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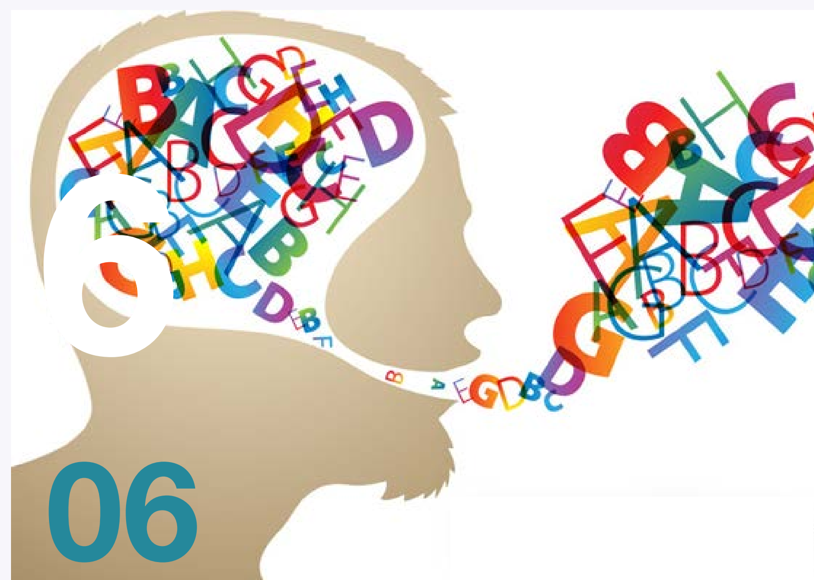

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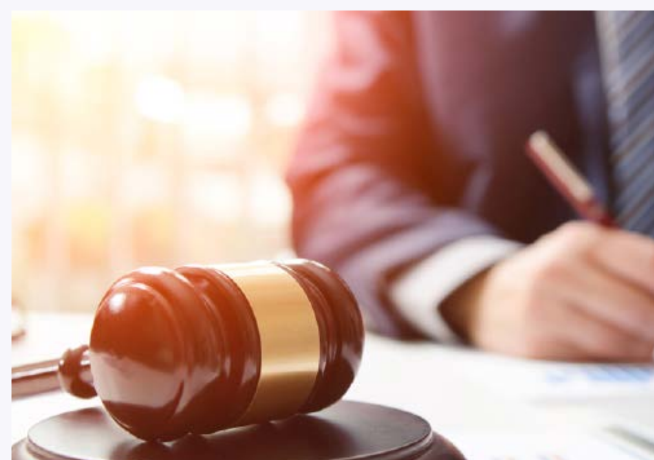

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Editorial

Volume II Issue III of the Institute of Judicial Administration Lushoto Journal publishes quality scholarly articles from judicial officers, academics, students, legal practitioners and other professionals in interdisciplinary works of relevance to law and practice. Is a general publication that has attracted some high-quality submissions that highlight the great variety of research topics currently being undertaken.

The issue recollects an interesting collection of papers from academics, researchers as well as legal practitioners in Tanzania and outside Tanzanian Jurisdiction. Some of the articles are the extension of the previous issue as reviewed before the revised edition of Tanzanian Laws of 2019 that came into force in 2020. However, some of the contributions presented by the collection herein are immense, remain relevant and invaluable, giving insightful contributions towards developing jurisprudence of many jurisdictions.

We are pleased to present five articles that in their ways contribute to a better understanding of a range of issues traversing the language barrier in courts of law, the Legal regime in trafficking, hot pursuits, Law of contract, and the law and practice on execution. I am honoured and privileged to welcome this issue comprising a total of five (05) articles, all of which are purely legal.

This volume starts with the article from ***Dr Fatma.*** The article addresses the issue of the language barrier by examining the use of language in the Mainland Tanzanian Courts, ultimately the author comes with recommendations towards improving the *status quo*.

Mr Onu and ***Mr Sojinu's*** article is on the Legal Regime for combating trafficking in person in Nigeria. The authors examine the regime in Nigeria which is a prevalent phenomenon in most African countries. Through the authors' examination, the *lacuna* unraveled and provide suggestions on how to curb the menace.

The third article by ***Mr Sharifu*** and ***Mr Chando.*** The article is very informative. The authors examine the doctrine of Hot Pursuit in Tanzania, how the Hot Pursuit Agreements (Treaties) are of importance in the wake to prevent illegal and unreported fishing in the Indian Ocean.

Ms Kaunda and ***Mr Majanjara*** revisit the doctrine of privity of contract in Tanzania by looking at the legal implications of its application. The contribution of the authors to this volume advances current knowledge about the doctrine, the authors establish that the doctrine renders difficulties in commercial relations then they suggest what ought to be done.

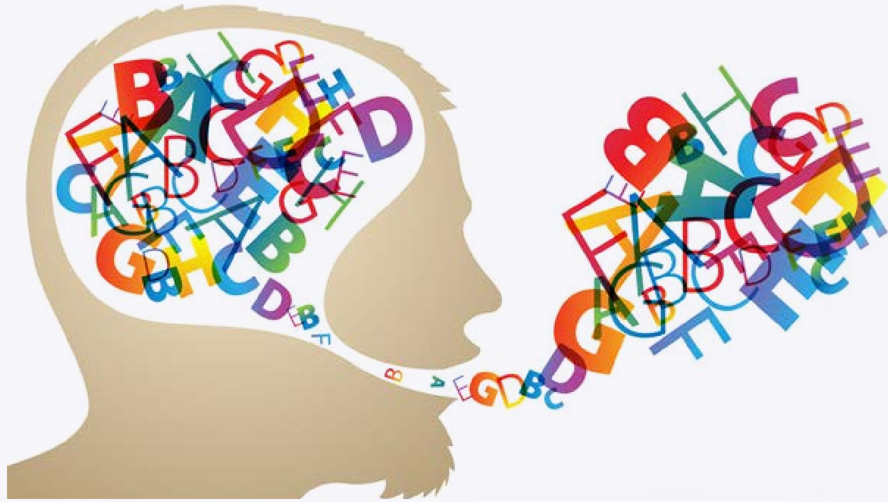
Mr Kiwango examines the procedure and practice during the execution of decrees when the Government is involved. The author identifies what are the challenges envisaged during the execution trail, remedies available and recommendations thereto. His article, replete with informative material for researchers in the field, is based on some key contentions.

Having gotten a snapshot of the present issue, on behalf of the Editorial Board, I would like to use this opportunity to commend and thank our esteemed contributors for choosing to publish with us. And recognisably, I would like to extend heartfelt appreciation to our Reviewers for ensuring that the papers published in this issue went through a rigorous peer-review process in assuring that the articles published are of the highest standards and in tandem with our in-house style, among others. We will endeavour to ensure that the support we get shall not go in vain.

Lastly, I would like to make a call to all potential authors to submit their manuscripts for our forthcoming Volumes and Issues.

Mr. Archibald Aristarch Kiwango
The Chief Editor

Language Use in Mainland Tanzanian Courts: *The Legal Framework and Language Barrier Puzzle*



By Dr. Fatma Rashid Khalfan[1]

Abstract

Tanzania is a heterogeneous society characterised by various languages which include Kiswahili, a widely spoken national language. The law provides mainly for English and Kiswahili as the languages of the court with former as the predominant language of the court record.[2]The context within which the two languages are used has potentials for language barrier in the course of court proceedings and difficulties to presiding judicial officers in recording proceedings and discrimination of those who do not understand the languages of the court.[3]This article examines the legal framework for language use in Mainland Tanzanian courts in relation to the inherent language barrier. It concludes that in apart from the presence of an inadequate regime that regulates interpretation of evidence in proceedings, there are other significant measures that need to be taken to address language barrier.

Key words: Court Language, Interpretation and Language fair trial rights.

1 LLB (ZU), LLM (Warwick), LLM (Turin), PhD (OUT). The author is an Advocate of High Court of Tanzania. This article is based on the author's PhD thesis (OUT), 2019, entitled "Legal Aspects of Language Barrier in Mainland Tanzanian Courts".

2 Wanitzek, U. and Twaib, F., *The Presentation of Claims in Matrimonial Proceedings in Tanzania: A Problem of Language and Legal Culture*, AAP, 1996, Vol. 47, 115- 137.

3 Odhiambo, K., et al., *Court Interpreters View of Language Use in Subordinate Courts in Nyanza Province, Kenya,* Theory and Practice in Language Studies, 2013, Vol. 3, No. 6, pp. 910-918.

1. Introduction

Language is broadly defined as any organised means of conveying or communicating ideas especially by human speech, written characters or sign language.[4] In the legal context, language is a pervasive and dynamic element that has powerful influences on the legal process. Tanzania is a multilingual country consisting of multi-ethnic population. There are more than 25 tribes and approximately 120 different ethnic groups living in Tanzania, and over 120 vernaculars languages, which are the first languages to the people, particularly those residing in rural areas. However, the Bantu-speaking ones are the majority of all.[5] Language use in Tanzanian courts of law is a subject which is provided for and regulated by the law. The law provides for specific languages, namely, Kiswahili and English which are official languages of courts. There are provisions for interpreters for those who do not understand language used by the court. Courts are therefore multilingual in nature. It is against the above background of the use of various languages that this article examines the legal framework for the use of language in courts in Mainland Tanzania and the potential language barrier.

4 Namakula, C. S. Language and the Right to Fair Hearing in International Criminal Trials, Springer, London, 2014; Karton, J., *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony,* Vanderbilt Journal of Transnational Law, 2008, Vol. 41, No. 1, 1-54.

5 Legal and Human Rights Centre, Tanzania Human Rights Report, Dar es Salaam, 2012, p.9, www.humanrights.or.tz (Accessed 6/10/2013). Legal and Human Rights Centre, Tanzania Human Rights Reports 2009, Dar es Salaam, 2010, p. 20https://www.researchgate.net/publication/267840648_The_linguistic_situation_in_Tanzania/citation/download.Petzell, M. *The Linguistic Situation in Tanzania,* University of Gothenburg. 2012. Vol.106(Accessed 20/4/2020).

2. Plurality of Languages in Tanzania and the Concern for Fair Trial

The major tribes in Mainland Tanzania includes the Sukuma, Nyamwezi, Haya, Nyakyusa, Chagga, Gogo, Makonde, Hehe, Luguru, Ngoni, Fipa, Bena, Makua, Kaguru, Sambaa, Kurya and Yao.[6] In addition, there are many other small tribes with their own vernaculars languages spoken as first languages by members of such tribes, mostly in rural areas. Although each tribe has its own native language, they are generally united by Kiswahili, which is the national language in Tanzania.[7]

Despite the general understanding that most of such tribes are united by Kiswahili, the country is not free from people who lack, or have limited, knowledge or understanding of Kiswahili and English.[8] Such situation is not uncommon with elderly illiterate population living in the interior parts of rural Tanzania.[9] Not only that, but also there are other foreign languages that are increasingly being spoken by residents from foreign nations who have limited knowledge of Kiswahili, English or any of the local tribal languages. The latter is true with globalisation and movement of people from different nations across the globe. The influx of people of Chinese origin is a case in point that serves to illustrate the point. It means therefore that language barrier problems may potentially result in court proceedings which may compromise fair trial, and negatively affect disposition of cases.

6 *Ibid.*

7 Boshe, P., and Mbezi P, *The Value of Pro bono Services in Accessing Justice in Tanzania,* Open University Law Journal, 2013, Vol.4, No.2, pp. 146-157.

8 Kiswahili is the national language of Tanzania, which is widely spoken across the country.

9 Wanitzek and Twaib (n 1) 121.

Language barrier in court proceedings would call for the need to interpret proceedings from one language to Kiswahili and hence instant translation by the court from Kiswahili to English. This scenario stimulates a debate on the impact of language diversity in fair hearing in the trial process because the conduct of a trial in more than one language affects the proceedings especially the rights of litigants and accused persons. A multilingual trial raises multiple complexities relating to cross-lingual and cross-cultural communication. Complexities such as misunderstandings, failures in translation, cultural distance among trial participants affect courtroom communication, and the presentation and perception of the evidence, hence challenging the credibility of a trial. The impact of interpretation on proceedings also makes language diversity in the proceedings a fair trial concern.

With the existence of plurality of languages within one and the same country as shown above, one cannot therefore speak of knowledge of 'the law' because a certain law, mostly the African customary law, may be well known to a person or a group of the population, while the official state law remains largely unknown.[10] In effect, the general populace remains mostly ignorant of the law. Consequently, the claim that everybody is presumed to know the law would in the circumstances amount to nothing but a fallacy.[11]

10 *Ibid.*

11 *Ibid* 117- 121.

3. Language of the Law and the Court

Language of the law is the language in which the legal system functions which is composed mainly of the legislature and the judiciary.[12]Section 84 of the Interpretation of Laws Act[13]provides at the scope of the language of the law in Tanzania. It states as follow:

84. Language of the Laws of Tanzania

(1) The language of the laws of Tanzania shall be English or Kiswahili or both.

(2) Where any written law is translated from one language into another and published in both languages, then in the case of conflict or doubt as to the meaning of any word or expression, the version of the language in which the law was enacted shall take precedence.

(3) Where any written law is enacted in both languages and there occurs a conflict or doubt as to the meaning of any word or expression, the English version shall take precedence.

Going by the above statutory provision, 'the language of the law' can in practical terms best be explained as follows. Firstly, it refers to the language in which bills and subsidiary legislation are drafted, and then debated and passed in parliament. And secondly, it refers to the language in which courts conduct and record proceedings, and write judgments.[14] In view of the above meaning, the language

12 Wanitzek and Twaib (n.1) 116. Rwezaura, B., *Constraining Factors to the Adoption of Kiswahili as a Language of the Law in Tanzania*, African Law Journal, 1994, Vol. 37, pp. 30-45.

13 Cap. 1 R.E 2002. The provision underlines the predominance of English over Kiswahili and other languages in Tanzania legal system.

14 *Ibid.* See also United Republic of Tanzania, The Law Reform Commission, Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, 2013.

of the law and therefore the court is English or Kiswahili or both. However, the scope as to the use of the languages is stipulated under section 13 of the Magistrates' Courts Act[15]with reference to Primary Courts, District Courts and Resident Magistrates' Courts. The same is to the effect that the language of the Resident Magistrate Courts and District Courts shall be English or Kiswahili.[16] The relevant provision reads thus:

13(1) The language of Primary Courts shall be Kiswahili

(2) The language of courts of a resident magistrate and of District Courts shall be either English or Kiswahili or such other language as the magistrate holding such court may direct save that is the exercise of appellate, revisional or confirmatory jurisdiction by a district court (in which case the record and judgment maybe in English or Kiswahili), the record and judgment of the court shall be in English.

It is pertinent that the above sectional so provides room for the use of "other languages" in such courts as a presiding magistrate may deem it fit. This room departs from the language of the law provided for under section 84 of the Interpretation of Law Act which does not envisage the use of "such other language." Although there is no guideline in place or rules as to the use of "other language" as the court may deem fit, it would appear that the use of the phrase "other language' was meant to cover other languages that are equally spoken in

15 [Cap. 20 R.E 2002].

16 Magistrates Courts Act [Cap. 20 R.E 2002], s. 13.

Tanzanian communities and to address the fact that Tanzania is a multilingual society. This, however, would be possible in actual practice only where the magistrate, the parties and the witnesses share a common language other than Kiswahili and English, which may rarely be the case.[17] The provision is also clear that while the said Resident Magistrate Courts and District Courts may use either Kiswahili or English, the record and judgment of the said courts must be in English.[18]The exception is the District Court which in the exercise of its appellate, revisional or confirmatory jurisdiction, its record and judgment maybe in either English or Kiswahili.

Similarly, the language of the High Court is either English or Kiswahili as directed by the trial judge presiding in such court. However, records of judgments or decisions of courts must be in English, save for the High Court (Labour Division) which may use either English or Kiswahili or both as the case may be.[19] Consistent with the position of the law in respect of the Resident Magistrate Courts and District Courts, the language used in the Court of Appeal is also English or Kiswahili but the judgment, order or decision of the court must be in English.[20]As for Primary Court the official language is Kiswahili.[21]

17 Wanitzek and Twaib (n 1) 121. Presently, there is no policy guideline to direct presiding district magistrate or resident magistrate to the use of 'other language' as the language of the court in court proceedings. Since language of the court record is English, the court will have to record the proceedings and write judgments in English regardless of the use of 'other language'.

18 Ibid.

19 Language of Court Rules, GN 115 of 1981. See also, Language of the Court Rules, GN. No. 307 of 1964 as amended in 1996. It is important to note that the Language of the Court Rules refers to the High Court only and not to subordinate Courts. The exception is the High Court (Labour Division). See rule 4(1) & (2) of the Labour Court Rules, 2007 (GN No. 106 of 2007).

20 Tanzania Court of Appeal Rules 2009, rule 5.

21 Magistrates Courts Act Cap. 20 R.E 2002, s. 13(1).

It follows also that the record and judgment of the Primary Courts must equally be in Kiswahili.

The law provides for the use of Kiswahili or English, but as a matter of practice in the higher courts, the inclination remains towards the use of English language.[22] As a result, presiding judicial officers ordinarily record proceedings in English even if the same are conducted in Kiswahili or in other language.[23] This seems to be the case because English remains the language of court records save for Primary Courts. The Law Reform Commission of Tanzania has had opportunity to address this practice of the courts conducting proceedings in Kiswahili and maintaining their records in English. In so doing, the commission appeared to defend the use of English as the language of record as opposed to Kiswahili. The commission said:

> *As a matter of policy, all courts permit parties to address the Court in Swahili or English or both interchangeably. The law simply requires records to be kept in English for obvious reasons. It is noted that the decisions of the High Court and Court of Appeal are being used as precedents in the courts in other commonwealth jurisdictions. English is the most widely used language globally and no one wants to be left behind. To insist that Swahili should be the only language in all aspects of judicial proceedings is hard to justify. Above all, it will aggravate the lack of command and proficiency of English language by our lawyers.*[24]*(Emphasis supplied).*

This practice however lacks clear guideline as to what the record should adhere to. To make things worse, the law is silent on how a presiding judicial officer should take and record court proceedings. The relevant law does not state that the record should indicate that the proceedings were conducted in Kiswahili and instantly and manually translated by the trial presiding judicial officer in English. The law does not also require the court to take and keep the original Kiswahili account that transpired in the court proceedings for reference in the event of a dispute or want of clarity. Since proceedings in the Primary Courts are conducted in Kiswahili and recorded in Kiswahili, the upper courts' practice of recording in English proceedings conducted in Kiswahili is non-existent in the Primary Courts. Reasons underlying the predominance of such practice have elsewhere been given. They include the fact that the medium of instruction for legal education in Tanzania is English and the law is drafted in English.[25]Among the Law Reform Commission recommendations'is that the language of the Court in the Court of Appeal and High Court should continue to be English language.[26]

The Commission underscored the observation made by the former Chief Justice of Tanzania, Mohamed Chande Othman who in one of his keynote address identified the use of English in Civil Procedure Code as opposed to Kiswahili as one of the pressing problems.[27] The Commission observed that:

> *The catalogue of weaknesses was recapitulated by Chief Justice Mohamed Othman Chande in his keynote address on the occasion of the Annual Conference of the Tanganyika Law Society, 17th February 2012 at Arusha as including, the adversarial process of justice, uneasy co-existence of procedures derived from Common Law, Customary Law and Islamic Law, and use of foreign language (English) which makes it the language of the law instead of Kiswahili the language of the people.*[28]

Nevertheless, the Commission in its final report, in the end, recommended that the Language of the Court Rules[29] should be amended. The proposed amendment was couched by the commission in the following manner.

> *Language of the Courts Rules, G.N. No. 307 of 1964*
>
> *(i) That the Language of the Court in the Court of Appeal must be English;*
>
> *(ii) That the Languages of the Courts in the High Court, Court of Resident Magistrate and District Court must be English or Kiswahili as the Judge or Magistrate holding such court shall direct, but the records of proceedings, orders, rulings or judgment must be in English; provided that when hearing appeals from Primary Courts, the Language of the Court must be Kiswahili but the record of proceedings, orders, rulings or judgments must be in English.*[30]

While the Commission glorified the continuing use of English as the language of courts record, it is unfortunate that it failed to see the risk and complexity involved in instant translation and recording of proceedings conducted in Kiswahili into English.[31]The practice allows only translated version of the proceedings to be on the record while the original Kiswahili version of the proceedings is not kept anywhere. In addition, there is no requirement on the part of a presiding judicial officer to make a clear record of the fact that the proceedings were conducted in Kiswahili and were instantly and manually translated and recorded by him in English in the course of the proceedings.

Much as the commission recommended the amendment of the Language of the Courts Rules, it did not find it important to recommend the regulation of the practice of instant translation and manual recording of proceedings from Kiswahili to English.

22 Wanitzek and Twaib (n 1) 118.

23 Order XVIII, Rule 9 of the Civil Procedure Code Cap. 33 R.E 2002 requires a judicial officer to direct a court stenographer to record the proceedings in short hand. Nonetheless, because of lack of qualified stenographers to record the proceedings in short hand, in practice the recording of the proceedings is often done by the judicial officers themselves.

24 United Republic of Tanzania, The Law Reform Commission, Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, 2013.

25 Wanitzek and Twaib (n.1) 117.

26 The Law Reform Commission is in favour of the practice of continuing using English as the language of courts.

27 *Ibid*. SeeOthman, M.C., A Keynote Address by Honourable Chief Justice of the United Republic of Tanzania on the occasion of the Annual Conference of the Tanganyika Law Society, Arusha, 17/02/2012,<https://www.scribd.com/document/112948089/CJ-Speech-AGM>(Accessed 01/012013).

28 *Ibid* 10.

29 G.N. No. 307 of 1964.

30 The Law Reform Commission, Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, 2013, p.128.

31 It is worthwhile to note that the report sought to provide for the gaps that exist in civil justice legislation and make recommendations on the ways to fill these gaps. The opinions of the stakeholders, consultants and the Commission were analysed before making recommendations on the best way to improve the civil justice system in Tanzania.

More importantly, the commission did not also see the significance of proposing for any improvement in the manner in which proceedings are taken and recorded in courts. There is no doubt that Mwakajinga had the above weaknesses in mind when he maintained thus:

> *While the Magistrates' Courts Act specifies that the record shall be in English in the District and Magistrates' Courts, but in Kiswahili in Primary Courts (section 12(1) (sic)), the law does not specify how court records can be obtained. The present practice is that the magistrate records the protocols in a case file in handwriting. Later these are typed when there is an appeal. At the trial the magistrate has to listen and write simultaneously. The magistrate has to be succinct, reasonably fast and accurate in writing, and be quick in sorting out relevant facts from the evidence. Finally, the magistrate reads the recorded evidence to a witness for corrections.*
>
> *This present method of protocolling is conducive to errors, omissions, or irregularities, which may amount to injustice. The proceedings should be taped-better yet even video-taped- so that in case of an error or omission, the tape will clarify the matter. Video taping has the advantage of showing the demeanor of the witnesses……. using such equipment would raise the costs of court proceedings.*[32]

According to the preceding quoatation it seems that it is difficult to reconcile the two laguages in the court proceedings simply because they impose an extra burden to the magistrate when they are writing the court records. The option which is suggested to address the anomaly is that the proceedings should be taped so that in case of an error or ommission the tape will calrify the matter. However, this method is expensive as it is likely to impose an extra burden.

4. Language of Law as a Special Variety of Language Use

The law refers to English language as among the language of the court, but the English used in law and in court is not the plain English language.[33] Rather, it is unique and peculiar legal English which is characterised by legal jargons, Latin and Greek words as well as legal terms peculiar only to law. Indeed, legal English, commonly known as legalese is the language that lawyers and judicial officers have been trained in and exposed to throughout their training process.

Since law aims at precision, legalese is seemingly used to avoid generalisation. It is used in courts by advocates for the purposes of argument and advancement of the interest of their clients. It is also used and reflected not only in court proceedings but also in judgments and other court records. There is no doubt that this language in itself poses a significant barrier to laypersons in their pursuit of accessing justice.

Apparently, even when Kiswahili is used, it also ends up being heavily mixed with such jargons and terms such that a layperson can hardly understand. It is instructive to inquire into the manner in which Kiswahili is used in court proceedings. This would have established the variety of Kiswahili that has emerged over the years as the language of the courts. To be sure, the variety of Kiswahili and in particular vocabularies and a conceptual apparatus used in court would not necessarily be the same as the ordinary Kiswahili spoken by ordinary people.[34] To the above extent, the language used in courts is the "lawyers' or rather "Lawyers Language".

The nature and character of the language of the law is clearly notable in legal writing which is characterised by unusually long sentences with numerous carefully phrased clauses and features that are intended to make it resistant to misinterpretation. It is a distinctive style of writing aimed at a highly specialised group that uses specialised vocabulary imbued with technical meaning.[35] The language of the law used in court rooms as well as during the drafting of legal documents is therefore difficult for the lay person to comprehend unless he gets legal assistance from a person knowledgeable in law.[36] Certainly, this is inimical to the interest of justice since representation by legal counsel is not free and so many people cannot afford it. This problem is captured by Evans and others when they observed as follow in relation to language of the law:

> *From the clients' point of view, resolving a legal problem without professional help would be extremely difficult. The first problem is the terminology used by lawyers and in the text books, which is both unfamiliar and intimidating to laypersons.* ***The way in which the lawyer communicates with his or her client may create a barrier between them****. It is therefore important for the lawyer to be aware that problem exists and also to be prepared to take steps to overcome it……It therefore makes sense to avoid the use of legal jargon and to discuss the problem in language the client understands.*[37]

It is not surprising that much concern have been raised against the language of law and language used in the court processes.[38] It is also for this reason, legal writing has often been criticised as an obtuse exercise that encourages the perception that lawyers speak in rhetoric that is without substance.[39] Explaining problem of legal language and the barrier it poses, Ashipu and Umukoro write:

> *The language of law is obscured because of its jargons, ambiguity and inaccuracy. The resultant problem is that those who are not in the legal profession, find it difficult to comprehend such a language variety. Hence, even in a situation*

32 Mwakajinga, A. N., *Court Administration and Doing Justice in Tanzania,* in Jones-Pauly, C., and Elbern, S.(eds), Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts, Kluwer Law International, London, 2002, pp.231and 233.

33 Both English and Kiswahili as languages of the court consist of legalese. Legalese refers to a jargon characteristically used by lawyers for legal writing which may not be easy for laypersons to understand. It is a special variety of language used by lawyers.

34 United Republic of Tanzania, Report of the Presidential Commission of Inquiry into Land Matters, Dar es Salaam, Ministry of Lands, Housing, and Urban Development, Government of United Republic of Tanzania1994, p. 199. See also n 146 whereby a list of some Kiswahili vocabularies commonly used in Primary Court proceedings is given.

35 Ashipu, K.B.C and Umukoro, G.M., *A Critique of the Language of Law in Selected Court Cases in Nigeria*, Mediterranean Journal of Social Sciences, 2014, Vol 5 No 8, pp. 622-626.

36 Ibid

37 Evans, J., and Perk, L. (ed) Legal Skills and System, Old Bailey Press, London, 1997, pp.305-306

38 Different calls and concerns have been made by several human rights activists for the need for courts to use plain English language and the language of the majority of the population.

39 Ashipu and Umukoro (n 38).

where the information that concerns them is vital, it is neglected due to their inability to understand the language. To speak of legal English as communicating meaning is in itself misleading. Of all the varieties of language, it is perhaps the least communicative in that it is designed not to enlighten the users of language at large.[40]

One can imagine the hardship the accused and litigants go through simply because they do not understand English language. The hardship is worsened by the fact that the legal English as shown above differs from the ordinary language in terms of vocabulary, syntax, semantic and morphology.[41] It comprises of legal jargons derived from colonial legacy constituting other foreign languages. Example the following Latin words used in law: *ab initio* (from the beginning); *ab extra* (from outside); *animus possidendi* (intention to posess); *actus reus* (guilty act); and *obiter dicta* (by the way).

No wonder this situation translates to hardship to unrepresented layperson and to an increased workload to judicial officers entrusted with dispensation of justice and hence delays in disposal of cases. It is in this context that Kwikima, Ag. J. (as he then was) in the case of *Simon Chatanda v. Abdul Kisoma*[42] advised as thus:

Where the parties to a suit are laymen conducting their own cases, the trial court should scrutinise the pleadings before admitting them and in general furnish any necessary guidance.

40 *Ibid* 623.
41 *Ibid*.
42 *Chatanda v. Abdul Kisoma* [1973] LRT 11.

