

**ADHERENCE TO FAIR TRIAL PRINCIPLES BY HIGH COURT OF
TANZANIA: A CASE STUDY OF DAR ES SALAAM REGION**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS OF THE
OPEN UNIVERSITY OF TANZANIA**

2020

CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance by the Open University of Tanzania dissertation titled: **Adherence to Fair Trial Principles by High Court of Tanzania: A Case Study of Dar es Salaam Region** in partial fulfillment of the requirements for the degree of Master of Laws of the Open University of Tanzania.

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Signature

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Date

DEDICATION

I dedicate this study to my dearest mother Khamsa Bouchemit thank you for your love.

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I am grateful to the Almighty God for his mercy, love, strength and care for protecting, saving and guiding me throughout every stage of this study. Under the supervision of Doctor Ezekiel Rindstone invaluable comments and inputs at every stage of this study being highly appreciated and acknowledged. I am grateful for his contribution. Any error in this study is entirely mine.

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ABSTRACT

The research concerns the adherence to Fair Trial by High court of Tanzania. The study has shown there are complaints alleging Tanzania especially High Court is in violation of fair trial as guaranteed in the constitution and other human rights international instruments. The study chose High court because of indispensable role played by the High Court in the fair administration of justice. The core objective of this study is to assess the extent of adherence to the fair trial by High court. Though the study found out that there are other minimum legal standards and principles associated with fair trial stipulated in Tanzania legal system, these standards are both not exhausted and followed. The research employed doctrinal, qualitative approach as well as comparative legal research methodology through the use of international instruments, which Tanzania has ratified to assess the extent of adherence. The study found out that the extent of adherence of fair trial right by High Court is very low. Vivid evidences are drawn from the decisions made in the cases carried out by High Court, and from the decisions of the Court of Appeal, the Highest court in hierarchy in Tanzania Judiciary, as well as from the several cases decided by the African Court on Human and Peoples' Right, which tell that Tanzania is in violations of fair trial rights as the cases were decided on merits. The study recommends that the number of competent Judges and Magistrates should be increased in order to reduce their workload and deploy them effectively. This, in turn, will help to achieve the desired case management goals in the Court of Appeal, High Court and subordinate courts.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Right
ADR	Alternative Dispute Resolution
CAP	Chapter
CCM	Chama cha Mapinduzi
EAC	East African Community
Ed	Edition
GN	Government Notice
ICCPR	International Convention on Civil and Political Rights of 1966
KB	King Bench
LRT	Law Report of Tanzania
LSRP	Legal Sector Reform Program
MKUKUTA	Mkakati wa Kukuza Uchumi na Kupunguza Umaskini Tanzania
NEC	National Executive Committee of Chama cha Mapinduzi
NGOs	Non-Governmental Organizations
OUT	Open University of Tanzania
P	Page
PCE	Permanent Commission of Enquiry
QB	Queens Bench
RE	Revised Edition
SAUT	Saint Augustine University of Tanzania
STEMMUCO	Stella Maris Mtwara University College
TLR	Tanzania Law Report

TPDF	Tanzania-Tanzania Peoples Defense Force
UDHR	Universal Declaration on Human Rights of 1948
UN	United Nations
UNDP	United Nations Development Programme
Vol	Volume

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The Constitution of the United Republic of Tanzania of 1977

The United State Constitution 1987

The Constitution of Uganda of 1995

The Constitution of Kenya of 2010

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The Civil Procedure Code Cap 33 [RE 2002]

The Code of Conduct of Judicial Official [1994]

The Criminal Procedure Act, 1985[Cap 20 RE 2002]

The Evidence Act [Cap 6 R.E 2002]

The Government Proceeding Act [Cap 6 RE 2002]

The Judge (Remuneration Terminal Benefits) Act [2007]

The Judicial Administration Act [No 4 of 2011]

The Law of the Child Act 2009

The Law of Limitation Act (Cap 89 R.E 2002)

The Law (Fatal Accident Miscellaneous) Application Act Cap 310

The Legal Aid Act, 2017

The Magistrate Court Act [Cap 11 RE 2002]

The Minimum Sentence Act [Cap 90 R.E 2002]

The National Prosecution Act of 2008

The Penal Code [Cap 16 RE 2002]

The office of the Attorney General (Discharge of Duties) Act No 4 2005

The Police Force and Auxiliary Services Act [Cap 322R.E 2002]

The Tanganyika Order in Council, 1920

The Written Laws (Miscellaneous Amendments) Act no 3 of 2011

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Director of Public Prosecutions v Daudi Pete 1993 T.L.R 22

Hadija Saidi Matika v Awesa Saidi Matika PC, Civil Appeal no 2 of 2016 High Court of Tanzania Mtwara (Unreported)

Hamisi Masisi v Republic [1984] T.L.R 951

Haryana Financial v Kalash Chandra JT [2008]8 SCC 70

Hatimali Adamji v East African Posts & Telecommunications Corporation [1973] L.R.T. No18

Joseph Kivuyo and Others v Regional Police Commissioner of Arusha and another Misc. Civ App No 22 of 1978 High Court of Tanzania at Arusha, (Unreported)

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Mwalimu Paul Mhozya v Attorney- General [1996] T.L.R 13

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Obadia Salehe v Dodoma Wine Company Ltd, Civ. Case No 53 of 1990 High Court of Tanzania at Dodoma (Unreported)

Omary v Tazania Application No 1/2012

Onyachi v Tanzania Application No 3 /2015

Painter v Liverpool oil gas light Co [1836]3 Ad

Regina v Henley [2005] NSWCCA 126

Rev. Christopher Mtikila and Others v Civ. App. Case No. 5 of 1993 R High Court of
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No. 2 of 8 of 2002) 2009

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CHAPTER ONE

GENERAL INTRODUCTION AND CONTEXT OF THE STUDY

1.1 Background of the Study

In Tanzania, the concept of fair trial rights and human rights in general its recognition and enforcement can be looked into three phases; the first phase is the period between 1961 to 1984. During this period the bill of rights was not included in the constitution¹. On some occasions they were provided in the preamble and in the schedule in the constitution. It was a period when Tanzania was in one-party system.

As a result, in the period between 1965, the Permanent Commission of Enquiry (PCE) was established to promote and protect human rights. And this was also included in the constitution.² However, this means that preamble and the establishment of PCE could not effectively replace a bill of rights. This was due to various limitations associated with their legal basis and mandate. The said limitations are:

First and foremost is that fundamental rights and freedoms placed in the preamble to the Interim Constitution were useless, this is because under common law jurisprudence which is also followed in Tanzania, the preamble is not part of the constitution and therefore for violation of rights and freedom cannot be based on the preamble as it was held by Kisanga, J in the case³. It was positioned that,

“A declaration of our belief in these rights, it is no more than just that. The rights themselves do not become enacted thereby such that they could be

¹ Constitution of United Republic of Tanzania 1977, as amended from time to time.

² Chapter 6 of the Interim Constitution, 1965

³ Attorney General v Lesinai Ndenai and others (1984) T.L.R 214

enforced under the Constitution. In other words, one cannot bring a complaint under the Constitution in respect of violation of any of these rights as enumerated in the Preamble.ö

Also, Biron, J. (as he then was) in the case of ⁴ was of the view that öIn fact, the Preamble did not afford any protection to the citizen in situations of violation of his rights and freedoms.ö

Moreover, the PCE also had its own weaknesses; firstly, it was not independent at all. All its investigation following a complaint ended up in the office of the President. Also, the President had the power to stop any commission's investigation at any time, and to bar any information needed by the commission.

Therefore, it can be seen that, during this phase there were no clear, specific and legal procedures for the enforcement of human rights in Tanzania and both the Preamble to the 1965 Interim Constitution and the PCE were ineffective, resulting into subjecting the fundamental rights and freedoms of the individual at the mercy of the executive arm of the State.

The second phase is the period between 1984 to 1994. Though the bill of rights was enacted into the Constitution of the United Republic of Tanzania in 1984, it was suspended for a period of three years⁵ on the reason(s) that to allow the government to

⁴ Hatimali Adamji v. East African Posts & Telecommunications Corporation [1973] L.R.T. No. 6

⁵ This was done through Section 5 (2) of the Constitution (Consequential, Transitional and Temporal Provisions) Act, 1984 (Act No. 15 of 1984)

put its house in order. This was due to the reasons that the incorporation was not due to the willingness of the ruling party, but rather a result of pressure from various sources, both internal and external and when the government decided to amend the Constitution in 1983 the National Executive Committee (NEC) of CCM did not contemplate a Bill of Rights.⁶

The justifiability of the Bill of Rights was delayed until 1988 vide the Constitution (Consequential, Transitional and Temporary Provisions) Act⁷ in order for the Government. To clear out laws that were deemed repugnant to or in direct conflict with the Bill of Rights. After three years had elapsed all the laws were still intact and the government had done nothing during the grace period. As a result, the government had two alternatives in respect of human rights.

Firstly, to suspend the enforcement human rights for another period, secondly to allow court to begin enforcing human rights by using constitution. Then the government opted for the second alternative and from there it is up to the court of law, (High Court) to determine the constitutionality of various laws, as per Article 30(4)⁸ through its was only the High Court, *Suo motto* (on its own motion) via its inherent powers. Therefore, the work of addressing this and other laws, which conflicted with the bill of rights, was placed squarely in the hands of the judiciary.

⁶ See the proposals by the CCM's NEC were contained in CHAMA CHA MAPINDUZI, 1983 NEC Proposals for Changes in the Constitution of the United Republic and the Constitution of the Revolutionary Government of Zanzibar, Dodoma: C.C.M. Department of Propaganda and Mass Mobilization, 1983.

⁷ Act No.16/1984

⁸ Constitution of United Republic of Tanzania, 1977 as amended from time to time.

Unfortunately, there was no procedural law by that time has been enacted to provide for the procedures of enforcing human rights before the court of law. As a result, the court began enforcing human rights in following the ordinary laws in civil procedures.⁹ The Government Proceedings Act¹⁰ together with the Law Reform (Fatal Accidents and Miscellaneous Provision) Act¹¹. Thus, the right to fair trial was not legal guaranteed at all rather it was basically on prudence of the court and judge at large.

Reference to this can be made in the case of ¹² where Mweisumo, J (as he then was) describing the position of the court in the society said that, “This is the temple of justice and nobody should fear to enter it to battle his legal redress as provided by the law of the landö.

Later with inclusion of Bill of Rights in Tanzania Constitution in 1984 through Constitution (Fifth Amendment) Act (No. 5/1984), The High court was afforded with exclusive power to enforce rights of individuals and to handle case relating to the Bill of Rights in Tanzania via vide Article 30(4).¹³

Therefore, as it was expected the judiciary particularly the High Court, took its work serious. The first case to go was the case of ¹⁴ this case took place exactly two weeks

⁹ Civil Procedure Code, Cap 33 of 1966

¹⁰ No 16 of 1967

¹¹ Cap 360, R.E 2002

¹² Joseph Kivuyo and Others v Regional Police Commissioner of Arusha and another High Court of Tanzania at Arusha, Miscellaneous. Civil Application No 22 of 1978 (unreported)

¹³ Act (No. 5/1984).

¹⁴ Chumchua S/O Marwa v The Officer in Charge of the Musoma Prison and The Attorney- General [1990] T.L.R, 757

after coming into the operation of the bill of rights in 1988. Mwalusanya, J declared that, the deportation of Tanzanians from one part of the country to another is unconstitutional, as it directly interferes the individual freedom of movement, which is guaranteed in the constitution. Also, the same applies in the case of¹⁵ as it affects Article 13 and 15 of the Constitution. Moreover, in the case of¹⁶ where the court declared the haya customary law of prohibiting females from inheriting clan land unconstitutional.

Then followed the case of¹⁷ in which it was found that, under Section 40 (a) of the Security of Employment Act¹⁸, an issue, in this case, was whether an employer who does not want to take back a dismissed employee as ordered by the labor court can avoid doing so as provided by the above section by buying him off. This was declared as unconstitutional as it interferes with the person's rights to work, as guaranteed in the constitution¹⁹.

That trend, first of all, shocked the state, there emerged conflicts; silently and openly between the state's legislature and the judiciary. Those conflicts first emerged due to the fact that the High Court declared certain provisions to be unconstitutional, though the legislature on the other hand, and the state continued to maintain that law in statute and books.

¹⁵ Director of Public Prosecutions v Daudi Pete [1993] T.L.R 22

¹⁶ Bernado Ephraim v Holaria Pastory and Gervas Kaizilege, Civil Appeal No. 70, of 1989 High Court of Tanzania at Mwanza (Unreported)

¹⁷ Obadia Salehe v Dodoma Wine Company Limited Civil Case No 53 of 1990 High Court of Tanzania at Dodoma, (Unreported)

¹⁸ Chapter 374 of the Revised Laws of Tanzania Mainland.

¹⁹ Article 22 of the Constitution of United Republic of Tanzania, 1977, guarantees the right to work.

Apparently, the executive and legislature contemplate the powers of the court. In the case of²⁰. In this case the court authorized independent candidate to contest and declared Section 40 of the Police Ordinance and Section 11 (a) of the Political Parties Act, to be unconstitutional. Also, Article 21 (1), Article 20 (4) and Article 39 (c) of the constitution as void. The latter was the most controversial, provides,ö No person shall be eligible for election to the office of the President of the United Republic, unless.

(C) is a member of, and sponsored by political party.”

The third phase came with the legal procedures for the enforcement of human rights in Tanzania. This was the period between 1994 onwards. This phase came with the enactment of the Basic Rights and Duties Enforcement Act²¹. Enacted in accordance with a constitutional provision in the Bill of Rights that is, Article 30(4) of the Constitution²² which requires the state authority to enact legislation for the purpose of:

- (i) Regulating procedure for instituting proceedings pursuant to this Article;
- (ii) Specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article;
- (iii) Ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution.

²⁰Rev. Christopher Mtikila and Others v R High Court of Tanzania at Dodoma, Civil Appeal Case No. 5 of 1993 (unreported)

²¹ Cap 3 R.E 2002

²² The Constitution of the united Republic of Tanzania of 1977 as amended from Time to time.

In the modern jurisprudence, the notion of equality for all citizens in terms of fair trial rights has been interpreted to mean both the general prohibition of discrimination and promise of equality between the parties. Every defendant has the right to a fair trial under international law, however in many developing countries Tanzania as a case study in criminal justice system as well as a civil justice system have yet to realize the promise of fair trial many factors contribute to this global failure and is discussed in detailed in this study.

The constitution of United Republic of Tanzania of 1977 provides among other things the fundamental basic rights among the civil rights, duties and interests of every person and community shall be protected and determined by the court of law or other state agencies established by or under the law.

Also, the constitution continues to provide for the right of equality that to ensure equality before the law, the state authority shall make procedures which are appropriate should consider the principle of fair hearing and the right of appeal or other legal remedy against the decision of the court or the other agency concerned.

Also, article 107A²³ of the Constitution provides that the authority of dispensing justice is vested to court and this institution shall give final decision. Moreover, the court in delivering decision in matters of civil and criminal nature, the court should observe the principle of impartiality, not to delay dispensation of justice without reasonable ground, awarding reasonable compensation to promote and to enhance dispute resolution among persons involved in the dispute and to dispense justice

²³The Constitution of United Republic of Tanzania of 1977

without being tied up with technicalities provisions which may obstruct dispensation of justice.²⁴

The reality is that the right to fair trial is not specifically mentioned in the Constitution but Article 13(6) and Article 107A (2)²⁵ tries to depict the presence of the right to fair trial in Tanzania. Further On 26/5/2014, His Lordship Chief Justice Othman Chande (As he then was) promulgated the Basic Rights and Duties Enforcement (Practice and Procedure) Rules²⁶ applying to all proceedings under the Basic Rights and Duties Enforcement Act with a view to advancing and realizing the basic rights and duties contained in the Constitution the right to fair trial in Tanzania is still one of hottest legal agenda under human rights.

This is more apparent with the entrenchment of Bill of right in 1984²⁷. However, there have been many factors that make the realization of such right difficult and at times impossible one of which being procedural technicalities. The Tanzania legal system is arguable that is not accessible and affordable to more Tanzanians as the effective administration of justice remains a central task of responsible and democratic governance, but administration of justice tends to be ineffective.

There are complaints that are directed to court, which arise from inordinate delay in resolving disputes and dispensation of justice, corruption and other unethical conduct

²⁴ Article 107A of The Constitution of the united Republic of Tanzania of 1977 as amended from Time to Time

²⁵ Ibid

²⁶ Government Notice No. 304 Published on 29th August 2014.

²⁷ Ogula, P.A, A Handbook of Educational Research, New Kemit Publisher, Nairobi, (1998), p. 3

of officers of the court at various levels in Tanzania legal system. Thus, being very important right, fair trial the main objective of this study is to assess the extent of adherence to the fair trial by High court in Tanzania by looking to the law and practice.

1.2 Statement of the Problem and Justification

Civil and criminal trials are the most acceptable ways of displaying and solving antagonistic relationship in society lawfully. The exercises are done through the courts of law, which are accepted as the organ of dispensing justice. And in any society, which upholds rule of law, separation of powers, good governance and human rights, the last resort is to secure justice in the court of law. However, justice depends on how clear fair and just procedures to enforce the machinery of justice administration.

Also, in almost every court most of the complaints against the administration of justice for centuries have been that the courts do not follow fairly procedures and often resulted in the failure of justice. For instance, current the African Court on Human and Peoplesø Rights (African Court) has recently been flooded with fair trial cases against its host state, Tanzania. To date, the African Court has disposed several cases on the merits, and dismissed the other as being inadmissible.

These cases are Abubakar v Tanzania²⁸, Jonas v Tanzania²⁹, Nganyi v Tanzania³⁰, Onyachi v Tanzania³¹, Thomas v Tanzania³², while the case of Chacha³³ and Omary v

²⁸Application No 7 /2013

²⁹Application No 11/2015

³⁰Application No 6/2013

³¹Application No 3 /2015

³²Application No 5/2013

Tanzania³⁴ were dismissed as inadmissible, other case which discussed the issue of trial in merits is Kijiji Isiaga v Tanzania³⁵, while the case of Kijiji Isiaga was decided on 2018. Numerous similar cases, all alleging that Tanzania is in violation of fair trial rights as guaranteed in the African Charter on Human and Peoples' Rights and other human rights instruments which Tanzania is the party, are pending before the African Court.

Although the constitution of the United Republic of Tanzania calls for the judiciary/court while delivering justice to comply with the rule under Article 13(6) and Article 107A (2) of the Constitution of United Republic of Tanzania of 1977 as amended but still this seem to be the problem both in civil and criminal cases. Tanzania has ratified different instruments in relation to human rights protection and therefore had incorporated the same into its laws. The said laws are expected to set out standards for fair trial rights and procedure.

This goes to the extent of making sure that those standards are observed and adhered by itself before announcing its decision being the sole organ vested with the power of dispensing justice in the country and it is the authority with final decision when exercising that power of dispensing justice as per article 107A of the Constitution of United Republic of Tanzania of 1977.

It is in the context that this study aiming at assessing the said laws governing fair trial and see whether High Court which exercise both original Jurisdiction and appellate

³³Application No 3/2012

³⁴Application No 1/2012

³⁵Application No 032/2015

Jurisdiction and as the court of records, as well as is the court afforded with exclusive power to enforce rights of individuals to handle cases relating to the Bill of Rights in Tanzania adhere to fair trial and the assessment will base on legal and practical aspect.

1.3 Objectives of the Study

Objectives of the research are mainly two; general and specific as hereunder stated.

1.3.1 General Objective

The core objective of this study is to assess the extent of adherence to the fair trial by High court in Tanzania.

