 16 R.E 2002).

6. Conclusion

Access to justice is a right in itself and a prerequisite for the fulfilment of all other rights, whether social and economic or civil and political rights. Access to justice is crucial for restoring rights that have been disregarded or violated which gives meaning to the human rights phenomenon. Considering the profound impacts of sexual violence against children, it is imperative that access to justice should be guaranteed. From the discussion above, access to justice for child victims of sexual violence is highly impeded. Children who have gone through the trauma of sexual violence become traumatised again when accessing formal justice institutions. As a result, they decide to stay away from these systems. Therefore, there is a need for reform in order to remove the impediments towards access to justice. Furthermore, access to justice should be improved based on the rights-based approach coupled with the new sociological studies of childhood. This is because access to justice is important to protect people's rights and promote their social inclusion while barriers to access reinforce poverty and social exclusion. Working on the elimination of the barriers is in line with the Sustainable Development Goal 16¹³⁹ which among other things calls for reducing all forms of violence, ending abuse, exploitation, trafficking and all forms of violence against children and ensuring equal access to justice for all.¹⁴⁰

139 UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at <https://www.refworld.org/docid/57b6e3e44.html> [accessed 18 January 2019].

140 UNGA (no. 137 above).

7. Recommendations

There is still much to be done in addressing the issue of victims of criminal justice. This includes enacting a specific law on victims and providing other remedies that will assist and provide support to victims. Such remedies will encourage more victims to come out and report violence that has happened to them.¹⁴¹ In the meantime, the criminal justice system needs to be improved in order to build confidence for people to report crimes. Areas of improvement include recruiting an adequate number of judicial officers and strengthening laws and enforcement dealing with judicial misconduct and corruption. Also, the Law of Marriage Act needs to be amended so that the minimum age for marriage can be raised to 18 for both boys and girls. Also, free and personal consent of the persons getting married should be a prerequisite. The Penal Code should equally be amended to make sure that marital rape is criminalised and also the definition of rape should be gender neutral especially statutory rape.

Additionally, there is a need for a discussion on the sentencing aspect of children when they commit atrocious crimes against other children. Sentences should be more serious which reflect weight of their actions against other children. Furthermore, serious advocacy should be done to make sure that children and their parents understand that sexual violence against children is wrong and when it happens, access to justice is a right. Similarly, advocacy should be done so that awareness is created against the harmful cultural practices which limit access to justice for child victims **of sexual violence.**

141 Philip (no.14 above) p. 21.