In that way people would feel secure to go to court. But not where they will be bombarded with Latin and other jargons they have never heard of and at the end of the day pay for it. [43]

Consistent with the above authority as per Kwikima Ag J (as he then was), it is according to *Manase Singano and two others v Director of Vicfish Ltd*,[44] the duty of the court to ensure that parties in both civil and criminal proceedings understand the language used in those proceedings. In that case, the appellants contended among other things that the advocate for the respondent always spoke English despite their protesting against it. Mrosso J observed that

I wish to sound a caution that a court has to ensure that all parties in a case are given all available facilities to follow and participate fully in the proceedings. I need hardly remind the trial magistrate that although the district court record must be in English, the proceedings may be in English or Kiswahili as convenient, considering the parties in court. Therefore, the trial court should have directed.....the learned advocate to address it in Kiswahili (if he in fact did not do so) so that the appellants could understand what he was telling the court in his submissions.

Likewise, in compliance with the procedural rule, the general rule appears to be that where parties to a case are represented, courts demand greater diligence in compliance with

43 The case was also discussed in Peter, C. M., 'The Contribution of the Court of Appeal of Tanzania in the Maintenance and Safeguard of Rule of Law and Human Rights' A Paper Presented in the 25th Anniversary of Tanzania Court of Appeal, Dar es Salaam, 2004, p. 13.
44 Civil Appeal No. 28 of 1999, High Court, Mwanza (2000) (*Unreported*).

the rules of procedure than those parties who are not represented. The court may in those cases, overlook the procedural errors, as was pointed out by Mkwawa J in *Ramadhani Nyoni v M/S Haule & Co.Advocates.*[45]

At this juncture, it is pertinent to note that the provisions of law that stipulate for language of law and use in courts do not go as far as imposing a duty to the court to translate pleadings to the litigants. It does not also describe the specificity of the language of law. The omission is perhaps notwithstanding the language fair trial rights that are inherent in article 13 (6) (a) of the said Constitution of United Republic of Tanzania discussed herein below. The only explicit and relevant provision in this context is perhaps section 135(a) (i) and (ii) of the Criminal Procedure Act which forestalls the use of legalese in a charge sheet. However, this provision is only relevant in criminal proceedings. As far as the provision relates to statement of offence, it insists on describing "the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence."[46] In relation to particulars of the offence, the provision states that the same must be "set out in ordinary language, in which the use of technical terms shall not be necessary."

The dominance in the use of English language in law and courts is not an accident. Rather, it is a retrospective reflection of the British colonial rule which replaced the German colonial rule immediately after the WWI.[47]The British colonial rule lasted for many years from 1922 to 1961.[48] It is responsible for introducing the English common law system in Mainland Tanzania. To facilitate the communication with people, Kiswahili was then used at the level of Native administration and courts. During the process of communication, the chiefs and clerks took the role to interpret.[49] It is from such background that English use in courts traced its origin in Mainland Tanzania.

5. Legal Aspects of Language Use and Language Fair Trial Rights in Court Proceedings

Aspects of language use and language fair trial rights in court trace their basis in article 13 of the Constitution of the United Republic of Tanzania and in particular sub-article 13 (6) (a) of the said Constitution. The significance of this article is that it guarantees right to a fair hearing/trial to any person whose rights and duties are being determined by the court. This right necessarily envisages language fair trial rights since the determination of the rights and duties of such a person involves a hearing; and hence language use and as communication in the administration of justice.[50]Arguably, language fair trial rights are priority rights situated within the minimum guarantees of trial fairness hence clarifying the position of language rights in court proceedings. It is arguable therefore that in so far as the language fair trial rights are concerned, the court has an obligation to fully respect these rights in the process of ensuring justice.[51] This duty is both

45 [1996] TLR 71 at p. 73.
46 Criminal Procedure Act [Cap. 20 R.E 2002], s. 135(a) (ii).
47 It was vide article 22 of the Covenant of the League of Nations that the British took over Tanganyika.

48 Rashid, N., *British Colonialism in East-Africa During Nineteenth Century*, IOSR Journal Of Humanities And Social Science, 2014, Vol. 19, No. 3, pp. 08-11. See also the Tanganyika Order in Council in 1920.
49 *Ibid*.
50 Namakula (n 3) 4.
51 *Ibid*.

negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights.[52]Language is therefore a pertinent subject for consideration in the reform discourse of civil and criminal justice system of any jurisdiction such as Mainland Tanzania. A commitment to guarantee trial fairness in court proceedings should entail commitment to address the language question.

For any fair trial, among other features, the language used needs to be well understood by all litigants appearing before the court. If the language used is understood only by one party and not understood by another party in the court trial, this leads to inequality before the court due to miscomprehension of language and thus the trial held will be unfair trial and unconstitutional. As stipulated under the cardinal principle of justice embodied in the Latin maxim: *"Audi Altera Parte*, *Audiatur Et Altera"* meaning that "no man should be condemned unheard or without having an opportunity of being heard.

Similarly, "*Qui Aliquid Statuerit Parte Inaudita Altera, Aequum Licet Dixerit, Haud Aequum Fecerit",* means that "He who shall decide anything without the other side having been heard," although he may have said what is right, will not have done what is right." [53]As stated in the case of *Alex John v R.*,[54] the state has enacted many laws containing provisions giving effect to this clear dictate of the Constitution. One such law is the Criminal Procedure Act [Cap. 20 R.E. 2002]. The Act contains many provisions which guarantee a full hearing or a fair trial to an accused person.

There is absolutely no doubt that language plays an important role for any court trial. A fair trial is a central pillar and a cardinal requirement of the rule of law in any justice system. It requires absence of abuse of process, inefficacious proceedings and in absence of bringing administration of justice into disrepute. As a fundamental legal principle in any civil or criminal trial, there is a need to have clear and unambiguous language use before the court.[55]

In *Mpemba Mponeja v Republic,*[56] the appellant was charged and convicted of murder contrary to section 196 of the Penal Code. He was sentenced to the mandatory sentence of death by hanging. He was aggrieved by the conviction and sentence. He therefore appealed against the conviction and sentence raising a number of grounds of appeal. One of such grounds of appeal which was also not opposed by the Republic was that the appellant was not given a fair hearing for lack of being provided with a court interpreter as provided for under section 211 (1) of the Criminal Procedure Act [Cap 20 R.E 2002]. The Court of Appeal examined the record of proceedings of the trial High Court. It was satisfied that the appellant was not conversant with Kiswahili but Kisukuma. Yet, the appellant was not provided with an interpreter during the trial.

52 *Ibid*. See also *Abdallah Mponzi v Daudi Mlwilo* Civil Revision No. 1 of 1999, Court of Appeal of Tanzania at Mbeya where the court said "…the fact that a litigant is a layman and therefore likely not to be conversant with technical legal issues before the court has never been regarded by the court as constituting a warrant for depriving the litigant his right to be heard. The right is so fundamental that deprivation of it makes the proceedings concerned incurably defective."

53 The above principle was adopted in the case of *The Attorney General v. Lesinoi Ndeinai and Joseph Saleyo Laizer and Two Others* Court of Appeal of Tanzania at Arusha (Nyalali, C.J., Mwakasendo and Kisanga, JJ.A) Criminal Appeal 52 and 53 of 1979.

54 Criminal Appeal No. 129 of 2006.

55 Wanitzek and Twaib (n 1), Namakula (n 3), Mwakajinga (n 31) 230, 232, and 233.

56 Criminal Appeal No. 256 of 2009, Court of Appeal of Tanzania, Mwanza (10/09/2012) (*Unreported*).

The Court of Appeal was settled that the omission constituted a fundamental breach of the appellant's rights to understand and follow up proceedings of the case against him. At page 5 of its typed judgment, the Court of Appeal observed and held that:

> *We start by considering the issue of denial of a fair hearing. This claim originates from claims that the appellant, who did not understand Kiswahili or could not speak it well, was at times during the trial, not provided with an interpreter from Kisukuma to Kiswahili and vice versa. We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellant's rights to understand and follow up proceedings of the case against him. It was a fatal omission.*

Consequently, the Court of Appeal quashed the conviction and set aside the sentence imposed by the High Court. The appellant was therefore set free. It is clear that the Court of Appeal did not in this case seriously consider whether the issue of failure to provide an interpreter was raised in the trial court. However, it is evident from the above quotation that the court only considered that the failure to provide the interpreter had prejudiced the appellant.

Similar omission occurred in the case of *Moses Mayanja @ Msoke v Republic,*[57] in which the appellant was charged with and convicted of the offence of armed robbery and sentenced to thirty years imprisonment by the District Court of Mwanza. The appellant's first appeal to the High Court against the conviction and sentence was dismissed. The appellant was aggrieved by the decision of the High Court and decided to lodge a second appeal to the Court of Appeal. The appellant's memorandum of appeal listed five grounds of complaint against the judgment of the High Court. The Court of Appeal found the second ground of appeal compelling. The ground had it that the appellant was not given a fair trial as two purported eyewitnesses testified in a language he did not understand and without an interpreter worth compelling. As such, he could not effectively cross-examine the eyewitnesses in his bid to establish his innocence.

Upon perusal of the trial court's record, the Court of Appeal discerned the fact that the appellant, who was a Ugandan by nationality, did not understand the Kiswahili language which was used by witnesses against him. The court observed from the record that such fact was known to the prosecutors as well as the trial magistrate, even before the trial started. The Court of Appeal was also clear that court interpreter had always been provided at the trial in the District Court at the instance of the public prosecutors. However, when the two witnesses were testifying, the service of the interpreter was withdrawn for undisclosed reasons. The Court of Appeal found that the omission was highly irregular and fundamentally flawed the trial of the appellant. The Court of Appeal went further to hold that the appellant was not given a fair trial or fair hearing. It therefore expunged the relevant evidence that was given without interpretation. In so doing, it further held that there was no cogent evidence left to ground

57 Criminal Appeal No. 56 of 2009, Court of Appeal Tanzania, Mwanza (*Unreported*).

the conviction. Consequently, the failure to provide interpretation led to the quashing of the trial proceedings and hence acquittal of the appellant.

In the case of *Musa Mwaikunde v Republic,*[58] the conviction against the appellant was quashed and sentence imposed against him was set aside. The court was satisfied that the charge sheet was defective as the particulars of the offence were not sufficient. In other words, the manner in which the charge sheet was drafted, it was clear that the prosecutor who drafted it suffered from language barrier. Apparently, the prosecutor could not properly craft statement of particulars of the offence that is consistent with the facts and the ingredients of the offence. The consequence was that the accused person was taken not to have known the nature of the case facing him and hence there was no fair trial. In relation to such failure, the court in this case stated that:

> *It is interesting to note here that in the above charge sheet the particular of statement of offence did not allege anything on threatening which is the catchword in the paragraph.*
>
> *The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing this in mind, the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element.....In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him.*

In addition, in the case of *Mawazo Makiwa v. Republic*[59] which was before Twaib, J,[60] the appellant was appealing against the decision and orders of Kilosa District Court at Kilosa, which convicted him of rape and sentenced him to 30 years imprisonment. After the perusal of the court proceedings and hearing both the appellant and the prosecution side, the appellant was discharged by the court and was ordered to be released from prison because the prosecution failed to state in the particulars of the offence, that; firstly, the accused's carnal knowledge of the girl was unlawful; and secondly, that the girl was below the age of 18 years. Therefore, due to the above two crucial omissions by the prosecution, the court stated that the crucial omissions had been committed by the prosecution and rendered the appellant's plea equivocal and, therefore, his conviction unsustainable. Subsequently, the court discharged the appellant.[61]

The case of *Atilio Kitine v Republic* provides instances where hearing impairment of the accused person was accidently detected by the court as the accused person/appellant who was thought to have jumped bail was in fact within the court premises waiting for his case to be called for preliminary hearing.[62] It became clear that he did not hear when his case was called because he had serious hearing impairment. Therefore, the warrant of arrest that was issued against him had to be cancelled although no arrangement was made by the court to overcome the inherent language barrier on the accused/appellant who had serious hearing impairment. When

58 *Musa Mwaikunde v R* [2006] TLR 387. See also *Buhimila Mapembe v Republic* [1988] TLR174; *Munisi Marko Nkya v R* [1989] TLR 59.

59 *Mawazo Makiwa v. Republic,* Criminal Appeal No. 45 of 2013, High Court, Dar es Salaam District Registry.

60 Twaib. J.

61 Judgment was delivered at Dar es Salaam on 27th October 2014.

62 *Atilio Kitine v Republic* DC Criminal Appeal No. 9 of 2012, High Court, Iringa (unreported).

this case came for hearing before the trial District Court, and PW.1 started to give his evidence, the trial magistrate suddenly observed that the accused/appellant had hearing impairment. Apparently, there was nothing that was put on the record suggesting that the accused/appellant had hearing impairment as earlier detected. It was then that the trial court abruptly called the accused/appellant's brother who was sworn in to serve as an interpreter of the accused/ appellant.[63] It was in the appeal to the High Court by the accused/

Consequently, the learned judge had this to say:

> *It is not clear how the appellant managed to understand and follow up the court proceedings from the date when the charge was read over and explained to him on 27/7/2006 and during preliminary hearing. Secondly it is not clear how the trial Magistrate discovered that Abas Kitine, the brother of the appellant was an expert in deaf-mute communication language. In addition the record of proceedings is not clear on how the interpretation was conducted especially on the defence level.*[64]

In this case, the trial judge allowed the appeal, quashed the conviction against the appellant and set aside the sentence of thirty (30) years imprisonment imposed against him.

Defects signifying language barrier are also notable in other court documents filed in court by or on behalf of litigants or accused person/persons. It occasionally happens that a quick look at a document makes one to conclude that whoever prepared it has limited understanding and knowledge of English language. It is always obvious in such documents that the drafter was struggling with language barrier and hence difficulties in proper and clear presentation of whatever he wanted to put across. With the recent technological advancement in communication, such instances are always exposed through social media. One of such instances can be drawn from a letter prepared and filed in Kilwa District Court by one advocate. The letter was a subject of debate in many social media. The letter in part reads as thus:

63 It would appear from the record that the prosecution side was not asked whether they object the accused's brother to serve as the interpreter. This is not notwithstanding that the accused's brother had obvious interest to serve in the case in which the accused was facing a charge of rape. See the case of *Cuscani v United Kingdom* (2003) 36 E.H.R.R 2 in which the accused's brother was present in court proceedings and the court was assured by the accused's counsel that in the event of any language barrier to the accused whose English knowledge was limited, the accused's brother would be able to deal with the situation. On appeal however the appellate court found that there was violation of the appellant/accused's rights to fair hearing. This case is discussed under subtitle 3.4.3 of chapter three of this study.

64 *Ibid* p. 4.

HON. DISTRICT COURT MAGISTRATE 1/C

KILWA DISTRICT COURT

P.O.BOX……..

KILWA

REF: THE NEED TO JOIN IN CRIMINAL CASE No. 4 of 2012

Reference is made to the above subject.

I am an advocate of the High Court Surbordinate. I am here by pray to join tthe case above to represent accuser an the suit is in the Kilwa District Court, the parties to the case are:

Republic

Verses

AHMADI ALLY RUWAMBO……….Accused

Due to the instructions of my client who is accuser to the suit, therefore trough this letter let the court accept and be aware that the accuser will be presented by Mnahi MNAHI MUHEKA NILUNBA & CO. ADVOCATES in the application against the Respondent.

Yours faithfully

(Sgn and stamped)

The foregoing is a testimony of the fact that the language barrier is also a challenge to some lawyers.

05/02/2013

6. Language Aspects of Taking and Recording of Evidence

In any court trial, evidence is substantial for one to prove his case. One cannot give solid ground without evidence. A strong argument is considered with sufficient evidence to prove the case. Therefore, evidence is paramount in all cases before the court of law. Again, in this matter it is paramount for language to be considered in the production of evidence as language is a communication means through which the evidence is given.

Whatever evidence produced, it needs to be understood by not only the parties in court but also the court so that they can present well their case in court and the court can at the end of the day determine the case based on the evidence on the record.

It goes without saying that the giving of evidence involves giving an accused person or a litigant a chance to call his witness to testify and if need be produce documents. The giving of such evidence is only possible if a witness understands the language of the court or is facilitated with a court interpreter who would interpret his evidence from the language he is using to give his evidence to Kiswahili or English.[65] It is settled law that refusal to give a party chance to call his witness to testify amounts to a refusal to a right to be heard.[66] There is no doubt that failure of a party or his witness to give evidence simply because of language barrier is tantamount to denying him his right to be heard and in particular denying him his language fair trial rights.[67] The same position would apply if a party is denied opportunity to cross-examine a witness of his opponent because of language barrier as afore stated.

In so far as criminal proceedings are concerned, the law clearly provides guidance as to how the evidence given must be taken and recorded by the Resident Magistrates' Courts and District Courts. The law goes as far as providing guidance as to the language to be used and the style of taking and recording the evidence. As far as Resident Magistrates' Courts and District Courts are concerned, the relevant provision reads thus:

210.-(1) In trials, other than trials under section 213, by or before, a magistrate, the evidence of the witnesses shall be recorded in the recording in the following manner

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by him and shall form part of the record;

(b) the evidence shall not ordinarily be taken down in the form of question and answer, but subject to subsection (2), in the form of a narrative.

(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.[68]

On the contrary, the relevant provision for the Primary Court with regard to the requirement of reading over the evidence to accused, complainant and witness reads as follow:

Rule 35 (6) the magistrate shall record the substance of the evidence of the complainant, the accused person and the witness and after each of them has given evidence shall read his evidence over to him and record any amendment or corrections. The magistrate shall certify at the foot of such evidence, that he has complied with this requirement.[69]

65 As regards to witnesses with speech and/or hearing impairment, section 128(1) of the Evidence Act Cap.6 R.E 2002 provides the manner in which the evidence of such dumb witnesses can be adduced. The provision reads: "A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written, and the signs made, in open court."

66 *Andrea Salimo v Ernest Msanjila*, Civil Appeal No. 1 of 2007, High Court, Dodoma (*Unreported*).

67 This is also the case if such a party or his witness does not speak any of the languages (English or Kiswahili) of the court and interpretation facilities are not provided. This is so if it was clear at the trial that the party or his witness was ignorant of the said languages.

68 Criminal Procedure Act Cap. 20 R.E 2002, s. 210.

69 Primary Courts Criminal Procedure Code Cap. 11 R.E 2002, rule 35(6).

Going by the provision of section 210 of the Criminal Procedure Act, it is clear that the evidence given in Resident Magistrates' Courts and District Courts must be taken and recorded in writing in narrative form in the language of the court. It must also be signed by the presiding judicial officer so that it forms part of the record of the court. As the evidence taken forms part of the record of the court, it is pertinent that the language in which the evidence is taken and recorded must be the language of court record which is presently English. A witness is entitled to have his evidence read over to him if upon being informed of this right by the court he asks the court to read his evidence.[70]

When his evidence is read over to him, he may comment on his recorded evidence. The comments given by the witness must be recorded by the presiding judicial officer.[71] One can deduce from the above provisions that the Primary Court magistrate is obliged to read over the evidence recorded to the witness whereas the resident or district magistrate is only obliged to inform the witness of his right to have the evidence read over to him. In any case, the provisions are excellent safeguard seeking to ensure that the translation and recording of the evidence in English or Kiswahili in the Primary Court did not lead to loss of evidence and distortion of witness testimonies.

In practice, however, witnesses are rarely informed of this right. Of significance is the insistence on the taking of the evidence in the language of the court, and the presence and hearing of the presiding judicial officer even when he directs the evidence to be taken under his direction or superintendent.[72]

70 See Criminal Procedure Act [Cap. 20 R.E 2002], s. 210 (3).
71 *Ibid.*
72 Criminal Procedure Act Cap. 11 R.E 2002, s. 210.

Despite the niceties of the provision, it does not provide guidance as to instant translation and recording of evidence given in court proceedings in Kiswahili.[73] The provision also caters only for criminal proceedings.[74] It is interesting to note that there is no similar provision applicable to the High Court as to recording of evidence adduced by a witness and reading the evidence over to the witness.

In order for a witness to give a proper testimony, he has to do so through the language known to him or her. It means that if he does not understand the language of the court, there must be a facility such as an interpreter to cater for the need. One of the basic tenets of due process or a fair trial is that evidence in a criminal trial ought to be tendered in the presence and hearing of an accused person unless the latter for any reason, decides to absent himself.[75] However, this requirement is not fulfilled by the mere physical presence of the accused in the court room. This presence must be accompanied by his actual full participation in the proceedings. Thus, this right would be illusive if the proceedings are conducted in a language not fully understood by the accused.

7. Language Use and Interpretation in Court Proceedings

The law envisages language barrier in court proceedings. It is in such regard that provisions were enacted that seek to address the problem. The problem might arise from a party's or his witness's ignorance or limited understanding of language used in court proceedings or language in which the evidence is given. This could arise when a party or his witness does not understand the language of the court or the language in which the evidence is given in court proceedings. It may also occur when a party or his witness cannot give evidence in the language of the court but in the language that he understands. Such a party cannot cross-examine his opponent or his opponent's witnesses by using the language of the court but the language he understands. In the context of Mainland Tanzania, such a party or his witness might be ignorant of or having limited understanding of the language used in the court proceedings, which is Kiswahili or English or both. The obvious implication is that the failure to cross-examine a witness on an important piece of evidence as a general rule renders such evidence to be taken as the truth.

73 Ibid.
74 The study did not find any similar provision in any other legislation that is applicable in civil proceedings.
75 Criminal Procedure Act Cap. 20 R.E 2002, s. 196.

In a bid to resolve the problem of language barrier once it arises in the proceedings, the law has in place provisions that cater for interpretation of the evidence given in the language not understood by the accused. One of such provisions is found in section 30 of the Magistrates' Courts' Act which stipulates that:[76]

> *30 (1) Where any evidence is given in a language not understood by the accused, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) Before entering upon the duties of his office, an interpreter shall take oath or be affirmed, as the case may be in the prescribed form:*
>
> *Provided that a regular court interpreter who has taken oath or has been affirmed generally shall not require to take oath or be affirmed in each proceeding.*

76 Cap. 11 R.E. 2002. See also section 4(b) of the Oaths (Judicial Proceedings), and Statutory Declarations Act [Cap.34 R.E 2002] which provides for the requirement for an interpreter to take an oath.

The other relevant provision is found under section 211 of the Criminal Procedure Act[77] states that:

> *(1) Whenever, any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) If he is represented by an advocate and the evidence is given in a language other than the language of the court, and not understood by the advocate, it shall be interpreted to such advocate in the language of the court.*
>
> *(3) When documents are produced for the purpose of formal proof it shall be in the discretion of the court to interpret as much of them as appears necessary.*

In Primary Courts, the provision of rule 30 of the Criminal Procedure Code is applicable for interpretation of evidence. The provision reads as follow.

> *30.-(1) where any evidence is given in a language not understood by the accused, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) Before entering upon the duties of his office, an interpreter shall take oath or be affirmed, as the case may be:*

77 *Ibid.*

> *Provided that a regular court interpreter who has taken oath or has been affirmed generally shall not require to take oath or be affirmed in each proceeding.*

The above provisions set a regime for interpretation of evidence in criminal proceedings. Accordingly, when evidence is given in a language not understood by the accused person, the evidence must be interpreted for him in open court in a language understood by him.[78] The evidence must, however, be given in the presence of the accused or his advocate where applicable. The evidence will also be interpreted to the accused's advocate if it is given in a language other than the language of the court. The interpreter must take oath or be affirmed before he discharges his responsibilities. However, if he is a regular court interpreter, there is no requirement for him to take an oath or being affirmed. The requirement as to the court interpreter taking oath or being affirmed is complemented by section 4(b) of the Oaths (Judicial Proceedings) and Statutory Declarations Act [Cap. 34 R.E 2002]. The provision reads:

> *Subject to any provision to the contrary contained in any law, an oath shall be made by-*
>
> *(a)………………………..*
>
> *(b) any person acting as interpreter of questions put and evidences given by a person being examined by or giving evidence before a court*

Notably, Part I of the First Schedule and Part I of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967, have provided a format of an oath to be made by an interpreter in the courts other than the Primary Courts in the following words:

> *I swear that I shall well and truly interpret and make explanation to the court and witnesses and others in the languages of …….. and …….. of all such matters and things as shall be required of me, [as interpreter appointed to the court of ....] to the best of my skill and undertaking.*[79]

As shown earlier, there are similar provisions for interpretation in Primary Court proceedings.[80]According to Part II of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967 an interpreter in the Primary Court must repeat the following:

78 It would appear that this is also applicable where a witness with speech and/or hearing impairment gives evidence in accordance with section 128(1) of the Evidence Act [Cap. 6 R.E 2002]. As the evidence may in this respect be given by sign language, an interpreter would necessarily be needed.

79 However, pursuant to paragraph 2 of Part I of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967 'any other interpreter shall make oath or affirmation in accordance with paragraph 1, except that he shall omit the words "as interpreter appointed to the court of......"'. It appears that the omission of the said phrase is applicable to interpreter appointed to discharge interpretation duties although he is not a regular court interpreter appointed as such. This implies that the courts must have regular and duly appointed interpreters that can be called upon to discharge such duties as may be necessary. Nevertheless, in practice the courts do not maintain a register of regular and duly appointed court interpreters.

80 Rule 6 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules Cap. 11 R.E. 2002 provides for interpretation where a party to a civil matter is not conversant with the language in which proceedings are being conducted. The proceedings have to be interpreted to him in open court in a language understood by him. What such party says must also be interpreted. The same is the case where the evidence is given in a language other than the language in which the proceedings are being conducted. The rules require an interpreter to be affirmed save where he is a regular interpreter who in such situation will need not to be affirmed in each proceeding. As for criminal proceedings see rule 30 of the Primary Court Criminal Procedure Code [Cap.11 R.E. 2002] which enacts similar provisions as the foregoing. Rule 19 of the Labour Court Rules, 2007 (GN No. 106 of 2007) provides for the requirements of taking oath or affirmation before an interpretor or translator interpretes or tranlsates in court or elsewhere in relation to court work and the exemption provided if such person is admitted and enrolled as a sworn interpreter or translator of any division of the High Court in which case he shall be deemed as such for interpreting or translating for the High Court (Labour Division).

> *"Mimi nathibitisha kwa kiapo kwamba nitatafsiri katika lugha ya .... na .... kwa ukweli na usahihi kwa kadri niwezavyo na nitatoa maelezo yanayohitajiwa kwa mahakama hii, kwa watu wadaawa na kwa mashahidi.".*

One can clearly see the emphasis placed by the law for an interpreter to take an oath or affirmation before discharging his responsibilities in court. It is pertinent that the purpose of such an oath is to give assurance to the witness whose evidence is being interpreted to the court that the interpretation is faithful and not misleading. The obvious question is on the legal effect of the omission by the court to require an interpreter to take the interpreter's oath or affirmation.[81]

Apart from the fact that Kiswahili is used in the Primary Courts and the affirmations/oaths for interpreters are made in Kiswahili, the other difference is that the regime for primary court interpreters covers both civil and criminal proceedings. This is particularly so because the provisions of section 211 of the Criminal Procedure Act and section 30 of the Magistrates Courts Act are only applicable in criminal proceedings in Resident Magistrates' Courts and District Courts. The study did not find a corresponding provision that applies in civil proceedings in such courts. The exception could be in probate and administration matters, in which there is the Probate and Administration Rules [Cap.352 R.E 2002] that governs translation of a document which ought to be filed with an application. The relevant rule reads as follow:

> *Where any document required under these Rules to be filed with an application or otherwise produced to the court is in any language other than English there shall be attached to such document a translation thereof in English made by a person competent to translate the same and verified by such person by affidavit in the form prescribed in Form 2 the First Schedule.*[82]

However, the above provision governs translation of document, which is in any language other than English which is the language of court record. It is strange that Kiswahili is omitted while it is as earlier shown language of the court and widely understood by people in Tanzania. Unlike the other provisions on interpretation and interpreters, rule 8 of the Probate and Administration Rules provides an indication as to the qualification of the translator which includes his experience in translating documents from the original language into English. According to such rule such translator must have competence to translate the document into English from another language. Having translated the document, the translator must verify by an affidavit that the translation is true and faithful. The format of the affidavit to be sworn or affirmed is prescribed in Form 2 in the First Schedule to the Probate and Administration Act [Cap. 352 R.E 2002]. The form is to the following effect.

81 See for instance *Interbest Investment Company Limited v Qingdao Foreign Economic Relations and Trade Company* Civil Appeal No. 95 of 2001, Court of Appeal, Dar es Salaam (unreported).

82 The first exception is reflected in rule 8 of the Probate and Administration Rules [Cap 352. R.E. 2002]. The case of *Re Aloysius Benedicto Rutaihwa* Probate and Administration Cause No. 1 of 2013, High Court, Bukoba (*Unreported*) is worth noting. In this case, a will written in English and *Kihaya* was used in evidence although it was admittedly translated by undisclosed person without following the requirement of rule 8 of Probate and Administration Rules [Cap. 352 R.E 2002]. The court did not seem to have addressed itself to the said rule. Had it done so, perhaps it would have rejected the translation. No doubt that the admission of the said will along with its translation occasioned failure of justice to those who were objecting the will. The other exception could be section 4 (b) of the Oaths (Judicial Proceedings) and Statutory Declarations Act which in practice seems to be applied in all courts in both civil and criminal proceedings.

