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THE SENTENCING PROCESS TO THE CONVICTED JUVENILE OFFENDER: THE JUDICIAL OFFICERS NEED ATTENTION

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A B S T R A C T

The child in some occasion perpetrates criminal offences. Such child is taken to court to answer the accusation. In case the court convicts him/her enters the sentence. However, before imposition of the sentence the court has responsibility to find out the best theory of punishment. This is with a view of rehabilitating the offender. However, it has been noted that, courts overlook this condition and imposes sentences which deteriorate the welfare of the child by disregarding the theories of punishment and important factors required to be considered before the imposition of the sentence. This article discusses the theories of punishment and the important factors required to be considered by the court before the imposition of the sentence to the convicted juvenile offender. This is with a view of calling attention to the judicial officers to utilise such theories and factors in the course of imposition of sentences to the juvenile for the purpose of rehabilitation process.

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INTRODUCTION

The convicted juvenile offender needs treatment that takes into account his immaturity by protecting him from degrading punishments. The court imposes correctional measures to the juvenile immediately after the declaration of the conviction has been founded. Joseph (1995) puts forward that the rationale for calling the juvenile offender to the correctional sentence is to rehabilitate and not to punish the offender. Zehr (2005:17) provides that:

> "Before pronouncing sentence, however, the judge methodologically enumerated the usual goals of sentences: the need for retribution, the need to isolate offenders from society, the need to rehabilitate, the need to deter. He noted the need for offenders to be held accountable for their actions."

In sentencing the offender the court considers the need for retribution, deterrence, prevention, and rehabilitation to the offender. The Legal and Human Rights Centre (2003) is of the view that non-custodial sentences should rehabilitate the offender rather than punishing him through the imposition of custodial sentences. The correction process begins immediately after the court has convicted the offender where the sentencing process begins by determining the best theory of punishment. Safari (2010) says that the prosecution and the defence sides are given an opportunity to provide the court with relevant information that will enable the court to impose the pertinent sentence. Normally, this stage is known as the mitigation stage where a number of mitigation information is given to the court in order to impose an appropriate sentence that encourages the rehabilitative effect to the juvenile. The court scrutinizes such information with a view of imposing the right sentence using the best theory of punishment and abiding to the relevant factors through which promotes the rehabilitation process.

THEORIES FOR SANCTIONING CONVICTED JUVENILE OFFENDERS

The process of sanctioning the juvenile offender for misbehaviour committed is not new in the world and Tanzania in particular. Paranjape (2001) says that misbehaviour and punishment are just as old as the society itself, and they are conducted by every society in the world. Thus, criminal law takes its role to take into sanctions the culprits through the theories of deterrent, preventive, reformative, and retributive. Therefore, the main intention of punishment is generally deterrent, retributive, preventive, and reformative means to the juvenile offender. The English case of *R. v. Sergeant* ((1974) 118 SJ 753) provides the rationale for sentencing to include retribution against the offender, preventing the commission of future crimes, and providing the rehabilitation against the

offender so as he should not commit crimes in the future, especially when the juvenile reaches the majority age.

In most of the countries to date there are laws set to stipulate the rights of the child's welfare and make provisions with respect to handling a juvenile when he is in conflict with the law. Tanzania for instance, has the Law of the Child Act, 2009. This law aims at maintaining law and order in the society by making sure that the child is protected. When the juvenile has committed an offence in the society, people normally take the child to the police who later hand him to the court for adjudication. The society does this to show that it disapproves juvenile offences. According to Mushanga (1998) this is done to restore the harmony that has been destroyed by the action of the child. When the child is found guilty of the offence charged, the process ends by the court imposing the sentence against the child. Srivastava (2005: 94) states that:

> "The object of punishment is the prevention of crime, and every punishment is intended to have double effect, viz., to prevent the person who has committed a crime from repeating the act or omission, and to prevent other members of the community from committing similar crimes. The object of punishment being preventive, the penal policy of a State should be to protect the society."

The imposition of sentences to the convicted juvenile offender is always done with a view of stopping the perpetration of acts classified as crimes because they are regarded as damaging the society. The sentences imposed also aim at threatening the juvenile so that cannot commit other such offences. The imposition of sentences to juveniles is believed to be one of the devices to which the society resorts to harmony or to repair the damage done to the society. The court normally imposes sentences for protecting the society from misbehaviours and undesirable elements. Normally, this is done through punishing those who have offended the society, deterring potential offenders, preventing the actual offenders from committing further offences, and reforming them to an extent of becoming law-abiding citizens. The society dislikes child misbehaviour, so society members encourage the police and the court to impose harsh punishments to the juvenile offender.

In consideration of the needs for the welfare development of the child, the child has to be protected by the State, community, parents, and other relatives. The child has to be handled with dignity when he is in conflict with the law to the extent that the sentences to be imposed by the court motivate his development. However, the Law of the Child Act does not provide guidance or doctrines that the court has to abide to while imposing punishment to juvenile offenders. In the case of *Thomas Mjengi*

v. R.((1992) TLR 157)Mwalusanya J., (as he then was) while giving the rationale of punishment he observed:

> "Punishment for criminal offences is generally viewed as serving one or more of three main purposes: (a) deterrence, both of the criminal himself and also of society at large (b) the rehabilitation of the criminal; and (c) restraint-the isolation of the hardened or dangerous criminal from society. ... evil men deserve to be punished, which notion is sometimes called retribution."

The imposition of punishment by the court aims at deterring the offender himself and the society at large from committing criminal offences, rehabilitating the offender as he should not further commit offences in the society, and restraining hardened or dangerous criminals in order to incapacitate them from committing offences. These objectives constitute the ultimate justification for the court to impose sentences to juvenile offenders. According to Paranjape (2001), there are four theories of punishment that guide the court in the imposition of punishments. These theories are retribution, deterrence, prevention, and reformation as explained below.