1.3.2 Specific Objectives

- (i) To assess the compliance and applicability of the minimum legal standards of fair trial by the High Court of Tanzania.
- (ii) To examine and analyze the legal and procedural limitations to the fair trial in the High court of Tanzania.

1.4 Research Questions

- (i) How does the High Court of Tanzania comply and apply minimum legal standards of fair trial?
- (ii) To what extent does the High Court in Tanzania adhere to minimum legal standards of fair trial?
- (iii) What are the laws and procedural limitations governing fair trial in Tanzania context?

1.5 Literature Review

Research on right to fair trial in relation to court adherence to the right is not a new venture in the legal arena. Various writers have had a lot shed light on concerning this rule of fair trial. It suffices at this juncture to mention but few of them;

Magnus Killander (Ed)³⁶ the author explains the role of international bodies particularly in African regional and sub- regional court as a complement of national protection, he explains on specific pertinent issues in relation to the overall theme of the role of international law in domestic human rights litigation and gave out the factors that are hindering effective human right litigation in general in African countries.

The author tries to emphasis that the international human rights treaties have influenced the national bills of rights which is totally true and the main role of international human rights law in the form of case laws. Other interpretations by supervisory bodies should be an aide to national courts to interpret constitutionality recognized rights. The researcher concur with the author as domestic court needs assistance from international human rights spheres issues concerning basic human rights are matters of importance.

John Alder³⁷ the author explains what could possibly mean the right to fair hearing as well as tracing it background which is ancient common law origin and he explains that the right is needed not only in courts but also in quas ó judicial bodies as long the matter is needed to be decided ÷judiciallyø also he gave out the possible factors that

³⁶Killander, M, International Law and Domestic Human Rights Litigation in Africa, University Press, Cape Town ,2010, p 1

³⁷Alder, J, Constitutional and Administrative Law, 5th Ed ,Palgrave Macmillan, New York, p 30-52

might override the right to hearing like matter of national security, also a hearing may be excluded when the court thinks that the outcome of the decision was not affected so that no injustice has been done.

But what the author fails to explain is on the basic elements or standards that constitute fair hearing he only mentioned that it is depending on merits of the case also the author explained fair hearing on administrative point of view meaning that this right is needed when right of a person on administrative matter while this right is needed also in other matter like criminal matters or whenever the right duties or interest of a person is needed to decided/determined.

Maliyamkono, Mason and Rutinwa,³⁸ the authors they have explained on how Tanzania need a good and standard constitution to all Tanzanians. Also, the authors depicted the position of current constitution of 1977 and what Tanzanians really need and expect on upcoming or new constitution.

Under fourth chapter particularly from page 91³⁹ the author Bonaventure Rutinwa discussed in detail civil rights and the results of new constitution he explained well on what it means by civil right and why the rights are classified or categorized into civil rights and continue mention these civil rights to include right to franchise as per Article 5 right to vote and be voted for, right to public association and freedom of assembly, right to give and receive information, freedom of movement. The author

³⁸Maliyamkono, M and Rutinwa K, Katiba Bora Tanzania, Tema Publishers Co Ltd, Dar es salaam, 2014 p 90-91

³⁹ Ibid footnote 13

deeply explained the current position of those civil rights and how they are expected to be in upcoming constitution.

But the authors fail to explain on the right of fair trial how this very crucial right in particular how is and is supposed to be in upcoming constitution as this right of fair trial affects those other civil rights. The authors explain well on the United States legal system as on fair trial require two things procedural and substantive. This will be a great reference to Tanzania legal system especially on administration of justice by courts.

Mbondenyi M⁴⁰ the author much appreciates that although Tanzania human rights system is plagued with numerous challenges and shortcomings it has equally made some positive contribution to the international human rights law discourse both regional and global. But he insists that Tanzania has acted and continued to act in ways that are antithetical to her human rights obligations under the African Human Rights System as a result, he emphasizes Tanzania need comprehensive reform and invigoration of her system to enable Tanzania among other things to comply with her human rights obligations.

But the author fails to give the normative reform of Tanzania human rights system as long as the right to fair trial concerned.

⁴⁰ Mbondenyi, M, International Human Rights and their Enforcement in Africa, Law Africa Publishing (K) Ltd, Nairobi, 2014 p 165-177.

Oluyede, P. O⁴¹ the author explains on judicial control of the administration as long as the court has jurisdiction, the law regarding the judicial control of administrative act is basically derived from common law principle that the High court has a right to supervise and review the decision of inferior bodies or court such as tribunal or magistrates.

If inferior jurisdictions could be checked whenever they acted in excess or in default of their jurisdictions there is no reason whatsoever why this principle does not apply mutatis to wrongful administrative acts. The author suggests that it is on this basis that the courts have maintained that administrative acts will be declared illegal if there is no jurisdiction to do what has been done in the words of Griffith and Street "Properly defined jurisdiction is the marking off of the area of power, something ascertainable at the outset of a process, the conditions on which the right of a body to act depends."

What the author failed to provide is the need of fair trial both in court and in administrative tribunal. He gives a lot of power to the court particularly high court as originated from Common law legal system and forget the fair trial right and procedure needed in the court while deciding matter under supervisory power like judicial review or any other kind of litigation.

Justice Suresh H⁴² the author insists on importance of all human rights, that all human rights be it civil, political, social, economic and cultural are enforceable as

⁴¹Oluyede P.O, Administrative Law in East Africa, Literature Bureau, Nairobi Kenya, 2010, p83-88

⁴² Suresh, H, All Human Rights are Fundamental, 2nd Ed, Universal Law Publishing Co, New Delhi (2010) p .96

fundamental rights, he mentioned that the right to life includes the right to live with human dignity and all that goes with it namely the bare necessities of life such as adequate nutrition, clothing, shelter over the head.

And he emphasized that there is a need to appreciate the basic concept that "The individual must be able to enjoy freedom from want as well as freedom from fear. Respect for the dignity of an individual cannot be ensured without the person enjoying all his or her rights"

This study is in line with what Justice stated; people have feared that, when there is a trial in court of law, if the trial will be fair? This makes them not to enjoy their fundamental rights. That is why the study is going to find out if the courts of law represented by High court which is the case study of this study do really adhere to the principle of fair trial.

Kamuli R⁴³the author discussed the principles of right to fair trial though at international level aspect for international crimes that it is the interest of fair trial that persons accused of international crimes however heinous are treated fairly it follows, therefore, that the desire to punish the most serious crime of international concern is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

⁴³Kamuli R, Modern International Criminal Justice, the Jurisprudence of the International Criminal Court, Intersentia publishing Limited, Portland USA 2014, p 9-20

The author scrutinizing all the relevant case-laws of the International Criminal Court (ICC), he elucidates the paradigm that the ICC's jurisprudence represents international criminal justice. He presents in-depth knowledge of how contemporary international criminal justice preserves, departs from or extends the principles that developed since Nuremberg Trials. He explains how the Court affirms that the most serious crimes of international concern must not go unpunished.

He explained both procedurally and substantively distinguishes the Court from other international criminal tribunals. He further explains the solid embedment of human rights law and victim-based justice into contemporary international criminal justice. He particularly elucidates the rights of victims before the ICC to participate in the proceedings and to receive reparations. The book is a primary and authoritative source for the interpretation of the Rome Statute the governing instrument of the ICC and the evolution of international criminal justice as a response to unimaginable atrocities that victimize humankind.

It is thus the duty of the court to ensure the protection of individual freedom rights. The right to a fair trial is amongst the most consequential human rights aims to sustain the core of humanity in their protection beholds as history teaches, the great danger for humanity such that no court of law should countenance.

Thus, necessities circumstances grave and compelling they may be not over showing the right to a fair trial. The author insists that the Rome statutes framework provides guarantee for rights of the accused the breach of which renders the holding of fair trial

impossible. But the author concentrates much on the criminal trial and tends to ignore civil cases.

Masabo J and others⁴⁴ in their article they provide on the access of justice that has become a serious problem in Tanzania and other countries in Sub Saharan Africa. And the problem is especially acute for indigents. And according to their research⁴⁵ the most vulnerable including the poorest of the poor and those disadvantaged because of their sex age ethnicity or disability remain marginalized and largely excluded from the benefits that have been attained.

And the major problem facing Tanzania and other countries in the region relate to inadequate number of lawyers majority of whom are based in urban areas disproportionate numbers between police and citizens overcrowded prisons and detention facilities and low level of legal literacy among the citizens .The authors continue to argue that these countries also have a poor human rights record, they are characterized by serious human rights abuses of which the poor and marginalized are always victims⁴⁶ .

That while there is an increase of persons in need of legal service there is an adequacy of persons to offer such services. Those who are available do so at very expensive rates. Legal assistance becomes the only means to assist those who are financially

⁴⁴ Masabo J and Others, University Based Legal Aid Clinics; Prospectus in Enhancing Access to Justice, Martisayi Solutions Limited, Dar es salaam ,2015, p 10

⁴⁵ UNDP, Rule of law and Access to Justice in Eastern and Southern Africa: Show casting Innovations and Good Practices, UNDP Regional Service Centre for Africa April 2013 pg10 at <https://www.undp.org/> (Accessed on February 2016)

⁴⁶ Human Rights Watch African Countries reports at <http://www.hrw.org/Africa>(Accessed on October 2014)

unable to hire advocates. The authors argue on one of the important elements of fair trial, legal presentation that is a requirement especially to marginalized citizens who face trials in court. Though authors discussed legal representation while their work based on universities, which were their subject, the matter is important and can be related to this study, which involve High court. As it is no doubt that one of the elements of fair trial is legal aid.

Kijo, B.H and Maina, C. P⁴⁷ discuss the legal aid matter in their work that right to legal representation and legal representation by non-lawyers specifically paralegals. They argue that legal presentation is an important legal right and should therefore be availed to any party to a trial. This right they assert relates to two other basic rights; the right to be heard and the right to personal freedom and liberty.

The author asserts that for a trial to be fair, both parties must be equally represented by competent counsels before a court of law. No justice can be manifested if for example, a poor man without legal representation is having a claim against a big corporation. Thus, it is important for the indigents to be provided with counsels. They must be informed that they have a right to legal representation.

Ghai Y and Cottrell J⁴⁸ the authors discussed the concept of rule of law and access to justice, which is closely connected, with the concept of fair trial. The authors believe that the concept of rule of law is fundamental for any just and democratic society.

⁴⁷ Kijo, B.H and Maina, C. P Justice and Rule of Law in Tanzania; Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, Legal and Human Rights Centre, Dar es salaam 1995-2005, p 119

⁴⁸ Ghai Y and Cottrell J, The Rule of Law and Access to Justice, in Yash Ghai and Jill Cottrell, Marginalized Communities and Access to Justices, Routledge Cavendish , London ,2009,p 8-24

Moreover, the authors believe that access to justice entails equality of all persons before the law. All people are entitled to the protection of their rights by state organs by the judiciary, which is entrusted with the duty to interpret the law. The authors advanced clearly and broadly the two concepts, which are the main discussion of this study.

Othman, H and Maina, C. P⁴⁹ the authors argue mainly on legal aid as an important human right, which ensures equality of all people before the law. And the emphasis is that the legal aid is a basic human right which should be guaranteed by the state and examines state of legal aid in Tanzania both Main-land and Zanzibar.

Kamuli R⁵⁰ the author pronounced fair trial to be rights to due process means a right to be treated fairly, efficiently and effectively by the administration of justice. And in order to guarantee fundamental fairness and justice the rights to due process place limitations on laws and legal proceedings.

He states that due process is a broad concept, it is interpreted to mean the rules administered through courts of justice in accordance with established and sanctioned legal principles and procedures and with safe-guards for the protection of individual rights.

⁴⁹ Othman H and Maina C P, Perspectives on Legal Aid and Access to Justice in Zanzibar published in the 10th anniversary of the Zanzibar Legal Services Centre, Legal and Human Rights Centre and Zanzibar Human Rights Centre, Dar es salaam ,2003, p 57-58

⁵⁰ Kamuli R, Human Rights Law Global, African and Tanzania Perspective. Inland Press, Mwanza Tanzania 2012, p 70-80

He further argues that the rules applicable to the administration of justice are extensive and vary from competency, independence and impartiality of the court /tribunal to fair trial and presumption of innocence. Fundamental elements of due process include quality in terms of administration of justices, quality in terms of protection of the rights of parties involved, efficiency and effectiveness.

Concerning the main discussion of this study, the author provides that the right to a fair trial is a complex issue. It encompasses multifaceted rules and practices. The right to a fair trial contains rules administered through the judiciary in accordance with established and sanctioned legal principles and procedures.

He contends further that it is embedded with safeguards for the protection of individual rights. Despite its evolution the right to a fair trial forms a key element in the due process. The rules applicable to a fair administration of justice includes but not limited to the interdependence and impartiality of the court, fair and public hearing as well as presumption of innocence.

Rwiza, R. N⁵¹ the author focuses on the history of rights stating civil and political rights being the first generation of human rights and as a fair trial is a civil right. He stated that this category of rights encompasses the attributive rights of the human person, rights that may in essence be invoked against the state and take for granted first of all hands-off policy on the part of the state.

⁵¹Rwiza R.N, Ethics of Human Rights, The African Contribution CUEA Press, Nairobi Kenya, 2010,p 171- 172

These are rights to freedom, and in tracing the history of the concept of human rights the rights of first-generation were promulgated with the rise of the great democratic revolutions at the end of 18th century in the United States and France. The focus was on individual civil and political rights with a view of guaranteeing both private liberty and democratic involvement. The rights of the first generation view human rights more in negative (freedom from) than positive (rights to) terms.

In other words, the author states that the rights of first-generation have a negative status (status negatives) because this indicates a defence character. They aim at preventing governmental violations of life, liberty and property. Moreover, rights of the first generation are also referred to as rights of the active status (status actives) of participation in the political process, which entails freedom of speech, assembly, association and democratic suffrage. Though the author concentrates much on the historical aspect of civil rights fair trial is one of them he failed to explain substantively on fair trial.

Mashamba, C. J⁵² the author stated that both international human rights law and international criminal law guarantee the accused's right to a free fair and expeditious trial and that the rights are explicitly provided in article 7⁵³. That this right comprises of the right to appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws regulations and customs in force. Also, the right to be presumed innocent until proved guilty by a

⁵² Mashamba, C.J, *Litigating Human Rights in African Institutions Law, Procedure and Practice*, Law Africa, Nairobi Kenya, 2017, p 80-81

⁵³ African Charter on Human and Peoples' Rights of 1981

competent court or tribunal. The right to defence including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial court or tribunal.

Ouguergouz F⁵⁴ the author discusses that despite its existence and recognition at international, regional and national level, there is no single agreed definition of what constitutes the right to fair trial. Ouguergouz explains that the concept of the right to a fair trial is inevitably bound up with the concept of justice. He notes that there appears to be no definition of the right to a fair trial either in the international instruments, which recognize it, or in the case-law of the international bodies protecting these instruments.

However, he proceeds stating that, the notion of the right to a fair trial can be understood in two distinct levels; the conceptual or structural level whose ingredients include independent, impartial, open and accessible judiciary and the technical sense, which is defined by reference to a number of procedural safeguards or requirements such as the right to be informed of a charge, right to counsel, right to a speedy trial. These two concepts, though distinct, complement each other. The researcher is in line with what the author discussed and other elements constitute fair trial as agreed internationally will be discussed thoroughly in this study.

⁵⁴ Ouguergouz F, *The African Charter on Human and People's Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff Publishers, the Hague ,2002, p 36-49

Halstead P⁵⁵ the author takes the view that it is possible to have a fair trial despite flaws in the procedure. He notes that there are circumstances where a conviction can be upheld even though some principles of the right to a fair trial have been violated. This view has created a gap since these principles are aimed at ensuring that no party is disadvantaged by having a right violated. Any violation is likely giving an advantage in favour of the violator. This will, more often than not, affect the fairness of the trial. The observation of the author is in line with the discussion of this study that the main aim is to have fair trial.

Akech M and Mbote, K.P⁵⁶ the authors pointed out that some courts have taken the view that any violation of the right to fair trial, even at the pre-trial stage, is fundamental and affects the validity of the entire proceedings. This entitles an accused to be acquitted.

That if it seeks to promote substantive justice by considering the effect of the right or its violation on the entire trial. However, they fail to consider how violation of some rights impact an accused person's ability to effectively defend himself and may, on its own render the entire trial unfair the authors' view that any violation is fundamental and entitles an accused to an acquittal is too much focused on formal justice at the expense of substantive justice. This is because it is important to analyze the nature of a violation, its impact on a trial and the overall effect before determining the appropriate remedy.

⁵⁵ Halstead P, *Unlocking human rights*, Hodder education, London, 2009.p 21-37

⁵⁶ Akech M and Mbote K. P, *Kenya: Justice sector and the rule of law*, Open society Initiative for eastern Africa, Nairobi, 2011,p11-33
<<http://www.ielrc.org/content/a1104.pdf>> accessed 14 January 2018.

The authors fail to take into account the various remedies that may address a violation, such as damages, enforcement of the right (for example the right to counsel), instead of an acquittal, especially where the violation does not affect the fairness of a trial.

Chadambuka, Z⁵⁷, analyses co-relation between the seriousness of an offence with which an accused is charged vis a vis the right to a fair trial within a reasonable time. She argues that where there is an inordinate delay in the trial, the court should be more willing to find a violation of the right to trial within a reasonable time in cases where an accused person is charged with a serious offence than where the charge is minor.

The seriousness of the crime relates to the gravity of the alleged criminal wrongdoing and how heavy the possible penalties can be if one is found guilty. She bases the right to a speedy trial on the seriousness of the offence. By focusing on the seriousness of the offence as the key determinant in enforcing this right, the writer fails to appreciate the other elements of fair trial, which may, render a trial unfair and unjust irrespective of its seriousness. Hence this gap will be filled by this study as the basic standard elements that constitute a fair trial will be discussed.

Mwimali, B. J⁵⁸ the author explores issues concerning the conceptualization and operationalization of the right to a fair trial in the Kenyan criminal justice system. Which is the neighbour of Tanzania and been colonized with the same Colonial

⁵⁷ Chadambuka Z ,Serious Offences and the Right to Trial within a Reasonable Time, Essex Human Rights Review 1.p 27 London2012, p1-9

⁵⁸ Mwimali, B.J, Conceptualization and Operationalization of the Right to a Fair Trial in Criminal Justice In Kenya ,Doctor of Philosophy, University of Birmingham , England 2012.p 32-41

master Britain and have almost the same legal system. He argues that the problems facing the full realization of the right to fair trial are not entirely attributed to shortcomings in the formal law and cannot be fully addressed from the formal law perspective alone.

It impacts factors outside the formal law such as poverty, illiteracy, corruption and cultural perceptions and contextual issues affect the enforcement of the right to fair trial. The right to have trial concluded within reasonable time embodies a broad range of factors core to whether the enjoyment of the right to a fair trial in general is possible.

A legal system wrought with legal technicalities may lead to time-wasting. He identifies factors that lead to delayed trials such as inept judicial officers, corruption, inadequate physical infrastructure and manpower as well as litigants themselves who may cause delays for various reasons. This literature is important as it gives an understanding of the factors which may lead to delays in the conclusion of cases and hence a violation of this right.

However, he did not discuss in detail what is a reasonable or unreasonable delay as to give rise to this right. He did not explore the factors, which ought to be taken into account in interpreting this right and the appropriate remedies that may be awarded once a violation occurs. And though the author discussed in Kenya perspective the same matter is facing Tanzania and among those six decided cases on merit by African court that right to fair trial facing some short-comings which are not only in

formal law only but in the system as a whole and this will be thoroughly discussed in this study in the next chapters.