"FORM 2

AFFIDAVIT VERIFYING TRANSLATION OF A DOCUMENT

(Rule 8)

(Title)

I, C.D. of .... make oath and say as follows–

1. That I am well acquainted with (Kiswahili) and English languages and have had experience in translation of documents from (Kiswahili) into English (state qualifications, if any)……………………............

2. That the paper writing marked "A" is a true and faithful translation of .... (descriptions of the document translated) marked B which is in (Kiswahili) language.

Sworn, etc."

It is pertinent to note that the translator is required to state his qualification relevant to translation involving English and the other language in which the document was written. This is glaringly wanting in the other provisions that cater for interpretation of evidence given in language not understood by the accused. This is particularly so as there is no stand-alone legislation that regulates the conducts of interpreters and translators.[83]

As to translation of a document, section 173(3) of the Evidence Act is relevant.[84] It enables the court to cause a document to be translated by a translator. In so doing, the court may direct the translator to keep the contents secret until such time when the document is given in evidence. If the translator disobeys such direction he will be held to have committed an offence under section 96 of the Penal Code [Cap. 16 R.E 2002] in relation to abuse of office whether or not he holds office in the public service. As a whole the law relating to translation and interpretation is not elaborate. Among other things, and in addition to the weaknesses pointed out above, it does not provide the types of interpretation required for the interpretation service in court. The law does not indicate whether the interpretation ought to be consecutive or simultaneous or perhaps both. The law does not explain how many interpreters are required in particular sessions and their tenure of service whether they are employed by the courts or are freelance interpreters. In this regard, the law does not state if there is specific guideline and any lists of the registered interpreters to provide interpretation service in court.

Nevertheless, the law also does not provide any kind of mechanism for monitoring and evaluation for the quality of interpretation service provided in courts. Most importantly, the law on court interpretation is completely silent as to the requirement of impartiality on the part of court interpreter and the right of a litigant or an accused to refuse the interpreter. There is yet another anomaly. The provisions as to interpretation of evidence given in the language which is not understood by an accused person only relate to the evidence given in the trial which is just a part of the entire court proceedings. Clearly, the relevant provisions do not provide for interpretation of the other part of the proceedings. Therefore, the existing law is not comprehensive. The following figure summarises the process of interpretation and translation of evidence from source language to the target language during court proceedings and the roles played by a court interpreter and a presiding judicial officer in the interpretation process.

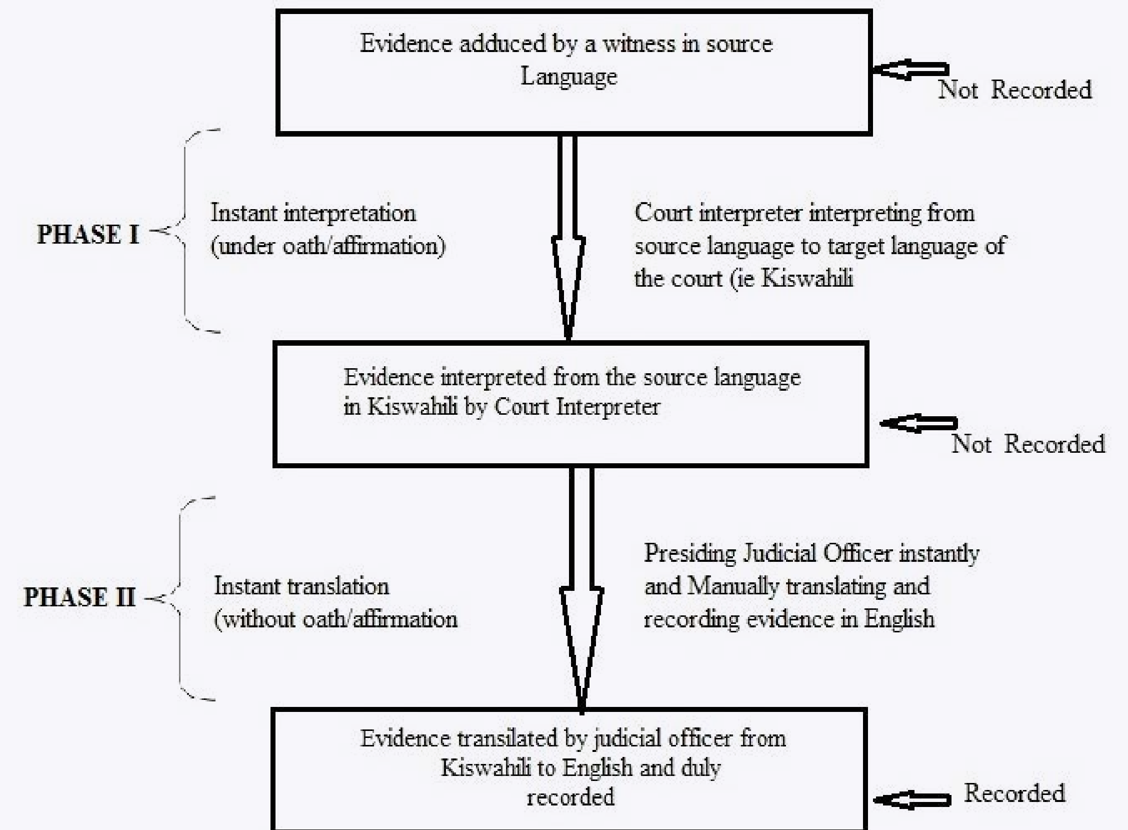


Figure 3: Court Interpretation and Translation Paradox in Court Proceedings

Source: Researcher of this study, 2017

83 See for example the US Federal Court Interpreter's Act 1978. This Act reflects the parallel efforts on the part of State governments in the US to ensure the due process rights of the non-English speaking and the hearing impaired. With this Act, when such persons are brought into the judicial system, increasingly one finds in the courtroom a person who makes communication between the legal actors possible: the court interpreter.

84 Cap. 6 R.E 2002.

8. Conclusion

The language of the law is characterised by legalese which creates barrier to laypersons in accessing courts. The fact that Tanzania is multilingual and the legal framework allows for complicated co-existence of Kiswahili and English as the languages of law and court in different contexts, the courts are potentially likely to experience instances of language barrier. It is unfortunate though that nothing very significant has been done to address language barrier other than the presence of an inadequate regime that regulates interpretation of evidence mainly in criminal proceedings. The instant translation and recording of evidence given in Kiswahili into English is a characteristic feature of the day to day court proceedings. Nothing has thus far been devised to address the challenge which has potential for loss and distortion of evidence and witnesses' testimonies. Whilst the regime appears to envisage language fair trial rights as priority rights, the concept is seemingly still yet to be realised and prioritised in court proceedings which creates flaws in due process of adjudicating justice. The lack of court interpreters to the parties that would also take into consideration persons with disabilities such as those with hearing impairment as explained *inter alia*, leads to expunction of relevant evidence that was given without interpretation.

Examination of the Legal Regime for Combatting Trafficking In Persons in Nigeria

By Kingsley Osinachi N. Onu[1], *& Rebecca Mayowa Sojinu*[2]

Abstract

Human trafficking is one of the biggest challenges of the 21st Century. The Sub Saharan Africa seems to be the center point of this global epidemic. Nigeria is an origin, transit and destination point for global trafficking in persons. This paper uses a doctrinal research approach to examine the legal regime for combatting trafficking in persons in Nigeria and argues that Nigeria must be more proactive in its fight against human trafficking. This paper finds that poverty, weak legal system, armed conflicts, climate change, family imbalance and greed among other factors, contribute to trafficking in persons. This paper finds that there exist plethora of legislations on human trafficking in Nigeria, such as the Constitution of the Federal Republic of Nigeria 1999, as amended in 2018; Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2015; the Immigration Act 2015; the Criminal and Penal Code Acts; the Child's Right Act and the African Charter. This paper finds that these extant legal framework in Nigeria are frost with several *lacuna* that will hamper and ultimately defeat the fight against human trafficking. The paper therefore makes suggestions on how to remedy the observed *lacuna*. The paper concludes by stating that the fight against human trafficking must be a collective effort by all. Human rights are not safe anywhere until all persons have enough of the same everywhere.

***Key words*: Legal, regime, Human trafficking, victims, trafficking in persons, Nigeria**

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1.0 Introduction

Human trafficking is a global menace that has ravished all the countries of the world, especially the third world countries.[3] Nigeria is a major *stakeholder* in global human trafficking as she serves as a supplier, receiver and transit point for human trafficking.[4] A study shows that African children constitute 80% of children trafficked to Italy and 60% of them are Nigerians.[5] Nigeria is considered as transit point for global human trafficking as young persons from the south eastern and southern parts of Nigeria are mostly trafficked into central African countries like Congo, Gabon and Equatorial Guinea, while their counterparts from the Northern States like Kwara and Sokoto are trafficked to work in Plantations and as sex slaves in Togo and Mali.[6]

Human trafficking is also internally carried out in Nigeria as children and women are being trafficked internally from less urban states like Benue, Bayelsa, Oyo, Cross River, Kwara, Niger and Ebonyi to the developed states like Rivers, Lagos, Abuja, Kano and Kaduna for farm works, domestic services, commercial sex works and other exploitative ventures.[7]

Human trafficking is an atrocious global crime engaged in by very powerful and highly organized consortiums. All kinds of tricks are deployed by the syndicates in the form of juicy job promises, coercion and deceit on vulnerable young persons whom they traffic to Europe or America for sexual slavery and domestic servitude.

Despite the prevalence of human trafficking in Nigeria, Nigeria as a nation continued to play the ostrich game with issues of human trafficking until the year 2003. Before then, human trafficking and incidental offences like child labour and child sex exploitation were addressed through the Criminal Code and Penal Code in the Southern and Northern Nigeria respectively. The year 2003 ushered in a new bliss to this aspect of Nigerian jurisprudence through the enactment of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003/2005, and the Child Rights Act, 2003/2005. The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003/2005 was repealed and replaced by Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2015.

This paper seeks to appraise the factors that encourage human trafficking and the various global and local instruments and legislation for combating this menace of human trafficking in Nigeria. To achieve this, this paper shall succinctly highlight the strength and weaknesses of these legislation, and proceed to proffer suggestions on how to improve on these laws knowing their sensitive status in the society.

2.0 Conceptual Clarification

2.1 Definition Human Trafficking

Several attempts have been made by scholars to define the term human trafficking. Makisaka defines human trafficking as 'as a process of people being recruited in their community and country of origin and transported to the destination where they are being exploited for the purposes of forced labor, prostitution, domestic servitude and other forms of exploitation'[8] Gabriel Idang opts to describe the term as 'involving a series of activities that culminate into the transfer of persons either from one state to another or to a far distance within the same state through deception'.[9] Some scholars also hold the view that it involves 'the movement of victims, usually women and children, across borders legally or illegally.'[10] Okeshola and Adenugba define human trafficking as 'the illegal and immoral buying and selling of human beings as commodities to meet global demands for commercial sexual slavery or forced labour.'[11] Article 3 of the United Nations Protocol to Prevent, Suppress and Punish trafficking in Persons with special regards to Women and Children (Palemo Protocol), supplementing the United Nations Convention against Transnational Organised Crime 2000 defines trafficking as

> *'the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception,*
>
> *of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'*[12]

Based on the above definition, Uwa *et al* posit that 'Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.'[13]

Section 64 of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of Nigeria (2003) as (Amended in 2005)[14] defines trafficking to include;

> *'all acts and attempted acts involved in the recruitment, transportation, within or across Nigerian border, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in forceor bonded labour, or slavery like conditions'*

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3 Federal Republic of Nigeria (2008) Country Review Report No. 8 African Peer Review Mechanism at p. viii. See also Ladan M.T. 2011 'Combating Trafficking Of Children And Women Under International And Nigerian Legal Regimes' A Paper Presented At A Training Workshop On United Nations System And Programme Organised By The Nigerian Institute Of Advanced Legal Studies, Lagos, between 5-8 of December, 2011.

4 See UNICEF, Lagos, Nigeria:- Child Trafficking in Nigerian Southern Border Towns (1999), in:- ANPPCAN Nigeria, Child Rights Monitor, Vol. 1, No. 3, pp. 51-63; See also Federal Government of Nigeria, Abuja:- Country Report on Child Trafficking in Nigeria (2002).

5 *Ibid*

6 *Ibid.* Uyanga, R., Dickson, A., and Mbosowo, M. (2014). Female Indebtedness and Enslavement: A Study of Relationships and Trends in Nigeria. *Asian Journal of Social Sciences & Humanities Vol*, *3*, 2.

7 Uwa, O., Okor, P., Titilade, A. (2014) 'Human Trafficking and Interface of Slavery in the 21st Century Nigeria' *Research on Humanities and Social Sciences* 4(21): 10-19. See also Hassan B.M. (2015) 'Why is Human Trafficking a Challenging issue in Nigeria? Retrieved October 31, 2018 from https://www.academia.edu/34604724/Why_is_Human_Trafficking_a_Challenging_issue_in_Nigeria_WHY_IS_HUMAN_TRAFFICKING_A_CHALLENGING_ISSUE_IN_NIGERIA?auto=download.

8 Makisaka, M. (2009) 'Human Trafficking: A Brief Overview' *Social Development Notes: Conflict, Crime and Violence* (122): 1-15

9 Idang, G. (2013) 'Eliminating Human Trafficking' *Studies Home Communication Science* 7(1): 49-54

10 Hassan *op. cit*

11 Okeshola F.B. and Adenugba A (2018) 'Human Trafficking: A Modern Day Slavery in Nigeria' *American International Journal of Contemporary Research Vol. 8, No. 2, June 2018.40-44.* Retrieved November 1, 2018 from *doi:10.30845/aijcr.v8n2p5*

12 The Organisation for Security and Co-operation in Europe (OSCE) also adopted this definition. See OSCE (Organization for Security and Co-operation in Europe, (2010) *Analysing The Business Model Of Trafficking In Human Beings To Better Prevent The Crime*. Austria: UN.GIF. p.17.

13 Uwa, O., Okor, P., Titilade, A. (2014) 'Human Trafficking and Interface of Slavery in the 21st Century Nigeria' *Research on Humanities and Social Sciences* 4(21): 10-19. 17

14 Act No. 24 of 14 July 2003. Hereafter referred to as TIPLEA

We agree with Kigbu and Hassan[15]that the Article 3 of the United Nations Protocol to Prevent, Suppress and Punish trafficking in Persons with special regards to Women and Children (Palemo Protocol) is more encompassing than the TIPLEA 2005.[16] TIPLEA 2015 captured all these criticism and made a more elaborate definition of the concept. Section 82 of TIPLEA 2015 defines trafficking or traffic in person to mean:

"trafficking or traffic in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or, use of force or other forms of coercion , abduction, fraud, deception, the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in forced or bonded labour, or in slavery-like conditions, the removal of organs or generally for exploitative purposes."

The above definition is all encompassing as it even extends to recent menace of organ harvesting that is ravaging the globe, especially in Asia and Africa.

15 Kigbu S.K and Hassan Y.B. (2015) 'Legal Framework for Combating Human Trafficking In Nigeria: The Journey So Far' Journal of Law, Policy and Globalization. Vol. 38. 2015. Pp 205-220.

16 Idehen, S.O., Edeko, M.O., Obasohan, O.J. (2013) 'Child and Human Trafficking in Nigeria' *International Journal of Gender and Development Issues* 1(1): 119-133.

In Nigeria, human trafficking manifests itself basically in four forms, which are:

a. Rural-Urban Trafficking: This is where trafficked victims are moved from rural areas to urban areas are used for forced labour ranging from domestic servitude to working in mines, quarries etc, and as commercial sex workers or domestic helps.[17]
b. Urban-Rural Trafficking: 'This is where victims move from urban area to rural areas. People in this category are usually trafficked for farming purpose.'[18]
c. Rural-Rural Trafficking: 'This is a situation where traffickers move victims from one rural area to another, for the purpose of farming and other connected purpose'[19]
d. Urban-Urban Trafficking: 'This is where traffickers move victims from one urban area to another for forced labor, domestic servitude and other connected purposes.'[20].

However, we categorically state that trafficking is of two types but can manifest in the above four forms. Basically, we have internal and external human trafficking. Internal human trafficking has to do with the movement or trafficking of a person within a given country; whereas external trafficking has to do with the movement or trafficking of a person from one country to another country.

17 Okeshola F.B. and Adenugba A (2018) 'Human Trafficking: A Modern Day Slavery in Nigeria' *American International Journal of Contemporary Research Vol. 8, No. 2, June 2018.40-44.* Retrieved November 1, 2018 from *doi:10.30845/aijcr.v8n2p5*

18 *Ibid*

19 *Ibid*

20 *Ibid*. See also Okeshola, B.F. (2007). "Assessment of Trafficking in Persons, for Labour Purposes in West and Central Africa, especially Children and Women (Nigeria – Cameroon Human Trafficking Assessment)". A Research conducted for National Agency for the Prohibition of Traffic in Persons and Other Related Matters (NAPTIP); Okeshola, B. F. (2007), Child Labour as a Social Problem in Nigeria. A Paper Presented at the Workshop Organised by NAPTIP, Kano in Collaboration with UNICEF 'D' between 14th August and 16th August.

2.2 Factors that Contribute to Human Trafficking

Bad as it may sound, human trafficking remains as one of the world's most flourishing crimes.[21]The male trafficked victims are used for forced labour to service quarries, mines, and farms. Other are used for domestic servitude and street vending.[22] On the other hand, the female victims are basically used as commercial sex slaves or as domestic servants.[23] The following have been identified as some of the major factors that contribute to human trafficking:

2.2.1 Poverty

Poverty has been adjudged as the most propelling factor behind human trafficking in the world. Poverty makes people vulnerable to human predators who prone on the financial disability of the low income members of the society. Nigeria is currently ranked as the poverty headquarters of the world.[24] Report has shown that poverty is the root cause of the prevalence of street children in Nigeria.[25] The report further shows that 'the desire of Nigerian potential victims to migrate is exploited by offenders to recruit and gain initial control or cooperation, only to be replaced by more coercive measures once the victims have been moved to another state or region of the country, which may not always be the one to which they had intended to migrate.'[26]

21 Okeshola F.B. and Adenugba A (2018) op. cit.

22 *Ibid*

23 Adepelumi, P. (2015). The Root Causes of Human Trafficking in Nigeria.African Center for Advocacy & Human Development, Nigeria.

24 Adebayo B (2018) Nigeria Overtakes India in Extreme Poverty Ranking. Retrieved November 2, 2018 from https://edition.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html

25 ILO/IPEC. (2002). Child Trafficking in Nigeria: The State of theAct. Geneva: ILO/IPEC. See also Okeshola F.B. and Adenugba A (2018) op. cit.

26 *Ibid*

2.2.2 Armed Conflicts

Armed conflicts have become common in the 21st century. Armed conflicts have made many flee their ancestral homes for safety. Many have become refugees in foreign countries and many others have become stationed in Internally Displaced Persons Camps (IDPs) within their own countries. Other victims of armed conflicts are homeless and helpless. These categories of people are vulnerable to human traffickers. Over 1.5 billion people are resident in countries that are experiencing severe armed conflicts.[27] Poverty, trafficking, and migration are caused by armed conflicts. In the conflict redden North Eastern part of Nigeria, Boko Haram terrorists kidnap and traffic children. They convert the male children to militias and child soldiers; while some of the girls are sold into slave; and the rest are used as their sex slaves and suicide bombers.[28]

2.2.3 Weak Legal System

The Nigeria legal system is currently weak. The Law enforcement agencies are vulnerable to compromise and this has made the borders to be porous. Okeshola and Adenugba note that 'the involvement of international organized criminal groups or networks and limited capacity of our commitment by immigration and law enforcement officers to control borders are contributory factors to human trafficking in Nigeria.'[29]

27 *Ibid*

28 Adepelumi, P. (2015). The Root Causes of Human Trafficking in Nigeria.African Center for Advocacy & Human Development, Nigeria.

29 Okeshola F.B. and Adenugba A (2018) 'Human Trafficking: A Modern Day Slavery in Nigeria' *American International Journal of Contemporary Research Vol. 8, No. 2, June 2018.40-44.* Retrieved November 1, 2018 from *doi:10.30845/aijcr.v8n2p5*

2.2.4 Family Imbalances

Family can be trot into unexpected dysfunctions as a result of poverty, death of the family bread winner, or large size of the family. The above indices will definitely affect the functionality of the family. In order to mitigate or cushion the negative effects of these imbalances, the family will be willing and ready to release some of their members to extended family members and disguised traffickers with appealing offers of assistance.[30]

2.2.5 Gendered Cultural Practices[31]

Gendered cultural practices also influence human trafficking. Gender roles are defined to mean "sets of cultural expectations that define the ways in which the members of each sex should behave."[32] Study has it that more than 85-114 million women, predominantly Muslims in Asia and Africa have suffered one form of gendered cultural practices or the other, such as discrimination, genital mutilation, domestic violence and obnoxious widowhood practices.[33]

These gendered cultural practices can trigger trafficking, because, a girl child that is afraid of continuous domestic violence or genital mutilation may willingly offer herself to be trafficked in order to gain safety. Also, in families where the father is not willing to train female children, such children may run away from home and may end up in the hands of trafficking syndicates.[34]

2.2.6 Advancement in Technology

Advancement in technology is triggering trafficking in the 21st century. The internet has made the world a global village. Children from the comfort of their rooms can connect and interact with all a sundry via the social media networks. This gives them opportunity to socialize, flirt and make new friends across the globe. These outlets expose a child to enticing promises of love, employment, fame and things of such a nature. The child exchanges his or her personal data with the 'online strangers' who may turn out to be human trafficking syndicate.

2.2.7 Globalization[35]

Just as we stated above, the world has become a global village. The people and nations have come to understand that a single tree cannot be called a forest, hence, the need to interact and open up borders. Muntarbhorn defines globalization as an "economic framework that is concerned with the flow of goods, services, capital, communications and migration of people."[36] Weiner perceives globalization as 'the growing interdependence between peoples, regions and countries of the world.'[37] Globalization has stimulated rapid economic development of device sectors thereby paving way for demand for cheap labour, and girls to service the growing commercial sex industry.[38]

This has given rise to mass exodus of people from rural to urban areas; and from under developed and developing countries to developed countries seeking for greener pastures.

Report has it that 'globalisation has facilitated freer movements of people, goods and services across international borders, unwittingly resulting in camouflaging clandestine operations such as human trafficking.[39]

2.2.8 Other factors

Other factors includes but are not limited to high level of illiteracy, climate change, unemployment and poor standards of living; restrictive immigration policies;[40] increased taste for materialistic values among youths aggravated by peer pressure; exploitative labour market;[41] poor reporting and monitoring of cases by law enforcement agencies;[42] high school drop-out rates coupled with long closure of higher institutions of learning;[43] abuse of the common practice of placement and fostering, along with weakened extended family safety net;[44] consumerism;[45] desperation of poor and illiterate parents with large families ignorant of the impact of child trafficking. (e.g. in the east, trafficking agents reportedly give poor parents money for a child to be trafficked);[46] and political and economic trade-offs.[47]

3.0 Legal Framework for Combating of Human Trafficking in Nigeria

3.1 The 1999 Constitution of the Federal Republic of Nigeria (As Amended)[48]

The CFRN 1999 is the *grundnorm* of Nigeria. The Constitution by virtue of its sections 34 and 42 makes provision for the protection of Nigerians from deprivation of their personal liberty, forced labour, slavery or compulsory labour; and for freedom from discrimination.

Section 34 provides that:

Every individual is entitled to respect for the dignity of his person and accordingly:

(a) No person shall be subjected to torture or to inhumane treatment or to degrading treatments.

(b) No person shall be held in slavery; and

(c) No person shall be required to perform forced or compulsory labour.

On the other hand, Section 42(2) states that: "No citizen of Nigeria shall be subjected to any disability or deprivation merely because of the circumstances of his birth."[49]

Human trafficking infringes on these rights. A trafficked person can seek redress in court pursuant to section 46 of CFRN. It is pertinent to state that the National Industrial Court has exclusive jurisdiction over child labour, child abuse, human trafficking and their incidental matters, pursuant to the third alteration of the Constitution.[50]

Article 5 of African Charter on Human and Peoples' Rights (Enforcement) Act[51] provide for dignity of human person and freedom

30 Dranailova-Trainor, G. & Belser, P. (2006). Globalization and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand. Geneva: *International Labour Organization*.

31 Eteng Ikpi Etobe (2009) 'Socio-Cultural Determinants of Sexual Behaviours and Trafficking in Children and Adolescents in the South-south Geo-Political Zone of Nigeria'. (Ph.D Thesis, Sociology, University of Zululand, South Africa). 270. 22.

32 Vander Zanden, J.W. (1996). *Sociology: The Core 4th Ed.* New York: McGraw-Hili. 225

33 Kaplan, H. et al (1987). Deviant Peers and Deviant Behaviour: Further Elaboration of a Model. *Sodal Psychology Quarterly,* 50; 277-284. 93.

34 Muntarbhorn, V. (2002). Human Rights versus Human Trafficking in the Face of Globalization. Geneva: *UN Human Rights Commission Publication.6; See also* Bruckert, C. & Parent,C. (2002). *Trafficking in Human Beings and Organized Crime: A literature Review.* Royal Canadian Mounted Police. 15.

35 Eteng Ikpi Etobe (2009) op. cit.

36 Muntarbhorn, V. (2002). Op. cit. 1

37 Weiner, S. (1998). *The Sociology* of *Knowledge.* London: Routledge and Kegan-Paul. 275.

38 Eteng Ikpi Etobe (2009) op. cit.

39 *UN Report of the Expert Group 2002.6.* See also Eteng Ikpi Etobe (2009) op. cit.