Retribution Theory

Maguire (2002) argues that the theory of retribution is the most ancient method of treating offenders. This method is related to the primitive form that punishes practically all crimes with extremely harsh sanctions. In primitive society, victims of crimes were allowed to have revenge against wrongdoers. Srivastava (2005:95) says that retribution "is based on the primitive nature of vengeance against the wrongdoer. The aim was to assuage the angry sentiments of the victim and the society." Therefore, Dignan (2005) asserts that, the retributive theory introduced the method of harmonising the state of anger of the society between the wrong doer and the affected part by punishing the offender in relation to the offence he has committed. Punishment was a way of paying debts resulting from breaking norms and the laws of the society. In those ages where the child committed an offence, the revenge principles were used against the child like adults, and in turn, they became an abuse of child rights.

The biblical principle of "an eye for an eye," "a tooth for a tooth," "a nail for a nail," was the basis of criminal administration and punishment through this theory. In the administration of punishment to the offender through this theory, in most cases the punishment inflicted on the offender proved greater than it was done to the victim. Commenting on retribution theory, Maguire (2002) asserts that there was no proportionality between the injury inflicted on the victim and the injury inflicted on the offender because it was regarded as revengeful, which was seen as contrary to Christian beliefs and practices, hence was considered quite immoral.

Gradually therefore, there developed a shift from this most primitive form of punishment to equal means of punishment between the offender and the victim. Hence, the doctrine of retribution for crime became popular because the slogan was to make the punishment fit the crime. The doctrine required that no punishment should go beyond that limit, no more than "eye for eye" and no more that "a tooth for tooth." In other words, punishment should be in proportion to the injury caused by the accused.

This retributive theory is based on considering the *actus reus* of the offence and does not put into the account the motive of committing such offence. It considers only the extent of the injury caused and not the goals for committing the offence. Retributive punishment gratifies the instinct for revenge and retaliation. In modern times, the idea of private revenge has been forsaken. Instead, the State has come forward to effect revenge in place of private individuals. A critic of retribution theory points out that punishment per-se is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment to a juvenile offender is an evil and it can be justified only when it yields better results. On commending retributive theory as a mode of guidance for the imposition of punishment, Srivastava (2005:95) states that:

> "In modern times it has lost much of its efficacy. The Supreme Court (of India) has recently laid down that an eye for an eye approach is neither proper nor desirable."

In light of the above quotation, despite its popularity in the ancient world, retributive theory is todate considered a barbaric method of punishment. Tanzania like other States discourages the use of this theory as a model for imposition of punishment to the juvenile offender. According to Bhoke (2008) retribution theory is currently used to direct the court on the imposition of the death penalty. The theory also applies in the imposition of long-term imprisonment sentences to separate the offender from the society. Mwalusanya J., challenging the use of retribution theory in the imposition of the 30 years imprisonment sentence in the case of *Thomas Mjengi v. R (*(1992) TLR 157) provided that:

> "It appears the government on enacting those severe sentences had in mind only retribution and restraint of the offenders. But it should be remembered that restraint of offenders is reserved for recidivists only (hardened and dangerous criminals). And retribution as a sentencing policy is old fashioned and uncivilised as is espouses sadism?"

To date, the State is highly empowered under the law to protect its people from all actions relating to criminal dealings. The laws have been enacted to penalise offenders. These laws provide long imprisonment and capital sentences. The Law of the Child Act, despite the fact that it seems

to prohibit the imposition of custodial sentences, it still enhances imprisonment against the juvenile offender. This shows the law is proactive of retribution theory as a mode of punishment. Imprisonment sentences have been counted to be enacted basing on retribution theory which may be imposed against hardened and dangerous criminals. Taking this into account, it is obvious that this theory is not appropriate as it justifies punishment to juvenile offenders. Juveniles should not be considered habitual criminals at such age. Reacting to the use of retribution theory in imposing the death penalty, Mwalusanya J., (as he then was) in the case of *R. v. Mbushuu Alias Dominic Mnyaroje and Kalai Sangula (*(1994) TLR. 146) remarked:

> "Then we have the argument of retribution in favour of the Republic. This argument runs along those lines. As many people believe that murderers deserve to die, the law must satisfy the public's thirst for vengeance otherwise the law will fall into disrepute... Retribution has no place in a civilized society, and negates the modern concepts of penology.

The court in this case went on insisting that retribution theory by itself is inhuman. The concept of modern penology does not advocate revenge but rehabilitation. This calls to mind the fact that the child who is immature in terms of age, mental, physical and social state of affairs has the right to protection and guidance for his development. This makes it clear that retributive based on revenge is not a good guide for the imposition of punishment to the juvenile offender.

Deterrent Theory

This theory is based on discouraging people from committing crime in the society. The use of this theory creates fear to all members of the society including the criminals themselves that in case the offence has been committed the offender will suffer. In other words, the object of punishment through this theory is not only to prevent the wrongdoer from doing wrongs at the second time, but also to make him an example to other persons with criminal behaviour. That is to say, the purpose of criminal law through this theory is to discourage criminal behaviour by making the evildoer an example to warn criminal minds in the entire society. In the case of *Tabu Fikwa v. R.* ((1988) TLR 48) Samatta J., (as he then was) provided that:

> "In determining or occasion sentence the court is perfectly entitled to take into account the necessity of deterring other persons from perpetrating similar offences, but that factor is not the sole or predominant basis for assessment of sentence."