Juwaki, Y. K⁵⁹ the author discusses the causes of delays in obtaining a speedy trial for prisoners in custodial remand in Zimbabwe. She analyzes section 18 (2) of the Zimbabwean Constitution under the Bill of Rights which provides that, if any person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time. She concludes that there exists a large gap between what the law is in books and what is in practice in Zimbabwe.

There are serious violations of the right to a speedy trial and there seems to be some deliberate neglect over the respect, protection and enforcement of the right. She makes various recommendations to speed trials in Zimbabwe so that prisoners' right to a fair trial is realized.

These include an increase in the number of courts that preside over criminal cases, increasing well-remunerated judicial personnel, computerization of court records, discipline of judicial officers who contribute to delays of trials, institutional resource capacitating of prisons, participation accountably and political non-interference.

This work will be the key in analyzing the right to fair trial and all of its elements and to see whether the court does adhere to this right. The work further failed to consider what remedies are available in law where a violation of this right occurs. This study seeks to address this gap.

⁵⁹ Juwaki Y.K, *Towards Trial of the Forgotten: An Enquiry into the Constitutional Right to a Speedy Trial for Remand Prisoners in Zimbabwe*, Masters, Netherlands 2012, p 18-26

Wahihu, W⁶⁰ takes the view that the right to fair trial is fundamental to the rule of law as it seeks to check arbitrary and unaccountable power. It has firm foundations both in international human rights law and in constitutionalist practice, particularly where it is written as a specific guarantee in the constitution. He considers the right a peremptory norm that underpins the protection of other human rights and that failure to observe it undermines the enjoyment of all other rights.

He also considers it to be an aspect of the natural justice rule, which prohibits condemnation without a hearing. He notes that the right is concerned with both procedural fairness, such as the right to be informed of a trial, as well as substantive fairness. The work, however, does not consider how violation of this right affects the outcome of a trial and which standards elements of fair trial are.

The literature reviewed in this work did not explore well whether the Tanzanian judiciary particularly High Court of Tanzania mainland adhere to fair trial. This work seeks to fill these gaps by assessing both legal and practical as well as discussing the matter.

1.6 Methodology

Research methodology shows the framework in which this study was carried out. The sort of data needed to answer the research questions and details, and how this was achieved in practice is also brought to light in this section.

⁶⁰ Wahihu, W, Human Rights Litigation and Domestication of Human Rights Standards in Sub ó Saharan Africa –AHRAJ casebook series, Volume 1, New York 2007,p 32-39 <https://www.ohchr.org> accessed on 28th March 2018

1.6.1 Doctrinal Legal Research

This study is doctrinal and qualitative one, and the research involved library consultations. Doctrinal legal research is a research into legal rules, doctrines, principles and concepts .It involves a rigorous systematic exposition, analysis and critical evaluation of legal rules, principles and doctrines and the interrelationship among them. It includes legal concepts and principles of all type of cases, statutes and rules.⁶¹

This methodology has been of essence in this study as it helps to look at court's judgment, how to interpret law findings, to know if the law is sufficient and how it is applicable. This methodology has helped to see that, High court has not adhered sufficiently to international standards of fair trial. Hence this methodology was used in order to see how the court interprets fair trial in decided cases.

This methodology has added a lot of values in this study it has helped to analyze different case laws decided by court of records to say High court and Court of Appeal as well as other precedents from different jurisdiction also at international level. Moreover to analyze statutory laws of Tanzania legal system pertaining fair trial, and studying the legal institution which in this study is High court to what extent in the administration of justice observe the right to fair trial.

Qualitative Research is the type of social science research that collects and works with non numerical data and seeks to interpret meaning from these data. Library research helped in finding out about what others have written on the subject and come up with

⁶¹ <https://www.academia.edu> Accessed on 28th February 2020

answers to the hypothesis. It involved perusal of books historical aspects, theories, doctrines, legislations, precedents and policies regarding adherence of fair trial in the High Court of Tanzania through articles, journals, Government papers, correspondences, various speeches and scholarly levels, reported and unreported cases; the internet, Governmental and non-Governmental records and other documented literature.

1.6.2 Comparative Legal Research Methodology

This methodology is applicable by comparing two legal systems against a national legal system, it can be international legal system against national legal system.⁶² The aim of using this methodology was to compare International standards regarding fair trial principles which Tanzania is the party as it has signed the treaties /International instruments regarding human rights. Comparing with local legislation to see how country wise Tanzania confirms with International law hence this method has complemented the doctrinal legal methodology. Also this methodology has added value to this study in a sense that by comparing international instruments and local legislation the study has come to know the extent of adherence to fair trial standards by High court of Tanzania.

1.6.3 Data Collection Methods and Study Area

1.6.3.1 Data Collection Methods

The word data is defined to mean and include all the information that the researcher collected and gathered for this study. There are two types of data namely primary and

⁶² <https://www.jstor.org> Accessed on 28th February 2020

secondary data. In this research, the researcher used both types of data: primary and secondary data. The primary data were obtained from Acts of Parliament /statutes and decided cases both reported and unreported.

Secondary data is the information that is obtained from published sources such as books, journals. Articles or from individuals who worked on the subject. This includes reviewing of written materials including, books, and journals. Or it might be information from a person who had dealt with the problem at one point or the other for example through research. This is based on the footing that it has enabled the researcher to know the research gapes and the extent in which the right to fair trial has been underscored by other writers. It has also helped the researcher to verify the findings on primary data.

Library research through books, journals, articles, Government papers, correspondences, policies, various speeches, bills, the internet, Governmental, non-Governmental records and other documentary literature. The study based on library search but observation method of data collection was used to complement the data from library as trials were observed in the High Court of Tanzania in Dar es salaam the main registry in different sessions both in criminal and civil cases.

The area of the study of this research is in Dar es salaam, Tanzania at the High Court of Tanzania. The researcher has decided to use High Court due to the reason that, this is the court of record means its decided cases are authority and are laws, has original jurisdiction, appellate jurisdiction, it has also inherent jurisdiction and exclusive power to hear and entertain all matters pertaining to human rights, issue like fair trial.

Therefore, it was from these reasons that the researcher selects to conduct this study in the city of Dar es Salaam as it is one of important cities in Tanzania.

In addition, the city is populated and it is in the list of among populated cities in Tanzania hence arising a lot of disputes, which need court to determine them. It is suggested that the city is the center for education, industry and is a diversity of people from almost all the Tanzania regions, which makes its culture unique and dispute is inevitable.

Furthermore, as the study involving library search the city of Dar es salaam is full of comprehensive libraries that may help researcher in conducting this study to mention national library is in this city, and as the city is full of academic institutions like universities which are facilitated with comprehensive libraries like the University of Dar es salaam library, the law school of Tanzania library, Mzumbe University library, the Open University library.

Dar es salaam also is one of the international recognized cities because of the international airport and the sea port, which make it the most important city not only in terms of businesses but also economically as it provides about high percent of the national income. Furthermore, most organizations, businesses, governmental and private have their headquarters in Dar es Salaam, and also it has the higher concentration of international human rights organizations and companies than any other region in Tanzania.

The other rationale of selecting the case study of Dar es Salaam stems from reasons that include: it is be easier for researcher to access the case under the study, given the

availability of a number of Human Rights organizations available in the city hence researcher had access to reports and researches conducted by them means helps in secondary data. Second, it is helpful as all the researcher primary sources of data are to be obtained from the High court of Tanzania at Dar es Salaam main registry where the cases both reported and unreported cases are there.

In other words, it is easy and convenient in making quick references to the secondary data like books and journals as needed. Also, the researcher's familiarity and work experiences and living experiences in the city of Dar es Salaam is of help. Lastly, with lack of resources such as funding of the research; it is very expensive to travel and conduct this research in other regions in Tanzania. Therefore, it is from these reasons that the researcher selects to conduct this study in the city of Dar es salaam.

1.6.3.2 Research Design

In this study Descriptive and Analytical research design were employed.

Descriptive research design is a fact finding investigation because it systematically describes a solution character phenomenon or problem. ⁶³It describes the existing state of a fact as it existing in present. In this study descriptive design was used as the research main objective requires answering the question what extent does High court of Tanzania adheres to fair trial principles.

Analytical research design is that kind of design that makes a critical examination of the existing state of a face. Analytical research attempts to establish why it is that way

⁶³ <https://www.questionpro.com> Accessed on 28 February 2020

or how it came to be, the analytical research usually concerns itself with cause-effect relationship.⁶⁴

In this study analytical research design has been used at analyzing the Tanzania legislations governing fair trial as a right whether they confirm to International standards and see to what extent High court of Tanzania adheres to those fair trial principles.

1.6.3.3 Data Analysis

The researcher applied legal analysis as this study was library search.

Legal analysis in the broad sense refers to a statement by a court, judicial officer, or legal expert as to the legality or illegality of an action, condition or intent.⁶⁵ In this study the reading of existing written laws, case laws/precedents decided by courts of records all of these have been discussed in this study to arrive at clear argument on answering research questions pertaining the extent of adherence of fair trial principles by High Court.

1.7 Scope and Limitations of the Study

The study is about adherence to Fair trial by High Court of Tanzania, where the assessment will base on legal and practical aspects, its limitation is in fair trial matter and the institution involved is High Court of Tanzania at Dar es Salaam main registry. The study is aiming at finding out whether the High Court is adhering to the rule of fair trial and if the answer is in affirmation to what extent, the researcher looked on

⁶⁴ <https://www.csus.edu> Accessed on 28 February 2020

⁶⁵ <https://definitions.uslegal.com> Accessed on 28 February 2020

the legal aspects which involved laws governing fair trial including Acts of Parliament, decided cases and international instruments like conventions which Tanzania has ratified so that to see if the legal system of Tanzania is compatible with those conventions which are provided under international level.

In practical aspect the study is limited to the High Court of Tanzania at Dar es salaam registry where the decided cases both reported and unreported were looked to see extent of adherence of fair trial and Observation method of data collection was used so as to get the clearly picture of how trials are conducted both civil cases and criminal trials. The study is limited to Dar es Salaam region only due to limitation of time and finance/fund / money resources as the researcher is funding herself therefore it is difficult for her to travel into other regions to conduct the study.

1.8 Significances and Justification of the Study

This study aims at extending knowledge by assessing the existing laws, rules and practical procedure as far as the right to fair trial is concern and sees how far Tanzanian courts particularly High Court adhere to the fair trial standards. Thus, the research add knowledge in relation to the issues of fair trial generally to persons desired to be dealt with human rights generally and those who are in the positions of dispensing justice. This study will also extend knowledge to other persons including students, teachers and interested persons in the field of human rights law and good governance on the trial procedures.

The research also provides new insights and ideas in relation to the development and application of the legal framework governing fair trial rights in Tanzania. The general

finding of this study implicitly reveal weakness on the existing laws and procedure as far as fair trial is concerned and in so doing the researcher highlights the gaps and provides recommendations that can be applied in influencing changes in the law.

The study also raises awareness to the policy makers, law makers and other institutions in the society about the existing law and its adequacies or inadequacies, and how far court have adhered to the said laws so as to ensure that those who face trial before it, are tried in accordance with the settled standards. The research is directed to various stakeholders who directly and indirectly deal with issues of fair trial and human rights at large, for example judges, and advocates human rights activists, prosecutors, state attorneys. This research therefore in general terms focuses on raising awareness and influence changes that can lead to the formulation of new policies or the amendments of the existing human rights laws specifically on the provisions concerning fair trial in general.

1.9 Outline of the Dissertation

The study has a total of six chapters the first chapter introduces fair trial norm as well as outlining the scope of this research. The second chapter illustrates the conceptual framework different concepts associated with fair trial are explained and discussed. The third chapter discuss legal framework for fair trial on fair trial safeguards under contemporary international human rights law. Essentially, the chapter demonstrates the extent to which fair trial rights are guaranteed in various international human rights law instruments. Being a party to a number of international human rights treaties, the manner in which Tanzania domesticates fair trial norms is highlighted in this chapter of this study.

The chapter looks at the normative framework and the approach of the national courts in upholding fair trial rights. The fourth chapter discusses state of dispensation of justice through adherence to Fair Trial principles in the High Court of Tanzania at Dar es Salaam main registry. Where trend of adherence to basic legal standards of civil trials in Dar es Salaam is discussed, court's mandate in pre-trial hearings and rights as well as powers of the courts to determine the pace of hearing of cases. Chapter five is about data analysis and discussion of research findings analyses and critiques the current fair trial jurisprudence of the African Court in six matters decided on the merits against Tanzania.

The part may assist in setting the tone for the application of fair trial norms in other parts of Africa. Then the last chapter, which is chapter six, provides some concluding remarks and recommendations. It gives a summary of the whole work and also provides for some solutions at this venture the chapter provides for various recommendations which if adopted will make well the enforcement of fair trial right as well as more efficient adherence of High Court to this right.

1.10 Conclusion

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. This chapter has discussed the historical background of the right to fair trial and its normative content. It traced the historical development of the right, from the first written code of laws founded on *Lex duodecim Tabularum* - the Law of the Twelve Tables - to the present time, which is governed by treaties, international legal instruments and national legislation.

The standards cited in this study differ in their legal status. Some are provisions of treaties; treaty provisions are legally binding on the states that are parties to the treaty. Others are provisions of non-treaty instruments. While non-treaty instruments are not in themselves binding, they represent the consensus of the international community on standards to which states should conform. Some of the rights recognized in these treaties and non-treaty instruments have been recognized as rules of customary international law, which is binding on all states Tanzania being part of it. Together they constitute an international framework of fundamental safeguards against unfair trials.

Respect of human right is paramount in every civilized society in the world. Every person is entitled to enjoy these rights include fair trial rights not by privilege but by virtue of being a human being. There is interdependence of these rights and therefore they should not be divided because enjoyment of one right depends on the existence of the other right. Therefore, joint efforts to protect and respect these rights are inevitable in order to attain the enjoyment of these rights to the maximum.

The right to fair trial is the basic fundamental and essential human right in the prevention of abuse of all other forms of human rights. Fair trial is all about what is conducted according to procedures. Also is the trial that observes the right of a party. The idea of a fair trial is central to human rights doctrine not only as a right itself but because without this one right all other are at risk. if the state is unfairly advantage in the trial process it cannot be prevented in the courts from abusing all other rights.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1 Introduction

The right to a fair trial has been defined in numerous regional and international human rights instruments. It is one of the most extensive human rights and most of international human rights instruments enshrine it in more than one article. The right to a fair trial is one of the most litigated human rights and substantial case law that have been established on the interpretation of the human right. In this chapter, the legal framework governing trials in Tanzania are going to be discussed. Despite variations in wording and placement of the various fair trial rights, international human rights instruments define the right to a fair trial broadly the same terms. The aim of the right is to ensure the proper administration of justice.

2.2 Fairness as a Concept

Fair means free from bias, dishonesty, or injustice or a legitimately sought, pursued, done, given, proper under the rules. If something is fair, it is reasonable and is what is expected or deserved; it is done according to the rules or fair may mean treating people equally without favoritism or discrimination and to high degree⁶⁶. This implies that once a person does or expected to do a certain issue, he or she has to do it without bias and in case if there is any procedure thereof, and he should follow them. Furthermore, if the said person is vested with power, he should utilize the said power without favoritism and or discrimination. He must use and apply the said power equally and in line with circumstances.

⁶⁶<https://en.oxforddictionaries> accessed on 1stSeptember 2018

2.3 Trial

Trial means the examination before a competent tribunal according to the law of the land of the facts or law⁶⁷. Puts an issue in a cause for the purpose of determining the said issue. A trial is the judicial examination of the issues between the parties whether they are guilt or innocence by due process of law⁶⁸.

2.4 Fair Trial

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him or her. The term 'suit at law' refers to various types of court proceedings including administrative proceedings, because the concept of a suit at law has been interpreted as hanging on the nature of the right involved rather than the status of one of the parties⁶⁹.

And just to be clear, the term fair trial does not appear in the Constitution of United Republic of Tanzania of 1977 the right to fair trial is just specifically accounted for in the Constitution itself also many writings⁷⁰ concerning on whether constitution of Tanzania clearly state on concept of fair trial stated that there is no clear concept of

⁶⁷ <http://legal> dictionary accessed on 3rd August 2018

⁶⁸ www.dictionay.com accessed on 4th August 2018

⁶⁹ Mc Goldrick, D, The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights, Clarendon Press, Oxford, 1994, at page 415

⁷⁰ Possi A, It is better that ten guilty persons escape than one innocent suffers: The African Court on Human and Peoples Rights and Fair Trial in Tanzania ,African Human Rights Yearbook 1 2017,p311-336 and Kamuli R Human Rights Law Global African and Tanzanian Perspective Inland Press, Mwanza-Tanzania, 2012, p 89-105

what is fair trial but there are things that have become part of constitution and part of bill of rights that are enshrined in the constitution and all together makes fair trial to have a meaning.

The term fair trial is often used but not often defined it is of broad scope. While we shall not undertake to give a formal definition of the term yet it may not be amiss to mention, in part at least its content. It means a trial before an impartial judge and in an atmosphere of judicial calm and being impartial means being indifferent as between the parties⁷¹. It involves observance of principles of natural justice which are you cannot be a judge of your own cause, avoid bias and the right to be heard.

The right to a fair trial is one of the fundamental guarantees of human rights and the rule of law aimed at ensuring administration of justice. It comprises various interrelated attributes and is often linked to the enjoyment of other rights such as the right to life and prohibition against torture and other forms of cruelty, inhuman or degrading treatment or punishment. All persons must have equal rights of access to courts and tribunals including access to remedies and reparations, which is relevant to persons subject to criminal and non-criminal proceedings.

Justice must be administered in a way that achieves fairness for all. Regardless of the identity of the parties to the proceeding or the nature of the proceeding itself criminal charges or a person's rights and obligations in a suit must be determined by a competent, independent and impartial court established by law. Justice must be

⁷¹ Boggs, D.J, The Right to a Fair Trial, A speech delivered at The University of Chicago Legal Forum Symposium November 7-8 1997

administered openly and in accordance with specific guarantee applicable to the determination of criminal charges and apparel guarantee in the determination of non-criminal matters that may be applicable as a result of the overarching need to ensure fairness and equality of arms⁷².

The right to a fair trial means that people are ensured that process will be fair and certain. It prevents the government organs from abusing their powers. A fair trial is the best means of separating the guilty from the innocent and protecting against injustice without this right the rule of law and public faith in the justice system collapse the right to a fair trial is one of the cornerstones of just society⁷³.

A trial is considered fair when is conducted fairly, justly and without procedural irregularity by an impartial judge and in which defendant is afforded his or her rights under the constitution or the appropriate law. Fair trial standards are commonly portrayed as a set of minimum coherent standards applicable across a range of different legal traditions there is a tension between these standards that accentuate the importance of individual will and autonomy and those that emphasize the importance of accurate outcome through an effective defense. This tension has been managed for the most part but enabling individuals to be represented by legal counsel who present the defense on the basis of their client's instructions.

Human rights law has recognized the importance of legal assistance at trial and pretrial stages of criminal process have led to a growing number of cases being

⁷² Ibid

⁷³ www.fairtrial.org

decided without an effective defense being provided by legal counsel such cases have been disposed on the basis of defendant's consent and this supposed autonomy has held way over any effective defense.

There are different dimensions of fair trial standards and exist a tension between the need for defendants to exercise autonomy over their case and the need for an effective defense. The right to counsel has acted as a bridge between these two competing demands.

Recent developments are then reviewed which have served to impede counsel from providing an effective defense in the interests of the client's freedom to choose how her case should be handled. The examples examined are the growing number of cases that are pleaded or diverted out of court with no real examination of the strength of the prosecution case. There is need to make a sharper distinction between individual rights and procedural standards and argues for greater attention to be given to and argues for later on the design of criminal procedure. And this was advanced more by Jackson of university of Dublin.