40 Ladan M.T. 2011 op. cit

41 *Ibid*

42 Eteng Ikpi Etobe (2009) op. cit.

43 Ladan M.T. 2011 op. cit

44 *Ibid*

45 Eteng Ikpi Etobe (2009) op. cit.

46 Ladan M.T. 2011 op. cit.

47 Eteng Ikpi Etobe (2009) op. cit.

48 Hereafter referred to as CFRN

49 *Ukeje vs.Ukeje* (2014) 11 NWLR (Pt. 1418) p. 384

50 S. 254C (1) Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2011.

51 Cap. A9 LFN 2004

from slavery and forced labour. Nigeria is a signatory to the ACHPR and has also domesticated this Charter.[52] ACHPR having satisfied the requirements of ratification and domestication under Section 12 of the 1999 Constitution of the Federal Republic of Nigeria[53] is now part and parcel of the Nigerian laws, and is therefore enforceable in Nigerian courts.[54] Furthermore, the Fundamental Rights (Enforcement Procedure) Rules 2009 in its Order 1 Rule 2 defined fundamental humans to include 'any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'.[55]

3.2 Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2015 (TIPLEA)

This Act was first enacted in July, 2003[56], and was amended in December 2005.[57] However, in 2015, the 2005 was repealed and a new Act was enacted.[58] The Act applies to all parts of Nigeria. This new Act has 83 sections and 2 schedules. The Act created the National Agency for the Prohibition of Traffic in Person (NAPTIP).[59] This agency 'took over the functions of the special taskforce in human trafficking and was vested with the responsibilities to enforce laws against traffic in persons, and to take charge and coordinate the rehabilitation and counseling of trafficked persons; and other related matters.'[60] The functions[61] and powers of the agency are created under sections 5 and 6 of the Act respectively. The Agency is under the supervision of the Attorney General of the Federation (hereafter referred to as AGF),[62] who has the power to make guidelines and directives to the Agency which the Agency shall abide by.[63]

3.2.1 Offences Created by the Act

The new Act retained all the offences created by the original and amended Act and went further to create additional offences like child labour and running of brothels.[64] Section 82 of TIPLEA 2015 defines trafficking or traffic in person to mean:

> "*trafficking or traffic in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or, use of force or other forms of coercion , abduction, fraud, deception, the abuse of power of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person or debt bondage for the purpose of placing or holding the person whether for or not in involuntaryservitude(domestic,sexualor reproductive) in forced or bonded labour, or in slavery-like conditions, the removal of organs or generally for exploitative purposes."*

52 Nigeria ratified the African Charter on 22/6/83 and domesticated it in 1983.
53 Cap. C23, Laws of the Federation of Nigeria, 2004.
54 *Abacha v Fawehinmi,* (2000) 6 NWLR (Pt 600) 228.
55 Emeka, P. A, 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access to Justice for Victims of Environmental Degradation', 6/3 Law, Environment and Development Journal (2010), p. 320, http://www.lead-journal.org/content/10320.pdf accessed 16 August 2017.
56 Act No. 24 of 14 July 2003.
57 The sections amended are: Sections 1, 2, 3, 4, 5, 6, 9, 15, 22, 29, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 36, 47 and 48.
58 Trafficking in Persons (Prohibition) Enforcement and Administration Act. No. 4 2015.
59 Section 2
60 Section 10. See also Kigbu S.K and Hassan Y.B. (2015) 'Legal Framework for Combating Human Trafficking In Nigeria: The Journey So Far' Journal of Law, Policy and Globalization. Vol. 38. 2015. Pp 205-220.
61 (a) enforce and administer the provisions of this Act ; (b) co-ordinate and enforce all other Laws on Trafficking in Persons and related offences; (c) adopt effective measures for the prevention and eradication of trafficking in persons and related offences ; (d) establish co-ordinated preventive, regulatory and investigatory machinery geared towards the eradication of trafficking in persons ; (e) investigate all cases oftraffrcking in persons including forced labour, child labour, forced prostitution, exploitative labour and other forms of exploitation, slavery and slavery-like activities, bonded labour, removal of organs, illegal smuggling of migrants, sale and purchase of persons ; (f) encourage and facilitate the availability and participation of persons who voluntarily, consent to assist in investigations or proceedings relating to trafficking in persons and related offences ; (g) enhance the effectiveness of Law Enforcement agents and other partners in the suppression of trafficking in persons ; (h) create public enlightenment and awareness through seminars, workshops, publications, radio and television programmes and other means aimed at educating the public on the dangers of trafficking in persons ; (i) establish and maintain communications to facilitate rapid exchange of information concerning offences under this Act; (j) conduct research and strengthen effective legal means of international co-operation in suppressing trafficking in persons; etc
62 *Serah Ekundayo Ezekiel V. Attorney General of the Federation* (2017) LPELR-41908(SC)
63 Sections 75 and 76.
64 *Ibid*. See section 2 of TIPLEA Act 2015

Section 13(1) generally prohibited all forms of human trafficking in Nigeria.[65]

The other offences include: Exportation of Persons out of Nigeria and Importation of Persons in to Nigeria;[66] Procurement of any person for sexual exploitation;[67] Abuse Procurement or recruitment of person under 18 years for prostitution or other forms of sexual exploitation;[68] Procurement or recruitment of person under the age of 18 years for pornography or brothel;[69] Foreign travel which promotes prostitution or sexual exploitation;[70] Procurement or recruitment of person for use in armed conflicts;[71] Procurement or recruitment of person for organ harvesting;[72] Prohibition of buying or selling of human beings for any purpose;[73] Forced labour;[74] Employment of child as domestic worker and inflicting grievous harm;[75] Trafficking in slaves;[76] Other offences created under the Act include: Offences relating to fraudulent entry of persons into another country;[77] conspiracy where the offence is actually committed;[78] conspiracy where the offence was not actually committed;[79] escape or aiding and abetting escape of any person in lawful custody of the Agency or suspected to have committed an offence under TIPLEA, 2015;[80] Where a person is convicted abroad for offences relating to trafficking in person;[81] Attempt to commit any of the offences under the Act;[82] Where evidence establishes an attempt to commit an offence or the Commission of the full offence;[83] An offence under this Act committed by body corporate on the instigation, connivance of or attributable to any neglect on the part of the Secretary of the body corporate, director or manager;[84] A body corporate convicted under this act;[85] Commercial carrier that knowingly carries any person in contravention of the Act;[86] Impersonation or assumption of character of an officer of the agency;[87]Tampering with evidence and

65 See section 13(1). See *AGF VS. Affiong Okon* Unreported. Charge No. 0/26c/2005 (High Court of Anambra State, Onitsha judicial Division). Judgment was delivered on 13/02/2006).
66 Section 14.
67 The punishment upon conviction is imprisonment for a term of 10years without an option of fine. See Section 15. *Bassey v. AGF* (2015) LPELR-40425(CA). See also *Raji v. FRN* (2019) LPELR-47182(CA).
68 Section 16. See also *Oloye V. A-G Federation* (2019) LPELR-46738(CA); *Folorunso v. FRN* (2019) LPELR-46463(CA)
69 Section 17. *Folorunso v. FRN* (Supra)
70 Section 18. See also *Oloye V. A-G Federation* (2019) LPELR-46738(CA)
71 Section 19. See Kingsley N.O. Onu (2018) 'An Appraisal of the EU-ACP Cotonou Partnership Agreement' *The Gravitas Review of Business & Property Law* Vol. 9 No. 3; 133-153, at 147
72 Section 20
73 Section 21. See *Alfred v. State* (2017) LPELR-42612(CA)
74 Section 22
75 Section 23
76 Section 24
77 This attracts a punishment of imprisonment for a term of not less than 5 years without an option of fine upon conviction. See Section 26.
78 This attracts the full punishment of offence conspired and committed upon conviction. Section 27(a)
79 This attracts the half punishment of offence conspired but not committed upon conviction. Section 27(b)
80 This is punishable with a term of 5 years imprisonment upon conviction. Section 28
81 This attracts a punishment of imprisonment not exceeding 1 year and forfeiture of assets to the federal government. Sections 51(1)(b) and 50.
82 This offence attracts upon conviction half the punishment for the offence. Section 29
83 For attempt the offender shall be liable to half the punishment for the offence. Section 30(1). Where full offence is established on a charge for attempt, the offender shall not be acquitted but be punished as though he was charged with the main offence. Section 30(1).
84 The officer shall be liable on conviction to the same punishrnent provided under this Act for individuals committing the offence. Section 31(1)
85 Shall be liable to a fine of N10 million and the court may also order for the winding up of the company and forfeiture of its assets and properties to the Victims of Trafficking Trust Funds. Section 31(2)
86 The punishment upon conviction is a fine not exceeding N10 million. Section 35
87 The punishment on conviction is imprisonment for a term not exceeding 5 years without an option of fine. Section 33

witness;[88] where the offence is committed on the instigation of the Manager, Secretary etc;[89]Any tour operators, travel agents or airline who violates the provision of section 35(1) and (2) commits an offence;[90] Conviction for any of the offences under the Act;[91] and Obstruction of the Agency authorised officers;[92] and Offences related to forfeiture orders.[93]

It is our submission that the reason for the pegging of the victims of most of the crimes created under the Act to persons below the age of 18 is not clear;[94] reason being that in Nigeria of today that is ranked as the world poverty headquarters, most graduates and persons above the age of 30 are roaming the streets unemployed and are as such vulnerable to the offences created above. We strictly submit that the Act be amended and the age limits expunged to reflect the present day reality in Nigeria.

3.2.2 Jurisdiction and Prosecution of Offences under TIPLEA, 2015

NAPTIP has been empowered by the Act to prosecute suspected offenders under the Act through its Legal and prosecution department[95]; to extradite suspects and also to provide legal advice to other departments and to perform other incidental legal matters.[96] Through this, actions can freely be initiated by the agency against suspected offenders without dependence on other agencies or authority. This prosecuting power of the agency is however, without prejudice to the overriding powers of the Attorney General of the Federation or States to take over or discontinue a criminal proceeding as the case may be.[97] NAPTIP usually initiates criminal cases with name 'Attorney General of the Federation' as the complainant. This practice was challenged in the case of *Serah Ekundayo Ezekiel V. Attorney General of the Federation*[98] where the appellant complained that the signature of the officer of the agency in the amended charge in the case did not sign on behalf of the Attorney General of Federation; and since the agency is a separate body that has perpetual succession, and power to sue and be sued in its corporate name, with no statutory provision making it a department in Attorney General's office, the agency could not initiate the charge in its name but on behalf of Attorney General. The Supreme Court resolved the issue by holding "... that for the purposes of investigation and prosecution of matters, law officers of the Agency are ... under the control and general supervision of the Attorney General and can, in the circumstance, sign processes and charges for and on behalf of the Attorney General of the Federation."[99]

The jurisdiction is vested on the High Court to try all the offences created under the Act.[100] The Act defined High Court to mean the Federal High Court, the High Court of a State or the High Court of the Federal Capital Territory.[101] This means that a suspected offender can be arraigned in any of these court in the state where the trafficking took place. The trafficker may also be prosecuted in another state if some part(s) of the trafficking took place in such a state.[102] Nigerians and foreigners outside foreign country that have violated the provisions of the Act may be repatriated back to Nigeria for trial through a request made by the Attorney General of the Federation based on an order of the Court, where extradition treaty exist between Nigeria and such a country.[103]

The Act empowers the trial Judges to reduce the sentence of a person convicted under the Act who facilitated the arrest of other accused persons or their sponsors.[104] The High Court can in addition to the sentence passed on a convicted person under the Act order that any property, asset or fund used in facilitating the commission of the offence or a proceed of such venture be forfeited to the Victims of Trafficking Trust Fund.[105] The passport of a convict under this Act shall be forfeited to the Federal Republic of Nigeria and the same shall be handed over to the Nigerian Immigration service for necessary action, and the same shall not be returned to the convict except on the order of the President while exercising his power to grant pardon pursuant to the Constitution.[106] The court also has the jurisdiction to order for interim attachment of proceeds or assets of persons accused of commission of any offence created under the Act to the Victims of Trafficking Trust Fund, where there exists a *prima facie* case against such an accused person and the proceeds or assets were acquired through the commission of an offence created under Act.[107] The procedure for seizure of property was well spelt out under the Act.[108] Where a person has been convicted under the Act such interim attachment above shall be made final,[109] and where such a convict has assets in foreign country which are proceeds of an offence for which the convict was convicted in Nigeria, subject to any treaty or arrangement between Nigeria and such a foreign country, such asset shall be forfeited to the Victims of Trafficking Trust Fund.[110]

The Act does not provide for the applicable Criminal Procedure law for the administration of the Act. It is suggested that the criminal procedure law that is applicable to the court of arraignment will be applied to such a case, however, the Act empowered the court to adopt all legitimate measures that it may deem expedient to eliminate unnecessary delay of trial of offences created under the Act.[111]

National Industrial Court of Nigeria is vested with the exclusive jurisdiction over civil cases emanating from the Act[112]. However, the idea of having different courts handling civil and criminal cases separately poses problems as most times the issues are intertwined within themselves i.e. a civil and criminal issues may arise from the same transaction; this confusion extends the litigation period, cost, and also discourages litigants. [113]

88 The punishment on conviction is imprisonment for a term not exceeding 5 years or to a fine not less than N250,000.00 or to both
89 The punishment upon conviction is the same punishment for individual offenders. Section 31(2)
90 Liable on conviction to a fine not exceeding N10,000,000.00. Section 35
91 The passport of the person convicted shall be forfeited to the Federal government of Nigeria. Section 48
92 The punishment on conviction to imprisonment for a term not exceeding 5 years or to a fine of N50,000.00 or both. Section 32
93 Section 58. This attracts not less than 1 year imprisonment without an option of a fine.
94 Kigbu S.K and Hassan Y.B. (2015) op. cit.
95 Section 11(1) (b).
96 See Section 12(2).
97 Sections 174 and 211, Constitution Federal Republic of Nigeria 1999 as Amended.
98 (2017) LPELR-41908(SC)
99 *Ibid*. 10-11
100 Section 36(1)
101 Section 82
102 *Njovens v. The State* (1973) NSCC 257.
103 Sections 70. It is important to note that Nigeria has the obligation to reciprocate such gesture under section 69. The Act also provided for the procedure for exchange of information and intelligence between Nigeria and a foreign country. See sections 69-74
104 Section 36(3)
105 Section 36(3)
106 See section 48
107 See section 55. This also includes money in the bank. See section 60
108 See Sections 52-54
109 See section 56 and 49
110 See section 50
111 This is notwithstanding to contrary provision in any other enactment. See Section 37
112 S. 254(1) (i) Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2011.
113

A victim may institute a civil action against his/her traffickers for compensation, damages and restitution.[114] However, the Court in making an award to the victim shall take into account the award made by the court in the criminal trial.

Where any person or body seeks to initiate a civil action against the agency, such a person or body must first issue the agency with a pre action notice and satisfy the conditions prescribed under section 77 of the Act.

3.2.3 Victims' Rights Welfare and Protection

In line with demands of the Palemo Protocol, the Act made elaborate provision for victims' welfare, protection and compensation. The Act mandates the Agency (NAPTIP) to ensure that victims of trafficking: are not discriminated upon on the ground of colour, race, ethnicity, sex, status of being a trafficked person or for the fact that they have been involved in the sex industry;[115] have access to adequate health care and social services while in temporary residence.[116] have access to the embassy or consulate of their home country;[117] are safely returned to their home if the person so wishes and when possible;[118] are not denied access to temporary visas during the pendency of any action related to trafficking in person;[119] personal family history and identity are protected;[120] and their family is protected from intimidation and reprisal attacks from trafficking syndicates; facilities are maintained and rehabilitated.[121]

114 Section 65(3)
115 Section 61(1) (a and h).
116 Section 61(1)(b)
117 Section 61(1)(c)
118 Section 61(1)(d)
119 Section 61(1)(e)
120 Section 61(1)(f and g)
121 Section 61(1)(h)

A victim of trafficking has right to access information pertaining to him/her being trafficked.[122]

The Act mandated to be established for the Agency transit shelters for rescued victim of trafficking (particularly women and children) which shall be run as homes to facilitate their reintegration into the society through assistance, protection and counselling.[123] The Act does not explain the rationale for the particularization of women and children for this awesome innovation. One may suggest that it is because this group is adjudged to be the most vulnerable, however, we submit that trafficking and effects of trafficking are not gender-sensitive, hence, this kind gesture should not be sectionalized.

A trafficked person shall be entitled to compensation, restitution, and recovery for psychological, emotional and economic damages which shall be assessed and paid from the assets forfeited from the convicted trafficker.[124] The Court may in addition to other punishments meted out to a person convicted for an offence under the Act, order the convict to pay compensation to the victim.[125] A victim may institute a civil action against his/her traffickers for compensation, damages and restitution.[126] However, the Court in making an award to the victim shall take into account the award made by the court in the criminal trial.

The Act establishes a Victim of Trafficking Trust Fund[127] for the purpose of paying compensation and restitution to victims of trafficking and for the establishment and maintenance of victims support services.[128]

122 Section 63
123 Section 64
124 Section 65(1)
125 Section 65(2)
126 Section 65(3)
127 Section 67(1)
128 Section 67(4)

The sources of funds for the Trust fund include appropriations from the Federal Government, forfeited assets of traffickers and donations.[129] A Trust Fund Committee is also established to administer the fund.[130]

3.3 Criminal Laws

Before the enactment of the TIPLEA in 2003, there was no comprehensive legal framework for trafficking in person. Trafficking persons' cases were addressed through the general criminal laws for the country, to wit: Criminal Code Act for the southern Nigeria[131] and the Penal Code Act for the Northern Nigeria.[132] Although these laws stood in the gap in the absence of a comprehensive unified legislation for the country, they were quite deficient in many respects. This criminal law is basically sanction-orientated; no attention whatsoever was paid to prevention and protection measures. Usually, such procured or exploited persons were treated as criminals themselves and subject to deportation.'[133] We shall now appraise these laws as they relate to trafficking in persons.

3.3.1 Criminal Code[134]

Under the Criminal Code, there are various offences against liberty or slave dealing which can used to prosecute trafficking in persons and prostitution.

129 Section 67(2)
130 Section 68
131 These are: Abia, Akwa-Ibom, Anambra, Bayelsa, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Imo, Lagos, Ogun, Ondo, Osun, Oyo and Rivers States.
132 These include: Adamawa, Bauchi, Benu, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Nasarawa, Niger, Plateau, Sokoto, Taraba, Yobe and Zamfara States plus the Federal Capital Territory, Abuja.
133 Kigbu S.K and Hassan Y.B. (2015) 'Legal Framework for Combating Human Trafficking In Nigeria: The Journey So Far' Journal of Law, Policy and Globalization. Vol. 38. 2015. Pp 205-220. 219
134 Cap C38, LFN 2004

Section 219 deals with the offence of a householder permitting defilement of girls under 16 years in his premises. This provision though laudable, is deficient, in that modern trends have revealed that young boys are also being defiled, hence making this provision delinquent for present day Nigeria. The accused person can raise the defence that he reasonably believed that the victim was above 16 years.[135]

Section 222A deals with the offence of causing or encouraging the seduction or prostitution of a girl under the age of 16 years that is under a person's care However, to succeed in proving this offence, the prosecution must establish that the accused person knowingly exposed the girl to such seduction or prostitution.

Section 222B deals with the offence of allowing a girl under the age of 16 years that is under a person's care to reside or frequent a brothel. The punishment for this offence is grossly paltry being that it is a term of six months imprisonment or a fine of 100 naira.

It is pertinent to note that an accused person under the age of 21 years charged with the offences created under sections 219, 221(1) and 222 above may raise the defence that he reasonably believed that the victim was above the age of 16 years.

Section 223 provides for the offence of procurement of woman or a girl to become a common prostitute either in Nigeria or elsewhere. This provision is laudable, however, the subsection 1 tends to exculpate the accused person where the victim is under 18 years and is 'a common prostitute or of known immoral character'. This provision

135 Section 20. Maybe the rationale for this defence is that a person that is above 16 years should be able to make right decisions for herself. We submit that this defence is fallacious, should be expunged.

is questionable in the sense that one would wonder what are the parameters for the determination of immoral character, and secondly, where a person that is below the adult age in the society is involved in immoral behavior, the society owe such a person duty to safe her from herself. We submit that this provision amended to address these challenges and the idea that only women can be sexually exploited be jettisoned with and buried in Medieval grave of costly assumptions, as present day realities has proven that sexual exploitation is not gender or race biased.

Section 224 deals with defilement of a woman by fraud, threat, or administering of drugs. We submit that this section be expanded to also accommodate the defilement of male by any of the above means.

Other trafficking in persons' related offences in the Criminal Code include unlawful confinement or detention against a person's will;[136] compelling someone to do something by threats, surveillance or other intimidation;[137] and slave dealing.[138]

3.3.2 Penal Code

The Penal Code[139] make similar provisions like the Criminal Code Act on human trafficking. Section 275 deals with inducement of a girl under the age of eighteen years to go from place to place for defilement. Section 278 prohibits the buying, selling, hiring or letting of persons below the age of 18 years with intent that such a person will be or is likely to be employed or used for prostitution or other unlawful or immoral purposes. This provision is laudable as it preserves the dignity of human person in that a human being is not a commodity that can be purposed in either open or black market. However, the pegging of the age of the victim to 18 years is unacceptable, in my view, being that human beings of all ages could be victims of such buying or selling. Secondly, the limiting of the purpose for such buying or selling to 'prostitution or other unlawful or immoral purposes will pose a huge challenge to the prosecuting authority to establish. In *Nwokocha v. State*[140] the appellant was convicted of buying a person contrary to section 278 of the Penal Code Act. She was convicted on the strength of her extra judicial statement where she stated that she bought the victim from her mother for her sister living in Abuja that has been married for over 10 years without a child. The Court of Appeal held that the buying and selling of new babies and minors is not illegal, that, that's what adoption entails, but in this case that the buying was not from authorized government agency or motherless babies home. The prosecution couldn't establish that the purpose of the buying was to subject the minor to 'prostitution or other unlawful or immoral purposes'. The content of the extra judicial statement only established the doing an act *prima facie* legal but by an illegal means. The Court discharged and acquitted the appellant on the above charge but convicted for conspiracy to under section 97(2) of the Penal Code.

Section 279 prohibits slave dealing. Section 280 deals with forced labour. We agree with Kigbu and Hassan[141]that 'the punishment does not seem to be adequate. It is not enough to deter perpetrators. The Penal Code does not define the term traffic. The term used in the penal code is "slave" which makes the provision extremely restrictive and not useful to prosecute traffickers.'

136 Section 365
137 Section 366
138 Section 369
139 This law applies only in Northern States of Nigeria

140 (2019) LPELR-47075(CA)
141 Kigbu S.K and Hassan Y.B. (2015) 'Legal Framework for Combating Human Trafficking In Nigeria: The Journey So Far' Journal of Law, Policy and Globalization. Vol. 38. 2015. Pp 205-220. 214

3.4 Immigration Act 2015

The Immigration service or department of every country is pivotal in the fight against human trafficking. In 2015, the Immigration Act of 1963 of Nigeria was repealed and replaced by the Immigration Act of 2015. Immigration Act 2015 recreated the National Immigration Service[142] which has the functions of controlling the entrance or leaving of Nigeria by any person; issuance of travel documents; border surveillance among other functions.[143] This Act and the Agency are key in controlling cross border trafficking in persons. The Act defines trafficking as 'all acts and attempted acts involved in the recruitment, transportation within or across Nigerian borders, purchase, sale, transfer, receipt, or harbouring of a person involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person, whether for or not in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like conditions.'[144] The Act categorizes any person trafficking in persons or smuggling;[145]a prostitute; a person who has been convicted of the offence of rape, defilement, or any other sexual offence; a brothel keeper or a person permitting the defilement, or seduction of a child or young person on his premises or on any other premises under his control; encourages the seduction of a child or young person; a person trading in prostitution, or is a procurer, as a prohibit immigrant, and show a person shall be refused admission or to be deported from Nigeria.[146]

The Act establishes the Division of Irregular Migration on the Directorate of

Migration with the responsibility of handling smuggling of migrants and matters related to it.[147] The Division is also responsible for 'dealing with matters connected with the extradition, deportation and mutual legal or other assistance between Nigeria and any other country involving trafficking in persons, subject to the powers of the Minister, and the Attorney-General of the Federation, in appropriate cases.'[148]

It is an offence under the Immigration Act to present forged travel documents to an immigration officer to travel out of Nigeriafor any purpose including prostitution or for 'human trafficking for the purpose of prostitution and child labour and abuse''[149] However, it is important to note that section 62 TIPLEA immune victims of trafficking from detention or prosecution for offences accruing from being a victim of trafficking, including non-possession of travel documents, use of fake travel or other documents.

3.6 The Child's Right Act

This Act was enacted to protect children in the society who are highly vulnerable to societal injustices and harms.[150] The Act is also very useful on the combating Human Trafficking as it makes some salient provisions on anti-human trafficking. The Act only protects people below the age of 18 years basically.[151]

142 Section 1 of Immigration Act, Act No.8, 2015.
143 Section 2
144 Section 116
145 Section 44

146 Section 44. h (i-v) The person is deemed to have committed an offence and is liable on conviction to imprisonment for ten years.
147 Section 61
148 Section 62(u)
149 See section 57(4). The punishment for this offence is 10 years imprisonment or a fine of Two Million Naira or both.
150 Ezeilo, J.N. Human Rights Documents Relevant to Women and Children's Rights in Nigeria (Lagos: Eddy Asae Nigeria Press, 2008) p. 499.
151 Section 277 of the Child's Right, 2003

The Act proscribes the exposure of a child to the production, trafficking or use of narcotic drugs.[152] It is also an offence under the Act to use a child is any form of criminal activity.[153] The abduction and transfer of a child from the lawful custody of such a child's parents or guardians;[154] exploitation of a child for forced labour;[155] buying, selling, hiring or otherwise dealing in children for the purposed of hawking or begging for alms or prostitution or other similar practices;[156] are also offences under the Act.

Section 29 of the Act extends the applications of the provisions relating to "young persons" protection under labour environment in sections 59–62 of the Labour Act, 2004[157] to children as defined under the Child's Right Act.

We agree with Kigbu and Hassan[158]that 'as rich as the above provisions of the Child Rights Act are, it is turning out again to be one of those exercises in futility that is the bane of Nigerian laws – that is, a poor enforcement machinery and the absence of the enabling environment for the effective operation of the law.'[159] For instance, despite the ban on the employment of children as domestic servants outside their own home or family environments, most privileged homes in Nigeria still have children house helps/servants. Secondly, children street beggars and aides to beggars flood major cities and towns in Nigeria, despite the fact that the child's Right Act is now 15 years in practice.

4.0 Conclusion and Recommendations

Trafficking in person is a sore to our collective conscience and a fundamental abuse of human dignity. One would expect that Nigeria, a country that is origin, transit and destination point for global trafficking in persons, would be more proactive in its fight against human trafficking. This paper has examined the legal frameworks for combatting trafficking in persons in Nigeria. It has also appraised the factors that necessitate human trafficking, and also pointed out some *lacuna* in the extant legal framework. Until all persons enjoy same rights everywhere, human right is not safe anywhere; thus, the fight against human trafficking must be a collective effort for all .This paper makes suggestions on how the existing frameworks can be strengthened:

1. Due to the nature of this offence, the stipulation limiting the age of victims to 18 years should be amended to read 'any person'. This is because young adults (like secondary school leavers and tertiary institutions students and unemployed or under employed graduates) and old people are also highly vulnerable to trafficking in human.
2. Dignifying verbs should be used to replace the use of the words "importation" and "exportation" of persons used in Section 14 of TIPLEA, as they are derogating. The use of those words reduces human beings to the level of commodities that can be imported and exported. It would be ironic to see a pro human rights law breaching the very human rights.

152 Section 25. The punishment for this offence is imprisonment for life

153 See section 26. The punishment for this offence is 14 years imprisonment

154 Section 27

155 Section 28

156 Section 30

157 Cap. L1, Laws of the Federation of Nigeria (LFN) 2004.

158 Kigbu S.K and Hassan Y.B. (2015) 'Legal Framework for Combating Human Trafficking In Nigeria: The Journey So Far' Journal of Law, Policy and Globalization. Vol. 38. 2015. Pp 205-220.

159 Ibid, 216

3. There's a need for the list of possible culprits under section 15 of TIPLEA to be expanded to include animals, sex machines and dolls and other connected objects and practices. This is driven by the change in how sexual activities are carried out in the world today. If these are not included, the accused can raise a defense stating that the procurement of a victim to engage in sexual activities using sex dolls and machines etc. is not covered under this provision of the Act.[160]
4. The words *'forced or compulsory'* should be expunged from section 19 of TIPLEA. This is because some trafficked victims under the age of 18 maybe recruited for used in an arm conflict willingly, [161] this doesn't however make it acceptable and legal.
5. Also, stiffer punishments should be the penalty for the offence of organ harvesting under Section 20 especially, where death results. Under the TIPLEA, the penalty for a conviction under this section is imprisonment for a term not less than 7 years and a fine of not less than 5,000,000, this should be increased to a term of imprisonment of not less than 20 years and an increased fine of not less than 12,000,000.00 as victims of organ harvesting sometimes lose their lives during or after the procedure and those alive may be prone to serious health issues and complications.
6. A human being is not a commodity, and as such, the purposes proposed for the buying and selling of human beings under Section 21 of the TIPLEA be expunged, and replaced with 'except for authorized adoption'.
7. That the phrase 'a common prostitute or of known immoral character' should be expunged from section 223 of the Criminal Code Act, the fact that a person below the age of 18 years or even above the same is 'a common prostitute or of known immoral character' is not a justification to have her defiled.
8. An expansion of Section 224 of the Criminal Code Act to accommodate the defilement of males by any of the means mentioned therein should also be incorporated.

Section 254(1) (i) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2011 vests exclusive jurisdiction on civil cases emanating from the Act on the National Industrial Court while jurisdiction for criminal matters is vested on the High Court by virtue of Section 36(1) of the Act. This provision should be amended and jurisdiction of both civil and criminal cases be vested on a single court to prevent confusion and prolonged litigation. The jurisdiction of cases (civil/criminal) emanating from the Act should be vested on the High Courts of every state, this is largely due to the fact that National Industrial Court is not situate in all parts.

160 K.O.N. Onu & Kolawole O.A. (2020) Trafficking In Persons (Prohibition) Law Enforcement and Administration Act, 2015: An Old Wine in A New Bottle? Journal of Law and Criminal Justice. Vol. 8. No. 1. 50-62, 59. Available online at URL: https://doi.org/10.15640/jlcj.v8n1a4.

161 For example, young persons that have lost loved ones to armed conflicts may willingly volunteer to fight for revenge.

The Doctrine of Hot Pursuit in Tanzania

By

Amiri N. Sharifu[1] and Kennedy H. Chando[2]

"Pirates often operate along territorial borders because they know there is no right of pursuit across territorial waters."

Captain Pottengal Mukundan.[3]

Abstract

By recalling that under the law of the sea, if a vessel enters into the territorial sea of a third country while conducting hot pursuit, that hot pursuit must be broken off unless the consent of the coastal state is received, thereby formation of agreement which allows an extended legitimate hot pursuit becomes important. This article, of course by invoking doctrinal approach, intends to capitalise this crucial point in the war against illegal, unregulated, and unreported fishing, which takes most of our resources in the Indian Ocean (IO). Although it has been overemphasized by other writers that these private arrangements are of importance, the country is yet to have one with other littoral states surrounding IO. In the course of stating practical significances, it has been recommended for the country to conclude multilateral or bilateral treaties with the neighboring countries in as far as prevention of illegal, unreported, and unregulated fishing through the undertaking of hot pursuit in the IO is concerned.