The theory of deterrence is deemed by the court immediately after convicting the offender. After convicting an offender, the court takes mitigation factors and considers the best sentence to impose against the offender through application of an appropriate theory of punishment, including deterrence theory. Persons who advocate for deterrent punishment do so because of its social utility as the infliction of pain upon those convicted of crime deters others from committing crime. In their view, deterrence theory has great value for that reason. Buying this view, in the case of *Ramadhani Mwenda v. R.(*(1989) TLR 3) Chipeta J., (as he then was) said that "a deterrent sentence" was called for "to be a lesson to the accused person and other people." Therefore, the imposition of sentences through deterrence theory aims at making the society fear committing offences upon remembering the punishment imposed against previous offenders.

Deterrence theory presupposes the imposition of severe penalties on offenders with a view to deterring them from committing crimes. This is executed by providing adequate penalties and exemplary punishments to offenders in order to keep them away from criminality. For this reason, some of the society members believe that the harsher the penalty or the more horrid it is, the more effective it becomes, which is not true. Deterrence theory was the basis of punishment in England in the medieval period, and consequently it became severe and inhuman and it was even inflicted upon minor offences. For instance, culprits of ordinary theft crimes were subjected to severe punishment of death by stoning and whipping which in case of juveniles is a violation of child rights.

The theory of deterrence has been criticised on the ground that it has proved to be not an effective method in checking and combating crimes. Deterrence encourages the imposition of unnecessary and excessive punishment that tends to defeat its own purpose. This makes the members of the public sympathetic with offenders suffering from the cruel and inhuman punishment imposed by the court. Deterrent punishments are likely to harden juvenile culprits instead of reforming their minds. Hardened criminals are not afraid of imprisonment. In *Tabu Fikwa* ((1988) TLR 57) Samatta J., (as he then was) stated that:

> "Deterrence is a well-recognised purpose of punishment, but imprisonment has never been regarded by judges, lawyers, or experts in penology as being the only punishment which is appropriate for that purpose. The object of punishment to hurt the offender (the justness of the object is, understandably, a subject matter of serious controversy) can fairly often be met by a substantial fine."

In its classical form, the potential harshness of the theory was alleviated by the principle that pain was a social evil. In punishment, the least pain was to be applied which was consistent with the objective of deterrence. Since man was viewed as a calculating animal, the punishment would have to be only a slighter greater pain, that the prospective enjoyment of the fruits of the crime was an anticipated pleasure which may be called the objective of general deterrence.

Preventive Theory

Preventive theory is also called *disablement theory*. The objective of imposing a sentence to a convicted offender through this theory is to prevent or to disable the criminal from committing an offence. This theory advocates the imposition of the death penalty or life imprisonment. The imposition of these penalties does not aim at preventing other incidences of criminal behaviour in the society but the convict himself.

The theory is based on the proposition that punishment does not retaliate but it prevents. It presupposes that the imposition of punishment simply arises from social necessities. In punishing a criminal, the community protects itself against anti-social acts which endanger social orders in general, or person or property of its members.

Preventive theory emphasises on the imposition of imprisonment and death penalties. By sending the criminal to jail, he is prevented from committing crimes in the society. Even the death penalty serves the same purpose of disabling the offender from offending again in the future. As an offshoot of preventive view regarding crime and criminals, the development of prison is the best mode of punishment because it serves as an effective deterrent as well. This theory provides useful preventive measures of crime since offenders are physically kept away from the society.

However, critics of preventive theory point out that preventive punishment has the undesirable effect of hardening first offenders when imprisonment is executed by placing them with hardened criminals. In addition, the theory is criticised on the ground that persons who are criminals can be prevented from committing crimes through reformation method rather than preventive method. The reformative method can make the person who initially was criminal to a non-criminal person. Chandra(2000) explains that the infliction of harsh punishments like death penalty and long imprisonment sentences is against human civilisation of the modern society. Hence, preventive theory is not a good guide to the imposition of sentences against a convicted juvenile.

Reformative Theory

Reformative theory aims at rehabilitating the criminal offender. The crime, which arose due to the existence of anti-social factors in the society, is considered a disease to the society. In the process of curing this disease, the mental medicine has to be administered to the offender. The imposition of punishment is avoided because it does not cure this disease. Therefore, in order to restrict opportunities for commission of crimes, the State has to design a measure to rehabilitate the criminal rather than imposing hard sentences against the offender.

Reformation theory advocates the imposition of sentences with rehabilitative effect. Some people believe that reformation is the best method of restricting the commission of crime. The argument goes that, if the criminal and his crime are the product of his society, then he cannot significantly be deterred by threat of punishment. Thus, the principal objective of the criminal sanction is to reform the criminal. Accordingly, the battle cry of the modern reform has been to make the punishment fit to the criminal, and not the crime. In the case of *Francis Chilema v. R ((*[1968] HCD 510) where the accused had pleaded guilty the court said *inter alia*:

> "It is generally, if not universally, recognised that an accused pleading guilty to an offence with which he is charged qualifies him for the exercise of mercy from the court. The reason is, I think obvious, in that one of the main objects of punishment is the reformation of the offender. Contrition is the first step toward reformation, and a confession of a crime, as opposed to brasening it out, is an indication of contrition."

Therefore, when the child is convicted he has to be provided with an opportunity for reformation. Thus, he needs exposure to education programmes such as carpentry, tailoring, gardening, dairy farming, and all sorts of time-consuming but productive occupations. Srivastava (2005:96) when commending the process of exposing convicts to educational programmes as a means of providing skills to convicts with a view of prohibiting them from committing criminal offences, says:

> "Much truth lies in the statement that to open schools is to close a prison. If persons of criminal character are so educated and trained that they are made competent to carryon well in society, will be little or no possibility at all of any crime being committed by them."