2.4.1 Fair for the Guilty or the Innocent

The concept on fair trial as whether the right to fair trial is for the guilty or the innocent is well discussed in this study as although the system is designed to give defendants various rights so that the chance of an incorrect conviction is minimized nothing in the traditional view indicates that the defendants deserves a sporting chance at acquittal if he is actually guilty. Such a perception may be a result of a system that

is designed to prevent abuse of government power but it is not part of the traditional model. There is a hope to convict the guilty and to avoid convicting the innocent. At the same time, it should be recognized that a fair trial is not always a perfect trial.

At the same time any dispassionate and informed observer must be willing to concede that some innocents will be convicted in practice the system can live that as well. Error correction mechanisms through appeal and later opportunities at redress are designed in part to deal with such mistake but it is known that in any system of human decision-making errors will still persist. That one relevant question as they look at criticisms of existing practice and proposed alternatives is how the proposed reforms will alter the numbers and balance of those errors. It is common places from Blackstone that it is better that ten guilty escape than one innocent be punished⁷⁴.

The study argue that yes, it is better that ten guilty escape than one innocent convicted/punished. Also, people should not confuse fair trial and issue of been released while you are truly guilty. Also, this concept is associated with one of the elements of fair trial presumption of innocence, which is provided under constitution of Tanzania and in international human rights instruments.

This is also been discussed by Ally Possi in his Article titled it is better that ten guilty persons escape than that one innocent suffer: the African Court on Human and Peoples Rights and fair trial right in Tanzania (2017) where he discussed in detail the Tanzanian perspective in regard with observance of fair trial by Tanzanian courts where at the end he suggested that the administration of criminal justice in Tanzania

⁷⁴ William M Blackstone ,4 Commentaries 358

is not functioning optimally and Tanzania has violated fair trial rights and this is according to report from African court and lastly he suggested it is better that ten guilty persons escape than one innocent suffers.

This is clearly observed by this study through case laws which are among primary sources of data used by this study, that Tanzania being a state party to African Union that its judiciary/courts do not observe fair trial rights hence several cases have been decided by African Court on Human and Peoples' rights which reveals the truth.

2.4.2 Justice and Human Rights

Fair trial as a concept is associated with justice and human rights in general,⁷⁵. In defining the term, right to fair trial one cannot fail to take into consideration philosophical concepts associated with the category of justice as well, if only for the adjective fair placed before the word trial⁷⁶. The full realization of the right to fair trial leads to justice to the accused and victim. A concept of justice is a significant and abiding concern of moral, political, and legal theory that have exercised the minds of thinkers since Plato and Aristotle⁷⁷.

Whenever a human right is violated it leads to injustice. The concept of justice in itself in an intuitively understandable, and varies from one society to another. More often no distinction is made between justice in the legal sense, moral sense, ethical sense and sociological sense.

⁷⁵ Biomdo, K. J, Judicial Enforcement of the Right to a Fair Trial without Unreasonable Delay under Article 50 of Constitution of Kenya LLM Thesis, University of Nairobi Kenya 2013.

⁷⁶ <http://www.search.ask.com> accessed on 20th August 2018

⁷⁷ Wacks ,R ,Understanding Jurisprudence, An Introduction to Legal Theory (3rd Ed.) Oxford University Press, Oxford, 2012,p22-36

This concept is relevant to this study since fair trial safeguards are meant to protect the right to liberty and ensure fairness and equality in administration of justice. The concept of human rights has been described as one of the greatest inventions of civilization, which can be compared in its impacts on human social life⁷⁸.

The chief exponent of the natural rights theory was John Locke, who developed his philosophy within the framework of seventeenth century during the Age of Enlightenment⁷⁹. John Locke in his Second Treatise of Government claimed that everyone had natural rights to life, liberty and property and that government was a trust established to protect these rights through the rule of law⁸⁰.

2.5 Court of Law

Is the judicial tribunal established to administer justice .An entity in the government to which the administration of justice is delegated ⁸¹.Or is any person or institution with authority to judge or adjudicate, often as a government institution with authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal and administrative matters in accordance with the rule of law.⁸²

2.6 Judiciary

Judiciary is the branch of authority in a country which is concerned with law and the legal system, a system of courts that interprets and applies the law in a country, state or an international community.⁸³

⁷⁸ Gerwith A, Reason and Morality, University of Chicago Press, Chicago 1978, p 22-26

⁷⁹ Symonides, J, Human Rights Concept and Standards, Dartmouth Publishing Company Limited, London ,2000, p 211-218

⁸⁰ Ibid

⁸¹ <https://legal-dictionary.thefreedictionary.com> accessed on 28th February 2020

⁸² <https://litigation.findlaw.com> accessed on 4th April 2018

⁸³ <https://dictionary.cambridge.org> accessed on 3rd April 2018

Judiciary is one of the organs of the state given power to dispense justice interpretation law and applicability of those laws as per Article 107A of The Constitution of The United Republic of Tanzania⁸⁴. The court system in Tanzania was introduced through the Magistrate Court Act ⁸⁵ and the High Court and Court of appeal of Tanzania were established 1979 by the constitution under Article 108 and 117 irrespective.

Briefly the history of judiciary of Tanzania can be traced on the 26th April 1964 when the United Republic of Tanzania was born. It was when the republic of Tanganyika and the People's Republic of Zanzibar united and formed a single country in the name of Tanzania. The administration of justice in Tanzania is an exclusive constitutional mandate of the judiciary of Tanzania vides Article 4, 107A and 107B of The Constitution of United Republic of Tanzania⁸⁶.

Furthermore, the judiciary is vested with power to protect rule of law and ensure supremacy of law. It safeguards rights of the individual, settles disputes in accordance with the law and ensures that democracy does not give way to individual or group dictatorship. And in so doing the rights and duties of the citizens within a state will be granted accordingly.

In Tanzania the history of judiciary can be traced back to the pre-colonial era, and as per the history it is said that judiciary develop gradually depending on the political and economic organization of the society.

⁸⁴ CAP 2 as amended from time to time

⁸⁵ Ibid

⁸⁶ Criminal Procedure Act CAP 20 RE 2002

Despite the union of the two countries one can still safely argue that Tanzania enjoys a twofold legal system namely that which applies in Tanzania island on one hand and the other which is relevant to Tanzania mainland (former Tanganyika) though the two systems merge at the apex for appeal from both the high court of Zanzibar and that of Tanzania mainland go to the Court of Appeal of Tanzania which is the union organ. The chief justice of Tanzania is the captain of both the court of appeal of Tanzania and the whole judiciary as per Article 118 of The Constitution of United Republic of Tanzania⁸⁷.

2.7 High Court

This court has been established under Article 108(1)⁸⁸. It has inherent power to hear all the matters being it civil or criminal. Section 2(1) Judicature and Application of Laws Act⁸⁹ is to the effect that the High court shall have full jurisdiction in civil and criminal matters. Furthermore, High court of Tanzania has division where each empowered to entertain and determine certain kind of cases, the reasons being to ensure that justice is attained timely. It is also regarded as the court of record, and thus make it is essential to this study as its decisions will be assessed so as to answer the research questions as to whether the High Court observe fair trial process and procedure.

⁸⁷ The Constitution of United Republic of Tanzania of 1977 CAP 2 as amended from time to time

⁸⁸ The Constitution of United Republic of Tanzania of 1977

⁸⁹ The Judicature and Application of Laws Act Cap 358 R.E 2002

2.8 Key Elements of Justice System

2.8.1 Rule of Law

The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country function. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.

The rule of law sometimes equated with the idea of constitutionalism has been widely proclaimed as a pillar of constitutional thought. Its most basic meaning is that all power in a community should be subject to general rules. Constitutionalism means limited government and includes the deals of the rule of law and the separations of powers as means of restricting and controlling government. The rule of law is in umbrella for assorted ideas about the virtues of law mainly from a liberal perspective. They center upon law as reason and law as means of controlling aggressive government.

The rule of law in its core sense emphasizes the importance of general rules as binding on government and citizen alike the core sense of the rule of law is morally ambivalent since it can also be regarded as an efficient tool of tyranny. In an amplified sense the rule of law requires the law to reflect certain basic values derived from the nature of rules as guides to conduct. However, there is also consistence with repressive laws. In extended sense the rule of law is claimed to be guardian of the

basic liberal values of the community entrusted to the courts because of their role as guardian of impartial reason.

It is claimed to be translated into rights such as nondiscrimination freedom of expression and access to government information. However, there is no reason to believe that these values or reason itself are the prerogative of courts and they have to be accommodated against social goals of elected government. Rule of law has been supported through improving accessibility to the court system, through finding public awareness, legal aid public litigation and alternative dispute resolution. Rule of law is the core of democracy.

As per author Issa G Shivji⁹⁰ he stated minimum requirements of rule of law that are;

- (i) Political /public power must be authorized by and exercised in accordance with the law and rules as per Article 36,47,58,59⁹¹ that offices of different department have been established by constitution.
- (ii) Law should have been made by a representative body duly authorized by the people to make law as per Article 62(1), 63(3) 64(1) of the constitution⁹².
- (iii) The laws should be just and fair as per Article 9(h) and (j), article 13(2) (3) and article 13 (6) a, b, c and e of the constitution of Tanzania.
- (iv) The makers of the law should not be the same people who determine what the law means, (the adherence of separation of power) Article 4 and 107A of the constitution of Tanzania.

⁹⁰Shivji , I.G, Constitutional Law and Legal System of Tanzania, Mkuki na Nyota, Dar es salaam 2004 p 375-388

⁹¹ The Constitution of United Republic of Tanzania of 1977 as amended from Time to Time.

⁹² Ibid

- (v) The law should treat all human beings equally regardless of their origin or socio-economic conditions as per Article 9 (a) (c) (g) (h) (I) (j) and article 12, 13 (2) and (4).
- (vi) Laws should not be contrary to basic human rights as per Article 12-29 of the Tanzania Constitution.

The study has revealed that these minimum requirements of rule of law which are supremacy of regular law as opposed to arbitrary power every state action must trace its authority from the law and every state power must base on authority conferred by law equality before the law and independence of judiciary. Access to justice, the judicial organs should be open to all those whose rights have been affected, accessibility should be devoid of undue technicalities which defeat ends of justice, meaningful remedy should be available, parties be treated fairly and equally by the law. Legal aid therefore gives meaning to rule of law. They do reflect the right to fair trial in a sense that in order to say that the country do observe fair trial that country must first observe rule of law.

2.8.2 Separation of Powers

The doctrine of separation of power means that the government power should be divided into legislature executive and judiciary and that each branch should have different personnel, institution and functions. The doctrine of separation of power attempts to combat issue of power to be gravitated towards a single personal leader by providing mechanisms to make it difficult for any single power group to dominate and to ensure that government action requires the cooperation of different groups each of which helps to keep the others within bounds.

The doctrine is particularly associated with republican thinking but also supports the liberal values of the rule of law. It is perhaps less important how the functions of government are divided than that however the division that has found most favor is that proposed by Montesquieu 1689-1755⁹³ who divided government into three branches corresponding to basic functions of government namely legislature, the executive and the judiciary. The legislative makes the laws, the judiciary settles disputes and imposes sanctions for breaking the law, and executive enforces and puts the law into effect.

Montesquieu thought that if any two of the functions three functions fall into the same hands the outcome is likely to be tyranny. According to the doctrine of separation of powers, each branch has different functions but each uses its powers each branch should be independent of the others. For example, judicial review exists both to police the limits of executive power and to protect the executive within those limits as positioned in the case of *M v Home Office*.⁹⁴

The proper constitutional relationship between the executive and the court is that the courts will respect all acts of the executive within its lawful province and that the executive will respect all decisions of the court as to what its lawful province. The balance between three powers depends on particular fears and worries of each party of legal system. In the case of *Mwalimu Paul Mhozya vs Attorney General*⁹⁵ the court said that the balance of power between the three branches of government namely the

⁹³ <https://www.jstor.org> accessed on 2nd August 2018

⁹⁴ [1992] QB 270,314

⁹⁵ [1996] T.L.R 13

executive, legislature and judiciary and the courts relationship must be maintained. One branch of the government should not usurp the powers of another branch. Also, the principles that the functions of one branch of government should not encroach on the functions of another branch is very important principles one of the principles which ensure the task of governing a state is executed smoothly and peacefully.

Though the researcher found out that it difficult to find absolute separation of power as the three institutions depend on each other, but a democratic country needs to declare in its Constitution that it observes separation of power for instance in Tanzania constitution under Article 4(1) provides that there is separation of power in Tanzania among the tree organs.

However in practice the study reveals that there is no clear separation of power as system allow the executive to intervene in judiciary power and this is vividly depicted by Regional Commissioners and District Commissioners powers given by the law establishing their offices and through case laws as in the case of Hamisi Masisi v Republic⁹⁶ the High Court of Tanzania held that once the executive have decided to take any person or matter to court then the judicial machinery should be left flee to apply the rules applicable without being harassed that is unjustifiable and illegal for the regional commissioner for order re-arrest merely because the accused person had been admitted to bail. . Also, even the recruitment of judicial personnel which is done by the executive and the salary is paid by executive organ hence may lead to judicial not to be impartial hence might lead not to observe fair trial.

⁹⁶[1984] T.L.R 951

2.8.3 Independence of the Judiciary

Independence is an aspect of rule of law in its own right. As per Kamuli Raphael⁹⁷ independence of judiciary entails independence from the executive and the legislature. Such independence is very important for the implementation and protection of human rights. If such independence does not exist, the recourse to a court is of little use.

According to the UN Basic Principles on the Independence of Judiciary independence of a tribunal is considered on the basis of the condition of service and tenure, manner of appointment of judges and discharge of their duties and degree of stability and logistical protection against outside pressure and harassment.

It overlaps with but goes beyond separation of powers. Judicial independence requires the independence of judges to be free from any threat from any pressure. Article 6 of the European convention on human right includes both elements by requiring a fair and public hearing by an independent and impartial tribunal established by law. In the case of *Millar v Dickson*⁹⁸ central to the rule of law in a modern democratic society is the principle that the judiciary must be seen to be independent from the executive.

Judicial independence also requires that judges should be protected against attacks on their conduct in court. They are immune from personal actions for damages in respect of acts within their powers or done in good faith. As positioned in the case of *Mcc v*

⁹⁷Kamuli, R, Human Rights Law Global, African and Tanzania Perspective, Inland Press Limited, Mwanza-Tanzania, 2012, p 87-88

⁹⁸ [2002]3ALL 1041

Mullan ⁹⁹1984 anything said in court by judge advocate and witness is absolutely privileged against an action in libel and slander.

Judicial independence also requires that judges should not have any personal conflict of interest in relation to the parties before them. It requires that judges should be protected against external pressures but it does not mean that they should not be accountable for their actions. In the case of *Hamisi Masisi v Republic*¹⁰⁰ the High Court of Tanzania held that once the executive has decided to take any person or matter to court then the judicial machinery should be left free to apply the rules applicable without being harassed that is unjustifiable and illegal for the regional commissioner for order re-arrest merely because the accused person had been admitted to bail.

According to Kamuli Raphael, in his book titled *Human Rights Law Global, African and Tanzania Perspective* he is of the views that the problems related to independence of the judiciary have both quality and quantity aspects. Those diverse problems range from insecurity of tenure to salary bargaining schemes. The study reveals that it is a trite requirement that a tribunal be established by law meaning that a tribunal be established through an enactment of the legislature and not upon the discretion of the executive branch. Special courts are only justifiable under exceptional circumstances.

Thus, the independency of the judiciary entails that every judge or magistrate to freely decide cases in accordance with his /her assessment of the facts and evidence as well

⁹⁹ [1984] AC 528

¹⁰⁰ [1984] TLR 951

as his /her understanding of the law. A judge /magistrate must be allowed to perform his/her duties without any improper influence, inducements or indirect or direct pressures. Through this fair trial rights may be realized as judicial personnel will be impartial as there is no external pressure.

2.8.4 Good Governance

Good governance means a network of government public policies, institutions assisting of economic relations and the role of nongovernmental organization. Governance can also be looked as the combination of ideas on political economic and social authority and management of resources effectively and equitably. Other writers have looked at governance as a network of private non-governmental bodies and their participation in formulation and implementation of public policy and delivery of public services.

Features of good governance is when the state is observing constitutional aspects political administration public service and economic system under constitutional level, good governance is looked at through observation of fundamental constitutional principles which includes separation of powers rule of law, respect of human rights particularly fair trial, accountability of political leaders and decentralization of political authority.

Good governance is an approach to government that is committed to creating a system founded in justice and peace that protects individual's human rights and civil liberties¹⁰¹ while governance means the process of decision making and the process by

¹⁰¹ <https://ww.unescap.org> accessed on 17 September 2018

which decisions are implemented or not implemented. Governance can be used in several contexts such as corporate governance international governance national governance and local governance.

Government is one of the actors in governance. Other actors involved in governance vary depending on the level of government that is under discussion as for this study national/central government is the subject matter under discussion. Good governance has several major characteristics¹⁰². Which are participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law, it assures that corruption is minimized the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision making It is also responsive to the present and future needs of society.¹⁰³

2.9 Natural Justice versus Rights to be heard

Natural justice is that justice that is simple and elementary as distinct from justice that is complex sophisticated and technical. The principles of natural justice or fundamental rules of procedure for administration action are neither fixed nor prescribed in any code. They are better known than described and easier proclaimed than, defined in *Abbot v Sullivan*¹⁰⁴, According to smith ¹⁰⁵ *Haryana Financial v. Kalash Chandra JT*¹⁰⁶

¹⁰² Ibid

¹⁰³ Ibid footnote 110

¹⁰⁴[1952] 1KB 189.

¹⁰⁵Judicial Review of Administrative Action (1995) at p 378

¹⁰⁶[2008]8 SCC 70)

The term natural justice expresses the close relationship between the common law and moral principles and it has impressive once it was also known as substantial justice, fundamental justice universal justice or fair play in action it is a great humanizing principle intended to invest law with fairness to secure justice and to prevent miscarriage of justice.

In the case of *Wiseman v Borneman*¹⁰⁷ the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. Natural justice is a branch of public law it is a formidable weapon, which can be wielded to secure justice to citizens. Rules of natural justice are basic values, which a man has cherished throughout the ages. They are embedded in many constitutional frameworks and their pristine glory and primary cannot be allowed to be submerged by exigencies of particular situations or cases.

Principles of natural justice control all actions of public authorities by applying justice, equity, and good conscience. Natural justice is part of law, which relates to administration of justice. Rules of natural justice are indeed great assurances of justice and fairness¹⁰⁸. The underlying object of rules of natural justice is to ensure fundamental liberties and rights of subjects. They thus serve public interest the golden rule, which stands firmly established is that the doctrine of natural justice but to prevent miscarriage of justice. Its essence is good conscience in a given situation nothing more but nothing less¹⁰⁹.

¹⁰⁷[1971] AC 297

¹⁰⁸Takwani C.K, Lectures on Administrative Law, Eastern Book Company, New Delhi,2007,p 171

¹⁰⁹ Ibid p172

Right to be heard or hear the other side in Latin it can be expressed as *audi alteram partem* it is one of the principles of natural justice means no man should be condemned unheard or both sides must be heard before passing any order. This is the basic requirement of the rule of law it has been described as foundational and fundamental concept it lays down a norm which should be implemented by all courts and tribunals at national as also at international level¹¹⁰. Right to be heard becomes an important safeguard against any abuse or arbitrary or wrong use of its powers by the administration in several ways.