Key words: Hot Pursuit, Maritime Zone, Pursuit Sparking Offences

1.0 Introduction

At the beginning of brainstorming of what to write, is when we remembered the old told story to the effect that, parents in a certain village bought clothes for their own two children. The two children, one of nine and the other of twenty years old, never had suitable clothes before. Forgetfulness or otherwise of the parents made them buy the same sized pairs of the clothes. All clothes befitted the elder brother. Lack of knowledge on the part of the parents as to the possibility of shaping clothes to the size of their nine years boy child, necessitated him to continue wearing oversized clothes. In forcing it fit with him, the nine years old boy child started using ropes instead of belt because it was all that his parents could afford. At the end and because of the regular usage of ropes in tightening his clothes the younger child began to develop skin problems around his waist and legs. His parents, however, refused to take him for medical attention on the belief that the usage of ropes has never been the reason for the skin problem. Due to the prolonged delay and reluctance of the parents in seeking appropriate medical solution, the skin problem penetrated into the other parts of the body. Eventually, lack of knowledge and reluctance of the parents affected wellbeing of the family, at least, and that of the little boy, at most. From that end, this article explores the doctrine of hot pursuit by first of all describing various items, such as hot pursuit, internal waters and territorial sea, as known in the law of the sea, what amounts to valid hot pursuit, agreement on the extended hot pursuit, the validity of such agreements, and their feasibility.

2.0 Hot Pursuit and Related Concepts

The right of hot pursuit is generally conceptualised in the law of the sea. This makes it necessary for the Article to extensively describe it by firstly stating the meaning of each maritime zone. From the internal waters to the high seas the descriptions are:

2.1 Internal Waters

It is an uncontested fact that this area covers all waters on the landward side of the baseline. Internal waters are considered part of the state's territory, and in that sense not a maritime zone. The coastal state exercises full sovereignty in internal waters, sovereignty which is applied over seabed, water column and air space, and postulates that foreign vessels and states are deprived of all of the high seas freedoms. There is no point where jurisdiction over the internal waters has been uncertain. The waters in this area differ from territorial sea primarily in that they are part of the territory, and they are fully within the unrestricted jurisdiction of the coastal state. The coastal state in this regard has jurisdiction to try a person who has committed wrong whilst laboring at the, bays, [4]roadsteads, creeks, river mouths, estuaries, ports or harbor of that state.[5] Legal back up of this assertion is to be found in the old case of ***Wildenhus***[6], where the United

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3 International Maritime Bureau (IMB) Director, Available at https://www.crosswalk.com (Accessed on 23th October, 2019) at 12:46am.

4 O'Connell, D.P., 1983 The International Law of the Sea, Clarendon Press, London, p. 385.

5 Kasoulides, G.C., 1993 Port State Control and Jurisdiction Evolution of the Port State Regime. Martinus Nijhoff Publishers, Leiden, p. 2.

6 120 US 1 (1887).

States of America Supreme Court held that the American Courts had jurisdiction to try a Belgian crew member who murdered another Belgian national in a Belgian vessel when the ship was docked in the United States America port in New Jersey in New York.

2.2 Territorial Sea

It is essential with bias to Tanzania to describe the concept of territorial sea in as far as this writing is concerned. By recalling one of the essentials of the right of hot pursuit that it must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted, it becomes prudent to let the meaning of territorial sea be understood. In a simple meaning, territorial sea is an extended sovereignty of the coastal states over the sea to the limit of twelve nautical miles. However, history dictates that before 1982 the area of the territorial sea was measured by the range of a cannon shot. The cannon shot rule accounted approximately for only three nautical miles. This rule was however not universal. Some countries such as France, United Kingdom and the United States of America adhered to it while others did not. All, Scandinavian countries for example, considered the area which gave rise to four nautical miles to be a territorial sea of the coastal states Portugal, Spain, Uruguay, Italy and Russia on the other hand claimed from six to twelve nautical miles. This brought disagreement at the Hague Conference of 1930.[7] The disagreement on distance of territorial sea was more eminent at the Geneva Law of the Sea Conference of 1958,[8]where Chile, Costa Rica, El Salvador and Peru wanted a two hundred (200) nautical mile territorial waters.[9]

Because of this non-universality of the distance of territorial waters from the base line, the President of Tanganyika, after independence, issued proclamation in 1963[10] which stipulated a territorial sea of 12 nautical miles. This was followed by another Proclamation by the President after the union of the United Republic of Tanzania in 1967[11] which maintained territorial sea distance of 12 nautical miles from base line. No wonder Tanzania chose to claim a territorial sea of 12 nautical miles for the reason of being a true disciple of socialism championed by the then Russian government which, as it has been stated, refused to align with France, United Kingdom, as well as the United States of America in establishing the area of exercising its sovereignty over the sea by invoking the cannon shot rule.

Another Proclamation was made in 1973[12] which established territorial sea of fifty nautical miles. This happened when the country stated detaching itself from the influence of the then Russian government. These three varying decisions prove the take of this article regarding the claim of 12 nautical miles as the country's territorial sea.

7 The Conference of Codification of International Law, 1930, The Hague.

8 The Convention on Territorial Sea and Contiguous Zone enacted on 29th April 1958 and entered into force on 10th September 1964.

9 Bendera, I.M., Admiralty and Maritime Law in Tanzania, Law Africa Publishing (K) Ltd, Dar es Salaam, 2017.

10 G.N. No. 353 of 1963, the Proclamation was made on 10th July 1963.

11 G.N. No. 137 of 1967, the Proclamation was made on 24th August 1967.

12 G.N. No. 209 of 1973, the Proclamation was made on 10th July 1973.

In terms of square kilometers the country has 64,000of its territorial sea.

2.3 Contiguous Zone

The idea of contiguous zone as an area bordering upon territorial sea has been claimed by Great Britain way back in 1736.[13]Other countries like United States of America, France and others followed suit. French writer A. Gidel is attributed to have written about it in the 1930s and the same appeared in the Convention on the Territorial Seas, 1958 under Article 24. Thus Contiguous zones were clearly differentiated from territorial seas. Territorial sea is automatically attached to the land territory of a state which has full sovereignty over it. Contiguous zone is referred to as part of the high seas and a coastal state can only exercise particular rights. Contiguous zones, however, were limited to a maximum of 12 nautical miles from the baseline from which the territorial sea is measured.[14] As of now, contiguous zone is limited to 24nm.

Article 3, under section 4 to the schedule of the Territorial Sea and Exclusive Economic Zone,[15] that embeds the Law of the Sea Convention of 1982, regarding the purpose served by contiguous zone, has it that the coastal state may exercise the control necessary to, (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and (b) punish infringement of the foregoing designed laws and regulations committed within its territory or territorial sea.[16] To simply put, all coastal and archipelagic states are sanctioned to the exercise of power in relation to the prevention and protection of the laws to the extent limited by the widely acceptable 1982 Convention.

The Coastal state retains the power of preventing and punishing jurisdiction in relation to an outbound foreign vessel that has breached (in that coastal state's national waters), or is suspected to be intending to breach (inbound into those national waters), a relevant coastal state fiscal, immigration, sanitary or custom laws. Beyond 24 nautical miles, however, these powers cease (unless valid hot pursuit has commenced).[17]Ideally, protection of own interests invites the use of various techniques. The techniques vary from the technological background of the coastal states. Patrolling in developing countries is not that effective compared to the patrolling executed by the developed states. Indian Ocean particularly to the waters claimed by Tanzania mainland, immigration is not that critical compared to the immigration from the Mediterranean to the Atlantic Oceanic states.[18] For the purposes of securing or conserving fishing stocks in a particular area, or to enable a state to have exclusive rights to the resources of the proclaimed area, arrest of the foreign vessels that operate illegally can be one of the mechanisms.

Arrest of the ship is defined by the International Convention Relating to the Arrest of Sea-Going Ships of 1952,[19] and

13 Andreyev, E.P, *et al.,* 1988 The International Law of the Sea, Moscow, Progress Publishers, p. 41.

14 Bendera, I.M.,Admiralty and Maritime Law in Tanzania, Law Africa Publishing (K) Ltd, Dar es Salaam, 2017, p. 60-1.

15 Cap 238 R.E 2002.

16 Dec. 10, 1982, 1822 U.N.T.S. 397.

17 McLaughlin, R., *Authorizations for Maritime Law Enforcement Operations*, International Review of the Red Cross, 2016,Vol.98, Issue No.2, pp.465-490,p.478.

18 Giovanna De Maio., Italy and Immigration: Europe's Achilles ' heel, *The Brookings*, Monday, January 14, 2019, Available at https://www.brookings.edu [Accessed on 17/06/2019], at 8:42am.

19 Brussels, 10th May 1952.

that of the International Convention on the Arrest of Ships, 1999[20]as the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment. Under Article 1, damage caused by a ship either in collision or otherwise, loss of life or personal injury caused by any ship or occurring in connection with the operation of the ship, and construction, repair, or equipment of any ship or dock charges and dues, are the circumstances that confer the coastal state with the power of arresting the ship in exercise of the power in contiguous zone.

Additionally, the contiguous zone can also be used to control traffic in archeological and historical objects found at sea, in terms of Article 303(2) of the 1982 Convention.[21]Sanitarily, coastal states are capacitated to enforce laws that control the deposit of wastes there.[22]

2.4 Exclusive Economic Zone

In absence of the international convention covering this area, the European Fisheries Convention, 1964 provided exclusive fisheries rights to coastal States on a six mile zone, in addition to the three mile territorial sea. In 1973 Iceland claimed 50 nautical miles exclusive fishing zone producing prolonged exchange with the United Kingdom and Germany resulting in the Fisheries Jurisdiction cases[23] and at the same pace Tanzania did claim it to the extent of 50 nautical miles in 1973.[24]After 1982 this area has been referred to as an exclusive economic zone within which the coastal or archipelagic states may exercise various activities other than fishing. Principally the exclusive economic zone as it stands by now reaches to 200 in term of total coverage in nautical miles form. For the purposes of being precise, a Square kilometers of the exclusive economic zone in Tanzania is 223,000.

2.5 Archipelagic Waters

Archipelago is a group of islands forming a single political unit. For an area to be considered archipelago the same must be "mid ocean". What probably makes the Convention on the Law of the Sea referred to as the constitution of the international legal orders of the sea is its coverage of almost everything oceanic. Archipelagic waters did not remain unguided as it was before the year 1982.[25] Archipelagic areas are regulated comprehensively under Part IV of the Convention. Article 111 on hot pursuit mentions archipelagic areas as the areas in which pursuit of IUU may start, and or legally required to be terminated. Tanzania mainland is not an archipelagic state but Zanzibar is.[26]

2.6 Continental Shelf

This is a seaward projecting land.[27]The modern concept of the continental shelf in international law of the sea can be traced to the 1945 Proclamation by President Harry Truman of the United States of America. In this Proclamation, President Truman declared that, having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States of America regards natural resources of the sea bed and subsoil of the continental shelf beneath the high seas but contiguous to the Coast of the United States of America as appertaining to it, subject to its jurisdiction and control.[28] In a subsequent Proclamation issued in respect to coastal fisheries he stated that, in view of the pressing need for conservation and protection of fishery resources, the Government of the United States of America regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States of America wherein fishing activities have been or in the future may be developed and maintained on substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States of America regarded it as proper to establish explicitly bounded conservation zones in which fishing activities would be subject to the regulation and control of it. From reading the above Proclamations it is clear that these claims were, as well, motivated by the post WWII social and economic needs. It was in the quest to address economic challenges in the post war period which prompted states to embark on claiming to expand their sovereign rights over the sea resources.

Consequently, after the Truman Declaration, other states made declarations reaffirming their sovereign claims to vast areas of water and seabed on the basis of sovereignty and economic needs.[29] For example in June 1947, Chile became the first country to claim 200 nautical miles (nm) when it proclaimed national sovereignty over the continental shelf off its coasts and island and over the seas above the shelf to a distance of 200nm. Subsequently Peru proclaimed its sovereignty on its 200nm in August of the same year. Examining the reasons that underpinned these declarations by both countries it is evident that both were motivated by the desire to promote their commercial interests in the adjacent seas. For example Chile wanted to protect its new offshore whaling operations, while Peru was keen to protect fishing in its shore from neighbors as well as from other states that could undertake fishing from afar.[30]

The 1958 Convention on the Continental Shelf was the first international instrument codifying the continental shelf claims by states. This Convention was significant in different aspects but chiefly, it recognised the fact that coastal states had legitimate claims on their continental shelf.[31]It took step to clarify what constituted continental shelf. The later aspect was important because due to technological advancement, states were making unilateral claims that solely advanced their economic interests without due regard to the interests of other states especially landlocked countries.[32]

Article 1 of the Convention provided that the term continental shelf refers to the sea bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters

20 Geneva, 12th March 1999.
21 Verma, S.K., 1998 An Introduction to Public International Law, Prentice-Hall of India Private Limited, New Delhi.
22 Article 33(a) of the Schedule to the Territorial Sea and Exclusive Economic Zone Act.
23 ICJ Reports, 1974.
24 G.N. No. 209 of 7th September 1973.
25 Verma, S.K., 1998 An Introduction to Public International Law, Prentice-Hall of India Private Limited, New Delhi.
26 Because Zanzibar is made up by two Islands: Unguja and Pemba.
27 Carrera, G., *A Method for the Delimitation of an Equidistant Boundary between Coastal States on the Surface of a Geodetic Ellip-soid*, International Hydrographic Review, 1987, LXIV (1): pp. 147-159.
28 Majinge, C.R., *The Submission for Extension of the Continental Shelf by the United Republic of Tanzania to the United Nations and the Reaction of Zanzibar*, Zanzibar Yearbook of Law, 2011, Vol. 1, p.370.
29 Verma, S.K., 1998 An Introduction to Public International Law, Prentice-Hall of India Private Limited, New Delhi, p.311.
30 *Ibid*.
31 Crawford, J & Rothwell, D.R. (Eds) (1995)*The Law of the Sea in the Asian Pacific Region: Development and Prospects*. Leiden: Martinus Nijhoff Publishers, p. 14.
32 Libya/Malta Case [1985] ICJ Rep 1985, para 39.

or, beyond that limit, to where the depth of the superjacent waters admit of the exploitation of the natural resources of the said area.[33]This position is reaffirmed by the International Court of Justice in its decision on the ***North Sea Continental Shelf Cases***.[34] In these cases the court noted that, the rights of the coastal state, in respect of the area of continental shelf which constitutes a natural prolongation of its land territory into and under the sea, exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. To date the same 200nm has been maintained by the Convention on the Law of the Sea.[35]

2.7 High Seas

According to section 17 of the Written (Amendments) (Act No.2) of 2010 which amended and substituted section 6 of the Penal Code, high seas means the open seas of the world outside the jurisdiction of any state.[36]The closed sea concept proclaimed by Spain and Portugal in the 15th and 16th centuries, and supported by the Papal Bulls of 1493 and 1506 dividing the seas of the World between two of the by then super powers was replaced by the notion of open seas, a concomitant to the freedom of the high seas during the 18th century. The high sea was further articulated as the area which the state was eligible to put it under its jurisdiction.[37] High Seas Convention of 1958 ruled that, the open seas rule is that no state

33 The Convention on the Continental Shelf, 1958.
34 The case between Germany and Denmark and Germany and Netherlands.
35 See Article 76 of the Convention.
36 Act No.11 of 2010.
37 Akyoo, F.L., *The Concept of High Seas and the Legal Principles Governing Jurisdiction Over Ships Exercising the Freedom of the High Seas*, Tuma Law Review, 2012, Vol. 1, No. 1, p. 209.

may acquire sovereignty over parts of the high seas.[38] However the question remained as to where the high seas began. The Cobweb in regard to where is the starting point of the high seas came to be clarified further in 1982 under the so called UNCLOS III. High seas started, officially, to be known as the areas immediately after Exclusive Economic Zone which consumes 200 nautical miles from the baseline.[39] This question attracted occasional answers to the same extent as it was with other maritime zone. Marking of these areas as *res communis* was deliberate. The policy projected was designed to foster transportation and communication free of restrictions by the State for the purposes of restricting commercial gain to it, and to promote equality of access to fisheries free of comparable claims to monopoly.[40] However this zone was and is currently not without restrictions. Restrictions have been placed in order to have the resources exploited sustainably. In the case of ***Behring Sea Fur Seals***, the tribunal curtained the unrestricted freedom and provided for solutions to the existing problems of conservation, for the freedom of fishing was not absolute but had to be regulated to take reasonable account of the interests of other states. **Ice*landic Fisheries Case***,[41] in this the ICJ upheld the right of fishing on the high seas but emphasised on the obligation of reasonable use in connection with conservation and preferential rights of the coastal states.

38 Churchill, R.R, and Lowe, A.V., 1999 *The Law of the Sea*, 3rd Ed, Manchester University Press, Manchester, p. 204.
39 See, Article 86, to The United Nations Convention on the Law of the Sea, 1982.
40 MacDougal, M.S., The Hydrogen Bomb Tests and the International Law of the Sea, *Faculty Scholarship Series Paper*, 1955, Series Paper No.2467retrieved from, http://digitalcommons.law
41 ICJ Rep, 1974.

2.8 Hot Pursuit

This is defined as the right of the coastal State to continue, outside the territorial sea, the contiguous zone, or certain adjacent areas, the pursuit of a foreign vessel which while within the internal waters, the archipelagic waters, the territorial sea, the contiguous zone, the exclusive economic zone, or the continental shelf of the pursuing State has violated the laws and regulations of this State,[42] provided, however, that the pursuit should have commenced immediately after the offense and should not have been interrupted.[43] This implies that the right of hot pursuit is an extension of the criminal jurisdiction of the pursuing state.[44] As such, its exercise is recognized as an exception to the freedom of the high seas though it ends the moment that vessel enters into the territorial sea of another State. Out of Article 111 of the Convention on the Law of the Sea, almost all maritime zones have been mentioned.

3.0 Adoption of the Doctrine

When resorted to come out with what is a constitutional treaty of the international legal order of the oceans,[45] how illegal, unregulated, and uncontrolled fishing ought to be prevented by the coastal states was considered. There is high possibility that this might have touched the interest of all coastal states considering how potential marine resources are to the economy. It was also in the knowledge of all coastal states that enforcement of marine laws involves prevention of the culprits from harnessing such resources. To undertake prevention pursuant to the requirements of the law, the deliberating states decided to reproduce the right of hot pursuit from article 23 of the Convention on the High Seas of 1958.[46] For, therefore, the hot pursuit to be legitimate the requirements of article 111 of the United Nations Convention on the Law of the Sea[47] must unexceptionally be fulfilled by the pursuing state.

4.0 Legitimacy of Pursuit

The right only exists for violations that have occurred within one of the coastal state's maritime zones. For the pursuit to be legitimate it is the requirement of Article 111 of the United Nations Convention on the Law of the Sea that: 1) The competent authorities of the coastal State must have good reason to believe that a foreign ship has violated the laws and regulations of that State. 2) The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State. 3) The pursuit can only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. 4) The pursuit can only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship. 5) The pursuit can only be exercised by warships or military aircraft,

42 See Article 111(1) and (2) of the United Nations on the Law of the Sea of 1982.
43 Espenilla, J.J.F., *Expanding the Right of Hot Pursuit: Challenges for Cooperative Maritime Law Enforcement between the Philippines and Indonesia*, International Journal of Maritime Affairs and Fisheries, 2017, Vol.9, Issue No.1, pp.01-018, pp.5-6.
44 *Ibid*.
45 Bendera, I.M., 2017 Admiralty and Maritime Law in Tanzania, Law Africa Publishing (K) Ltd, Dar es Salaam, p.45.
46 Done at Geneva on 29 April 1958. Entered into force on 30 September 1962. United Nations, Treaty Series, Vol. 450, p. 11, p. 82.
47 General Assembly, Draft Final Act of the Third United Nations Conference on the Law of the Sea (October 21, 1982), A/CONF.62/121, Reprinted in 21 I.L.M. 1245 (1982).

or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. 6) The pursuit initially commenced by an aircraft can be transferred to pursuit by a ship providing that the foreign ship was ordered to stop and the pursuit has been carried out without interruption. The International Tribunal for the Law of the Sea (ITLOS) ruled in M/V *Saiga Case*[48]that the above conditions are intended to be cumulative – each must be satisfied for the pursuit to be legitimate under the Convention of the Law of the Sea.

5.0 Pursuit -Sparking Offences

The types of offenses giving rise to the right of hot pursuit depend on the competence of the coastal state to enact laws and regulations in relation to various maritime zones.[49]Offences that may prompt foreign vessels to be boarded and inspected under the ambit of hot pursuit are drawn more specifically from the domestic legislation governing the domination of the coastal states over the sea. Principally, therefore, in Tanzania, such offences are found under the Territorial Sea and Exclusive Economic Zone Act, and the Penal Code. As amended by the Written Laws (Miscellaneous Amendments) (No.17) Act, 2009[50] under section 19, the Territorial Sea and Exclusive Economic Zone Act[51]establishes some acts commission of which confers the right of hot pursuit to the country provided that they have been committed while the foreign vessel was within the four corners of its maritime zones. For ease of reference, the

48 Case No.1 and 2.
49 Walker, R., *International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century*, Auckland University Law Review, 2011, Vol.17, Issue No.1, pp.194-218, p.200.
50 Act No.17 of 2009.
51 Cap 283 R.E 2002.

provisions of section 17(1) (a)-(f) of the Act provides that any person who:

(a) Assaults, resists, obstructs or intimidates an authorised officer or any person, assisting him in the execution of his duty;

(b) Uses indecent, abusive or insulting language to an authorised officer in the execution of his duty;

(c) Interferes with or hinders an authorised officer in the execution of his duty;

(d) By any gratuity, bribe, promise or other inducement, prevents an authorised officer from carrying out his duty;

(e) Without the authority of an authorised parts with any articles ceased;

(f) Contravenes any provision of the Act for which no penalty is provided or the regulations,

commits an offence and is liable upon conviction to a fine not less than one hundred thousand US dollars or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment and, in addition the court may order the forfeiture of any vessel, structure, equipment, device or thing in connection with which the offence was committed.

These offences that may prompt the undertaking of the hot pursuit are, as general rule, triable by the High Court in terms of section 17(2) of the Territorial Sea and Exclusive Economic Zone Act.[52] In the direction of the Director of Public Prosecutions these offences may be tried by the subordinate courts. By annexing some parts of the United Nations Convention on

52 [Cap 283 R.E 2002].

the Law of the Sea to the Act, the country has directly given effect to its jurisdiction in the contiguous zone.

By recalling the fact that if the foreign ship is within a contiguous zone, as defined under Article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established,[53]the country may start pursuing the suspected foreign vessel as the means necessary to prevent and, punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea as it has been exemplified.

6.0 Agreement on Pursuit

Practical difficulties brought by the manner in which legitimacy of the hot pursuit becomes into being has prompted many states to deliberate and conclude bilateral treaties for the purposes of seriously preventing illegal fishing, and or violation of the laws of the coastal states. The distinct modality of pursuing ships which is usually set bilaterally or multilaterally is one of the ways through which coastal states apprehend foreign fishing vessels which operate illegally.

7.0 Concluded Agreements on Pursuit

Deviation from the provisions that principally guide legitimacy of the hot pursuit is demonstrated by three examples. Firstly, in 2005, a bilateral agreement was concluded between Australia and France which established a framework for cooperation in the surveillance of fishing vessels and in fisheries-related scientific research within the adjoining waters of

53 See Article 111(1) of the United Nations Convention of the Law of the Sea.

Australia's Heard Island and McDonald Island fishery and the French territories on the Kerguelen Plateau.[54]

The subsequent agreement which took effect in 2011 enhanced these arrangements by enabling enforcement personnel from each party to deploy on the other's vessel patrols and to undertake cooperative enforcement activities such as apprehension, boarding and hot pursuit.[55]Armed with these agreements, Australia and France can continue undertaking the hot pursuit through each other's territorial sea. However, this sub-sector is threatened by illegal, unreported and unregulated (IUU) fishing, which manifests in various forms. One of these is foreign industrial fishing ships trespassing in Benin's territorial waters.

According to local fishermen, IUU ships that operated in the coastal strip (5 nautical miles from the coast) reserved for artisanal fishing continue to operate unlawfully, but in more distant zones where the military patrol boats rarely go.[56] In reaction to the numerous pirate attacks on ships in their maritime areas, Benin and Nigeria signed an agreement on 28 September 2011 to jointly combat piracy. The initiative, dubbed 'Operation Prosperity', consisted of organising joint maritime patrols at their common border over six months.[57] Benin

54 *Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands,* done at Canberra 24 November 2003, entered into force 1 February 2005, [2005] ATS 6.
55 *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands,* done at Paris 8 January 2007, entered into force 7 January 2011, [2011] ATS 1; Department of the Environment, *Submission* 15, pp 4-5.
56 ISS., *Benin's Maritime Security Challenges in the Gulf of Guinea*, West Africa Report, 2015, Issue No.12, p.3.
57 *Ibid*, p.4.

had operational command over the patrols while Nigeria exercised tactical command.[58]

8.0 Outcome of Illegitimate Pursuit

It has been stated more often that, under Article 111 of the United Nations Convention on the Law of the Sea, if the pursued vessel enters the territorial sea of another state, the hot pursuit is taken to be discontinued and the pursuing party loses the right to board the pursued vessel. If it, however, does the pursued vessel is entitled to compensation. Entitlement to compensation as relief depends on the boarding manner of the pursuing states. Proof of the use of unreasonable forces, in apprehending the suspected IUU vessels, maximizes opportunity of the owners of the pursued vessels of being compensated. Both Article 111(8) and 304 of the United Nations Convention on the Law of the Sea provide basis of the relief for the interception occurring beyond one's maritime zones. Under Article 111(8), where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained. The loss or damage sustained is not necessary physical. Loss of time may also be compensated if so proved. The possibility, on the other hand, of claiming compensation by evidencing violation of the provision(s) of the Convention on part of the pursuing state lies with Article 304.[59]

9.0 A Way Forward

Tanzania as an independent, sovereign, coastal state is found between latitudes 1'00' and 11'45' south of the Equator and longitudes 29'15' and 41'00 east of the Greenwich meridian. It is bordered by the Republics of Kenya and Uganda to the north, Rwanda and Burundi to the northwest, Democratic Republic of Congo to the west, Republic of Zambia to the southwest, Republic of Malawi and the Republic of Mozambique to the south. It also shares the waters of the Indian Ocean with the Republics of the Seychelles and Comoros to the east and southeast, respectively. Further, the coastline of the country extends approximately 1,400km in a north-south direction from the Tanzania-Kenya boarder to the Tanzania-Mozambique border to the south.[60]

By recalling that under the law of the sea, if a vessel enters into the territorial sea of a third country while conducting hot pursuit, that hot pursuit must be broken off unless the consent of the coastal state is received,[61] formation of agreement that allows extended legitimate hot pursuit is of utmost importance. Appealing to the fact that illegal fishing multiplies in expense of Tanzanians, [62]this Article urges for the country to be aggressive in concluding bilateral or multilateral agreements with its neighboring states as one of the mechanisms of inhibiting illegal, unreported, and unregulated fishing by way of continuing pursuing IUU Vessels even if arrived at another state's territorial waters.

58 Gullett, W., *Legislative Implementation of the Law of the Sea Convention in Australia*, The University of Tasmania Law Review, 2013, Vol. 32, No 2, p.8-9.

59 General Assembly, Draft Final Act of the Third United Nations Conference on the Law of the Sea (October 21, 1982), A/CONF.62/121, Reprinted in 21 I.L.M. 1245 (1982).

60 URT-DOC-001-18-01-2012.

61 Commonwealth of Australia, Official Committee Hansard, Joint Committee on Treaties, Treaties Tabled in May and June 2003, Monday, 26 July 2004, p.9.

62 Hotuba ya Msemaji Mkuu wa Kambi Rasmi ya Upinzani Bungeni kwa Wizara ya Mifugo na Uvuvi, Mheshimiwa DR. Sware I. Semesi (MB), Kuhusu Utekelezaji wa Bajeti ya Ofisi hiyo Kwa Mwaka wa Fedha 2018/19 na Mpango wa Bajeti kwa Mwaka wa Fedha 2019/20, Yanatolewa chini ya Kanuni ya 99(9) ya Kanuni za Bunge, Toleo la Januari, 2016, p.17,

In substantiating this recommendation, legality of the agreements of this nature that the country is urged to take and feasibility of these agreements must be described as herein below:

9.1 Legality of the Agreements

The act of concluding agreements which aim at diverging from being bound by the requirements, especially that which illegalizes the IUU vessels to be pursued soon after entering the territorial sea of its own State or in that of the third party, for legitimate hot pursuit as provided for under Article 111 of the United Nations Convention on the Law of the Sea is legally acceptable. The legality of these agreements, of course with reference to Tanzania and Mozambique and Seychelles, is drawn from the United Nations Convention on the Law of the Sea, the Constitutive Act of the African Union,[63] and the Treaty of the Southern African Development Community.[64]Being members of the African Union and the Treaty of the Southern African Development Community, Tanzania, Mozambique, Seychelles, and Kenya agreed, to be cooperating in various areas for the best interests of their people.[65]So, one of the areas that Tanzania can potentially deploy the wordings of the Act, and the treaty for the interest of its people, is by entering into bilateral agreement with Mozambique, or Kenya, or Seychelles, in order to curb the problem of illegal fishing which the country experiences. Or alternatively persuade these three countries for the sake of architecting a comprehensive multilateral treaty of a similar focus. Something special with what the country can legally craft a bilateral treaty with Kenya is that both belong to the East African Community (EAC). The Treaty for its establishment[66]encourages cooperation among its members.[67]

Therefore the country is able to execute the required legally. Previous agreements between Tanzania and these countries in relation to the law of the sea are: Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 23 June 2009,[68] Agreement between the Government of the United Republic of Tanzania and the Government of the Republic of Seychelles on the Delimitation of the Maritime Boundary of the Exclusive Economic Zone and Continental Shelf of 23rd January, 2002(1),[69]and Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary of 28 December, 1988.[70]Furthermore, nothing prevents the coastal state to authorise the pursuing state from continuing its hot pursuit. Such authorisation can be given on an *ad hoc* basis, but also more permanently as part of a bilateral or multilateral agreement.[71]

63 Adopted by the Thirty-Sixth Ordinary Session of the Assembly of the Heads of State and Government, 11 July, 2000, Lome-TOGO.