In line with the above argument, training in various activities assists the convict to refrain from criminality as a means of life. The daily bread

should come from the fruits of his work and not from the fruits of his criminality. Therefore, in achieving this, the convict should be provided with the curative measures and not killing, imprisoning or torturing him. This is because no person is expected to be reformed by being killed or imprisoned. The reformation process requires making the person fit in terms of physical, mental, social, and providing to him with the best skills for his life. In modern times, much attention is given with emphasis to reformation of criminals, especially young offenders in whose case this theory has very successfully been applied.

Critics of this theory say that if criminals are sent to prison with a view of transforming them into good citizens, a prison will no longer be a prison but a dwelling house. It is argued that the deterrence motive cannot be abandoned altogether in favour of the reformative approach since the permanent influence of criminal law contributes largely to the maintenance of the moral and social habit that prevent offenders from committing crimes. This also deters prospective criminals from committing anti-social acts. Srivastava (2005) says that the reformative theory has failed to reform habitual criminals and professionals. The reformation method through education programmes has not been able to reform the professional person. This is because such a criminal already has education and has the professional skills and the work to do but still commits crimes sometimes by using his profession. Education programmes as the means of reformation method does not apply to such kind of convicts, and this necessitates the application of other theories of punishments.

The Theory of Punishment for a Juvenile Offender

This part has discussed different theories of punishment. Retribution theory ACCORDING TO Srivastava (2005:95)"is based on primitive nature of vengeance against the wrongdoer. The aim was to assuage the angry sentiments of the victim and the society." Deterrent theory seeks to create fear in the mind of others by providing adequate penalty and exemplary punishment to offenders, which should keep them away from criminality. The fear created to the society rescinds the members of the society from committing criminal offences. Preventive theory aims at preventing or disabling the criminal from committing offences. This theory advocates for the imposition of the death penalty or long life imprisonment sentences. Reformation theory advocates for the imposition of sentences with rehabilitative effects. This theory motivates the imposition of non-custodial sentences accompanied with the education programmes.

The court uses these theories in sentencing adult convicts. In sentencing adult criminals, the magistrates interviewed said that there is no single theory that is comprehensive and satisfactory on its own to fulfill the standards of punishment. In relation to this, the court needs to apply a

combination of all these theories. The combination of these theories in the process of determination of sentences, according to Srivastava (2005), enables the court to impose the right sentence to an offender, taking into account the proportion of the gravity of the offence committed, nature of the offence and the needs of the society.

The child is affected due to unique factors of socio-economic, cultural, traditional, developmental circumstances, and exploitation. Thus, the child needs legal protection in conditions of freedom, dignity, and security. All these conditions help the child to grow up in a family environment with happiness, love, and understanding of child rights, and legal protection. This motivates child protection in the systems of administration of juvenile justice. In case the court has convicted the offender, it has to consider different factors that emphasise the child development and reformation before entering the sentence. However, before imposing the sentence the court has to take into account the theories of punishment in relation to the needs and development of the child. These theories are retribution, deterrence, prevention, and reformation.

When the child is brought into the systems of the administration of juvenile justice, he has the right to protection and reformation through sentences imposed against him. For purposes of the development of the child, reformation theory seems to be the best means for guiding the court in imposing the sentence. This theory emphasises the need to expose the child to education programmes. These education programmes will enable the child to acquire vocational skills and trainings in the form of apprenticeship that will impart the child with proper knowledge that will enable him perform certain activities for earning life and in turn do away with criminality. However, the imposition of sentences against the juvenile has to consider cultural and other new factors arising in that society. In respect of the imposition of sentences, Srivastava (2005: 97) provides:

> "Undoubtedly there is a cross cultural conflict where living law must find answer to the new challenges and the courts are to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay in its ruin. Protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate punishment."

Taking into account what Srivastava (2005) says above, the child in conflict with the law has to be reformed in line with cultural changes and the need to protect the child rights. Therefore, the court has to determine whether the reformative penalties meet the need of the society to an extent of ensuring that justice is done. In the process of imposition

of sentence, the court also considers the aggravating and mitigation factors as well as the reformative sentences to the offender.

THE PROCESS FOR CONVICTING AND SENTENCING JUVENILE OFFENDERS

The process of sentencing the convicted juvenile offender is probably the most public fate of the criminal justice systems. Sentencing is the most difficult phase in handling juvenile justice systems. Safari (2010) says that sentencing starts immediately after the trial court has issued the declaration of conviction against the juvenile offender, after it has ruled out that the juvenile offender is guilty as charged. In the case of *Ramadhani Masha v. R (*(1985) TLR 172) the appellant, Ramadhani Masha was charged of being in possession of stolen property. After hearing the evidence of the prosecution and defence, the trial court magistrate sentenced the appellant to six months' imprisonment. He did so without first convicting him. Four months later, the magistrate wrote a judgement convicting the appellant as charged. In appeal the Sisya J., held that:

> "In a criminal trial, where it is decided that the accused person is guilty, the basic elements of the decision of the court are conviction and sentence, with the former being a prerequisite of the latter; as there was no conviction when the appellant was sentenced, there was no decision of the court and, the error being incurable ..., the sentence passed in this case was unlawful."