As per Kamuli Raphael ¹¹¹ fair hearing entails the equal and reasonable opportunity for all parties to present a case. Issues encompassed in the right to hearing include but not limited to the presentation of evidence or the behavior of the public members of the court and press. The right to fair hearing is often dependent on several other rights such as the availability of competent legal assistance.

What the author tries to suggest here is that court will come into place after hearing has been given to the person concerned and the courts will be in a better position to review administrative action as per prevalent principles of judicial review of administrative action. The courts have far greater control over administrative actions involving a hearing¹¹².

¹¹⁰ Ibid p 188

¹¹¹ Kamuli R, Human Rights Law Global, African and Tanzania Perspective, Inland Press Limited, Mwanza Tanzania, 2012, p 89

¹¹¹ [2002] 3ALL 1041

¹¹² Jain M. P, late Jain , S.N , Principles of Administrative Law (4thEd) Dellismt Rampyari Wadhwa, New Delhi, 1997 at p 140

Courts are called upon to decide whether or not in a particular situation failure on the part of administration to give a hearing is fatal to the action taken there is no readymade formula to judge this question and every case has to be considered its own merits.

The study has found out that the right of hearing can be claimed by the individual affected by an administrative action from the three sources first the requirement of hearing may be spelt out of certain fundamental rights granted by the second statute under which an administrative action is being taken may itself expressly impose the requirement of hearing and hearing is of two main types judicial and non-judicial.

Generally, no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him. A party is not to suffer in person or in purse without an opportunity of being heard. *Painter v Liverpool oil gas light co*¹¹³ this is the first principles of civilized jurisprudence and is accepted by laws of men and God. In short before an order is passed against any person reasonable opportunity of being heard must be given to him it includes two elements notice and hearing.

In the case of *Mbeya Rukwa Autoparts and Transport Ltd v Jestina George Mwakyoma*¹¹⁴ the law provided that, court has no mandate whatsoever to revoke a right of occupancy except the President. The court held in that case that a decision of a court to revoke a right of occupancy without giving opportunity to the appellants to be

¹¹³ [1836]3 ad.

¹¹⁴ [2005] TLR 251

heard was not only a violation of the rules of natural justice but also a contravention of the constitution hence void and of no legal effect but also decision of the court to revoke and grant a right of occupancy to respondent violated the doctrine of separation of power hence illegal and of the legal effect.

2.10 Conclusion

Civil and political rights are not wholly negative they cannot be implemented simply by a state refraining from conduct as to right to fair trial as per the requirement of international human rights instruments like ICCPR requires the establishment of adequate judicial infrastructure. And the main problem is implementation not how you guarantee this fair trial right. Hence the legal obligation surrounding fair trial right is both negative and positive.

In the case of *Mwalimu Paul John Muhozya v Attorney General*¹¹⁵ it was observed that it is the function of a court of justice to try to get the bottom of the real dispute and determine what the real issue in the matter before it are. Provided of course no party can be prejudiced as already remarked substance rather than form should be the court's primary concern.

If legal steps can be taken to cure any defects in a pleading or affidavit without substantially prejudicing with the opposite party a court of justice should grant leave to the party to take these remedied steps if she so wishes.

¹¹⁵ [1996] T.L.R13

This chapter gives the details about the concept of fair trial and how the same has been covered in various laws in Tanzania and also at international arena. Laws shows that the concept is well covered, both domestically and internationally and as Tanzania being signatory to those International instruments has obligation to observe fair trial. Now the issue is on how the same is practiced and or implemented or adhered by the Tanzanian High Court, which is the subject question of this study.

CHAPTER THREE

LEGAL FRAMEWORK FOR FAIR TRIAL

3.1 Introduction

The concept of justice is as old as origin of human society itself. The social nature of man demands that he must live peacefully in society. While living so he experienced a conflict of interest and expects rightful conduct on the part of others. This is the reason why Salmond and Roscoe Pound have emphasized the importance of justice in their definitions of law¹¹⁶.

The study reveals that, it is through the instrumentality of law that justice is administered by the state. Likewise, also Law is a body of principles recognized and enforced by state for administration of justice and Justice is reservoir from where the concept of right, and equity evolves. From the above descriptions then one can get to know the concept of justice.

In evaluating the fairness of a trial monitors should refer to norms of undisputedly legal origin the laws of the country in which the trial is being held, the human rights treaties to which that country is party and the norms of customary international law. And in order to administer justice the investigations machinery and the courts ought to have duty of care and diligence within the ambit of the law.

The 1977 Constitution of the United Republic of Tanzania as amended from time to time enjoins the courts as the institutions with final authority on delivery of justice as

¹¹⁶Tinkham, R.P, Justice According to Law, by Roscoe Pound ,Indiana Law Journal vol 27,Iss 4 Article 10 ,Indiana ,1952

per Article 107. The administration of justice as per the doctrine of separation of state or government functions is therefore the sole mandate of the judicial branch. The administration of justice significantly affects the basic fabric of society. Respect for the rule of law and confidence and trust of the people in the institutions that administer the law (courts and tribunals) are fundamental to a well-ordered society. Justice, rightly defined and administered, enhances the quality of life for all current and future lives of the people and also gives a country a competitive edge in all its socio-economic endeavors.¹¹⁷

Administration of justice is hardly self-defining. It may mean different things to different persons. Hence there is no agreed definition of the term. There are several variations like judicial administration, court management and to administer the delivery of court system services, which may convey approximately the same meaning. All matters relating to courts, including the substance of judicial decisions at one time or another have been addressed under administration of justice or its kin.

Judicial administration also is referred to as court administration is the practices, procedures and offices that deal with the management of the administrative systems of the courts. Judicial administration is concerned with the day-to-day and long-range activities of the court system. The study discerned that in other countries for example United States of America, Judicial administration has become a profession. Every court in the USA has some form of administrative structure that seeks to enhance the

¹¹⁷ Hon Mr. Justice Robert Vincent Makaramba Unearthing Key Challenges and Solutions in Advancing Justice in Tanzania, A Paper represented at the Tanganyika Law Society Annual Conference and General Meeting held at the Arusha International Conference Centre (AIC) on 20th day February 2015.

work of judges and provide services to attorneys and citizens who use the judicial system.

In Tanzania with the promulgation of the Judiciary Administration Act in 2011, a new cadre of professionals in the judiciary known as court administrators has also been introducing. In terms of the new organizational; structure of the Judiciary of Tanzania court administrators deal with court management, which is part of the administration of the courts, that is the administrative activity that creates and maintains the resources and personnel required for arriving at court judgments and rulings.

The main purpose of introducing professional court administrators in the administration of courts in Tanzania was to ensure the efficient administration of the courts as major institutions for providing judicial services without compromising the independence of judges and magistrates. This undertaking has already started paying off as now Tanzania is beginning to witness some increased efficiency in the management of resources in the courts. Judicial officers (mainly Registrars and Deputy Registrars) who in the past used to handle administrative and judicial function have now been released to concentrate on the core function of advancing delivery of justice.

Separating the administrative activity from the justice delivery activity has therefore been solution to the perennial problem of poorly managing resources and personnel in the Judiciary the ensuring efficiency in case disposal. Though the study shows Tanzania has a long way to go to achieve this due to other associated challenges. The judiciary in delivering service to the public is required to fulfill its promise to

everyone by creating a legal framework and jurisprudence of the highest standard which also is responsive to social, political, economic, cultural and technological trends and needs both at national as well as international level.

The study finds out that there are popular dissatisfaction with delivery or administration of justice, as per Justice Makaramba in 2015 February speech he stated that, in 1906, Dean Roscoe Pound of the Harvard Law School gave a seminal speech at the Annual General Meeting of the American Bar Association (ABA)¹¹⁸ noted that dissatisfaction with the administration of justice in general and the legal profession in particular, is not new. It is as old as the law itself.

The study noticed that observation by Dean Roscoe Pound is as valid as today as it was at that time, in 1994, Edward D R out of inspiration by Dean Roscoe Pound's famous address in 1906 wrote a Paper on the Causes of Popular Dissatisfaction with the Legal Profession echoing what Dean Roscoe Pound has said more than a century.

It was, additionally, realized that, procedural matters, adversarial systems, uncertainty, delay, expense, multiplicity of courts, concurrent jurisdiction, and geographic jurisdiction, political influence on and in courts and public ignorance regarding the courts the courts. Where forty three years later Chief Justice Arthur Vanderbilt of New Jersey, in his speech on Minimum Standards of Judicial Administration¹¹⁹, addressed a rather different list of topics the selection, conduct, and tenure of judge, managing

¹¹⁸ Re Edward D, The Causes of Popular Dissatisfaction with the Legal Profession, St John's Law Review vol 68, West Virginia, 1994

¹¹⁹ Chief Justice Arthur Vanderbilt of New Jersey, in his speech on Minimum Standards of Judicial Administration, 1949.

the business of the courts, rulemaking and the judicial regulation of procedure, the selection and service of juries, pretrial conferences, trial practice courts of limited jurisdiction, the law of evidence, appellate practice and the state of administrative agencies and tribunals. This is vivid even today.

The latest generation of standards for administering justice moves from the quantitative aspects of courts to the qualitative by espousing and attempting to measure access to justice, expedition and timeliness, equality, fairness and integrity independence and accountability and public trust and confidence. In Tanzania and elsewhere, the major challenge ahead for the legal sector is how to ensure that fair trial is adhered as required. For having timely and accessible justice to all, the Tanzanians need the court to ensure speedy dispensation of justice for all social groups.

The judiciary must ensure that in every case all parties are treated equally ethically and fairly by judicial officers under the due process of law. The effective administration of justice remains a central task of responsible and democratic governance. Justice as an ideal is a moral imperative but it is also a necessary precondition for peace and development, effective speedy and fair system of litigation. Hence, this chapter is going to discuss on how fair trial adherence by the court may hinder or help justice to people.

3.2 International Legal Framework

The concept of fair hearing and or fair trial at large has been also exposed by international forum and organizations for the purpose and aim of protecting parties to any proceedings thereto. The concept has been widely covered in various instruments

ranging from Regional Level and International Level. The instruments, which are covered hereunder, try to narrate out the concept of fair trial in both criminal and civil case at international level.

- (i) The charter at the preamble explicitly shows the intention of the Charter, among other things to establish condition under which justice and respect for the obligations arising from treaties and other sources of international law to be maintained.

Also, under Article 3 the Charter insisting on international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedom for all without distinction as to race, sex, language or religion and states to ensure their action are in conformity with these aims.

The fact that the charter recognizes the respect of human rights and fair trial being one, the charter encourages the state to respect the international instruments / treaties of human rights being one of them. Tanzania as a member state of charter has responsibility to observe the requirement of the charter to respect human rights being one of the duties.

- (ii) In response to the horrors of the Second World War, the United Nations was formed and set out the fundamental rights of human beings in the (UDHR). The right to a fair trial was at its heart. Various rights associated with a fair trial are explicitly proclaimed in Article 10 of the UDHR. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of any criminal charge against him.

The international community proclaimed the right to a fair trial to be a foundation of freedom, justice and peace in the world. The right to fair trial is recognized internationally as a fundamental human right and countries are required to respect it. Different countries have developed different ways of doing this but regardless of how a particular legal system operates, there are standards principles which are core to all fair justice systems and they all form part of the right to a fair trial.

(iii) The right to fair trial is treated as corresponding to the overarching right to a fair and public hearing by a competent, independent and impartial tribunal established by law as provided under Article 14 (1) of the ICCPR, the provisions of Articles 14 and 15 of the ICCPR that are expressly applicable to criminal proceedings alongside parallel guarantees for criminal proceedings in a *õsuit at law* arising from the overarching right to a fair trial and equality of arms as well as law and standards under customary international law and as identified in documents such as the United Nations Human Rights Committee's General comment on the right to a fair trial which stands as an authoritative interpretation of the meaning and application of Article 14 of the ICCPR.

Broadly speaking, a suit at law *õrefers to various civil (private law) or administrative proceedings before a judicial body. So due process is required into both non-criminal proceeding and criminal proceeding. In its broad setting as provided under ICCPR is due process is the legal requirement that the state must respect all of the legal rights that are owed to a person. õdue processö is treated as meaning the process that is due to be respected in the context of specific setting whether concerning the detention trial or expulsion of a person and required to ensure fairness, reasonableness, absence of*

arbitrariness and the necessity and proportionality of any limitation imposed on rights of the individual in question.

As per ICCPR several elements are required by the principle of fair trial the right of the accused to know the criminal charges against her or himself and the evidence on which such criminal charges are based, including exculpatory evidence, the enticement to respond to such evidence and any submission made by the alternate party, the right to legal representation and the right to call one's own witness and cross examine opposing witnesses. The statute provides the highest standard of rules on due process. It defines in detail principles of criminal and principles of fair trial.

Article 20 which sets out the principle of *ne bis in idem*: no person shall be tried before the court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the court.

Article 22 which sets out the principle of *nullum crimen sine lege*: a person shall not be criminally responsible unless the conduct in question constitutes, at the time it takes place a crime within the jurisdiction of the court.

Article 23 which sets out the principle of *nulla poena sine lege*: a person convicted by the court may be punished only in accordance with the statute which created the offence.

Article 24 which sets out the principle of non-retroactivity *ratione personae*: no person shall be criminally responsible for the conduct prior to the entry into force of the respective law. In the event of a change in the law applicable to a given case prior

to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply.

Article 26 excludes the jurisdiction of the court over children below the age of 18 at the time of the alleged commission of crime.

Article 30 sets out that a person shall be criminally liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with intent and knowledge.

Article 62 provides generally that the accused shall be present during trial.

Article 66 provides for presumption of innocence.

Article 67 provides in detail the rights of the accused which include:

- (a) To be informed of the nature, cause and content of the charge
- (b) To have adequate time and facilities for the preparation of defense and communicate freely with counsel.
- (c) To be tried without undue delay
- (d) Legal assistance
- (e) To examine the witnesses against him or her
- (f) Assistance of competent interpreter and translations
- (g) Not to be compelled to testify or to confess guilt and to remain silent without such silence being a consideration in the determination of guilt or innocence
- (h) To make an unsworn oral or written statement in his or her defense
- (i) Not to have imposed on him or her any rehearsal of the burden of proof for any onus of rebuttal.

- (iv) Tanzania being one the signatory of Rome Statute is bound to follow the above principles in relation to right to fair trial. This is to the effect that Tanzania has ratified and incorporates Rome Statute to its domestic laws and thus the said laws apply *mutatis mutandis* as other laws enacted by the parliament. Further Tanzania is a signatory to a number of international treaties under which it has an obligation to implement them in good faith in compliance with the international law doctrine of *pancta sunt servanda*.¹²⁰

Example Some criminal laws principles like *nullum crimen sine lege, nulla poena sine lege* and many others which are applied in criminal proceedings has its root from this international instrument.

- (v) The ACHPR codifies the right to a fair trial under Article 7 contains many of the rights to a fair trial under Article 7 contains many of the rights included in other human rights instruments, such as the right to an appeal, the presumption of innocence and the right to be tried within a reasonable time period by an impartial court or tribunal.

That, every individual shall have the right to have his cause heard. This comprises:

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;

¹²⁰ Article 26 of The Vienna Convention on the Law of Treaties (1966) clearly states the doctrine of *pancta sunt servanda* as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

- (c) The right to defense, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal.

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

3.3 National Legal Framework for Fair Trial in Tanzania

The question of fair trial in Tanzania is purely a legal issue as it is governed by numbers of laws as herein under elucidated;

- (i) Principles of fair trial in the Constitution¹²¹

The Constitution is the mother law. It provides for rights and duties of citizens and it provides for right to fair trial to any person whose rights and duties are to be determined by court of law. The said right is well enshrined under Article 13 (6).

- (a) When rights and duties of any person are being determined by the court or any other agency that person shall be entitled to a fair hearing and the right of appeal or other legal remedy against the decision of the court of the other agency concerned.
- (b) No person charged with a criminal offence shall be treated as guilty of the offence.
- (c) No person shall be punished for an act, which at the time of its commission was not an offence under the law and also no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed.

¹²¹ The Constitution of United Republic of Tanzania 1977 Cap 2 of the Laws of Tanzania

Further Article 107A (2) (a)-(e)¹²² impose duties to the court of law to do away with technicalities, be impartial, not to delay dispensation of justice without reasonable ground, to award compensation and or penalties basing on relevant laws.

(ii) Fair trial in enforcing the Bill of Rights ¹²³

This Act provide for procedure for the enforcement of constitutional basic rights, for duties and for the related matters. Fair trial being one among the basic right provided under the Constitution, principally its enforcement is done basing on procedures provided under this Act.

Section 2 of the Act¹²⁴, then in case anyone have interest/cause of action, if he/she does feel when his rights being determined and the trial procedure were not followed may use this law to initiate a human right case in court of law. Under section 8¹²⁵ the High Court has been given power to hear and determine any application, therefore the High Court shall exercise that power and exercise it in a fair trial manner.

Further in 2014 his Excellence Honorable Chief Justice (As he then was) Othman Mohamed Chande, through his power under Section 15 of the Act¹²⁶ enacts rules which shall be applied with a view to advancing and realizing the basic rights and duties contained in the Constitution. The rules provide for procedures to be used in

¹²² Ibid

¹²³ The Basic Rights and Duties Enforcement Act of 1994 Act No. 33 of 1994, Cap 3 of the Laws of Tanzania and the Basic Rights and Duties Enforcement (Practice and Procedure) Rules G.N No. 304 of 2014.

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ Act No. 33 of 1994 Cap 3 [R.E 2002]

any Human Rights matter and further rules give room to the subordinate court to determine human rights cases.

(iii) Adherence of fair trial by Criminal justice system

Among other things, the Act¹²⁷ provides for offence, its ingredients and their punishment. Further through its schedule it gives out list of offences and the court in which the same can be tried. The law also provides for defense¹²⁸ for an accused person to plea whenever he is subject to any kind of criminal offence listed thereto.

Under Section 21 the Law prohibits a person who was already punished for the same offence to be punished twice; ðA Person shall not be punished twice, either under the provisions of the penal Code or under the Provisions of any other Law for the same offence.ö This is totally a fair trial requirement in the category of after trial.

This is an Act¹²⁹ to provide for the procedure to be followed in investigation of crimes and conduct of criminal trials and for other related purposes. The Act provides for the procedure to be followed in the investigation of crime and the conduct of criminal trials, the whole pre-trial or post trial concerning criminal matters in Tanzania Mainland are provided under this Law.

The law stipulates procedure relating to criminal investigations like arrest, escape, search and seizure, the control of criminal proceedings, institutions of proceedings, power of the court in trial and procedure of trials before different hierarchy of courts from subordinate courts to High court. It also covers procedure for convictions,

¹²⁷ The Penal Code Cap 16 of the Laws of Tanzania [R.E 2002]

¹²⁸ See Sections 8, 9,10,11,13,14 and 15 of The Penal Code, [CAP16 R.E 2002]

¹²⁹ The Criminal Procedure Act [Cap 20 R.E 2002]

judgments, sentence and execution. It is upon the Court of Law to follow the procedure provided which is the main question of this study.

This is an Act¹³⁰ which was enacted with sole purpose of providing for the organization, management, monitoring, and supervision of prosecution and coordination of investigation with a view to promote and enhancing dispensation of criminal justice, and to provide for related matters. Among elements to be tested for one to see if there is a well rules and procedure to ensure fair trial is the manner in which criminal proceeding are managed, as the law suggest itself the control of criminal proceeding are to done in a well-organized manner to ensure that justice is real done.

This is an Act¹³¹ to provide for the organization, discipline, powers and duties of the Police Force, a Police Reserve and an Auxiliary Police Force and for related matters. As its long title suggests it provide for powers and duties of police force and related officers and it is well known that police force play a great role in administration of justice and enforcement of laws. Thus, it is also the law is of vital use in ensuring that justice is not only done but seen to be done as the police force are among basic machinery in ensuring that laws are well enforced as well as during the investigation periods on pretrial stage.