64 Signed by the Heads of State or Government of the Majority Ruled Southern African States on 17 August, 1992, Windhoek, Republic of Namibia.

65 See Article 3 (a) and (k) of the Constitutive Act of the Union, and Article 24 of the Treaty of the Southern African Development Community.

66 (As amended on 14th December, 2006and 20th August, 2007).

67 See Act 5(1) of the Treaty.

68 The Agreement between Tanzania and Kenya registered with the Secretariat of the United Nations on 30 July 2009. Registration number: I-46308. Entry into force: 23 June 2009, Accessed from https://www.un.org.depts.los on 10th October, 2019 at 2:42pm.

69 Accessed from https://www.un.org.depts.los on 10th October, 2019 at 2:43pm.

70 Accessed from https://www.un.org.depts.los on 10th October, 2019 at 2:44pm.

71 Molenaar, E.J., *Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi*, The International Journal of Marine and Coastal Law, 2004, Vol.19, Issue No.1, pp.19-43, p.29, as quoted

9.2 Feasibility of the Agreements

It is a fact that the World's fisheries are under pressure from overfishing with the growing demand for fishery products and the global overcapacity in the fishing industry, the increasing incidence of illegal fishing has become a matter of great concern to all countries that wish to fish responsibly and sustainably.[72]The Australian Financial Markets Association (AFMA) indicated that since these agreements entered into force, AFMA and Australia Customs and Border Protection Service (ACBPS) officers had been routinely deployed on French patrols, which took place on average four times per year. This had enabled cooperative enforcement to be undertaken including the apprehension of an IUU vessel from the Republic of Korea fishing in France's EEZ in 2013.[73] The same is expected to prove useful to the country.

10.0 Conclusion

It is the effects of sincerity to the provisions governing the undertaking of the hot pursuit that prompted the writing of this article. Its implication to the interest of improving the sustainability of marine resources is really what mattered. Agreements that have already been entered for the purposes of obviating the enshrined requirements of undertaking the hot pursuit have proved feasible. As littoral state, it has been recommended for Tanzania to conclude multilateral or bilateral treaties with the neighboring countries in as far as prevention of illegal, unreported, and unregulated fishing through the undertaking of hot pursuit in the Indian Ocean is concerned.

from Allen, C.H., *Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices*, Ocean Development and International Law, 1989, Vol.20, Issue No.1, pp. 309–341, at p. 320.

72 Accessed from https://www.aph.gov.au on 16 November, 2019 at 21:30pm.

73 Accessed from https://www.aph.gov.au on 16 November, 2019 at 16:00pm.

The Legal Implications of the Application of the Doctrine of Privity of Contract in Tanzania

By

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Abstract

Privity of contract is one of the cornerstones for the law of contract. A contract creates personal rights and obligations only for the parties to the contract. However, unlike the common law position, a third party in Tanzania is allowed to furnish consideration. This permission raises a question on privity of contract in Tanzania and whether a third party, who furnishes consideration or accrues a benefit can have any rights. The argument is that the doctrine of privity is unfavorable and it should not be preferred in consumer contracts and e-commerce. Privity to contract is unjust, it does not accommodate the interests of third parties even where there are genuine interests that arise in a contract and affect the third party. This paper is a critique of the application of the doctrine of privity of contract in Tanzania. It concludes that the application of the doctrine of privity in Tanzania creates a difficult environment for commercial relations. Therefore, there is a need to amend the Law of Contract Act and allow third parties to, in certain circumstances, enforce a contract to which they are not party to.

Key Words: Contracts, Consideration, Privity to Contract.

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1. Introduction

Privity to contract requires that it is only the parties who negotiated a contract that should be bound by the terms of the contract and be allowed to enforce them.[3] In common law practice, this principle was neither a settled one nor did it premise a clear stance as to whether a third party can sue under a contract to which he or she is not a party. It was only in the middle of the 19th century that judges reaffirmed the idea of bargain as the foundation of the English contract.[4] Concomitantly, they drew the inference that only parties to the bargaining incur reciprocal obligations and should enjoy reciprocal rights.[5] This gave rise to the doctrine of privity. Following the onset of the doctrine of privity, the rule at common law that consideration must move from the promisee also came into existence.[6]

This paper examines the legal implications of the application of the doctrine of privity of contract in Tanzania. It also makes an analysis on the negative effects that third parties may be exposed to by allowing them to furnish consideration while not being capable of enforcing or suing under such contracts by not being privy to them and other circumstances in which third parties should genuinely be allowed to have rights under a contract, although they were not parties to it.

2. Privity to Contract

Privity of contract aims at excluding third parties from contracts. The general rule is that only parties to a contract can incur the rights and obligations under it and that third parties cannot sue or be sued under the contract to which they are not part of. Therefore, only a party to a contract can sue on a contract and only a party to a contract can be sued on a contract. Even where a contract was made for the benefit of a third party, the third party still has no rights under it.[7] It is only reasonable that where an agreement has been entered between and **A** and **B**, **C** should not be allowed to have anything to do with such an agreement as s/he is not privy to it. Christie[8] observed that a contract creates rights and duties, exclusively for the parties to that contract and does not include random third parties. Treitel[9] defines the concept of privity as general rule that a contract should be between two parties to confer rights or impose obligations arising under it and not on any person except the parties to it.

The doctrine of privity rests upon three theories. They include the interest theory, the benefit theory and the consideration theory. The interest theory provides that an action of a beneficiary should be supported by evidence of non-performance of the promise which caused an injury to his interests, as such, he should receive compensation. Here the interests of an individual are equated to his property and thus, he could enforce

3 Cheshire G.C and Fifoot C.H.S, 1969 Law of Contract, 7th Edition, Butterworths, London, p.402. See also the case of *Tweddle vs Atkinson* (1861) QB 57
4 See *Tweddle vs Atkinson* (1861) QB 57.
5 Cheshire & Fifoot (1969), p. 402.
6 See *Dunlop vs Selfridge* [1915] AC 847.

7 Elliot C., and Quinn F., Contract Law, 2009 7th Edition, Pearson Longman, Essex, p. 274.
8 Christie, R, 2011 The Law of Contract in South Africa, 4th Edition, Lexis Nexis, Durban, p.269.
9 Treitel, The Law of Contract, 10th Edition, Sweet & Maxwell, Lincolnshire, 1999, p.538.

upon his properties.[10] In *Hadves vs Levit*[11] the bride's father while anticipating the marriage of his child, promised the groom's father that he would pay £200 to the plaintiff's son after the marriage had taken place. The plaintiff also promised the same to the defendant's daughter upon contracting marriage with his son. However, after the marriage had taken place, the defendant failed to pay the money to the plaintiff's son. The court held that the son was the one who was the proper person to bring the suit as he was the one who had more interest in the issue. The father was not the one who had interest as the compensation did not affect him in terms of gains or losses, although he was the one who entered into the agreement, he still did not actually benefit in any way. The son, on the other hand, was the one who felt the actual loss. The line between a party who was interested and one who was not did not depend on whether one was party to the contract, but one who was at loss or gain out of the transaction concluded.[12] This theory therefore allowed third parties to have rights and obligations under a contract only when they had an interest in the same.

The benefit theory was based on the premise that a party to whom the benefit of a promise accrues is allowed to bring an action. It is in connection with the idea that the beneficiary had a claim and thus he could be able to claim.[13] The word 'benefit' is used differently from 'interest' as the former was utilized when it came to gifts. For instance, where a defendant failed to deliver a gift, then the donee was not affected adversely. There was no particular justification for the deliverance of such a gift to him as there was no *quid quo pro*.[14] This theory was shown in operation in *Sprat vs Agar*.[15] In the case, Thomas Lockier was promised that upon Henry Sprat contracting marriage with the daughter of John Agar, the defendant would Henry Sprat with certain lands upon his death. The plaintiff proceeded to marry but later, contrary to the promise and upon the death of John Agar, he devised a will which bequeathed all lands to his wife and none to Henry Sprat. The court awarded the plaintiff damages of £1300. It was reasoned that although Henry Sprat was not the one who entered into the agreement, he was the one benefiting from such agreement and had the right to bring the action. The benefit theory therefore was different but yet similar in some ways to the interest theory as it allowed a third party to lay claims over an agreement which benefited him in respect of gifts.

Lastly, the consideration theory was one which consolidated and engulfed the two former theories discussed above. It was stricter and arose in circumstances where a creditor beneficiary sued a "substitute" debtor who made a promise to pay off the debt of the creditor's original debtor. The actions of the creditor were restricted, whether or not he had the promise of the substitute's promise and whether or not he had provided for the consideration.[16] In *Bourne vs Mason*[17] a creditor was refused an action to sue on a promise after it was ascertained that he had furnished no consideration, that nothing was done by the creditor as he had not done anything which could indicate the benefit for

10 Palmer V.V, *The History of Privity – The Formative Period (1500-1680)*, The American Journal of Legal History, 1989, Vol. 33, No.1, p. 6, available at https://www.jstor.org/stable/845785?seq=4#metadata_info_tab_contents, last accessed on 15th May 2020.
11 (1632) Het. 176.
12 Palmer (1989), p. 8.
13 *Ibid*, p.6.

14 *Ibid*, p. 21.
15 *Sprat vs Agar* (1658) 2 Sid 115.
16 Palmer, (1989), p. 7.
17 (1699) 1 Ventris 6.

himself, he was considered as a stranger to the consideration. In *Clypsam vs Morris*[18]an individual volunteered to pay off a debt owed by a third party to the creditor, the creditor agreed. The court refused to grant any remedy arising out of failure to pay such a debt by the defendant as the defendant was not the original debtor and the consideration had not moved from him. Strictly speaking, he was a stranger to such a consideration. This line of reasoning is what was considered as a modern approach to privity due to the rise of commercial transactions. It was applied throughout commercial transaction and it became the benchmark for assessing whether a third party could accrue right of action under a contract. It did bring with its certainty as it gave relief to individuals entering any transaction that no other person could interfere with what they agreed and further, that the agreement becomes specific to them and none other.

Therefore, the doctrine of privity considers that the rights and obligations of parties in a contract are strictly the private matters of contracting parties, and hence, the strangers have no legal access to them.[19] In its strict sense, it is held that he who is not a party to a contract cannot bring an action on the contract.[20] It reinforces the idea that only parties to a contract are legally entitled to enforce it, or be bound by it. While, this doctrine has not been specifically contained in the laws of Tanzania, it has been well established in England.[21]

3. Historical Development of the Doctrine of Privity of Contract

The doctrine of privity of contract owes its origin to the English Common Law Courts. It originated in the period when judges were busy discovering a suitable principle for determining who was entitled to sue for the breach of a promise. However, before 1861, the position as to whether third parties could sue was not clear.

It was *Jordan vs Jordan*[22] where it started existing. The doctrine was, however, not applied in the way that the privity doctrine has crystallized. Thus, it definitely left room for development. Following this ruling, it excluded third parties from enforcing the terms of the promise. In *Lever vs Keys*[23], the court overruled the decision in *Jordan's* case and allowed the strangers to sue and be sued in a contract. Here, the father of a girl promised the father of a boy that if he would be willing to give his consent to the marriage of the boy with the girl and assure £40 to the son, he would pay £200 to the son in marriage. The action was brought by the son upon breaching the promise. It was held that the son was entitled to sue, thereby defeating the precedent that was set in *Jordan's* case that a stranger could not raise any claim in a contract that he is not a part of.

In *Dutton vs Poole*[24], a son promised his father that in return for his father not selling wood, he would pay £1000 to his sister. The father refrained from selling the wood but the son did not pay the money. It was held that the sister could sue on the ground that the consideration and promise to the father

18 (1699) 2 Keb. 401.
19 Collins, H, 1986 The Law of Contract, Weidnefeld& Nicolson, London, , p. 112.
20 Cheshire & Fifoot, (1969), p.438.
21 Lilienthal, J, *Privity of Contract*, Harvard Law Review Journal, (1887), Vol.1, No. 5, pp.226 – 232.

22 (1594) Cro Eliz 369.
23 *Lever vs Keys* (1598) Cro Eliz 619.
24 (1678) 2 Lev 210.

may well have extended to her on account of the tie of blood between them. However, there was a disagreement as to whether the daughter could, even though she was a third party. This was the early stage in the development of the privity to contract rule. In this development, a few things can be notably observed. The courts recognized exceptions to the privity rule such as when one is a beneficiary in an agreement entered for his/her benefit.

The doctrine of privity of contract was finally established and cemented in *Tweddle vs Atkinson.*[25]The plaintiff was about to get married. His father and prospective father-in-law made a contract requiring each of them to give a sum of money to the plaintiff upon contracting the marriage. Even though the contract expressly provided the plaintiff was to be entitled to enforce it, the court held that he could not do so. The reason for this state of affair was advanced on the ground that because he was a stranger to the contract, he could not take advantage of it though it was made for his benefit.

A similar development was observed in *Dunlop Pneumatic tires co ltd vs Selfridge co ltd*[26] where the court held that the doctrine of privity requires that it is only the promisor and promisee that have the rights and obligations to enforce a contract. Similarly, in *Beswick vs Beswick,*[27]the court held that due to privity of contract, a wife could not sue in her capacity as such, only in her capacity as the administratix of an estate.

A concern was raised that privity to contract was too rigidly applied and as a result, third parties were not able to claim. In *Lloy'ds vs Harper*[28], the court negated privity altogether and provided for an exception where a third party may assert that he is a trustee and be able to sue. Lord Denning opposed the doctrine of privity in *Drive Yourself Hire Co. (London) Ltd vs Strutt.*[29]He provided that before 1861, where a contract was made for the benefit of a third person, it could be enforceable by such a third person despite of him not being part of it.Lord Denning's arguments were positive developments because the strict application of the doctrine of privity to contract led to third parties who had claims over the contracts having their rights diminished. However, in *Woodard Investment Development Ltd vs Wimpey Construction UK Ltd,*[30]the House of Lords disapproved Lord Denning's statement, that damages should not generally be recovered on behalf of a third party. Lord Wilberforce, however, suggested that there are certain categories of contracts which need special treatment. Such facets are to embody where one party contracted for benefit of a group such as family holidays or ordering meals in restaurants for a party. It was also called up that where the opportunity arises, the House of Lords would reconsider *Tweedle's* case and the other cases which stand guard over the unjust rule of privity to contract.[31]

25 [1861] EWHC J57 QB.
26 [1915] AC 847.
27 [1968] AC 58.

28 [1888] 16 CD 290.
29 [1954] 1 QB 250 CA.
30 [1980] 1 All ER 571.
31 Elliot & Quinn, (2009), p. 275.

4. Application of the Doctrine of Privity of Contract in Tanzania

4.1 Legislation

In Tanzania, the Law of Contract Act[32] does not expressly stipulate on the doctrine of privity to contract. However, reading through the Act[33], an inference can be drawn that it does embody the doctrine within it. When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.[34] The words *any other person* mean that third parties can furnish consideration.[35] As the law is silent on the principle, guidance must be sought from the case of *Tanganyika Auto Garage vs Marcel G. Mafuruki*[36], that when our laws are silent, we fall back to common law. The common law position, however, shows that third parties are not allowed to be involved in contracts. It further provides that whether it is for the purposes of furnishing consideration, suing or being sued, only parties to a contract have rights and liabilities under such a contract. This stance could perhaps be owed to the fact that Tanzania inherited the Indian Law of Contract Act, 1872 which had a similar position.[37] Apart from the Contract Act, there are several other laws which address the issue of privity.

32 Cap 345.
33 Section 2(1) (d) of the Law of Contract Act Cap. 345.
34 *Ibid.*
35 See *Tarlock Singh Nayar and Another vs Sterling Insurance Co. Ltd* [1966] E.A. 144.
36 [1975] L.R.T 23.
37 Nyangarika K, Legal and Evidential Validity to Electronic Transactions in Commerce and Formation of Contract: Tanzania Perspective, LLM Dissertation, Open University of Tanzania, 2013, p. 9, available at http://repository.out.ac.tz/759/1/KASSIM_NYANGARIKA.pdf, last accessed on 16th May 2020. Also see *Kepong Prospecting Ltd vs Schmidt* [1968] A.C. 810.

The Insurance Act[38] recognizes the rights of third parties against insurers. Where under any contract of insurance, the insured is insured against liabilities to third parties which he may incur, then in case the insurer becomes insolvent or bankrupt or makes an arrangement with its creditors, or where the insurer is a company in the event of its winding up, where any liability was incurred by the insured before or after the event, the rights of the insured against the insurer under the contract shall be transferred and vest in the third party to whom the liability was incurred.[39]A similar trend is seen in the Motor Vehicles Insurance Act.[40] As noted earlier, the basic difference concerning privity in Tanzania and the common law position is that generally under the latter, third parties are not allowed to furnish consideration or incur any rights or liability under such a contract. On the contrary, with regard to the former, a third party is allowed to furnish consideration, but cannot incur any rights or liabilities under it.

4.2 Case Law

There are various cases and laws that show the application of the doctrine of privity in Tanzania. *Burns & Blane Ltd. vs United Construction Company Ltd*[41] involved a plaintiff who was a subcontractor to the main contractor (defendant). The plaintiff was suing for goods sold and delivered and services rendered with respect of a construction project. The defendant alleged that the recovery of the plaintiff ought to be deducted from the amount of expenses which the defendant incurred while correcting defects and also by the amount of a settlement which the defendant made with a third party. The amount of settlement consisted of the company for which the building was being constructed because of other defects in materials which the plaintiff had supplied. It was held that there existed no privity of contract between the plaintiff and the third party with which the defendant had made the settlement. There was also no expenditure in relation to corrections of defects in respect of which such a settlement was made. Thus, the amount of settlement had not to be deducted from the plaintiff's claims.

38 Act No. 10 of 2009.
39 Section 58(1).
40 Cap 169 R.E 2009, Section 4 and 15.
41 [1967] H.C.D No. 156.

In *TUICO vs Mbeya Cement Company & N.I.C Ltd*[42]the plaintiff, a branch of TUICO trade union at Mbeya cement company Ltd. filed a suit against the defendants jointly for, among other reliefs, a specific performance of a trust deed. The basis of the suit was the trust deed rules and regulations for Mbeya cement Company Group staff endowed Assurance Scheme. The defendants raised a preliminary objection that the plaintiff had no *locus standi* to institute the suit either for lack of legal status or based on the trust deed. It was decided that although the plaintiff union is capable of suing and being sued, it can only do so if the alleged wrongful acts were committed against it. As such, it is for each of the individual employee to sue the defendants for their rights under the trust deed and group endowment scheme. The trade union, let alone branch of it, has no *locus standi* to sue on behalf of ex-employees of the trust deed and group staff endowment scheme as it was not privy to it.

42 [2005] T.L.R 41.

In *Puma Energy Tanzania Ltd vs Speck-Check Enterprises Ltd*[43], the plaintiff had changed its name from BP Tanzania Ltd to Puma Energy Tanzania Ltd. It later claimed under a distributorship agreement for damages based on the loss of 177,327 litres of diesel and 231,035 litres of heavy fuel which left the tanks from Kilombero sugar factory and Alliance one Deposits without the plaintiff being issued with respective invoices. The point of controversy was based on the doctrine of privity, that the plaintiff had no *locus standi* to sue on the said agreement as it was not a party to it. The agreement contained BP Tanzania Ltd as a party and not Puma Energy Tanzania Ltd. There was also no notice on the change of name. The court upheld the defendant's claims on lack of *locus standi,* basing on the doctrine of privity as the plaintiff did not advance the certificate of change of names in the records of the case file. The plaintiff had the capacity to produce it but did not do so.

In *Civil Loaths Enterprises vs Lindi Municipal Council and F.E.L.O Investment Ltd*[44], the appellant had entered into a 90-day contract for building an abattoir and other associated buildings at NgongoTulieni area within Lindi Municipality to the tune of Tshs 162,924,070/=. However, the contract was not executed as expected due to shortage of funds. The first respondent terminated the contract between her and the second respondent and also detained a car, property of the appellant, a Nissan Navara with Reg. No. T. 864 DEQ on grounds that clause No. 63.1 of the General Conditions of their contract allowed her to do so and the vehicle was used for construction purposes. Hence, the appellant claimed for Tshs 20,000,000/=

43 Commercial Case No. 19 of 2014.
44 Civil Appeal No. 4 of 2019.

as damages due to loss of use of the vehicle, not less than Tshs 20,000,000/= as general damages and the release of the motor vehicle. The trial court dismissed the case against the appellants.

The appellant then appealed on grounds, *inter alia,* that the learned trial Magistrate erred in conceding to the fact that the detainment of the vehicle was appropriate as per clause 63.1 of the general term of the contract. It was the contention of the appellant that such act was wrong because the cause of action was not breach of contract whose parties were the 1st and 2nd respondents and the appellant was not privy to the said contract, and had no legal obligation. The solicitor for the 1st respondent argued that the appellant, not being a party, does not take away the rights and obligations of the contracting parties to such a contract. The court was of the view that detainment of a vehicle which was owned by a company that was not party to the contract, which is not privy to the contract between the two respondents, was contrary to the principles of law of contract and therefore it was determined illegal.

A similar observation on privity of contracts exists in *John Vitalis Ngonyani vs Fanyeje Ally*[45]. Here, the appellant unsuccessfully sued the respondent and one Method Anthony, the two of which were alleged to be husband and wife, in the Ward Tribunal. He appealed to the District Land and Housing Tribunal on grounds that the Ward Tribunal erred after recognizing a Sale Agreement which did not involve the respondent in the current case. The appeal was allowed and the transaction was declared a nullity. The appellant preferred an appeal on grounds, *inter alia,* that the District Land and Housing Tribunal erred by allowing an appeal that had different parties form the original proceedings at the Msigani Ward Tribunal and holding that one Method Anthony and the respondent were spouses and the land in dispute was a matrimonial asset without Method Anthony being a party to that appeal.

The court was of the view that the original parties in the tribunal were John Vitalis Ngonyani*vs* Method Anthony and Fanyeje Ally, who were alleged to be spouses. Method Anthony as evidenced by the Sale Agreement was the seller of the land to the appellant. The respondent was not privy to the Sale Agreement between the appellant and Method Anthony, and there was neither evidence of marriage between the respondent and Method Anthony nor was there presumption of the same. Hence, the land in dispute was not a matrimonial property. The Sale Agreement was binding to those two parties and not any other person. The contractual obligations and rights could not be shifted to the respondent as she was not a party to the contract.

Another relevant example on the application of the doctrine of privity to contract in Tanzania exists in *National Microfinance Bank PLC vs Mary Rwabizi Trading T/A Amuga Enterprises.*[46]The appellant contested the decision of the lower court on grounds, *inter alia,* that the trial judge erred in law and fact by holding that Efam Company Ltd (first appellant in the trial court) had breached the contract but decreeing the 2nd defendant (the current appellant) to pay the purchase price, general and punitive damages. The facts were that the 1st defendant in the trial court was sued jointly with the 2nd defendant for non-payment of Tshs. 140,000,000/=. The 1st defendant was in a contract for supply of 7000 water pipes with the plaintiff (the current respondent), as a result, the money was not paid and the reasons was that the 2nd defendant had acted negligently for closing the account of the 1st defendant. Further, the cheques that were to be payable to the plaintiff were dishonored and thus, occasioned the loss as she closed the account without collecting cheque leaves first.

The court held that the appellant was liable in negligence as failure to ensure that the customer had returned the cheque book and all unused cheque books before closing the account was in breach of duty and constituted to negligence. However, the judgment for payment of Tshs 140,000,000/= was to be entered against the 1st defendant. The appellant was not privy to the contract of supply of the water pipes and there is nothing to show that she could be held liable in contract to which it was not privy to. The trial court erred in ordering the appellant to pay the contractual debt which should have been paid by the 1st defendant alone.

In the *Board of Trustee of Good Neighbors Tanzania vs Doreen Augustine Dominic T/A Dawson's Water Point Drilling*[47] the defendant claimed that the defendant had no capacity to institute the as it was brought against a wrong party. The reason is that the plaintiff in the pleadings suggested that the casue of action was between Ms. Good Neghbors Tanzania and Ms Dawson;s Water Point Drilling Company, however, its only parties to a contract who can sue under it. In this case, the plaintiff and defendant are not privy to the contract since they were not party to it. The court upheld the preliminary objection while reasoning that as per Section 18 of the NGO Act, a registered NGO by virtue of its registration under it can be a body corporate capable of suing and being sued in its name. In this case, the plaintiff is the Board of Trustee of Good Neighbor Tanzania instead of Good Neighbor Tanzania which has been registered under the NGO Act and its certificate of registration attached to the plaint. The plaintiff therefore has no capacity to sue.

In *TANESCO vs Robinson Trader Company and EWURA*[48] the Tribunal provided that the contract between TANESCO and M.S Omary is distinct from the contract between TANESCO and Robisnson Traders. It is elementary that under the doctrine of privity to contract, a person cannot acquire rights or by subject to liabilities arising out of a contract to which he is not a party. Imposing liabilities M.S Omary liabilities on Robinson Traders amounts to unfair business practice which should be condemned. It unfairly imposed the liability of Mr. M.S Omary on Robinson Traders out of despair as there was a customer who did not pay and he was nowhere to be found. This practice is oppressive since it seeks to exploit customers legally connected with electricity only to be disconnected later on the basis of previous customer's liability.

In *Juma Garage vs Co-operative and Rural Development Bank*[49] the respondent owned a motor vehicle insured by the National Insurance Corporation. It was later involved

45 Misc. Land Case Appeal No. 37 of 2017.

46 Civil Appeal no. 296 of 2017.

47 Commercial Case No. 69 of 2019, High Court of Tanzania at Dar es Salaam.

48 Tribunal Appeal No. 4 of 2014.

49 [2003] TLR 429.

in a car accident and made NIC liable to repair it. NIC took the vehicle to the Garage for repairs and later on when the work was delayed, they told the Bank to make follow up over the same. After completion of the work, the Bank sued the Garage for general and exemplary damages as costs of replacing some parts which were missing from the vehicle at the time the respondent took delivery of the motor vehicle. It was argued that there was no privy of contract between the Bank and the Garage and therefore no cause of action could arise. The court held that the contract was between NIC and the Garage, there is nowhere in the Plaint where it was alleged that the Bank was a party to the contract of repair.

In another case *Tanzania Pharmaceutical Industries Limited vs Dr. EpharimNjau (Number 2)*[50], the contention was whether there was a contract between the respondent and the appellant. The respondent contended that he was appointed as the general manager by the appellant's Board of Directors but was later transferred to Keko pharmaceutical Industries Limited by National Chemical Industries Limited, which is the holding corporation of the appellant company. He later challenged the transfer and removal from his present employment and considering it unlawful as it amounted to the breach of contract between him and the appellant company. The court held that the respondent sued a party which had no contractual relationship with him, he should have sued the NCI which appointed him and with which he signed a contract of employment.

50 [2000] TLR 236.

5. The Privity Doctrine in other Jurisdictions

The doctrine of privity to contract has been treated differently in other jurisdictions. In England as noted, there was a tug of war between courts, some supporting the doctrine and some showing intent to give exceptions as the rigid application the same proved to occasion injustice. The movement to relax the doctrine was also present outside courts. The Law Commission of England called for a reform as the doctrine prevents effect being given to the intentions of the contracting parties, it has led to unnecessary complexity and uncertainty in the law, and the technical hurdles which must be overcome if one circumvents the rule will raise many arguments that some requirement has not been satisfied. This is commercially inconvenient and causes injustice.[51]

The Law Commission proposed that there should be a reconsideration of the rule and provided for how legislation could reform the rule and strike a balance between third parties and the contracting parties. As a result, the Contracts (Rights of Third Parties) Act 1999 was introduced in England and Wales. The Act, *inter alia*, provides for the right of third parties to enforce contractual terms.[52] A person not party to the contract may in his own right enforce terms of the contract if the contract expressly provides that he may, or a there is a term in the contract which purports to benefit him.[53] The third party must be expressly identified in the contract.[54]

51 The Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties, Consultation Paper No. 121, 1991, p. 65.
52 Section 1.
53 Section 1(1).
54 Section 1(3).