The order imposed by Sisya J., reveals that when hearing the case against the juvenile offender, the juvenile court should follow all stages of the trial. The court cannot just jump to the imposition of a sentence immediately after hearing the evidence of the witnesses. The court should have evaluated the evidence carefully and concluded whether or not the juvenile offender was guilty only after hearing the testimonials from witnesses. In case the juvenile offender is guilt then, there are two basic elements of "the decision" and these are conviction, and sentence. The conviction is issued first against the juvenile offender before the imposition of the sentence. In case there is a sentence pronounced by the court in absence of the conviction, the sentence imposed is unlawful. The Law of the Child Act gives these two mandatory procedures for juvenile trial in Tanzania. Section 111 provides:

> "Where the child admits the offence and the Juvenile Court accepts its plea or after hearing the witnesses the Juvenile Court is satisfied that the offence is proved, the Juvenile Court shall convict the child and then, except in cases where the circumstances are so

> trivial as not to justify such a procedure, obtain such information as to his character, antecedents, home life, occupation and health as may enable it to deal with the case in the best interests of the child, and may put to him any question arising out of that information."

The law provides expressly that when the court has taken the plea of guilty of the juvenile offender or upon proof of the offence through witness testimonials, the court shall first convict the juvenile offender and then, obtain information that can assist the court in the imposition of the right sentences. The acquiring of this information through the mitigation processes is mandatory. The mitigation process aims at getting the information on character, antecedents, home life, occupation, and health of the juvenile offender. Such information assists the court to reach the imposition of the right sentence to the convicts.

Section 111 of the Law of the Child Act requires that the juvenile court should receive some information that the court thinks relevant for assessing a proper sentence to the best interest of the juvenile offender. However, the law does not make it mandatory for a court to receive such information despite the fact that this stage of the trial has high value in the imposition of a proper sentence to the convict. Slattery (1972: 25) remarks:

> "The law provides, in a very general way, that once a court has convicted an accused, it may then, before passing sentence, receive such evidence as it thinks fit in order to assist it in arriving at a proper sentence. Although the law does not make mandatory for a court to receive such information, nevertheless it is obviously highly desirable for a court to do so."

The court has to receive such additional information in order to arrive at a proper decision. The law is also silent on the stages which the court should adopt in order to receive such information from the parties of the case. However, on reading section 111 of the Law of the Child Act, one can get a notion that immediately after the court has pronounced the conviction against the juvenile, the court has to take additional information which will assist pronouncing the sentence that takes on board the best interest of the child. This stage is called the mitigation stage. Mitigation is a stage between the pronouncements of the conviction statement and the stage before the pronouncement of the sentence to the convicted juvenile offender. The mitigation process has two stages. Mirindo (2011) says that the first stage is for the prosecution side to inform the court on such relevant factors that the side finds fit and will assist the court to pronounce the right sentence to the juvenile offender. The second stage is reverted to the convicted juvenile offender to provide information to the court, which

the court will end up with either discharging him without condition or imposing a lesser sentence. However, juvenile offenders do not utilize this stage to their advantage because they are not aware of the rationales of this stage. This makes it hard for the court to show lenience in its imposition of sentences.

Prosecution Statement

This is a statement issued by the prosecution side after the court has convicted the juvenile offender as charged. This is the opportunity to issue an additional statement by the prosecution side. This stage aims at assisting the court in assessing the proper sentence against the juvenile offender. It is significant to note that, the duty of the prosecution is not to make sure that the juvenile offender is convicted and punished to a higher sentence but to assist the court to pronounce a proper and justifiable sentence against the convict. In respect to the prosecution statement, Slattery (1972:26) provides:

> "The procedure which a court should follow in assessing sentence has been set down in many cases. After convicting an accused, the court should first call upon the prosecution for factual statement…In particular, the prosecution should state whether the accused has any previous convictions."

In respect to the above statement, the prosecution statement has to contain information relating to the child's age, education background, previous conviction records, family background, character, antecedents, home life, occupation, and health. It is significant to point out that the prosecutor cannot allege the offences to which the juvenile has not been tried and convicted as part of the conviction record, and he always has to avoid telling lies to the court against the convicted juvenile offender. Sometimes the prosecution side tells lies to the court in order the court to enhance punishment or pressure the court to impose severe punishments.

In case the prosecutor has any information in favour of the convicted juvenile offender that will lower the sentence, he has to disclose it without hesitation. It is essential to count that the main role and interest of the prosecutor in any case is to assist the court to do justice to the juvenile in order to reform him. The information that is within the knowledge of the prosecutor that assists the juvenile offender can be given on oath. The court considers an un-sworn statement only when it has not encountered opposition of its truth from the juvenile offender. Munkman (2007) says that, in case such statement is given under oath, then the statement may be subjected to cross-examination. The main aim of this stage is to enable the prosecution side to submit to the court facts that will lead the court to impose a sentence with rehabilitative value. This stage

should not encourage the court to impose harsh punishment to the juvenile offender.

Juvenile Offender Statement

After the prosecution side has finished giving additional information, an opportunity is reverted to the juvenile offender. Commenting on the necessity of giving this opportunity to the juvenile offender, Slattery (1972: 26) states:

> "In any case, the accused must then be given the opportunity to deny or qualify anything said by the prosecution, or of stating further facts in mitigation. Where something alleged by the prosecution is disputed, then the court must make a finding as to its truth. To do so it follows the normal procedure of proof in criminal trials."

During this stage, the court with harmony has to record each statement of mitigation given by the juvenile offender. However, it is imperative to understand that where the juvenile offender is unrepresented by a lawyer he will not be able to understand what facts to testify to the court at this stage. Normally, through ignorance the juvenile offender may possibly deny the conviction by re-giving evidence to rebut conviction. In solving this problem, the court is required to explain to the juvenile offender the essence of this stage. The convict is required to give to the court facts that contain information that qualifies or denies the statement given by the prosecution side, or by giving further information that will either lead into discharge or imposition of less sentence to the offence.