(iv) Adherence of fair trial in the procedures of civil justice system

¹³⁰ The National Prosecution Act of 2008 Act No. 27 of 2008

¹³¹ The Police Force and Auxiliary Services Act [Cap 322 R.E 2002]

The law¹³² provides for the procedure and related matters in civil proceedings. It stipulates how civil proceedings are to be conducted fairly in the court. According to section 2, the act applies to all proceedings in the High Court of the United Republic of Tanzania - Mainland, courts of Resident magistrates and District courts.

Likewise, the Act provides for the issue of jurisdiction and place of suing and how to institute a civil suit, the duty parties in raising issues, alternative dispute resolution methods (which is compulsory stage in settling civil matters) as well as matter of pre-trial settlement scheduling conference. On post-trial issue the Act give out procedure of execution. Therefore, the Civil Procedure Code is so clear concerning how civil trial should be conducted in fairly manner. The issue is whether in reality the court adheres to what the law provides.

(v) Fair trial in presenting administering, analyzing evidences in court of law

It is Act number 6 of 1967 and it was gazette via G.N No. 225 of 1967¹³³. It is an Act to declare the law of evidence. For court of all law to do justice fairly, its decisions are to be found on strength of the evidences adduced by parties to the cases thereto. This legislation gives procedures and clerical rules for the evidence to be admitted.

It goes further by explain as to who may be called to give testimonies before the court of law, what facts are to be taken into account and what facts are to be distinguished from the facts in issues. It also gives out the extent of proving the cases in both criminal and civil cases.

¹³² The Civil Procedure Code [Cap 33 RE 2002]

¹³³ The Evidence Act [Cap 6 R.E 2002]

Thus, it has to be noted that for the trial to be promptly fair this law should be well observed by the court of law at all stages but much investments and efforts should be during hearing stage. This legislation applies to all proceedings of criminal and civil nature in all courts high court in particular, with exceptions to primary courts where its procedure is of less difference.

(vi) Adherence of fair trial principles by government authorities

This legislation¹³⁴ provides for the discharge of duties and exercise of powers of the Attorney General and to provide for the relationship of the Office of the Attorney General with other Public offices and officers performing legal function in the Central Government and Local government authorities.

This law is of significance as under Section 6 establish the office of Director of Public Prosecution and its functions of public prosecutions and control all criminal prosecutions in the country and these is a public outcry especially in criminal cases that the trial is not conducted fairly, the blame to go to court and prosecution side. Therefore, this office is very important in determining fairness of trial.

(vii) Other incidences to the adherence of fair trial principles

This Act¹³⁵ provides for jurisdiction, powers and functions of magistrates' courts and other related matters. It also provides for restrictions to the advocate and or public prosecutors to appear in any primary court.

¹³⁴ The office of the Attorney General (Discharge of Duties) Act No. 4 of 2005

¹³⁵ The Magistrates Courts Act [Cap 11 RE 2002]

Also, the Act covers the questions of revisions, appeal and powers of the court thereto. Thus, this Act is also one of the procedural laws where one needs to observe for in order that justice should be done. In line to this study the Act is important as it provides for power of High Court to deal with appeals and revisions originated from primary courts, it also provides for supervisory power of High Court to the Subordinate Courts.

The Act¹³⁶ provides for better provision to the control and eradication of certain crime and culpable non-criminal misconduct through the prescription of modified investigation and trial procedures, and new penal prohibitions, the provision of enhanced sanctions and new remedies, and for related matters. The Act has been amended several times to accommodate establishment of new High Court division to deal with crimes of such nature, the said amendment comes vide The Written Laws (Miscellaneous Amendment) Act, 2016¹³⁷

The law provides for fair trial procedure as far as economic and organized crime is concerned. The only doubt is how the procedures provided for in the Act are adhered by the Court of law here after High Court. The Act¹³⁸ provides for the imposition of minimum sentence in respect of specified offences. It is well known that relevant punishment to the relevant offence is one among the essential element of fair trial in criminal case whereby accused person should not be punished with inflicted sentence,

¹³⁶The Economic and Organized Crime Control Act, Cap 200

¹³⁷ Act No. 6 of 2016

¹³⁸ The Minimum Sentence Act [Cap 90 R.E 2002]

which is higher than what the law provides. It is advised that the court should prefer minimum sentence and where there is an alternative, which is less, punitive the court should choose the lesser one. On the contrary, the study revealed the opposite as the practice showed that most of times Courts do not observe this Minimum Sentence Act.

It is an Act¹³⁹ to regulate and coordinate the provision of legal aid services to indigent persons, to recognize paralegals, to repeal the legal Aid (Criminal Proceedings) Act¹⁴⁰ and to provide for other related matters. The Act provides for the rendering of free legal aid in both criminal and civil proceedings involving indigent person. Actually, the very main reason of establishing this law is to help the poor to get justice and a very essential element to determine fair trial.

Furthermore, the Act establishes the legal aid board, which its main task is to supervise all issues pertaining to legal aid in Tanzania. Among other things the Act expand the scope of the legal aid as it is now giving room to those who face civil cases to be aided. Thus, the Law provides access to fair trial to the poor to access legal aid that will help them solve their problems by seeking proper remedies.

Moreover, for the smooth operation of the jurisprudence behind the Act, it provides that there shall be regulations thereto to be made by the minister for Legal Affairs as per section 48 of the Act. The said regulations¹⁴¹ provide among other things, the

¹³⁹ The Legal Aid Act, Act No. 1 of 2017 and the Legal Aid Regulation G.N No. 44 of 2018

¹⁴⁰ Section 49 of The Legal Aid Act, 2017

¹⁴¹ G.N No. 44 of 2017. Also see the Juvenile Court Rules, G.N NO. 182 Published on 20/5/2016 to provide for clear procedures in cases involving children.

procedures which are to be followed for one to access the said free legal aid and registration of legal aid providers.

The law¹⁴² provides for reform and consolidation of laws relating to children in the issues of child rights, in promotion, protection and maintenance of the welfare of a child with a view to give effect to international and regional convention on the right of the child also the law provides for affiliation foster care, adoption and custody of the child.

More importantly, this law regulate and make provisions with respect to a child in conflict with law, provided under Part IX of the Child Act, establishment of Juvenile Court where cases involve children will be conducted with different procedures which are different from other trial. Also, the law provides that in case a child is witness in any case what are the procedures to be followed, also sentence in case a child is convicted¹⁴³.

The legal system that allow/ respect rights of children especially when a child is in conflict with the laws then that country may be considered as it follows fair trial. Though the study revealed that under another law, which is Criminal Procedure Act Chapter 20, when a child in conflicts of law at the time of committing crime alleged to have committed with adults, the trial will be held in normal court. This is not an observance of fair trial.

¹⁴² The Law of the Child Act, 2009

¹⁴³ See Section 115 of the Act

Time is a very important aspect during trial, especially in civil trial. This prescribes the law for the limitation of a choice in civil proceeding. Under schedule of this legislation¹⁴⁴ provides description of suit and period of limitation for example tort suit is three years.

3.3.1 Tanzania Treaty Practice

The fair trial rights in Tanzania are regulated by international, regional and domestic laws. Tanzania has ratified international and regional instruments, which provide elements that constitute fair trial and the duty for Tanzania to adhere them. Tanzania has in place domestic legal framework, which provides space for provision of fair trial.

Tanzania follows the dualist system through which the international adopted instruments only become part of the domestic legal order after Parliament passes a bill to operationalize such instrument¹⁴⁵. In this respect, some of the international instruments relating to provision of fair trial in Tanzania as provided above on what they contain in terms of provision of fair trial.

3.4 Basic Legal Principles for Civil Administration of Justice

The administration of justice is an act, which is normally associated with the carrying on of the business of government. The administration of justice is the process by which the legal system of a government is executed. The presumed goal of such administration is to provide justice for all those accessing the legal system.

¹⁴⁴ The Law of Limitation Act, Cap 89

¹⁴⁵ Article 62 and 64 of the Constitution of United Republic of Tanzania 1977

Civil justice is a way for individuals to achieve a fair solution when they have been injured or harmed. The civil justice system allows one to sue for money damages and obtain recovery for injuries. The civil justice system allows one to hold others accountable for their actions. If the court finds that one is liable, that party has to show money and pay damages to the injured party.

In Tanzania, the law governing civil trial is Civil Procedure Code cap 33 but it is one of several statutes that regulate civil proceeding in Tanzania. Civil justice covers diverse areas of procedural and substantive law. For example, land disputes are regulated by Land Act 1999, the Village Land Act, 1999 and the Land Court Disputes Settlement Act, 2002.

Matrimonial disputes are regulated by the Law of Marriage Act, 1971 and the Law of Marriage (Matrimonial Proceedings Rules, 1971, civil justice laws also include labor disputes regulated by the Employment and Labor Relations Act 2004 and Labor Institutions Act 2004.

Apart from statutes and subsidiary legislation the scope of civil justice system is also about how courts and other judicial officers use those civil justice laws to dispense justice. The decisions of the courts are therefore an invaluable input in civil justice system and explain how the rules and procedure should be applied.¹⁴⁶

¹⁴⁶ Report of the comprehensive Review of Civil Justice System in Tanzania, Presented to the Minister for Justice and Constitutional Affairs Dar es salaam may 2013

Initially, to get a civil case started, one must file a complaint against the person or entity he/she want to sue¹⁴⁷. The person who initiate the case is known as plaintiff while the person against whom the case is brought is known as the defendant.¹⁴⁸

The complaint/plaint includes a list of the allegations he/the plaintiff is making against that person or entity /defendant That person or entity has a certain amount of time to respond in formal answer or they can make other types of motions such as motion to dismiss the complaint. Next the case will go through a maze of different types of legal motions and eventually it may get to trial. At the trial each side will have the chance to present its case and makes arguments.

The plaintiff has the burden to prove their case while the defendant simply must defend their side of the story.¹⁴⁹ Once each side has presented their case the judge will make determination if the defendant is found liable the defendant will be responsible for either paying sum of money to the plaintiff or performing an act or a combination of those.

Suits is just a term, in civil law are ordinary proceeding in a court of law which brought by plaintiff(s) for the purpose of enforcing or protecting his right or prevention of a wrong doing against him. According to Blackø Law Dictionary, Suits defined as any proceeding in a court of justice in which the plaintiff pursues in such court the remedy, which the law affords him. Therefore, any suits will result into judgment or decree and be terminated.

¹⁴⁷ Section 22 of the Civil Procedure Code cap 33

¹⁴⁸ <https://www.lawteacher.net> accessed on 29th October

¹⁴⁹ Section 110 and 115 of the Evidence Act cap 6

However, suits in civil law are proceeding instituted for the purpose of settling disputes between individuals, whether real or legal personalities in their private capacity. Therefore, suits as stated above are governed by the Civil Procedure Code which sets out the process that the courts of law shall follow during the hearing of civil nature cases, for example, how a law suit must be commenced, types of services during the process is required, kind of pleadings, motions and orders permitted, the timing and manner of deposition and discovery, the conduct of trial, the process for judgment, various available remedies and how the courts and clerks must function¹⁵⁰.

According to Order II rule 2 provides the plaintiff has to contain the whole claim arising out of transaction. All suits in civil law have to follow all procedures provided under the civil procedure code. Jurisdiction simply means the magnitude of right and power to interpret and apply the law. Hence, jurisdiction means the extent of the authority of a court to administer justice. The authority given to court or tribunals derived from statutes, constitution and other instruments for the purpose of making decision to any inquiry submitted before them, for example civil cases (defamation, trespass).

Therefore, jurisdiction in civil cases means the extent of authority of courts, tribunals or other instruments to exercise its powers in deciding disputes brought before them which arose between citizens (civil cases). Any trial conducted by courts or tribunal with no jurisdiction to try the same will be declared a nullity on appeal or in revision¹⁵¹.

¹⁵⁰ Ibid

¹⁵¹ Chipeta, B.D, Civil Procedure in Tanzania, A Student's Manual, Dar es salaam University Press, Dar es salaam, 2002, p. 3

Jurisdiction of the High court in civil matter is provided under part 2 of the Judicature and Application of Laws Act cap 358 section 2. Where High court has been directed to apply written laws applicable in Tanzania as well as substance of common law, the doctrines of equity and the statutes of general application in force in England on the twenty second day of July 1920.

In the case *Hadija Saidi Matika v Awesa Saidi Matika*¹⁵² in this case elaborated the essence of jurisdiction as it is so fundamental to court and should be addressed at early stage /commencement of court. The study found out that, civil justice system is said to be vogue in Tanzania as is the case for many ex British colonies is largely of common law origins. This system is sprinkled with customary law, Islamic and Hindu (personal status law) systems.

Due to its Common law origins the justice delivery or advancing system is largely informed by the adversarial system of adjudication, where an umpire in the name of a judge as in the case of High court or magistrate presiding over Magistrate courts assumes a referee stance watching litigants and lawyers battling it in the temple of justice This is the biggest challenge the common law system of litigation faces.

Litigation, instead of being a thing of the last resort available for the resolution of civil, it becomes of first resort. Similarly, alternative systems of dispute resolution, which are the bedrock of the traditional dispute resolution systems, have almost been neglected and /or relegated to the background. It is another challenge although ADR

¹⁵² Primary Court, Civil Appeal no 2 of 2016 High Court of Tanzania at Mtwara (Unreported)

was made part of the civil litigation in Tanzania since 1994, still up to this time 2018 it has not gained the expected primacy in resolving civil disputes.

The inherited common law adversarial system is vogue in Tanzanians with its attendant English practice and procedure has always been at the center of public criticism for contributing to delays in the dispensation of justice together with legal technicalities and high costs of litigation. Besides, the adjudication system is in hands of the parties and their lawyers/attorneys/advocates. Judges or magistrates do not have a lot of control over the litigation process. Consequently, civil litigation has been dogged with frequent adjournments, which contribute to further delays of justice.

Civil litigation follows the inherited English procedure of orderly conduct of court trials with direct examination or examination in chief where the plaintiff/petitioner calls its witness and introduces evidence at trial. Essentially, direct examination elicits factual information from either witness or writings for the purpose of supporting the allegations in the petition. A chronological arrangement offers the best approach for reasons of clarity and storytelling, however has been another source of delays in delivery of justice in Tanzania.

The study found out that experience at the Commercial Court where new rules of procedure have been operating since 2012 is a living testimony of the expedited process in civil litigation by doing away with examination in chief by introducing witness statements. This has cut down tremendously on the time spent on examination in chief, a practice which is very common in arbitration proceedings. Though the court's cost of the case is very expensive. The study revealed that, Commercial court

due to bulk of examination in chief contributed to unnecessary delays since lawyers spent a lot of time asking questions which are not entirely relevant to the dispute at hand.

That the recipe for successful cross examinations mandates plenty of preparation including through research into possible bias and conflicting statements and most importantly the use of short and clear leading questions. A tactical advantage of cross examination not only includes the use of leading questions, but encompasses the ability to introduce otherwise non admissible hearsay to impeach the credibility of witness.

The line of attack for proper impeachment takes into consideration prior criminal convictions, improper motives or biases, inconsistent statements and bad character evidence through reputation in the community. And consequently, the discovery process is crucial to mounting a meaningful cross examination and this is assured with the introduction of witness statements thus avoiding surprises and bringing in more transparency in civil litigation process.

Tanzania justice systems still suffer from the use of foreign language in the superior courts, the Court of Appeal and the High Court, where English is by law the official language of record. And is evidently that the majority of Tanzania laws are available in the English language, in a country whose official language is Kiswahili and which is also the language in the legislature which passed those laws.

The majority of the litigants in Tanzania courts are not conversant in the English language and as such they denied access to justice. In 1731 the UK Parliament enacted

a statute providing that all courts documents shall be in the English tongue only and not Latin or French, unfortunate that lawyers are still fond of talking in tongues and this after the dust of the Norman Conquest has long settled.

Another challenge Tanzania civil litigation system faces is lack of legal representation particularly for poor litigants. Though Tanzania legal representation particularly for indigent litigants is not a widely applicable phenomenon due to small number of practicing lawyers, the majority of whom are urban base and their fees are not small. Legal aid is available only for certain specified criminal matters and in certain civil disputes where some NGOs provide it using the means test, which apart from their small number is largely urban based.

In Tanzanian courts, perhaps with the exception of Primary Courts, where advocates are statutorily barred from appearing are largely lawyer dependent especially in civil matters. The traditional common law view of the adjudication process is that judges should only play a passive but not an active role in civil dispute processing, which means that the lawyers not the judges are in control of the process of a case may compromise the disinterested independence, neutrality or impartiality of the judge.

The study has found out that, constitutionally, dispensation of justice is governed by the principle of fair, public hearing by an impartial and independent court or tribunal, which suggest among other things that there has to be a courthouse in the sense of a physical structure specifically designed to provide justice delivery center and where the public will have unhindered access so that it can facilitate the enjoyment of their constitutional right of fair and public hearing.

Unfortunately, the majority of Tanzania court houses are fairly old and dilapidated, which make the working environment for judges and magistrates unfriendly which impacts in not a small measure to poor quality of justice. And that the majority of judges and magistrates and supporting staffs are operating extremely difficult working environment where they are always bargaining for adequate space, facilities and general supplies which the justice delivery systems suffers.

The independence of judiciary will be the first victim where there is lack of adequate administrative arrangements for judicial officers; thus, requiring the involvement of the executive which has to come to the rescue of the courts.

Tanzania justice system as the study reveals, is still largely urban based, which make access to justice for the majority of Tanzanians who live in rural areas considerable problematic. Also the factor of the behavior or attitude of some judges and magistrates and lawyers the most visible participants in the wheels of justice delivery, which may account for the quality of justice delivered. It is worth noting that the personal attitude of judicial officers accounts as much to access to justice as friendly procedures and court houses. Therefore, the culture and norms among judges, magistrates and lawyers as well as their conduct prevail in the justice delivery system.

By looking at the Civil Procedure code among many things the study has identified impediments to the expeditious and fair administration of justice. Like challenges that court procedures are often incomprehensible to many litigants and the civil justice system is too adversarial since the cases are determined more by the parties and less by the courts. This is vividly depicted by the provisions of the code the way they are

arranged gives more power to parties and not to the court; hence, a lot of technicalities.

Despite the adequacy of provisions in the Civil Procedure Code that enjoin Magistrates and Judges to control civil proceedings, judges and magistrates do not exert that control over trials and they invariably allow advocates to dictate the terms and pace of trials¹⁵³. This will be discussed more in the next chapter on findings.

3.5 Basic legal Principles for Criminal Administration of Justice

Criminal justice system / administration of justice is the system of practices and institutions of government that deals with criminal matters. The Criminal justice of Tanzania mainland, consist of main three parts:

- (i) The legislature as per Article 62 and 64 of the Constitution of United Republic of Tanzania. Parliament consists of President and National Assembly its main objective is to make laws both penal laws like Penal Code Cap 16 and procedural laws like Criminal Procedure Act cap 20.
- (ii) The courts for the purpose of adjudicating and dispense justice as vested this power under Article 107 of the Constitution. Which fall under this study while doing so the High court to observe fair trial.
- (iii) Correction consists of jail, prisons probation and parole the place where accused may be remanded waiting for trial or after been convicted then sent to serve his time as an inmate.

¹⁵³ Justice Mujulizi B. A, Report of the comprehensive Review of Civil Justice System in Tanzania, Presented to the Minister for Justice and Constitutional Affairs Dar es salaam February 2013

In Criminal Justice System those distinct agencies must operate together both under the rule of law and as a principle means of maintaining rule of law within a society. Therefore, criminal justice system consists of courts, legislature and correction.