In Uganda, the rights of third parties are recognized under the Contracts Act.[55] Section 65 provides for the right of third parties to enforce contractual terms. A party who is not party to a contract may in his or her own right enforce a term of the contract where the contract expressly provides that he may do so or where a term of the contract confers a benefit to that person.[56] It also provides that the third party must be expressly identified in the contract[57] and that he shall have any remedies as if he was a party to the contract.[58]This is almost a replica of the English Contracts (Rights of Third Parties) Act 1999. In *Asante Aviation Ltd vs Star of Africa Air Charters Ltd & 3 Others*[59], the court provided that privity of contract is a legal doctrine that confers rights and imposes liabilities only to parties to the agreement. A third party can therefore not sue. However, the position has not changed, it is now possible a person not privy to the contract to sue. Such instances are where the third party is a beneficiary to the agreement between the other two parties, the test lies in the question of whether the two contracting parties intended the third party to derive benefit from their contract.

New Zealand had previously enacted the Contracts (Privity) Act in 1982. This was after the New Zealand Contract and Commercial Law Reform Committee published a report in 1981[60] which requested that there be a change in law as the doctrine of privity was inconsistent with commercial relations and

55 Act No. 7 of 2010.
56 Section 65(1) (2).
57 Section 65(3).
58 Section 65(5).
59 HCCS No. 431 of 2014.
60 The New Zealand Contracts and Commercial Law Reform Committee's Report on Privity of Contract, 1981,

contractual intentions in general.[61]Later, the Act was repealed and re-enacted in the Contract and Commercial Law Act.[62] The Act has specifically included a part to permit a third person to enforce a promise made for the benefit of that person.[63] A "benefit" is any advantage, immunity, or limitation conferred to a third party.[64] Section 12 provides for a contracts for benefit of persons who are not parties, where a third person is conferred any benefit and is designated by name, description or reference to class, such a party can enforce the contract.

6. Criticisms Leveled Against the Doctrine of Privity to Contracts

One of the most apparent defects of the doctrine of privity of contract in Tanzania is the violation of third parties' rights to have access in legal institutions, especially courts and tribunals. The doctrine violates the constitutional rights of third parties to have any disputes that can be resolved by the application of law decided in a fair hearing before the courts or tribunals.[65] There are some aspects in which the doctrine of privity should not be preferred and ought to be relaxed for the benefit of third parties.

There is a wide existence and use of banking services *via* electronic devices. This calls for the need to reform the traditional doctrine of privity to contracts as these services do at times involve more than just two parties. At times, banks tend to exempt themselves from liability such as when the machine fails to dispense money to customers. Strictly embracing the doctrine of privity of

61 *Ibid*, p. 45.
62 No. 5 of 2017.
63 Section 10.
64 Section 11.
65 The Constitution of the United Republic of Tanzania, 1977, Article 13(6)(a).

contracts in this circumstance would mean that a customer cannot institute complaints against the network provider if it was the fault of such a network provider. This is simply because the one who has entered in the contract with the service provider is the bank and not the customer.[66] This shortcoming is more apparent when a bank refuses to sue, a third party cannot force such an institution to do so. As the Law of Contract Act has not yet embraced such a progressive development, third parties cannot sue[67] and in this instance, they stand to be at a detriment. Another area in which the privity of contract raises concerns is in consumer contracts and protection. This has a direct connection with the doctrine of privity to contracts as without a clear distinction of consumers and protection of their rights by the laws, consumers who are not party to the contracts may not be able to seek remedies. It is not always where consumers become parties to the contract and furnishes consideration for services or goods, at times, services and goods may be distributed without even consideration taking place and consumers not being part of the contract.[68]

The Fair Competitions Act[69] defines a consumer to mean any person who purchases or offers to purchase goods or services for purposes other than resale or using them in the production or manufacture of any goods or articles for sale. A customer is defined as a person who purchases or offers to purchase goods or services.[70] These two definitions reflect the aspect of privity as it does not include third parties or any other persons who may have not furnished the consideration but did use the products or services. This shows how the doctrine of privity could injure consumer protection when it occurs that a consumer, who is a third party, has been injured and wants to claim before the court.

The Sale of Goods Act also embraces the privity doctrine as it contains no mention of a third party for purposes of them being able to have rights under any sale agreement, it is only buyers[71] and sellers that are recognized. A buyer is defined as a person who buys or agrees to buy goods.[72] In general, the Act has given effect to the doctrine of privity and affected consumers, whether a beneficiary or a third party such as a child of the buyer could not sue a manufacturer or supplier for any defective product contained in a contract.[73]

It is evident that the doctrine of privity of contracts does not bode in various circumstances. Third parties are rendered helpless when any contract entered into affects them and the law does not afford them an opportunity to claim their rights under the benefit they ought to have received. For instance, one may purchase goods or services to be consumed by the family and thus, legal protection must be afforded to all of them regardless of whether they furnished consideration and are parties to the contract or not. To further show that the doctrine of privity of contracts should not apply here is where producers are required to be given education to consumers without them even having bought any goods or services, something that is beyond normal contractual principles.[74]

7. Conclusion

This article made an assessment of the doctrine of privity of contract as applied in Tanzania. It is noted that the doctrine of privity to contracts originates from common law and thus was adopted by Tanzania. The privity doctrine puts emphasis on legal certainty when it comes to contracts and that only parties to such a contract can accrue rights and duties under it.

In spite of the advantages it has, the doctrine of privity to contracts has some shortcomings especially to third parties. Third parties could have justifiably obtained rights under a contract but they cannot enforce a right basing on contract because of the doctrine of privity. This problem has been mitigated in other jurisdictions by allowing third parties to sue if they fall within exceptions contained in the law. Tanzania is yet to recognize they rights of third parties in its legal framework. The way forward is to amend the law, especially the Law of Contract Act or through enactment of a specific legislation which recognized rights of third parties to contracts. This will be in line with the current economic situation where one transaction may involve a number of institutions and individuals or where one person may get products and services for the benefit of others.

8. Recommendations

It is high time to develop the doctrine of privity of contract as the strict application of the same without having due regard to the change in the socio-economic aspect becomes harmful to the interests of individuals who have a genuine interest in contract. The existence of the rule has given rise to a complex body of law and to the use of elaborate and often artificial stratagems and structures in order to give third parties enforceable rights.[75] There exists a number of commercial engagements[76] in which third parties may justifiably have an interest because of the loss occasioned or harmed although they are not parties to the agreement. An example of a bank which has engaged in provision of services for with another party for the benefit of a customer currently renders the customer unable to enforce anything out of the agreement between the bank and the other party as the customer is not privy to it. Also, a person whom has been delivered goods by another and he is not considered as a customer cannot lay claims arising out the agreement to purchase such goods.

The Law of Contract Act does not recognize rights of a third party to bring a suit arising out of a contract under any exception and does at times cause injustice. This can be mitigated by amending the Law of Contract Act to accommodate the interests of third parties in a contract. Not only should the Law of Contract Act be amended, but also, consumer protection laws should also be

66 Mukama R., *Electronic Banking and Technological Development in Tanzania: A Legal Analysis*, Ruaha Law Review, 2014, Vol. 2, No. 2, p. 20, available at http://scholar.mzumbe.ac.tz/bitstream/handle/11192/2026/ROSEMARY+MUKAMA+Electronic+Banking+in+Tanzania2.pdf?sequence=1, last accessed on 20th May 2020.

67 Mukama, 2014, p.20.

68 *Ibid*, p. 53.

69 Act No. 8 of 2003.

70 Section 2.

71 See Section 2 of the Act for the definition of a buyer.

72 *Ibid.*

73 Nangela D., 2011 The Adequacy of the Tanzanian Law on E-Commerce and E-contracting: Possible Solutions to be Found in International Models and South African Legislation, PhD Thesis, University of Cape Town,p. 91.

74 *Ibid*, p. 54.

75 Mahmood, A., The Need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia, PhD Thesis, Queensland University of Technology, 2013, p. 76, available at https://eprints.qut.edu.au/64243/1/Anida_Mahmood_Thesis.pdf, last accessed on 16th May 2020.

76 See *Ibid*, part 5.0.

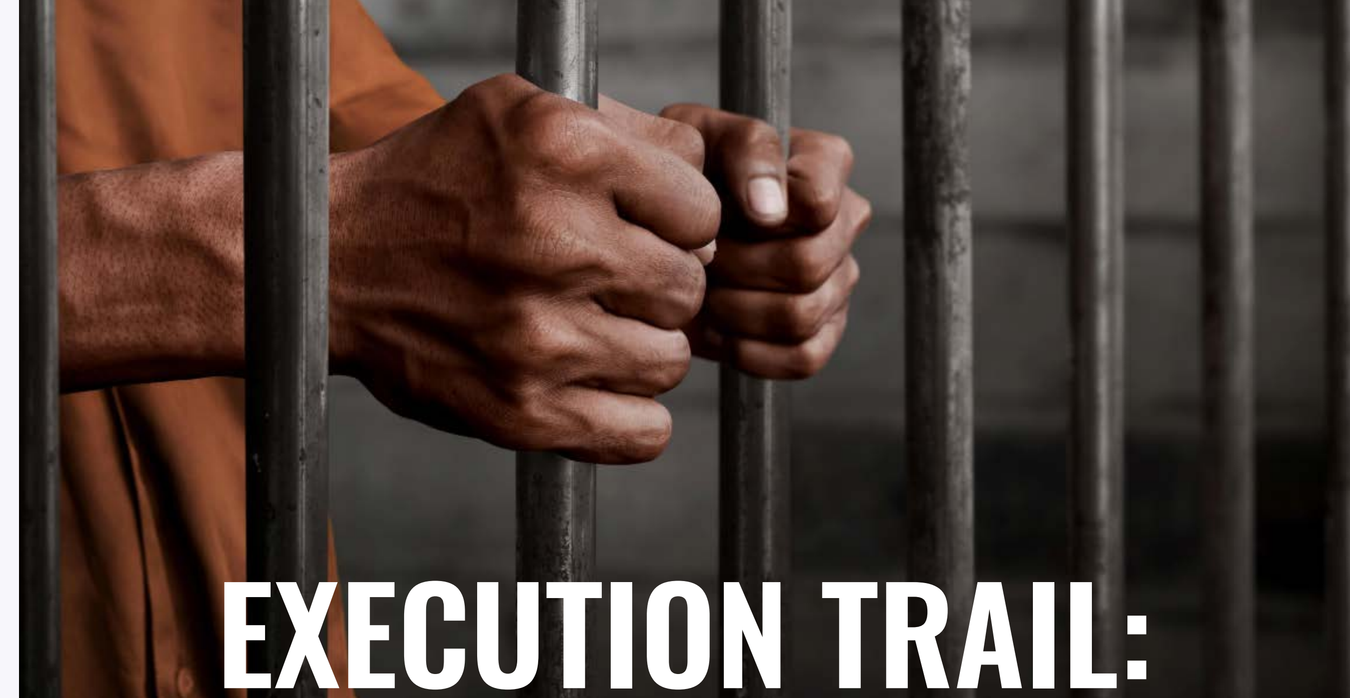
amended to accommodate protection of third parties.

The jurisdiction from which Tanzania adopted the doctrine from has already progressed over the strict application of this doctrine. The Contracts (Rights of Third Parties) Act[77] was enacted to give third parties the rights to enforce contractual terms. It allows a third party to sue in his own right when the contract expressly provides that he may or where the terms of the contract confer a benefit upon him.[78] This is partly a reversion to the 'benefit theory' where one could sue where a transaction was intended for his benefit. Tanzania should also fall in the same line by relaxing the doctrine of privity to contract through amending of the Law of Contract Act to recognize third party rights. This is especially where it is evident that the doctrine produces perverse and unjust results to third parties who have suffered the loss of the intended benefit and cannot sue, while the person who has suffered no loss can sue.[79]

The technical hurdles which must be overcome if one is to circumvent the rule in individual cases also leads to uncertainty, since it will often be possible for a defendant to raise arguments that a technical requirement has not been fulfilled.[80] Hence, such uncertainty is, in the contemporary era, commercially inconvenient. There is a need therefore, to provide certainty in the commercial arena through relaxing the privity doctrine of contract. The rule itself has been abrogated throughout much of the common law world.[81] The extent of the criticism and reform elsewhere is in itself a strong indication that the doctrine of privity of contract is flawed.

77 1999.
78 See Section 1(1).
79 Collins, (1986), p.112.

80 Pearson, G.D., 1981 Privity *of contract: Proposed Reform in New Zealand*, Otago Law Review, , p. 316.
81 Law Commission, 1991, p. 40.



EXECUTION TRAIL:
THE PROCEDURE AND PRACTICE WHEN THE GOVERNMENT IS INVOLVED:,
- A Quagmire In Tanzania Questing A Revisit

By

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Abstract

Decrees as it is with other orders have been industrious and given on daily basis. However, they have been a clarion call to stakeholders, particularly when the government is involved. Execution of decrees among other orders is a pivotal part when it comes to dispensation and administration of justice. Thus its issuance and execution demands highest degree of intergrity which surpasses an ordinary yardstick of discpline that is demanded. Despite the execution process and procedures being envisaged in the Tanzanian jurisprudence, particularly under the Civil Procedure Code and Government Proceedings Act, the same has not been complacent. Its execution where the government is involved has been dicey, desirous or rather dubious, In other words, the execution process of the same has not been a walk in the park as the process has been bewildered by diffrent shortcomings. The article confines itself to the concept of decrees, the nitty gritty of procedure and practice by looking at the law governing the same, types of decrees, execution of decrees, challenges envisaged in the process, remedies available and way forward.

Keywords: Decrees, Execution, Government

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1. Introduction

Tanzania as many other countries that fell under the British ambit of colonization is religious to the cardinal principles of the English jurisprudence. One of such principles is that, wherever there is a right , there is a remedy (***Ubi jus ibi remedium***). This principle has been adopted in its all fours by the Tanzanian Legal system also. In fact, right and remedy are two sides of the same coin and they cannot be separated from each other.[2]

It is in the same vein that a litigant having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impiedly barred by any statute.[3] In the exercise of the preceding bestowed duties, competent civil courts ordinarily render decrees among other orders.

2. Judgment and Decrees

At the very outset it should be made clear that, the court after the case has been heard, shall pronounce the judgement, and on the basis of such judgment a decree shall follow.[4] In other words, a decree cannot be divorced from a judgment,[5] as is (decree) a formal expression of the contents of a decision or judgment, thus, must be in consonance with the judgment.[6] The foregoing is imperative as per the wording of the law.[7]

Succinctly driving the point home, a decree is a summary of the contents of a judgment. A person in whose favour a decree has been passed is called a decree-holder , and he against whom it is passed is called a judgment-debtor.[8]

It should be taken on board that judgements and decrees despite their hegemony are both delivered and executed in difrent forms. In civil litigation, judgments may be (i) *in rem*;[9] or (ii) *in personam*.[10]

3. Meaning of Decree

Ordinarily, in most of the statutes there is a section that provides for definitions of the terms that are used in the body/statute (the Act). This definition clause is a kind of statutory dictionary. Statutes in Tanzania are not *alien* to this prevalent practice worldwide.

Section 3 of the ***Tanzanian Civil Procedure Code***[11], herein after to be referred to as a ***Code***, ***inter alia*** , provides the following definition,

Section 3 of the *Code* defines the term *"decree"* in the following words:

"Decree" , means the formal expression of an adjudication which, so far as regards the court expressing it, conclussively determines the rights of the parties with regard to all or any of the matters in controvesry in the suit and may be either *preliminary* or *final* and it shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89, but shall not include[12]:

2 Takwani C.K., 2013 *Civil Procedure with Limitation Act*, 1963, Eastern Book Company, Lucknow 7th Ed., p. 41

3 *Most Rev. P.M.A Metropolitan v Moran Mar Marthoma,* 1995 Supp (40 SCC 286 at p. 318

4 Judiciary of Tanzania: *A Benchbook for Judges in Tanzania*, Published by the Judiciary of Tanzania with the support of the World Bank, 2019, at p. 39

5 This is an evident truth as a decree ensues from a judgment as exemplified under Section 3 of the Civil Procedure Code, R.E: 2002

6 This is as a matter of law as a decree is drawn up after the judgment is delivered. See: *Unifrico and Two others v. Exim Bank (Ltd)*, Civil Appeal No. 300 of 2006 , CAT (*Unreported*)

7 Order XX r 6, of the Code, *Ibid*

8 This is as well envisaged under section 3 of the Civil Procedure Code

9 Means judgment against subject, property or thing

10 Means a judgment against a specific individual

11 Cap. 33 R.E: 2019

12 Relatively akin definition is accentuated in, Garner, B. A, *Blacks Law Dictionary, West Group*, 7th Ed.1999,

(a) An adjudication from which an appeal lies as an appeal from an order, or

(b) Any order of dismissal for default.

The section for purposes of clarity, goes a mile ahead by providing for explanation,

Explanation :A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit.[13]

It is point blank that, as per section 3 of the *Code*, a decree does not include an adjudication from which an appeal lies as an appeal from an order, or any other order of dismissal for default.[14] *From the afore tenet, one thing is connoted, for one to say that a decison of a court is a decree, then the following elements must contemporaneosly ensue therefrom***,**

(i) There must be an adjudication;

(ii) Such adjudication must have been done in a suit;

(iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(iv) Such determination must be of a conclusive nature, and

(v) There must be a formal expression of such adjudication.[15]

From the above precept it is thus concluced that decrees form part of the adjudication of a court of law , the other one is orders.

4. Types of Decrees

When one peruses the law governing execution of decrees, in particular the Code, there are about ten (10) categories of decrees as set out in Order XX of the Code as well the section 15 of the GPA that include the following,

(i) A decree for the payment of money[16]

(ii) A decree for the recovery of immovable property[17]

(iii) A decree for delivery of movable property[18]

(iv) A decree for delivery of movable property[19]

(v) A decree may be passed for possession and rent/mesne profits[20]

(vi) A decree passed in a situation where set-of has been allowed by the court[21]

(vii) A decree passed in a suit for partrition of property or separate possession of a share therein [22]

(viii) A decree passed in suits relating to administration[23]

(ix) A decree passed in pre-emption suit[24]

(x) A decree in a suit for account between a principal and an agent[25]

The afore mentioned with their corresponding provisions of the law are the types of decrees that are ordinarily issued by the courts of law whilst conducting their business where and when the government in one way or the other is involved.[26] It

13 Akin definition to this effect may as well be extracted from the case of *Dr. Gabriel Michael Muhagama v. Salim Abass Salum and Two others* (2006) TLR 336

14 The position was well enunciated and aptly put in the case of *Mansion House Ltd v John Stansbury Wilkinson* (1954) 21 EACA 98, 102

15 This was expressed with opulence in the case of *Tang Gas Distributors Ltd v. Mohamed Slim Said, The Administrator General and MABUNDA Auction Mart Co. Ltd* ,Civ. Appl. for Revison No. 68/2011, Court of Appeal of Tanzania, p. 38 & 39

16 Section 15 (1) of Cap: 5 & O. XX, r. 11

17 O. XX, r. 9 of the Code

18 O. XX, r. 10, ibid

19 O. XX, r. 15, ibid

20 G.N. No. 376/1968 & O. XX, r. 12, ibid

21 O. XX, r. 19(1), ibid

22 O. XX, r. 18, ibid

23 O. XX, r. 13, ibid

24 O. XX, r. 14, ibid

25 O. XX, r. 16, *Ibid*

26 It is however not the intent of this paper to discuss in *extenso* the types of decrees mentioned save only for other avenue of academic discourse and deliberations, but at least the reader need be conversant of the types as mentioned.

suffices to say however that, in common parlance whatever type of decree, should be in consonance with the condition precedent provided in the *Code*.[27]

5. The Law Governing Decrees

The paper finds its confinement in Tanzania though some practical underpinnings in due course may be plucked from other jurisdictions. In Tanzania, there are mainly two laws governing execution of decrees in as far as the Government is a party or rather involved. These laws are the Government Proceedings Act[28], herein after referred to as the GPA and the Civil Procedure Code, the *Code*[29]

When one takes a glance at the provisions found in the Government Proceedings Act, one thing is crystal clear. The GPA[30] does not provide for comprehensive procedure (s) for execution of decrees.[31] The *lacunae* is catered for by the *Code*, exemplary under Order XXI, which as the way coined is applicable or ought to be read in *tandem* with section 15 (1) of Cap: 5, which is hereby reproduced in *verbatim* ,

"The provision of any written law relating to the payment of interest where a decree is for the payment of money and to the payment of interest on costs shall apply in the case of Government as they do in the case of private person."

The application of Order XXI under the *Code* as manifested under Section 15 of Cap.5 is, furtherly, qualified by Ss 12, 16 and 17 of the GPA.

By paraphrasing the applicability of Order XXI of the Code under the GPA as provided under section 15 as afore mentioned, it is extended under sections 12, 16 and 17 of the GPA. The extension is paraphrased in such a way that, in case of any civil proceedings by or against the government, the court subject to the provisions of the GPA , have powers to make all such orders as it has to make in proceedings between private persons and reliefs thereto.[32] By itself the foregoing is an anomaly that needs a panacea.

Order XXI of the Code as applicable under the GPA is further qualified by section 16 of the Act, which provides for satisfaction of orders against the government which calls for procedural aspects to be followed upon application involving cost among others against the government.[33]

The other provision that would like to be dealt with on this arena is on execution by the government. This is as qualified under the GPA, which calls upon such execution of an order made in favour of or against the government to be in the same way as an order made in an action between private persons.[34]

27 O. XX r. 6, of the Code
28 Cap: 5 RE. 2002
29 Cap: 33 R.E. 2002
30 Despite the Government Proceedings Act being the epicenter of the government proceedings is lacking very important element when the government is involved. This is one of the *lacunae* under the Act as it does not cover the procedural aspect of decrees and their execution in *extenso* as how it was supposed to be canvassed.
31 See: *Execution of Decrees involving the Government, A Paper presented by* the Solictor General, Dr. C.J Mashmba *at the 1st Meeting of DLS's & HLSUs*, held on 30th-31st October 2019 at Mipango Institute, Dodoma
32 It means civil proceedings involving government is to be treated the same as to the nature of reliefs as it is with private persons.
33 One to be conversant to this may as well have a glance to O. XX of the *Code*
34 Section 17 of the GPA, and it is s a result of the section that most of the cases used will be between private persons.

6. The Nuts and Bolts of Execution

6.1 Execution of Decrees

When one takes a glance to the law governing execution of decrees in Tanzania, there is a recuring anomaly concerning lack of definition of the word *"execution*". There is no definition of the word "execution" either in the current Court of Appeal Rules[35], GPA , or in the Code. However case laws have filled the *lacunae*. Before embarking on the case laws, it is crucial to take a glance in other pieces of sources.

The Indian Code of Civil Procedure defines execution to mean the enforecement process by the court, of its own decrees.[36]

Apart from Mulla Code of Civil Procedure, in Tanzania Chipeta, B.D as well defines the execution as thus:

...The process by which the decrees of succesful parties are satisfied...[37]

Case laws were not in the bay on defining what is execution.[38] Case laws have defined the term execution in several dimensions. One , to mean the process for enforcing or giving effect to the judgment of the court, and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment,[39] or, Execution as the final act, that is the satisfaction of the judgment.[40]

6.2 Execution as a Process

As posited *supra*, execution of court decrees is one of the pivotal part of adjudication and generally the administration of justice, depicting that, the process ought to be done above the ordinary thresholds of intergrity and without ado. It is trite position of the law that the process of execution should be done by the court which passed the decree,[41] contrary to this when proper procedure not alluded, it may consequently abuse the court process.

The execution process in Tanzania is currently bewildered with some myriads and whimsical processess that raise eyebrows from the stakeholders, it is thus apposite not to counternance the situation as it stands, the shorfalls in execution process are apparent, thus need to be addressed so that we may do away with the trajectory.

Generally, execution as a process is provided as a summarized procedure that ought to be followed as provided under Order XXI of the Code.The process is ordinarily two fold in as far as the court is concerned. As provided by the law, a decree may be executed either by the court which passed it or by the court to which it is sent for execution.[42]

The case law of *Tanzania Motors Services Ltd v Tantract Agencies Ltd* ***(Supra)*** envisages events to be taken on board before execution is deemed to be completed. Kaji, J.A (as he then was) provided for the following events,

35 The Court of Appeal Rules, 2009
36 Solil, P 2001 *Mulla Code of Civil Procedure*, 2001, Butterworths, , p. 568
37 Chipeta, B.D, 2002 *Civil Procedure in Tanzania, A Student Manual, Law Africa*, p. 245.
38 One of the case is that of *East African Development Bank v. Blue Line Enterprises* , Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 57 of 2004 (Unreported)
39 *Shell and PB Ltd v UDSM* , Court of Appeal of Tanzania, Civil Application No. 68 of 1999 (*Unreported*)
40 One may take a look to the case of *Tanzania Motors Services Ltd. V. Tantract Agencies Ltd*, CA, Civil Application No. 86 of 2004 (*Unreported*)
41 A court which "passed a decree" as per section 32 of the *Code*, connotes , or words to that effect shall in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction , the court of first instance; and (b) where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.
42 Section 33 of the *Code*

i. *Application for execution in court;*
ii. *Making a warrant of attachment ;*
iii. *Issuing the attachment order by the court;*
iv. *Attaching the property as ordered by the court;*
v. *Making a proclamation for sale of the attached property*
vi. *Selling the attached property , and*
vii. *Payment of the sale proceeds to the decree-holder.*[43]

6.2.1 Execution Trail: The Practice

When one peruses different literature, statutes being among them, there are two situations of execution of decrees when the government is involved. This may be execution by the government or against the government.

6.2.1.1 Execution against the Government.

Execution against the government is governed by section 16 of the GPA. For execution to be made to its fruition under the umbrela of the afore section the following should be heeded to.

First and foremost, there must be an application for certificate containing particulars of the order/decree.[44] Secondly, the Permanent Secretary to the Treasury or such other government accounting officer shall pay to the person entitled to/ his advocate the amount appearing in the certificate to be due to him together with any interest, lawfully due thereon.

43 This process is as well canvassed under O. XXI of the *Code*
44 Should however be noted that, in other circumstances the court may also direct that a separate certificate be issued with respect to the costs ordered to be paid to the applicant.

6.2.1.2 Execution by the Government

On the other hand, the government may be involved in those decrees where by it becomes the decree-holder out of which it is supposed to be executed. Despite the anomalies contained in the laws on execution, the same has been canvassed under the GPA. The provision is to the effect that;

...any order made in favour of the government against any person in any civil proceedings to which the government is a party, may only be enforced in the same manner as an order made in an action between private persons...[45]

When one goes through the nitty gritty of execution when the government is involved from the two precept, it is clear that the laws governing execution to private persons are to be applied in situations when the governemnet is involved as provided in the GPA as read together with the *Code*. The foregoing is the *lacunae* depicted in the Tanzanian jurisprudence, suggestingly, the process is to a greater extent left in the hands and discretion of the court among other officers involved in the execution trail.

7. Modes of Execution of Decrees

There are several modes of execution of decrees which are at the disposal of a decree holder.However, the choice of a certain mode of execution, mostly depends on the nature of respective decree and property subject of execution. Thus, it is the decree holder who is at liberty to choose a suitable mode of execution. Despite such liberty, the court of law should satisfy itself on the proposed mode of execution and the application for

45 Section 17 of the GPA

the same whether they are in conformity with the law to ensure that they are not intended to be an abuse of court process.[46]

Despite numerous modes of execution provided by the law, willy nilly a debtor is to follow a certain mode of execution. The most common modes are the following;

7.1 Attachment and Sale

Ordinarily in the case of a decree for the payment of money, such decree may be executed by attachment and sale[47] of the judgment –debtor's property, or by garnishee order.