This opportunity is given to the juvenile offender by the court where Slattery (1972:26) asserts, "once a court has convicted an accused, it may then, before passing sentence, receive such evidence as it thinks fit in order to assist it in arriving at a proper sentence." Therefore, it is upon the juvenile offender to give relevant information to the court in order to enable the court to impose a sentence which cultivates the process of change during which the juvenile is able to reach his physical, mental, emotional, and social potentials. The sentences to be imposed should not exonerate the juvenile from the society environment which develops juvenile welfare.

As provided above, there is a great burden on the juvenile offender in providing better mitigation statements during the sentencing stage. Slattery (1972: 27) insists that:

> "Many people brought before the courts have little idea of law, and as to what might constitute circumstances. So, when asked to say something in mitigation, prisoner may often say quite irrelevant

> things, such as to deny the charge or accuse the police for conspiracy."

In line with Slattery's view, it is right to say that the child knows no law. When he is called upon to give mitigation statements he normally provides irrelevant information such as denying his involvement in the offence or accusing prosecution and other persons who are not even in the case. In such circumstances, the juvenile court directs specific questions to the juvenile offender to enable him lay his mitigation to the court. The court uses such mitigation statements to impose a proper sentence to the offender taking into account the best interest of the juvenile offender.

BASIC MATTERS CONSIDERED BY THE JUVENILE COURT BEFORE SENTENCING

As the world is advancing in terms of child rights, protection, and child development, the court also has to protect the child against abuse through the systems of juvenile justice administration. It should do this by avoiding mistreatment and punishments with degrading effects. During the sentencing process, the court has to give the parties to the case an opportunity to give their mitigation statement. The mitigation statement contains information that may assist the court to impose a proper sentence to the juvenile offender. The statement holds relevant factors that call the court to impose a sentence that takes into account physical, mental, emotional, and social potentials of the juvenile development. In *Salum Shabani v. R (*(1985) TLR 71) Mtenga J., in the cause of sentencing the offender stated that:

> "I understand that the task of sentencing is a very difficult one though admittedly, it is a discretionary task. ...There are a number of factors that the court has to consider before passing a sentence such as gravity of the offence, prevalence of the offence, the interest of society, the penalty section under which the accused is charged and last but not least, the record of the accused person."

Thus, in the imposition of sentences, the court has to take into consideration various factors provided to the court by both the prosecution and the defence sides. The court has the responsibility to explain to the juvenile offender the importance of this stage, and where possible, the court has to ask the juvenile offender some clue questions through which the court will receive useful information. It is vital to note that the juvenile offender needs rehabilitation and not punishment. In case the juvenile offender stays silent during the mitigation, it should not be construed as one of the aggravating factors. The juvenile remains silent because of his

ignorance of the law. The court when imposing sentences has to accord its weight the principle of triad and the best interest of the child.

The Triad Principle

The law provides the requirement to the court to assess the sentence. It is this which makes it mandatory for the court to be conversant with purposes of punishment as explained through the theories of punishment. In the proper imposition of sentences, the court has also to utilise the understanding of the principles for assessing sentences, and the jurisdiction of the court in terms of offences and sentences.

Among the principles for assessing sentence to be imposed to a juvenile offender is the triad principle. This principle urges the court to take into consideration three main factors, to wit, the crime, the offender, and the interest of that society. However, by looking at the state of affair of the offender, crime and the society, the court does not reject any of the theories of punishments, namely retribution, prevention, deterrence, and reformation. In addition, it does not expressly agree with any of these theories. In the cause of sentencing through the triad principle, the court finds itself imposing the sentence basing on a particular theory of punishment. The reformative theory is the one deemed the best in sentencing the juvenile convict.

The triad principle was used in Tanzania in the case of *Tabu Fikwa ((*1988) TLR 48). In this case, the appellant Tabu Fikwa pleaded guilty to the offence of possessing native liquor popularly known as "gongo." The court convicted her and sentenced her to five months' imprisonment. Tabu Fikwa was not given an option to pay fine. During the mitigation, the appellant told the court that it was her first offence and that she manufactures "gongo" because she had financial problems. The appeal court considered the law and the circumstance of the case. Samatta J., (as he then was) *inter alia* stated that:

> "In determining or assessing sentence what the court must consider is the triad consisting of the offence, the offender and the interests of society. Thus, the magnitude of the offence and motives to its commission and the character of the offender are some of the matters which the court must have regarded to. The court must strive to strike a reasonable balance between the elements of the triad."

Therefore, in line with the triad principle, the court must consider the offence, the offender and the interests of the society. In addition, the triad principle considers factors such the magnitude of the offence, motives

to the commission of the offence, and the character of the offender. The triad principle also considers the kind of the offence, the manner the offence has been committed and the prevalence of an offence in the society. These are the main ingredients in assessing sentences to the convicted juvenile offender. Nevertheless, the triad principle is not exhaustive in the assessment of sentences to the juvenile.

In the case of *Yassin Maulid Kipanta and two Others v. R (*(1987) TLR 183) Chipeta J., (as he then was) reacting in the use of prevalence of the offence as a factor in assessing sentence provided:

> "With unfeigned respect, the prevalence of an offence is one of the factors to be taken into consideration in assessing sentences. But it is not the only consideration. It must be taken into consideration along with other factors."

This view was initially adopted and discussed in the case of *Silvanus Leonard Nguruwe v. R (*[1981] TLR 66) where the court stated that:

> "Prevalence of an offence is indeed a factor which a trial court should always take into account when assessing a proper sentence to impose in any particular case; but it would be contrary to principle to consider this fact either as the predominant or the only factor that must guide the court in its consideration of sentence."