Purpose of Criminal Justice System;

- (i) Is to deliver justice for all by convicting and punishing the guilty and helping them to stop offending while protecting the innocent.
- (ii) Is to deliver efficient, effective, accountable and fair justice process for the public
- (iii) Prison being one of the machineries its purpose is to reduce crime in several ways by
- (iv) Incapacitating offenders, by punishing, by deterring others who would want to commit crime and by rehabilitating offenders.
- (v) The justice system presents a bulwark against the potentially overweening power of the state and other vested interests. A concern of due process checks and balances core values and an underlying institutional strength.
- (vi) Public protection the aim is to prevent and deterring crime through incapacitation and rehabilitation.
- (vii) Justice and the rule of law involve ensuring the proper treatment of defendants, successfully prosecuting those who have committed a crime and acquitting those who are innocent.
- (viii) Public order achieved through the maintenance of law and social order.
- (ix) Denunciation registering social disapproval of certain behaviors
- (x) Victim services through the provisions of appropriate advice and assistance to victims of crime.

- (xi) Public confidence ensuring that criminal justice system is perceived as dealing effectively and fairly with the threat to the public posed by offenders
- (xii) To protect people from wrongful treatment and wrongful conviction. Also, Article 9(3)⁴ provides the comparable concept that; criminal charge shall be brought promptly before the judge and shall also be determined within reasonable time. Therefore, the whole process of trial when conducted with fairness will be able to reach the best administering of criminal justice since every person is equal before the law.

For proper and good administration of criminal justice, there should be a criminal trial within a short and clearly specified time, without any interference which may prolong the trial. Once the case is instituted before the court, there are steps which the case should be considered until final disposal. Those steps include reading charge to the accused person, preliminary hearing under section 192⁵, and hearing of the case and final step which is announcement of judgment. Once an offence has been committed, in order to find out who involved in commission of such an offence then some process of finding the truth and evidence or making analysis of how the act occurred should be conducted, this is called investigation.

The provisions dealing with investigation, on the way the details are being obtained by the police as provided the major experts in the process of investigation according to criminal Procedure Act and also Section 5 of the Police Force Act¹⁶. Therefore, most of criminal cases are investigated by the police department. There are other

⁶ Police Force and Auxiliary Police Act [CAP 332 R.E 2002]

departments which also has the duty to investigate for example PPCB⁷ or Tanzania Revenue Authority⁸.

One of the biggest challenges facing criminal justice system is delays in investigation in murder case which is exclusively tried by High court and the time wasted in conducting Preliminary Inquiry (PI) by subordinate courts before committing the accused person to the High court for Preliminary Hearing (PH) and finally trial.

Findings of the study showed that there is any added value in PI procedure there are number of cases where the magistrates conducting PI do forget to overlook to make an order committing the accused to the High court for PH. For stance the case of Republic v Tumwime¹⁵⁴ in this case the proper committal order was missing and the High court proceeded with the conduct of PH. The whole proceeding was declared a nullity with an order that the whole of process should start afresh with the holding of a fresh PI and PH before the case could be set for trial. This clearly caused untold sufferings to many remanded who find themselves spending quite a long time for justice to be delivered.

The other problem facing the criminal justice system is the nature of the client attorney relationship. In principle a counsel appointed or tasked with undertaking to represent an indigent defendant whether it is public defender or a volunteer private attorney, the parties enter into an attorney client relationship, which is no less inviolable than if counsel had been retained.

¹⁵⁴ Criminal Revision no 01/2006 (CA) (Mwanza) (unreported)

To hold otherwise would be subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused. It is a matter of law for an accused person facing a murder or treason charge to be provided with an attorney at state expense. However, there is a need for the law to be amended to include other serious crime like armed robbery, corruption and eliciting drugs.

On Juvenile Justice System, in Tanzania there is no separate juvenile system. The Law of the Child Act of 2009 envisages a separate juvenile justice system for dealing with cases of children in conflict with the law and those in need of special; protection and care with rules and regulations as well as practice. It means that throughout the country children in conflict with the law are arraigned before courts meant for adults with the possibility of violating the rights of children in conflict with the law as stipulated under article 40 of the United Nations Convention on the Rights of the Child, 1989, which Tanzania has ratified.

Another challenge in the juvenile justice system is that children who are victims of crime testify in open courtroom thus having to face the perpetrators of the crime with the potential risk of not being able to give evidence freely. Needs of closed-circuit television (CCTV) arise to shield the child victim from his /her perpetrator which makes the child to feel free and comfortable in giving testimony at the hearing. The need to shield children who are victims of crime from any anticipated harm by having to testify in court is highly critical.

The other challenge facing juvenile justice system is that not so many judicial officers and lawyers who handle cases involving children are trained in the specific laws and

the rights of children and child psychology. Judicial officers tend to treat children like adults especially when examining children in the court house to elicit information relating to case in which a child is either a victim or a witness.

Concerning sentencing and punishment system, in Tanzania there are no sentencing guidelines in place, it is a big challenge, which has resulted into unexplained variations in sentencing by judicial officers in cases of similar nature. This has, in some occasion, led to public complaints that the sentencing meted out by judicial officers does not match the severity of the crime.

Conclusively, the study reveals that a blindfolded lady holding weighing scales is a symbol of justice. It symbolizes the daily activity of judges of balancing competing interests and to render justice is partially, fairly and expeditiously. The fine distinction between law and justice, which has tasked many a brain of legal philosophers and jurists, equally is quite elusive. Lack of consensus on what is justice and administration of justice equally impacts on the delivery of justice.

Justice and the rule of law demand that in the conduct of legal proceedings procedural fairness be observed. Subsumed within this requirement are many subsidiary conditions the judge must be impartial, *nemo judex in sua causa*. Where assessors are in case of High court is involved, they too must be free from bias. In addition, assessors should be reasonably representative of the society though not trained in law should be reasonably representative of the society they serve.

Evidence gathered by the police must be acquired by lawful means. The evidence admitted into court must be both of an admissible nature and fairly presented. The

proceedings should be conducted in such a manner as to be conducted in such a manner as to be intelligible to the parties and witness. For the rule of law to be observed it is central importance that the evidence before the court be both complete and reliable. Contravention of this requirement undermines the concept of a fair trial.

3.6 Legal Protection of Fair Trial

When one talks about the Judiciary of Tanzania, it should always be remembered that it is only the Court of Appeal which is for the whole of the United Republic. Otherwise Zanzibar has its own High Court and the so called the High Court of Tanzania is only for the Mainland Tanzania without any jurisdiction over Zanzibar. The main institution which is the subject matter of this study is the High Court of Tanzania as the study assesses the High Court of Tanzania mainland and sees if it observes the fair trial. Below is how High court protecting the said rights with few examples from decided cases. Also, the study discusses the protection under international law and under regional level.

Human Rights Committee at International level have given decision on cases concerning article 14 of ICCPR and a lot of cases are about the fairness of trials for persons on death row .In the case of Levy v Jamaica ¹⁵⁵where committee among other things positioned that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant where Committee commented that;

¹⁵⁵ CCPR/C/64/D/719/1996

As to the allegation of violation of articles 7 and 10 paragraph 1 of the Covenant on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that the author has made specific allegations. He states that he is detained twenty three hours a day in a cell with no mattress, other bedding or furniture, that the cell has no natural light and inadequate sanitation, and that the food is not palatable. Further, he states that there in general is a lack of medical assistance.

Specifically, he mentions that in April 1995 he should have had an operation on his jaw and throat but that the prison authorities made it impossible for him to keep his appointment. The state party has not refuted these specific allegations, and has not forwarded results of the announced investigation into the author's allegations that he was denied opportunity to have an operation in April 1995. The Committee finds that these circumstances disclose a violation of article 10 paragraph 1 of the Covenant.

Concerning right to fair trial the Committee has issued two General Comments. General Comment No 13-Article 14 Right to Fair Trial and General Comment no 29-Article 4 State of Emergency. Thereafter the Committee categorically stated that there are some elements of the right to a fair trial that are considered fundamental principles that should not be departed from any emergency situations that it is inherent in the protection of rights explicitly recognized as non derogable in the Convention, that they must be secured by procedural guarantees, including often judicial guarantees. Therefore, provisions relating to procedural safeguards must never be subject to measures that would circumvent the protection of derogable rights.

Therefore, under international regime the right to fair trial is protected as the rights are there under ICCPR under the institution which is called the Human Rights Committee and have dealt with several cases concerning rules of fair trial if the state part to the convention have observed or not.

At the African level there are two avenues that protect right to fair trial, the Commission and the Court. The African Commission on Human and Peoples Rights has mainly dealt in its communications with issues concerning the presumption of innocence and the impartiality of the court. Also, the Commission has adopted a number of resolutions with regard to a fair trial. The resolutions elaborate upon article 7(1) of the and guarantee several additional rights as well as elaborating up on the role of lawyers and judges in the implementation of the ACHPR and the strengthening of the independence of the judiciary.

The Commission recalls that the right to fair trial involves fulfillment of certain objective criteria, including the right to equal treatment, the right to defense by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all.

The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defense and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly, it entails the equal treatment of all accused persons by jurisdictions charged with trying them.

This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner. In the case under consideration, it is expected of the Commission to attend to the first aspect, that is, observation of the rule of equality of the means utilized by the defense and the prosecution.

The right to defense also implies that at each stage of the criminal proceedings, the accused and his counsel be able to reply to the indictment of the public prosecutor and in any case, to be the last to intervene before the court retires for deliberations. The Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial, more so where the interests of justice demand it.

It holds the view that, in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty one may face for stance sever penalty for the offence of murder treason and armed robbery; it is in the interest of justice for an accused to have the benefit of the assistance of a lawyer at each stage of the case.

The African Court on Human and Peoples' Rights (African Court) has dealt with fair trial cases against its host state Tanzania. Several cases have been disposed of some are on merit other on the reason of being inadmissible. The cases are *Abubakar v Tanzania*¹⁵⁶, *Jonas v Tanzania*¹⁵⁷, *Nganyi v Tanzania*¹⁵⁸, *Onyachi v Tanzania*¹⁵⁹,

¹⁵⁶Application no 7 /2013

¹⁵⁷Application no 11/2015

Thomas v Tanzania¹⁶⁰, while the case of Chacha¹⁶¹ and Omary v Tanzania¹⁶² were dismissed as inadmissible, other case which discussed the issue of trial in merits is Kijiji Isiaga v R¹⁶³, while the case of Kijiji Isiaga is a very recently one as the court gave its decision on march 2018.

Numerous similar cases are alleging that Tanzania is in violation of right to fair trial as guaranteed in the African Charter on Human and Peoples Rights and other human rights instrument are pending before the African Court. Therefore, the African court nurture and protect fair trial norms by disposing those cases it has shown its authority on the matter. In some case the African court has granted effective remedies in favor of the applicants whose fair trial rights were ruled to be violated.

Therefore, the study observed that though both the Commission and the African court protect fair trial, the Court has more authority than the Commission. Also, it was depicted that upon looking on those decided cases by the court above it gives an impression that the country's judiciary and prosecuting authority are careless and sloppy in their application of fair trial standards.¹⁶⁴

The Judiciary of Tanzania has determined a considerable number of cases on fair trial like the recently case of Attorney General v Jeremiah Mtobesya¹⁶⁵ decided in 2nd February 2018 the right to a fair hearing by its very nature requires there be equality

¹⁵⁸Application no 6/2013

¹⁵⁹Application no 3 /2015

¹⁶⁰Application no 5/2013

¹⁶¹Application no 3/2012

¹⁶²Application no 1/2012

¹⁶³Application no 032/2015

¹⁶⁴ Possi A, it is better that ten guilty persons escape than one innocent suffers: the AFRICAN Court on Human and Peoples Rights and fair trial rights in Tanzania. African Year book Vol 1 (2017)p 311-336

¹⁶⁵Civil Appeal no 65 of 2015

between the contestants in the proceeding. There can be no true equality if the legislature as Court of Appeal of Tanzania stated allows one part to deprive the other of his personal liberty merely by her say so. Therefore, article 13 (6) (a) of the constitution declared to be infringed by section 148(4) of Criminal Procedure Act.

The basics of a fair trial were clearly identified in the case of *Mussa Mwaikunda v R*¹⁶⁶ among others, a case which relied on the case of *Regina v Henley*¹⁶⁷ a case from New South Wales Court of Appeal on page 8 of the judgment in *Mussa Mwaikunda* case, the Court identified the basics standards of a fair trial to include the following;

- (i) To understand the nature of a charge
- (ii) To plead to the charge and to exercise the right of challenge.
- (iii) To understand the nature of the proceedings, namely that it is an inquiry as to whether the accused committed the offence charged,
- (iv) To follow the course of the proceedings.
- (v) To understand the substantial effect of any evidence that may be given in support of the prosecution, and
- (vi) To make a defense or to answer the charge

The other case is *Jebra Kambole v the Attorney General*¹⁶⁸ in this case a ruling was given on 15th August 2018 where the right to fair trial was vividly protected by the court where the court positioned that provisions of law /statute should not go against due process/fair trial rules and those provisions of law are to be held unconstitutional by the court.

¹⁶⁶ Criminal Appeal no 174 of 2006, Court of Appeal, Mbeya Registry(unreported)

¹⁶⁷ [2005] NSWCCA 126

¹⁶⁸ Misc Civil Cause no 27 of 2017(Unreported)

3.7 Conclusion

Both in civil and criminal proceedings there is a wrong. The law will enforce a right only against a person who has already violated it or who has shown an intention to do so. Justice is administered only against wrong doers. A wrong regarded as a subject matter of civil proceedings is called a civil wrong and a wrong regarded as the subject matter of criminal proceedings is termed as a criminal wrong or a crime.

Justice is based on respect for the human rights of every individual. As the Universal Declaration of Human Rights puts it, "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". When an individual stands trial on criminal charges, he or she is confronted by the machinery of the state. How the person is treated when accused of a crime provides a concrete demonstration of how well that state respects individual human rights and the rule of law.

Every criminal trial tests the state's commitment to justice and respect for human rights. The commitment is tested even more when a person is accused of crimes which threaten the security of a society, such as acts of terrorism, crimes against humanity, war crimes, or crimes which threaten the security of those who hold power/treason. Every government has a duty to bring to justice those responsible for crimes in independent, impartial and competent courts in a manner that respects international standards of fairness.

Whatever the crime, if people are subjected to unfair trials, justice is not served for the accused, the victim of the crime or the public. The criminal justice system itself loses

credibility when people are tortured or ill-treated by law enforcement officials, when trials are manifestly unfair and when proceedings are tainted by discrimination. Unless human rights are upheld during arrest, and in the police station, the interrogation room, the detention center, the court and the prison cell, the state has failed in its duties and betrayed its responsibilities.

The study found out that the Legal System should be more accessible and affordable to more Tanzanians, and inaccessible justice is also justice denied and there are two main obstacles to justice. The first is cost in terms of time and money. The second is the onerous procedural and bureaucratic complexity that could be lessened. About cost, it was revealed in this study that, the majority of Tanzanian people are poor and if access to justice is determined by ability to afford professional legal counsel, the majority of tax payers who sustain judicial system will be the very ones to be shut off from it. In other words, majority of Tanzania will be taxed to provide justice to the minority who can afford it.

That of course is a universal problem. The best legal counsel is expensive and is available only to those who can afford it. Not even in the United States can everyone afford the legal counsel that was retained by O. J Simpson but a line has to be drawn, a threshold determined, below which no citizens should find him or herself, unable to access justice in free and democratic country. Legal discrimination on the basis of economic status is not right.

The situation is discernibly more difficult in civil courts. All over the world people demand tort reform because they are agreed that the costs of litigation are becoming

increasingly prohibitive and the procedural technicalities so complex and arcane that one must resort to costly professional advisement. On a light note one victim of costly justice found himself before a stern judgeø have you anything to offer the court before sentence is passed on youø Prisoner ÆNo your Honor, my lawyer took my last shillingø

In article entitledø Justice for all; Strategies for Effective Court Reform Douglas Dunn¹⁶⁹, writing about the American system said Ænot only has the system become so complex that it cannot be accessed without very expensive professional counsel but huge pompous courtrooms simply cost too much. Accordingly damage claims arising out of tort actions must be high enough to cover all the pain and suffering not from accidents, but from going through the legal system plus the actual costs of court and exorbitant legal fees.

He then concludes that Æthe expensive and pompous formality of the courtroom along with costly interrogatories and depositions used to wear down opponent (and drive up fees), can be replaced with more efficient processes in which, again participants generally feel more confident about the quality of justice dispensed.

The article was about the American court system. But the study reveals the same description can very likely apply to our own systems in Africa, and elsewhere and in any case in this world of cultural globalization particularly in Tanzania. But if legislature, the executive and judiciary will work hard and cooperatively to ensure that

¹⁶⁹ (2000)

this mechanism will uphold and actually translate into accessible, speedy and cost-effective justice for all the people of Tanzania.

Moreover, the study depicts, that even in a market economy where the government devolves much of its previous preoccupations to the private sector, the effective administration of justice remains a central task of responsible and democratic governance. And it is the duty of executive to ensure that working in partnership with the Judiciary in Tanzania is not only governed justly, but that justice prevails in relationship between those who govern and the governed, and between the governed themselves, both private and corporate citizens.

Justice is an ideal a moral imperative but it is also a necessary precondition for peace and development. That justice needs to be pursued for both ends, and executive need to lead in the pursuit of justice in its duality. And if justice goes out the right window, chaos conflict, and impunity enters through the left window. And the balance between the contending forces of justice and peace on the one side, and injustice and conflict on the other to be the honorable motive of politics and fundamental justification of the necessary partnership that has to evolve and be nurtured between the executive and the judicial branches of government and between them and the legislature.

Justice must be administered in a way that achieves fairness for all. Regardless of the identity of the parties to the proceedings or the nature of the proceedings themselves. criminal charges or a person's rights and obligations in a suit of law must be determined by a competent, independent and impartial tribunal established by law justice must be administered openly and in accordance with specific guarantee

applicable to the determination of criminal charges and guarantee in the determination of non-criminal matters that may be applicable as a result of the overarching need to ensure fairness and equality of arms.

In determining a nation's rank in political organization no test is considered more decisive than its administration of justice, for it has been conceived as one of the firmest pillars of any government. A state may not be called a state, if it has failed to discharge its functions concerning the administration of justice. Life may not be lived in society in which there is no preservation of the rights of men and no prevention of injustice. Be that as it may it must be stated that the advantages of administration of justice far outweigh its disadvantages and it is an effective media for establishment of rule of law in modern democracies.

CHAPTER FOUR
DISPENSATION OF JUSTICE AND ADHERENCE TO FAIR TRIAL
PRINCIPLES

4.1 Introduction

The United Republic of Tanzania is a sovereign, democratic state founded as a nation of equal and free individuals enjoying freedom, justice, fraternity, and concord. The Constitution recognizes that sovereignty resides in the people, and that the primary objective of the Government is the welfare of the people. Key measures to strengthen the promotion and protection of human rights and fundamental democratic principles include the supremacy of the Constitution and the rule of law, the separation of powers of government, regular elections and a multi-party system of government, and an independent judiciary which were briefly discussed in chapter three.

In addition, the Constitution establishes a Bill of Rights among the right is fair trial which is the subject of this study, as well as state institutions to support human rights and fundamental democratic principles one among institutions is the High Court of Tanzania which will be assessed as at what extent the institution adhere to the fair trial right.

However great a country's justice system, however fair its laws, however independent and impartial its judges, this amounts to nothing if people cannot access justice in practice. Access to justice is about making sure that people have all the means they need to assert and to defend their rights. This is, of course, multifaceted and some people need more support than others.