7.2 Arrest, Seizure and Detention

A decree may as well be for a movable property. In case it is a decree for any specific movable property (e.g. a motor vehicle), it may be executed by seizure,[48] if practicable, of such movable property and by delivering it to the decree-holder, or by arrest and detention of the judgment debtor as a civil prisoner, or by attachment of his property.[49] or by all such means.[50] This ordinarily happens when a decree debtor fails to heed the judgment hence the creditor on application may wish to exercise his or her right to execute in such a mode he desires on failure to be paid the decretal sum as adjudged.[51]

It may as well happen that a decree is for specific performance of a contract or for an injuction, and the judgment-debtor has had time to obey it but has wilfully failed to

46 Chipeta, B.D, *Ibid*, p.248
47 For this mode to be exercised conditions stipulated under section 48 of the Code on the property liable to attachment and sale in execution ought to be met.
48 This mode is however subject to the conditions set under section 49 of the Code
49 This position is as well canvassed under section 42 (c), 44 and O. XXI, r. 28 of the Code
50 See as well Chipeta, B.D, *Ibid*, p. 248
51 *Princess Shabaha Company v. NIC Bank Tanzania Ltd* ,Case No. 94, HC of Tanzania at Dar es Salaam, (*Unreported*)

heed to. In such a circumstance, such decree may be executed by his detention as a civil prisoner[52]

8. Remedies Available Against Execution of a Decree

It is the cardinal rule that for every damage there must be a remedy available. Thus, it is common for a third party or judgment-debtor himself to object what was rendered by the court. It means he may decline a mode of execution , be it sale, attachment, detention or else. He may aver several grounds to that effect, common one being, that property or properties were not liable to attachment on some grounds or other.[53]

Common remedies available in *plethora* are discussed (though not in *extenso*) hereunder;

8.1 Resistance to Execution

Reisistance to execution is the remedy available on immovable property. This remedy may be employed when a purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or any other person on his behalf.[54] In such a circumstance, if there is no just cause for such obstruction, then the court may order for an arrest and detention of a judgment-debtor or any other person as the case may be[55] or order possession of the property to a rightful person.[56]

52 Conditions provided under section 46 of the Code need to be followed
53 This was evidenced in the case of *Kangaulu Mussa v Mounghati Mchodo* (1984) TLR 348
54 Solil Paul p.888
55 This position is well footed under section 55 of the Code.
56 The position is as well canvassed under O. XXI, r 95,96,97 of the Code

8.2 Appeals, Revision and Review

Apart from the afore mentioned (i.e Resistance to execution), there are other Post-Judgment remedies which invole Appeal, Revison and Review. These are discussed hereunder.

8.2.1 Appeals

The expression "appeal" has not been defined in the Code. According to a dictionary meaning,

" appeal" is the judicial examination of the decision by a higher court of the decision of an inferior court.[57]

However, appeal as a right is not a natural or inherent right.[58] It is well-settled that an appeal is a creature of statute and there is no right of appeal unless it is given clearly and in express terms by a statute.[59]

It should be noted that appeals may lie from preliminary decree or final decree. However, it is the position of the law that, if a party agrieved by a preliminary decree does not appeal from such decree, he will be precluded from disputing its correctness in any appeal which may be preferred from final appeal.[60] Under this remedy, it is a continuation of the procedings. In effect, the entire proceedings are before the appeallate authority and it has power to review the evidence subject to the statutory limitations.

8.2.2 Revision

The revisional jurisdiction of a court, in our case categorically the High Court, is a part and parcel of the appellate powers of the High Court. The power under the Code is as well

57 Wharton's *Law Lexicon* at p.72

58 Sometimes appeals are matters of discretion by the court, but conditions set for the same should not be onerous as it amount to unreasonable restrictions rendering the right almost illusory

59 This position may be deduced from the wording of section 70 of the Code

60 Section 71 of the Code

canvassed.[61] The powers are only exercised by the High Court when and where there is no appeal preferred. The powers may be so invoked as a remedy upon application, as the court is mandated with powers to interfere for the purpose of rectifying the error of the court below. However. the powers are not the same as appeal, whereas for appeal the High Court is having powers to rehear the case on points of law and fact unless the statute confering the right of appeal limits the rehearing in one way or the other.

8.2.3 Review

Section 78 of the Code gives a substantive right of review in certain circumstances and provides for procedure thereof. The provision relating to review constitutes an exception to the general rule that once judgment is signed and pronounced by the court it becomes *functus officio* (ceases to have control over the matter) and has no jurisdiction to alter it.[62] In legal parlance, review simply is a judicial re-examination of the case by the same court and by the same judge. In review, a judge or magistarte who has disposed of the matter reviews an earlier order passed by him in certain circumstamnces.

8.3 Objection to Attachment/Proceedings

It often happens that a third party or the judgment-debtor himself objects to the attachmnet of a particular property or properties, usually on the ground that such property is not liable to attachment usually on some ground or other. So a party need not file a fresh suit, rather to file for objection out of which proceedings are to follow trail.[63] In Tanzania, the provisions of the Code that support filing in court objections to the attachment of property are provided

61 Section 79 of the code

62 O. XXI, r. 3

63 *Kangaulu Mussa v Mpunghati Mchodo* (1984) TLR 348

under Order XXI of the Code.[64]

The application , should be supported with an affidavit, that must be filed in the court which passed the decree and be served to the parties.

In such a situation , it is the duty of the court to investigate such claim or objection. In doing so, the court will deal with the matter as if the objector (if a third party) was party to the suit. The objector will be asked to adduce evidence to show that the property is not subject to attachment, say on the ground that at the date of the attachment he had some interest in such property, or that, by operation of law, the property is not subject to attachment.[65]

After the objector or claimant has adduced evidence to that effect, the judgment-debtor and /or the decree-holder[66] may adduce evidence to refute the claimant's evidence.[67] Thereafter, the court will rule on the matter. It is the trite position of the law that, the magistrate who granted the order of attachemnt and sale ought to determine the objection proceedings.[68] The afore obligation was as well reiterated in the case of *Kwiga Masa v Samwel Mtubwata*.[69] The courts, however, may decline to entertian an objection or to investigate if its of the view that it was designedly or uncessarily delayed.[70]

64 Categorically O. XXI r. 57-62

65 O. XXI, r. 57 and 58

66 If the deceree holder intends to challenge the objection the law requires to file a counter affidavit.

67 *Nyanza Distributors Co. V Geita Generakl Stores* (1977) LRTn.2

68 High Court Rulling in the case of *Mrs. Nuru Mbaraka v Awadhi Abeid and Bahati Abeid Hiyala* (2002) TLR 188

69 (1989) TLR 103

70 *Ibid*, section 57 (1)

8.4 Garnishee orders/Proceedings

The Code in its recuring anomaly neither defines the word garnishee nor garnishee proceedings. The same problem is under the GPA. However, Garnishee proceeding is a proceeding by which the decree-holder seeks to reach money or property of the judgment-debtor in the hands of a third party (debtor of judgment-debtor).[71] By this process, an executing court may order a third party to the judgmnet-creditor (decree-holder) the debt from him to the judgment-debtor. The payment made by the garnishee pursuant to the order passed by the executing court is a valid discharge to him against his decree-holder.

Takwani, C.K (*supra*) at page 673 defines what is a garnishee proceeding. What lingers is what is a Garnishee?. Garnishee has been defined to mean a third party who is a debtor of judgment debtor,[72] or is a person who is liable to pay a debt to a judgment-debtor to deliver any movable property to him. Under the circumstance is the "Garnisher" (Garnishor*)* who is a judgment-creditor the one who initiates garnishee proceedings to reach judgment-debtors money or property held or possessed by third party (garnishee). "Garnishment" is a proceeding by which the decree-holder seeks to get the property of judgment-debtor. To facilitate the foregoing, there must be a garnishee proceeding which is a judicial proceeding in which a judgment-creditor (decree-holder) prays to executing court to direct third party who is a debtor of the judgment-debtor to pay the amount to garnisher (decree-holder). Garnishee order is an order passed by a court ordering a garnishee not to pay money to the judgment-debtor because the latter is indebted to the garnisher.[73]

71 *Takwani, C.K* p. 673

72 *Ibid* p. 673

73 *Halsbury's Laws of England* (4th Edn.) Vol.17 at p.325

9.0 Challenges involved in Execution Trail

As it was introduced in the beginning , execution is one of the pivotal part when it comes to dispensation of justice touching the bedrock of administartion of justice in Tanzania.

Execution as a process ought to be executed by professionals, having clear guidelines of procedures as a roadmap or benchmark when conducted. Failure to this may taint the image of the judiciary by abusing court process leading to judicial spat and conversely, when interests and rights of different stakeholders are involved.[74]

Thus, bad practice to the process may lead to loss of confidence in the country and ultimately paralayse the functioning of the economy during this particular time of the ***"Uchumi wa Viwanda"***.[75]

As introduced in the beginning, this article *inter alia* provides for challenges and suggestions which would suggest the need to do away with a prevalent trajectory when it comes to execution. Here under is an epitome of challenges that are gradually creeping in the judiciary in as far as execution of decrees is concerned.

Frivolous attachments or garnishee orders.

When it comes to execution, it is a trail that involves money, or valuable properties of million of shillings. Henceforth, without proper execution ethical standards, values and process may attract frivolous attachments. The foregoing has been a clarion call of objections towards the said attachments or garnishee orders as evidenced in several cases as challenged.[76] Thus, execution process should not be there as a matter of business as usual but be in accordance with the law and of value that would fit the purpose of execution. to the contrary in some occassions, the process has been marred with with some shortcomings involving the properties attached which are not even of value to meet the purpose thereof, this is facetious. This does not only curtail the rights of a judgment holder/creditor but as well taints the image of the court.

Unscrupulous undertakings

Due to prevalent and distinguishable position of the law under the Code, the Court of Appeal rules, Case laws and discretion that is left to the court towards execution process and applications that are available in abundance that are at courts' discretion , issuing of orders and pendency of appeal or notice of appeal, leave lots desired.

For example, the position of the law as provided under the Code on notice of appeal. When appeal is properly lodged under rule 83 and the other position under the court of appeal rules, Rule 11 (2) (b) which is to the effect that, in law the pendency of a notice of appeal or of an appeal does not constitute a stay of execution of a decree in the trial court, save only there is an order for stay of execution. A trial court is estopped from issuing an execution order, thus an appeal cannot desist a court from issuing an order for execution. The above among others have led to unscrupulous undertakings. Here under the circumstances are deliberated, *albeit* briefly,

74 For example banking and finance industry among other investors.

75 The ruling party Chama cha Mapinduzi (CCM) has demonstrated the fifth term government under the abled Presidency of his excellency the President,Hon: John Pombe Joseph Magufuli as it is for the "Industrialized Economy"

76 *NBC Ltd v. Lake Oil Ltd* , HC (T), at Dar es Salaam , Commercial Appeal No. 5/2014

There was a trite position of the law as well articulated in the case of *Ahamed Mbaraka v. Mwananchi Engineering Contracting Company Ltd.*[77] as an *obiter* on how to control unscrupulous move in the execution process during the pendency of an application for stay. In this case the court made an *obiter dictum* that,

The officer signing the order authorizing execution to be carried out must comply with the provisions of the law. He/she must ensure that before signing the documents authorising execution to be carried out, there is either no appeal pending or none of the parties has initiatated the appeal process, there is negligence by the party in making a following"[78]

Despite the move (above) from the highest court in the hierachy and the presence of the law providing for roadmap, sometimes things may always not look as they seem to be. It is all sometimes chalk and cheese particularly during the enforcement process through the registrar and/or other officers in the registry.[79]

The foregoing means to say, under the Code there are circumstances that the court may take notice as a stay by exercising its dicretion, contrary to this court should not desist from issuing the order of execution this position contary to that under the court of appeal rules may lead to unscrupulous move in execution porocess. This discretion vested to the court under the Code contrary to the Court of Appeal Rules, Rule 11 (2) may result to unscupulous move, frivolous attachments or the discretion not to be wisely exercised that may result to a failure for decree creditor to enjoy his or her rights.

Encouraging Abuse of court process process and due process of the law in casse management

As envisaged in the discussions *supra*, it is quite evident that there are occassions when and where there are numerous leeways for applications, as observed for example, applications to resistance, objection proceedings , appeals and many others of which may cause stay of execution process. This may lead to abusing the due process of the law and case management which conversely contravene with the one of the pillars as clearly provided in the *Five Year Strategic Plan (JSP 2016/17 -2019/20) of the Judiciary of Tanzania.*[80]

Despite the crystal postion of the law that a notice of appeal neither an appeal doesn't act as an automatic stay of execution[81], there are circumstances that the court is having discretion whereas as may grant such applications.[82] The law allows appeal to act as stay of execution unless for sufficient cause shown. The question that may linger what are these sufficient causes? What is a yardstick measuring the weight of one sufficient cause or the other or from another? or does it depend on the the due

77 CA (T) Civ. Appeal No. 229/2014

78 This *dictum* though is directive, is not realistic and may as a result refrain the rightful decree creditor the right to enjoy the fruits of the judgment and the decretal sum, and furthermore the position of the case is not tantamount to appeal lodged under rule 83 of the Code. From the precept it is evident that the unscrupulous moves are rampant , and this may be as a result of lack of coordination, or not having proper data base or mechanism of having a judge or executing officer informed of a stage or stages of the case at hand, whether there is an appeal or not, etc.

79 This entails for example appointment of court brokers and signing of various forms to enable the appointed court broker to carry execution process, of which this stage is essentially administrative which needs good supervision by the court and compliance with the law by the officers concerned.

80 One of the pillars of the Plan is Access to Justice and Expeditiousness, which targets at creating systems and processes that accelerate disposal of cases and enhance access to justice, of which corollary to this, effective case management becomes central to the administration of justice.

81 The position is aptly inked under O. XXXIX, r. 5(1), on the other hand when an appeal is properly lodged in accordance to rule 83

82 Mruma , J in *Jawinga Co. Ltd v. Aristepro Investment Co. Ltd*, the HC of Tanzania at Dar es Salaam, pg. 4

indulgence of the chair or one seated?[83] all these questions need to be addressed for justice to be done among other far fetched applications.[84]

Endless litigations/Multiplicity litigation

It is a public policy that ***interest reipublicae ut sit finis litium*** which is point blank and a cardinal principle in civil litigations. The latin *maxim* means, is in the interest of society /public as a whole, litigation must come to an end. [85] The execution process and the trajectory that it takes tend to contravene and cripple the whole process of administration of justice henceforth contravening the *maxim*. In execution trail, there are numerous applications that are given, a leeway of which failure to have a proper mechanism to their guidance lead to endeless litigations. This is evident categorically on objection proceedings, if the anomaly or situation is not ameliorated, there will be evidenced an exponential rise of unnnecessary applications.

Despite clear wording under the code, in particular O. XXI, rs. 57-62, the provisions have been a stagnant and an inroad towards a decree creditor to enjoy the fruits of the litigation. This is not an author's perspective, rather also the stand of other stakeholders involved, the government among others. Despite the jurisprudential spirit of the provisions in relation to objection proceedings is to expedite such proceedings and to prevent abuse of court process, which may occur given the high-stakes, intense and faced-paced nature of proceedings. The leeways found in the provisions , for example , that any person who, on at the date of attachment , had some interest in, or was possessed of, the property attached , may file an application in court objecting to the attachment becomes an inroad towards achieving the spirit of the provisions. It is apparent that when there are multi million shillings properties involved numerous objection proceedings have been observed and the whole process taint and seen as acrimonious to decree creditors despite the jurisprudential value of the provisions, the same need be revisited.[86] As the properties whose sale has been halted by the proceedings may take time for the objetions to be investigated and be determined.[87] And though the the objection orders are not appelable, yet the agrieved party , as stipulated under O, XXI, r. 62 of the code may sue for the title of the property he is objecting by instituting as suit to recover the wrongly seized property while bearing in mind that the winful objector is already having propery objected while won at hand with or without costs. All these among other many applications under the Tanzanian laws ruin the cardinal principle.

Corrupt practices

Execution process is two fold, first facet ends with a judge upon issuance of the execution order, and the other one (second limb) is the enforcement of the order issued, this is ordinarily done in the registry by the

83 The phenomenon leaves lots desired as once put in the case of *Ahamed Mbaraka vs Mwananchi Engineering Contracting Copmany Ltd (supra)*

84 It is too bad when the court so exercises its discretion without proper guidelines, in many occassions there may not be an application for execution rather pendency of an appeal suit, and yet the court grants execution. The position as was envisaged in the case *of Jawinga Co. Ltd v. Aristepro Inv. Co. Ltd* , HC (T), Commercial Divison, Commercial case No. 103/2012

85 Or on the other hand it may be said that, it is to the interest of the state that there be a limit to litigation.

86 Despite the fact that court orders in objection proceedings are conclusive and are not appealable per *Thomas Joseph Kimaro v. Apaisaria Martin Carl Mkumbo and Oscar Mushi* (2002) TLR 369, the whole process is cumbersome involving numerous objectors that are called upon to tender evidence as to their claims in tandem with O. XXI, r. 58 of the Code

87 See The Citizen , February 23, 2019

registrar or any other designated officer in the registry.[88] This execution process is administrative in nature.[89] The second stage of execution if not exercised properly may tarnish the image of the judiciary or bring the same to disrepute , this stage among other things involves, appointment of court brokers and signing of different forms that are to facilitate execution process. The process has been lamented by stakeholders as the one fouls are played, invloving frivolous attachments that may lead to unfounded, baseless and flimpys applications to the courts thus crippling the execution process. Is the same stage that the court of appeal of Tanzania echoed remarkable, plausible sentiments and cautioned those involved in the case of *Ahamed Mbaraka*[90] *(supra),* as ordinarily entails fouls, without mincing , corrupt practices.

Incomprehensive legal framework governing execution

Deliberated by the submission above in almost each and every part , the laws governing execution of decrees when the gopvernment is involved, one thing is evident. There are two laws of great significance, the Civil Procedure Code and the Government Proceedings Act, but the two are not devoid of shortcomings when it comes to the government. We have seen the laws are lacking comprehensive procedures governing execution process by or against the government. The laws merely provide that the process as it is with private persons need to be followed. This *lacunae* is recurring in the laws, such an anomaly need be rectified towards having unwrinkled execution process.

10. Conclussion and Recommendations

Vulganized from the analysis and discussion above there are issues which are pertinent to the administration of justice if not dealt with squarely and without any ado, judicial spat and lack of confidence to the judiciary will remain to be prevalent. And conversely, the realisation of the Five-Year Strtegic Plan (JSP 2016/17-2019/20) will remain to be a myth. Herein below are some of the recommendations that need be taken aboard to smoothern execution process when the government is involved.

Training /Tailor made courses to personnel

It is quite evident that there are mulpractices that are seen during execution process. This is a result of lack of sufficient knowledge on execution, negligence and intentional acts or omissions, for example, failure to follow 14 days notice as per Rule 4 of the Code. As envisaged, execution is a process that entails at least two steps, one step is of judicial function and the other one is administrative (enforcement of execution). In the latter stage, the judicial officers and executing officers (court brokers) need to be imparted with knowledge on execution process. Credit is to the the Institute of Judicial Administration Lushoto[91] that as of now conducts courses to court brokers and process servers on these aspects. It is noteworthy that, much education needs to be imparted to these stakeholders. Meanwhile,the Court Brokers and Process Servers (Appointment, Renumeration and

88 See Jawinga's case at pg. 6 *(supra)*

89 *Ibid*

90 *Ibid*, p. 7

91 The Institute now offers to the court brokers and process servers fundamental requirement of a certificate of competence in the duties of the brokers and process servers.

Disciplinary) Rules, 2017[92] need to be more stringent as to the actions to be taken to those found indisciplined. This among other trainings or courses will forge and create common understanding amongst judicial officers and executing personnel.

Overhauling the laws governing execution

From the discussions above, it is clear that the laws governing execution process are lacking, ranging from the Civil Procedure Code, to the Government Proceedings Act. Prime areas that need amendments or rather lacking have been identified. Is high time the Attorney General Office comes with a proposal to amend the laws so that they may be accomodative of the lacking situations and be in consonance to the changing times which have made execution process onerous amounting to the rights of the creditors seen illusory.

On this proposal if at all made one of the key areas to be looked into on execution is on unnecesasary applications, and objections which ultimately prolong litigations negating the maxim ***interest reipublicae ut sit finis litium.***

92 GN. 363/2017

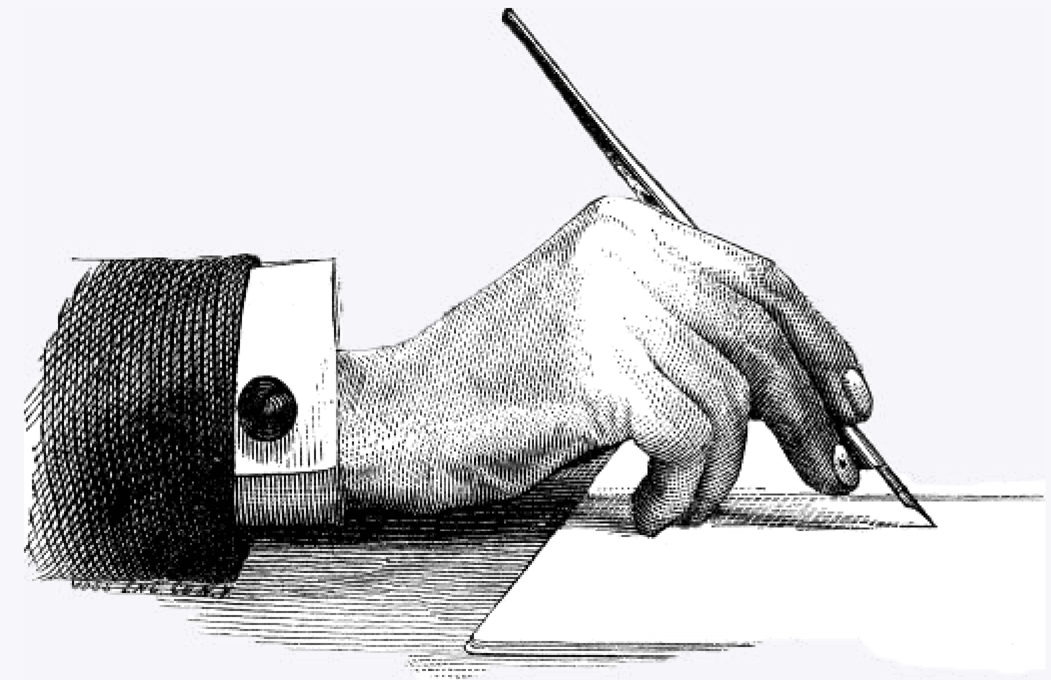
Database , networking and involvement

The article outrightly re-qualify the statement found in the benchbook for judges which says, *...It is important that a judge should know fully and precisely how far his decree is satisfied...*[93] The foregoing statement need to be re-qualified so that the court process may not be abused, to avoid malpractices of executing officers as well to do away with cases or applications which purely arise out of negligence. Thus there is a need for this statement to go further to include not

only judges, but all stakeholders involved in execution trail. This may be achieved by having an established database of the decrees in execution, executed decrees and their enforcement as well as for the officers to have a network that would share pending cases[94], this is to avoid unscrupulous moves as cautioned in the case of *Ahamed (supra).*

93 A Bench book for Judges in Tanzania, at p. 42

94 This may be streamlined through improvements to be made to the Cases Information Management System *(CIMS)*



INSTITUTE OF JUDICIAL ADMINISTRATION LUSHOTO JOURNAL POLICY

Introduction

This policy may be cited as the *IJA Journal Policy*.

1.0 Name and Publication of the Journal

1.1 The name of the Journal shall be the Institute of Judicial Administration Lushoto Journal and its mode of citation shall be *IJA-JOURNAL*.

1.2 The Journal shall publish quality scholarly articles from Judicial Officers, academics, students, legal practitioners and other professionals in interdisciplinary works of relevance to law and practice in Tanzania.

1.3 The Journal shall be published in print and electronic form (online).

1.4 The Journal shall be published twice in a year.

2.0 Management and Administration of the Journal

2.1 The Administration and Management of the Journal shall be vested in the Editorial Board.

2.2 The Editorial Board shall comprise of members from IJA, The Judiciary of Tanzania, external members from institutions of higher learning and legal practitioners.

2.3 The Editorial Board shall comprise of Chief Editor and other members who shall not exceed eight.

2.4 The Chief Editor and other members of the Editorial Board shall be appointed by the IJA Deputy Rector – Academic, Research and Consultancy after consultation with the Principal.

2.5 There shall be an Advisory Board of not more than six members who shall be appointed by the Editorial Board.

2.6 The tenure of the Editorial Board and the Advisory Board members shall be three years subject to renewal for another term of three years. No member shall be allowed to serve more than three terms. However, the tenure of an individual member may be shortened or terminated due to failure to perform his/her duties, resignation or any other good cause.

2.7 The Chief Editor shall be responsible for the day-to-day running of the Journal.

2.8 Each member of the Board shall be entitled to a copy of every issue of the Journal and to have online access to its electronic copy. However, it shall be the discretion of the Principal to determine and vary this entitlement.

2.9 The Editorial Board shall be responsible for:-

i. Overseeing the administration of the Journal,

ii. Receiving and approving management and production reports of the Journal submitted by the Chief Editor,

iii. Advising on matters pertaining to quality improvement and circulation of the Journal,

iv. Determining and directing all forms of subscriptions to the Journal.

2.10 The Chief Editor shall be responsible for distribution and circulation of the Journal.

3.0 Editorial Policy

3.1 The Journal shall address a wide range of issues on law and other related subjects.

3.2 A submission will be considered for publication only on the understanding that it has not been published elsewhere in whole, in part, or in substance: and above all it is submitted exclusively to the *IJA JOURNAL*.

3.3 Any form of plagiarism detected in any manuscript will disqualify a submission from further consideration.

3.4. The Journal invites authors to submit manuscript based on the following:

a) Comment on articles

Manuscripts for comment, articles analyzing and commenting on recent cases, legislation and other topical matters must range between 1500 and 2500 words. No footnote shall be allowed in comment articles. References, case citation, legislation and relevant literature should appear in brackets in the main text. All comment on articles should be accompanied by a short abstract not exceeding 50 words. The comment must bear the following headings;

- Title (descriptive)
- Name/Citation of relevant case/ legislation/material
- Legal context
- Facts
- Analysis
- Practical significance

b) Full-length articles

Manuscripts for full-length articles must range between 5000 and 10,000 words (including footnotes). Each submission must be accompanied by an abstract of between 100-200 words indicating briefly the overall argument of the author. Three key words must be written immediately below the abstract and footnotes must be kept to the minimum.

c) Book Review

Book reviews may range between 1500 to 2000 words although review articles could be much longer. The title of any book review must take the following format;

Author/Editor Name, Book Title, Publisher, Year of Publication, ISBN, Number of Pages, Price.

Book reviews should be clear and objective and particularly address these points;

- The intended audience of the book
- The main argument and objective of the book
- The soundness of the argument and the research methods used
- The strength and weakness of the book as a scholarly piece of work.

3.5 While authors shall retain the copyright in their work, by publishing with IJA JOURNAL authors automatically grants IJA JOURNAL an exclusive license to publish their work in print and in electronic form and distribute it.

4.0 Submission guidelines

4.1 All manuscripts must be word-processed, double spaced, with wide margins written using Times New Roman style in an A-4 format.

For fonts in the main body text, use font size 12 and in the footnotes use font size 10.5.

4.2 The following rules of citation shall be applicable to submissions;

- Books should be cited starting with author's surname followed by initials. The title of a book should follow, edition, with publisher, place of publication, and year of publication, finalized by page number. Example: Peter C. M., Human Rights in Tanzania: Selected Cases and Materials, Rudiiger Verlag, Koln, 1997, p.11.

- A chapter in an edited book should be cited in the following format: Author's name followed by title of chapter in italics then the names of editor (s), title of the book, publisher, place and year of publication followed by page of chapter. Example: Othman, H.H., *The State of Constitutionalism in Tanzania* 2008 in Khot Chilomba Kamanga, Constitutionalism in East Africa 2008, Fountain Publishers, Kampala, 2010, p. 99-137, at p. 116.

- A Journal article should be cited starting with the name of the author as in books, followed by article title in italics, then journal's name, year of publication, volume and issue number, followed by page numbers of journal covering the article. Example: Makulilo A.B, *Likelihood of Confusion: what is the yardstick? Trademark jurisprudence in Tanzania,* Journal of Intellectual Property Law and Practice, 2012, Vol.7, No. 5, pp. 350-357.

- The use of 'op cit', 'loc cit', or other such abbreviations, other than 'ibid' (next to the work cited immediately above) are not acceptable.
- Cross-references should be done in either of the following manner 'Makulilo (No. 2 above) p. 14' or Makulilo (2012) p. 14.
- Citation of internet-based materials should always indicate the name of the author, tittle of the work, link or webpage and the date when it was accessed.

4.3 Quotation marks should always be avoided Quotation from any source should be in italics, indented both side with 1.5 cm. Longer quotations should be avoided, where necessary authors should paraphrase them.

4.4 Name (s) of author (s), academic tile and/or professional qualifications, main appointments, and email addresses must be footnoted at the first page of the manuscript.

4.5 Information regarding contribution to the Journal shall appear on the first pages of the journal.

4.6 All manuscripts shall first be reviewed. In order to ensure a fair review, authors shall be advised to avoid information within the text that discloses their identity.

4.7 All manuscripts shall further be subjected to editorial review for style, arrangement, literary quality and scholarly contents. The Editorial Board serves the right to reject, edit or shorten any submission approved for publication.

4.8 A decision on every manuscript shall be made in a timely manner and communicated to authors.

4.9 No two manuscripts of the same author shall be published in one journal issues. However, a co-authored manuscript may be published alongside a sole authored manuscript.

4.10 Upon publication of their submission, authors will receive one hard copy of the issue of the Journal where their submission appears and/or be allowed to access their published articles electronically.

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