Thus, the prevalence of the offence in the society to which the juvenile offender has committed is not the main factor for imposition of a heavy sentence against the juvenile. The offender needs protection against degrading punishment, and the nature of the offence should not motivate the court to impose a heavy sentence to the juvenile offender. It is vital for the court to consider the fact that there is no single factor which is useful for assessing a sentence against the juvenile. Likewise, the court should not adopt a factor of prevalence of the offence in enhancing the imposition of a sentence against the offender. The interview with Maromboso Primary Court Magistrates revealed that the prevalence of the offence is a key factor in the imposition of sentences to the juvenile offender. This aims at discouraging the commission of such offences. It is the opinion of the researcher that the imposition of punishments to the juvenile offender on the basis of prevalence of the offence violates the rights of the juvenile because such sentence does not take into account the need for rehabilitation.

The main objective of the triad principle is to reconcile the main theories of punishment with one another. In determining a sentence, courts

strive to accomplish and arrive at a judicious counter balance between the three elements in order to ensure that no element is unjustifiably emphasised at the expense of another and to the exclusion of others. Maguire (2002) explains that the court should consider and try to balance between the nature and the circumstances of the offence, the characteristics of the offender, the impact of the crime on the community, and the welfare development of the child offender.

In the process of sentencing, the court has to take into consideration the effect of such sentence to the juvenile offender. The court has the responsibility to consider the way the offence has been committed, the repentance of the juvenile offender and whether or not he is a first time offender. In *R. v. Asia Salum and Others(* (1986) TLR 12) the accused mother and her 17-year-old son were convicted of assault causing actual bodily harm. Both were first offenders and were each sentenced to twelve months' imprisonment. The record of the proceedings was called by the High Court for satisfying itself as to the correctness, legality and the propriety of the sentences imposed. Mnzavas JK, (as he then was) held that:

> "(i) Where a first offender is concerned the emphasis should always be on the reformative aspect of punishment…"
>
> "(ii) first offenders should not, as a rule, be sent to prison where there is an opportunity to mix with and learn bad habits from more seasoned criminals."

In this case, the court considered the fate of the offender to the fact that he is a first time offender so he cannot be sent to prison where habitual criminals can spoil him. A first time offender has to be reformed through non-custodial sentences. In this case, the second accused aged 17 was a form III student and a first time offender. The offender had a big cut wound on his face and dislocation of the left shoulder. Considering all these factors, the court was of the view that imprisonment was not a favourable sentence to this juvenile offender. The court further opined that the proper sentence to this juvenile offender should have been a probation order or even discharging the child with or without conditions.

Slattery contends that the court in the process of sentencing a juvenile offender using the triad principle has to consider the nature of the offence. Such consideration takes into account the factors relating to the gravity of the offence because when the offence is serious, it enhances the sentences to discourage the commission of such offence. The seriousness of the offence is determined by the nature of the harm caused and its result in the society. Ashworth and Wasik (1998) provide that there are aggravating factors for determining the seriousness of the offence. These

include the difficulties in detection of the commission of the crime and the frequency of the commission of the offence in the society. In case the offence is serious, then it attracts imposition of an exemplary punishment against the offender. However, during the imposition of sentences in consideration of these factors, rehabilitation goals to the juvenile offender have to be highly considered. This means that the sentence to be imposed to the juvenile offender has to restrict suffering because the contrary is a violation of the rights of the juvenile offender.

The Best Interest of the Child

In the process of sentencing, the court has to impose the sentence that takes into account the best interest of the juvenile offender. The principle of the best interest of the juvenile *inter alia*, requires the court to give to the offender an opportunity to be heard either directly or through an impartial representative. The views given are taken into consideration by the relevant authority in accordance with the provisions of appropriate law. The principle of the best interest of the child advocates that the child has to be treated in the manner that promotes the child's welfare development. This is achieved by handling the child in the process of change through which a child will be able to reach his physical, mental, emotional and social potentials.

In order for the court to impose an appropriate sentence to the convicted juvenile, the court is required to take into consideration different factors affecting the child as presented to the court during the mitigation stage. There are numerous factors which the juvenile offender may inform the court during this stage. However, every offender gives factors in relation to his condition. The Law of the Child Act determines the main factors including the character of the child, antecedents, home life, occupation, and health status. The case of *R.v. Kidato Abudlla (*(1973) LRT 82) provided several factors such as the gravity of the offence, age, the interests of the society, and the best interest of the juvenile. However, the main challenge is that the juvenile court does not always consider these factors during the imposition of sentences. Samatta J., in *Tabu Fikwa* took the view that the court has to consider factors like the nature of the offence committed by the juvenile offender by taking into account the magnitude of the offence and motives for its commission; the state of affairs of the juvenile himself including his character; and the interest of the society. However, on scrutinising the process of sentencing when there is a conflict between the interest of the juvenile offender and the society he remarked:

> "An offender is a member of society and quite often a product of social and economic conditions. If his interests and those of society are in conflict the former must be subordinated to the latter. If, however, they can be reconciled the court should embark upon that course."

This is to say that in the process of sentencing the juvenile when there is conflict of interests between the interest of the society and that of the juvenile offender, the interest of the society prevails. This kind of sentencing is an abuse of the principle of the best interest of the child. The principle of the best interest of the child requires that anything related to the child must receive paramount consideration. This means that the interest of the child overrides any other factor in the sentencing process. The principle of the best interest of the child puts into emphasis the protection of the rights of the child to the level that nothing can prevent the well-being of the child.

There is no exhaustive list of factors to be considered by the court during the assessment and imposition of sentences to the convicted juvenile offender. In the case of *Bernadeta Paul v. R (*(1992) TLR 97) the appellant was convicted by the High Court on her own plea of guilty for killing her 8 day old baby. In sentencing the appellant, the court put into mind only two mitigation factors namely that the appellant was a first time offender and she had been in custody for about five years. On this base the appellant was sentenced four years in prison. It was argued on appeal in favour of the appellant that the trial court had ignored the fact that the appellant had readily pleaded guilty to the offence. This, according to the court, should have been taken as a mitigating factor. The court held that:

> "...had the learned judge taken into account appellant's plea of guilty to the offence with which she was charged the judge would no doubt have found that the appellant was entitled to a much more lenient sentence than the sentence of 4 years imposed."

This case further opens other mitigation factors which may be taken on board by the court in the process of determination of sentences. These are such as the juvenile offender is a first time offender; the period of remaining under custody without bail; and readiness in pleading of guilty to the offence.

In case the court deems to impose fine against the juvenile offender during the mitigation process, it has to inquire on the financial position of the juvenile or anyone may be ordered to pay on behalf of the juvenile. The accused in the case of *Ramadhani Mwenda v. R (*[l972] HCD 115) a secondary school student, assaulted his fellow student in a classroom with a penknife and caused the victim to sustain a cut wound. He was convicted of unlawful wounding under section 228(1) of the Penal Code and sentenced to pay a fine of Tshs. 7,000 or nine months' imprisonment and to pay Tshs. 3,000 as compensation. On appeal the court stated that:

> "This court has often held that a sentence must fit the crime and guilt as well as the circumstances of the offender. If a sentencing court is minded to impose a

> sentence of fine as an option to a custodial sentence, such court should take pains to inquire into the financial means of the accused person, for if that is not done, a court might find itself imposing on an accused person a sentence of fine whose result would be to render the option of a fine illusory."

Generally the court may impose a proper sentence relating to a fine against the juvenile offender only when it has received enough relevant information relating to the financial position of the juvenile and his parents or relatives are ordered to pay the fine on his behalf. This does not mean that the sentence of a fine has to be low but that it can be paid as ordered by the court, however a bit with difficulties.

There are plenty of factors which may be tabled to the court by the juvenile offender during the assessment of an appropriate sentence. The juvenile offender only mentions factors which are useful in making it possible for him to get an appropriate sentence. However, when determining such factors, the court must pay attention to goals of imposing sentences which encourage reformation to the juvenile offender. Nevertheless, it has been noted in Tanzania that children are not afforded with proper access to rehabilitative activities. The report by the Commission for Human Rights and Good Governance provides that the provision of facilities for education, vocational training, and recreation in approved school and prisons was wholly inadequate. This limits the rehabilitation and reintegration processes to the juvenile offender in Tanzania.

CONCLUSION

This article has surveyed the theories of punishment including the retribution, deterrent, preventive and reformation. As the juvenile is considered immature in terms of physical, mental and social it has been noted that in the course of imposition of sentence to the juvenile offender judicial officers have to use the reformative theory. This theory is considered has better mechanism of child rights protection from degrading punishments in the systems of justice administration. The article as well has discussed the stages of convicting and sentencing the juvenile offender. However, the judicial officer has responsibility to take into account the principle of the best interest of the juvenile offender in all stages of imposition of the sentence.

REFERENCES

Ashworth & M. Wasik, *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch*, Clarendon Press, Oxford 1998, 103.

A.J. Saffari, *Prosecution, and Defence of Criminal Cases*, Huda Publishers Limited, Dar es Salaam 2010.

B. D. Chipeta, *A Magistrate's Manual,* T.M.P. Book Department, Tabora, 227.

C. Bhoke, Unconstitutionality of the Death Penalty and its Mandatory Imposition in Tanzania, 7 No 2 *The Justice Review,* (2008).

C. J. Mashamba, Accepting the Necessary Evil: The Need for A New Statute for Promoting and Protecting Children Rights in Tanzania, I-VI, Nos 1-6 (2006-2008*) The Justice Review, Special Consolidated Edition to Mark the 5th Anniversary of* NOLA, (2008).

H. Zehr, *Changing Lenses: A New Focus for Crime and Justice*, 3 Edition, Herald Press, Ontario 2005.

J. Dignan, *Understanding Victims and Restorative Justice*, Open University Press, Maidenhead 2005.

J. Joseph, *Black Youths, Delinquency and Juvenile Justice*, Praeger, Westport CT, 1995.

J.H. Munkman, *The Technique of Advocacy,* Universal Law Punishing Co. Pvt. Ltd., New Delhi 2007.

Legal and Human Rights Centre, "The State of Juvenile Justice in Tanzania: A Fact-Finding Report on Legal and Practical Considerations," Legal and Human Rights Centre, Dar es Salaam 2003.

M. Maguire et all; *The Oxford Handbook of Criminology,* 3rd Edition, Oxford University Press, New York 2002.

N.V. Paranjape, *Criminology and Penology,* 11th Edition, Central Law Publications, Allah bad 2001.

O. P. Srivastava, *Principles of Criminal Law*, 4 Editions, Eastern Book Company, Lucknow, 2005.

S.E. Mchome, Human Dignity: The Source of all Other Rights and Freedoms, 1 No. 1 *Nyerere Law Journal,* (2003), 14.

Slattery, *A Handbook on Sentencing: with particular reference to Tanzania,* East African Literature Bureau, Nairobi, 1972.

T. M. Mushanga, *Crime and Deviance: An Introduction to Criminology*, Kenya Literature Bureau, Nairobi, (1988).

U.Chandra, *Human Rights*, 3rd Edition, Allahabad Law Agency Publications, Allhabad 2000, 68.