The scope of fair trial in criminal matters varies from one jurisdiction to another. However fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed.

The concept of fair trial rights transcends the scope of the rights of accused persons, however, to encompass as well the interests of victims and witnesses, the role of the High Court to fairness, and societal interest in fair trials. All of these aspects of the right to a fair trial will be touched upon below, but the particular focus will be on observing minimum basic elements of fair trial guaranteed by international instrument which Tanzania is the part and assessing whether High court of Tanzania adhere the right to fair trial and if the answer is in affirmative to what extent.

4.2 Trend of Adherence to Basic Legal Standards of Civil Trials in Dar es Salaam

Whether the courts in Dar es Salaam comply to the basic legal standards in determining civil cases. It is a half and half situation, it depends with nature of case circumstances surrounding and the decision maker, that trends goes up and down, sometimes the court comply sometimes does not, and this will be observed from the cases below from Court of Appeal of Tanzania sitting at Dar es Salaam exercising appellate and supervisory powers over High court of Tanzania main Registry at Dar es salaam.

In the case of Ally Abasi Hamisi v Najma Hassan Ally Kanji Misc. Land Case Application no 140 of 2017 in the High Court of Tanzania at Dar es Salaam

(Unreported). Where the applicant made application under section 14(1)¹⁷⁰, Order IX Rule 13(1) and section 95.¹⁷¹ Where the Court well dealt with the matter right to fair trial was well observed.

Mariam Samburo (Legal Personal Representative of late Ramadhan Abas v Masoud Mohamed Josh and Others Civil Appeal no 109 of 2016 Court of Appeal of Tanzania at Dar es salaam (Unreported). In this Case the appellant was a losing party in Land Case No 36 of 2009, which she had instituted in the High Court of Tanzania, Land Division at Dar es Salaam. Where it was observed that the takeover of the partly heard case by the successor judges mentioned was highly irregular there were no reasons for the succession advanced on record of appeal.

The Court of Appeal was in position that in the circumstances that failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity. Then the Court of Appeal quashed the entire proceedings conducted at the trial High Court and set aside the judgment and decree.

4.3 Court's Mandate in Pre – trial Hearings and Rights

Fair trial includes both procedural and substantive aspects. It applies to both civil and purely administrative proceedings as well as criminal proceedings. Though in this

¹⁷⁰ Of the Law of Limitation Act, cap 89 R.E 2002

¹⁷¹ Of Civil Procedure Act, cap 33 RE 2002

research civil aspect discussed but concentration is in criminal aspect. Hence whenever public bodies including courts, take decisions which affect private citizens in a certain way; they are required to observe certain minimum procedural requirements such as to give the person concerned an opportunity to be heard.

The law of criminal procedure regulates the modes of apprehending; charging and trying suspected offenders, the imposition of penalties on convicted offenders and the methods of challenging the legality. The Criminal Procedure Act cap 20 is the law vested to regulate pretrial hearings.

Pre -trial proceedings in various jurisdictions trials are preceded by pre-trial proceeds. In other jurisdictions they are termed as pre- trial motions. The procedure of conducting pre -trial proceedings may differ from one jurisdiction to another depending on the circumstances of each jurisdiction. In some instances, the phrases committal proceedings used interchangeably with the phrase Preliminary Inquiry It involves offences triable by High Court only like murder where the law governing is from sections 243-251 ¹⁷²

What the court can do to assure fair trial during committal proceedings

- (i) To guarantee the rights of suspects, victims and witness during the investigatory phase and to ensure the integrity of the proceedings.
- (ii) To decide whether or not to issue warrants of arrest or summons to appear in court.¹⁷³
- (iii) To make sure accused get bail in case the offence is bailable¹⁷⁴

¹⁷² Of Cap 20

¹⁷³ Section 17 and 19 of Criminal Procedure Act Cap 20

- (iv) The court can give an accused a right to give comments in the committal proceedings and that comments should be recorded.
- (v) Accused to be given charge, and police statements of witness.¹⁷⁵
- (vi) Duty to tell an accused has right to have legal counsel and to provide one in heinous crimes like murder armed robbery if the accused cannot afford one.

One of the advantages of pre trial hearing is they enshrining the doctrine of fair trial but disadvantage is they cause unnecessary delays.

4.4 Powers of the Courts to Determine the Pace of Cases' Hearing

The basic principle is that it is for the prosecution not the court to decide whether a prosecution should be commenced and if commenced whether it should continue. However, the courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to stay an indictment or stop a prosecution if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court though it is exercised only in exceptional circumstances as per requirements of Criminal Procedure Act Cap 20.

Also, the law provides for accelerated trial under section 192¹⁷⁶ preliminary hearing to determine matters not in dispute. A preliminary hearing should be held in an open court in the presence of an accused and his advocate and of the public prosecutor to consider such matters as are not in dispute between the parties and which will promote

¹⁷⁴ Section 148 of Criminal Procedure Act Cap 20

¹⁷⁵ Section 249 of Criminal Procedure Act Cap 20

¹⁷⁶ Criminal Procedure Act Cap 20

fair and expeditious trial. This is a good example observation of fair trial and power of court to determine pace of hearing of cases.

- (i) To ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused and due regard for the protection of the victims and the witnesses.
- (ii) To order for amendments of information, separate trial if possible, as per section 276¹⁷⁷
- (iii) Discharge of accused person whose investigation has been prolonged and unfinished.
- (iv) Putting guidelines timelines or deadlines of submission of documents hearing of cases.

4.5 Essential Principles of fair trial in Criminal cases

Article 14 of the ICCPR provides for equality before the court and for the right to a fair and public hearing by a competent independent and impartial tribunal established by law regardless of whether a criminal trial or a suit at law involves.

- (i) Equal access to and equality before the courts

This means that all persons must be granted without discrimination the right of equal access to a court, paragraph 5 of the basic principles of Independence of Judiciary provides that everyone shall have the right to be tried by ordinary courts or tribunal using established procedure.

¹⁷⁷ Ibid

In Tanzania under the Constitution of the United Republic of Tanzania 1977 article 13 provides equality before the law and no person shall be discriminated against by any person or any authority acting under any law in the discharge of the functions of any state office including court of law.

(ii) The right to a fair hearing

The single most important criterion in evaluating the fairness of a trial is the observance of the principles of equality of arms between the defense and the prosecution means that both parties are treated in a manner ensuring the procedurally equal position during the course of trial.

The right to fair hearing entails the equal and reasonable opportunity for all parties to present a case. Things encompassed in the right to hearing include but not limited to the presentation of evidence or the behavior of the court and press. The right to fair hearing is often dependent on several other rights such as the availability of competent legal assistance. Fair hearing is provided under article 13(6) (a) of the Constitution of United Republic of Tanzania of 1977.

(iii) The right to a public hearing

Article 14(1) of the ICCPR also guarantees the right to a public hearing as one of the essential elements of the concept of a fair trial also it provides several exceptions to this general rule under specified circumstances. The right to a public hearing means that the hearing should as a rule conducted orally and publicly without a specific request by the parties to that effect. The courts or tribunal is obliged to make information about the time and venue of the public hearing available and to provide

adequate facilities for attendance by interested members of public within reasonable limits.

The public including the press may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society or when the interest of the private lives of the parties so requires also the public may be barred from a trial in the interests of justice but only in special circumstances and to the extent strictly necessary in the opinion of the court. But during pronouncement of a judgment it shall be made public when it is published or made public by combination of both oral and publication.

The study found out that it is trite principle of fair trial that oral hearings on the merits of the case are held in public where members of the public can attend. And courts must provide to the public sufficient and reasonable notice on time and venue of the oral hearings. Courts must also provide adequate and reasonable facilities for the attendance of interested members of the public.

This includes the provision of reasonable accommodation for persons with disabilities. Save for very exceptional cases, judgments are also to be made public. The public's access to hearings may be restricted in certain narrowly defined circumstances such as the best interest of the child, public morals, public order, protection of private life of the parties or where publicity is found to prejudice the interests of justice.

- (iv) The right to a competent, independent and impartial tribunal established by law.

As per article 14(1) of ICCPR the basic institutional framework enabling the enjoyment of the right to a fair trial is that a case is conducted by a competent,

independent and impartial tribunal established by law in order to be independent a trial court must have been established by law to perform adjudicative functions in which the judiciary is institutionally protected from undue influence by or interference from the executive branch and legislative branch.

As per the Constitution of United Republic of Tanzania 1977 article 107A the court including High court which is the case study of this study has authority in dispensing justice. And in doing so is governed by principles of impartiality to all without due regards to one's social or economic status as per Article 107A (a) and is independent means it has freedom and is required to observe the provisions of constitution.

The concept of the right to fair trial requires that the proceeding be conducted by an independent and impartial court or tribunal established by law. The rationale is to avoid biasness and unfairness that would result if a political or administrative body would be hearing a criminal case. The court's competence refers to the appropriate personal, subject matter, territorial or temporal jurisdiction of a court in a given case. Independence eludes separation of powers between the judiciary and other arms of government to avoid interference and undue influence. Impartiality refers to the court's conduct and bearing on the outcome of the case.

(v) The right to presumption of innocence.

Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. Article 14(2) of the ICCPR as a basic compound of the right to a fair trial the presumption of innocence means that burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit

of the doubt. Presumption of innocence must be maintained during hearing and also during pretrial stage.

It is the duty of both the official involved in case as well as all the public authorities to maintain the presumption of innocence by refraining from pre judging the outcome of a trial. Also, to prohibit the requirement of accused to wear handcuffs shackles or person uniform in the courtrooms.

The study noted that the notion or the right that every accused person must be presumed to be innocent until proven guilty. And in its broad sense, this fundamental principle requires that judges, juries, prosecutors, police, public authorities and the public in general refrain from pre-judging any case by making statements about the guilt or innocence of an accused before the outcome of the trial.

That was declared by the Human Rights Committee in its General Comment no 13 Article 14 Right to a fair trial at paragraph 7. It also means that the authorities have a duty to prevent the news media or other influential social groups from influencing the outcome of a case by pronouncing on its merits. In accordance with the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the burden of proof throughout a trial lies with the prosecution.

In Tanzania under article 13(6) (b) of the constitution of United Republic of Tanzania of 1977 provides the rights of the accused to be presumed innocent until proved guilty of that offence not to be treated as a guilty person.

(vi) Right to prompt notice of the nature and cause of criminal charges

In determining any criminal charge against an accused everyone shall be entitled in full equality to be informed promptly and in details in a language, which he understands of the nature and cause of the charge against him. The rationale is that the information provided must be sufficient to allow the preparation of a defense.

(vii) The right to adequate time and facilities for the preparation of the defense

This is provided under 14(3) of ICCPR in determining any criminal charge an accused or everyone is entitled to have adequate times and facilities for the preparation of his defense. What constitutes adequate time will depend on the nature of the proceedings and the factual circumstances of case. Factors to be considered include the complexity of a case, the defendant's access to evidence and the time limits for in the domestic laws for certain actions in the proceedings. An individual right to communicate with counsel of his or her own choice is the most important element of the right to adequate facilities for the preparation of a defense.

(viii) The right to trial without undue delay

In determination of any criminal charge against an accused he or she should be entitled to be tried without undue delay as per article 14(3) (c) of ICCPR which signifies the right to a fair trial that produces a final judgment and if appropriate a sentence without undue delay.

(ix) The right to defend oneself in person or through legal representation.

The law requires any person who is charged for instance with grave offences such like murder and treason to be availed an opportunity to be represented by a legal counsel

even where he cannot afford to hire such a lawyer then the government will have to hire for him. Article 14(3) (d) of the ICCPR provides for the same position. More so it has been provided in the 2018 legal aid rules that where an accused does not have any sufficient means to pay for the legal representation then he shall be sponsored. This right includes the following rights the right to be tried in one's presence.

- (a) to defend oneself in person,
- (b) to choose one's counsel,
- (c) To receive free legal assistance.

The right to counsel applies to all stages of criminal proceedings including the preliminary investigation and pretrial detention. Court appointed counsel must be able effectively to defend the accused that is to freely exercise his or her professional judgment and actually advocate in favor of the accused.

- (x) The right to examine witness.

The article 14(3) (e) of ICCPR provides that everyone has the right to examine or have the examined his witness against him and to obtain the attendance and examination of the witness on his behalf under the same conditions as witness against him. The right is an essential element of the principles of equality of arms. Also, the same article provides that the prosecution must inform the defense of the witness they intend to call at trial within a reasonable time prior to the trial so that the defendants may have sufficient time to prepare his or her defense.

- (xi) The right to interpreter

The law provides that in determination of a criminal charge against any person everyone is entitled to have free assistance of an interpreter. If he cannot understand

or speak the language used in the court. When the right to the assistance of an interpreter is free and can in no way be restricted by seeking payment from the defendants upon conviction.

(xii) The prohibition on self-incrimination

In the determination of any criminal charge against any person everyone is entitled not to be compelled to testify against himself or to confess guilty. As per article 14(3) (g) of ICCPR the aim is to prohibit any form of coercion whether direct or indirect, physical or mental and whether before or during the trial that could be used to force the accused to testify against himself or herself or to confess guilt and such evidence is not admissible at trial.

(xiii) The prohibition on retroactive application of criminal laws

Article 15(1) of ICCPR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. This is also provided in the Constitution under article 13(6). Along with this right it prohibits a penalty heavier than the one that was prescribed at the time of the commission of the offence. Also, ICCPR requires states to be obliged to retroactively apply a lighter penalty if it is subsequently provided by law. In Tanzania there is a minimum sentence Act.

(xiv) The prohibition on double jeopardy

No one shall be liable to be tried or punished again for an offence for which he has already been convicted or acquitted in accordance with the law and penal procedure of

each country. As per article 14(7) ICCPR ñe bis in idemö aiming at preventing a person from being tried and punished for the same crime.

4.6 Conclusion

It is actually impossible to overstate how important the right to fair trial is. The constitution views the judiciary / court as protector of fundamental rights and also as a guardian which ensures the protection of fundamental rights of the citizens.

Fair trials are only way to prevent miscarriages of justice and are an essential part of a just society. Every person accused of a crime should have their guilt or innocence determined by a fair and effective legal process. But it is not just about protecting suspects and defendants. It also makes societies safer and stronger. Without fair trials, victims can have no confidence that justice will be done. Without fair trials, trust in government and the rule of law collapses.

The right to a fair trial helps one case to be held within reasonable time. Also, to be heard by an independent and impartial decision maker. And allows one to be presented and to have an interpreter where appropriate also followed by a public decision.

Fair trial helps states to respect all legal rights that are owed to a person, also fair trial balances the power of law of the land and protects the individual person from it, when a government harms a person without following the exact course of the law. The interpretation of fair trial is sometimes expressed as a command that the government must not be unfair to the people or abuse them physically.

Fair trial helps in the administration of justice and thus acts as a safe guard from arbitrary denial of life liberty or property by the government outside the sanction of law, it provides four protections, procedural due process (in civil and criminal proceedings), substantive due process, a prohibition against vague laws, and as the vehicle for the incorporation of the Bill of Rights.

The right to fair trial is in the core of the human rights protection system because only courts can restore violated rights

Fair trial is a guarantee that the state will not abuse its power and dispute will be resolved in a just and fair manner. Fair trial is a guarantee of stability and positive investment climate.

Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice the concern of the law is to avoid practical injustice.

Fair trial also helps citizens to be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting.

Fair trial in the field of criminal law helps in determining whether the procedure is offensive to the concept of fundamental fairness while in civil contexts a balancing test is used that evaluates the government's chosen procedure with respect to the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure and the government interest at stake. Fundamental rights therefore are guaranteed by constitution of the United Republic of Tanzania of 1977

Fundamental rights safeguard the personal interest of a Tanzanian citizen, Provide the filings of equality, protects the citizens form exploitation allow them to practice their religious access to constitutional law and maintaining privacy and dignity of a citizen. It is due to the fundamental rights some people can openly express their views through the right to freedom of speech.

The right to equality safeguards the interest of different deprived class and needy one like for specifically enabled, minorities, women, and kids.

Fundamental Rights protect the liberties and freedom of the citizens against any invasion by the state prevents the establishment of authoritarian and dictatorial rule on the country.

Therefore, fundamental rights are necessary to let human beings live a better life. Mixture of fundamental rights and fundamental duties procedures good citizens and good citizens contribute in development of a nation.

Fundamental Rights are essential for all round development of the individuals. Fundamental rights uphold the equality of all individuals, dignity of the individual and the nation's unity as they are backbone of the nation.

Generally fair trial is interpreted as right to be treated fairly, efficiently and effectively by the administration of justice. The fair trial places limitations on laws and legal proceedings, in order to guarantee fundamental fairness and justice. Fair trial is interpreted as rules administered through courts of justice in accordance with established and sanctioned legal principles and procedures, and safeguards for the protection of individual rights.

The rules applicable to the administration of justice are extensive and refer to inter alia, fair trial, presumption of innocence and independence and impartiality of the court. Important elements of fair trial are quality in terms of administration of justice, quality in terms of protection of the rights of the parties involved, efficiency and effectiveness.

The importance of these rights in the protection of human rights is underscored by the fact that the implementation of all human rights depends upon the proper administration of justice. Whenever a person's rights are interfered with. She /he can only defend herself/himself adequately if she /he enjoy an effective recourse to fair trial.

Trials serve as a mechanism of accountability, a vehicle of due process and a provider of remedies for victims of crime or injustice. As such it essential for them to be fair. The right to fair and public hearing is in fact a bundle of key human rights protections that serve to safeguard the rule of law through procedural means. These rights feature prominently in several international human rights instruments and arguably form part of customary international human rights law.¹⁷⁸

¹⁷⁸ Article 14 of ICCPR and Article 10 of UDHR

CHAPTER FIVE

DATA ANALYSIS AND DISCUSSION OF RESEARCH FINDINGS

5.1 Introduction

This research aimed at assessing legal and practical adherence to Fair Trial by High Court of Tanzania. The core objective of this study is to assess the extent of adherence to the fair trial by High court in Tanzania. Also, to examine and analyze the legal and procedural limitations to the fair trial in the High court of Tanzania. Moreover, to examine and analyze compliance to minimum legal standards of fair trial by the High Court of Tanzania. Lastly, is to assess the applicability of the minimum legal standards of fair trial in the High Court of Tanzania. This study has explained the principal rights that must be effectively ensured to accused persons in the determination of any criminal charges against them, rights which must be protected from the beginning of the trial proceedings until conviction or acquittal.

The right to fair trial is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, especially the right to liberty and security of person¹⁷⁹. It relates to the administration of justice in both civil and criminal proceedings. The administration of justice entails two aspects the institutional, which comprise an independent and impartial court or tribunal; and procedural, which focuses on a fair and public hearing. In sharp contrast to civil cases where monetary damages are granted, criminal cases have stark and

¹⁷⁹Legislation Online, -Fair Trial www.legislationonline.org/topics/topic/8 accessed 3rd January 2019.

almost irreparable consequences such as death where the death penalty is awarded or lengthy imprisonment¹⁸⁰.

This calls for the need to ensure that the fundamental right to fair trial is protected and promoted in order to deliver justice to the accused. The scope of the right to fair trial ranges from prohibition of torture during detention, to the right to an interpreter and the right to compensation and damages for injustice¹⁸¹. It constitutes a fair and public hearing carried out by an independent and impartial tribunal or body. This has been echoed in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), which provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law¹⁸².

The right to fair trial in criminal proceedings is synonymous with the trial process itself and has gained recognition for centuries through codification in various international, regional and national instruments¹⁸³. It has existed in the international arena as an integral part of the general scheme for the protection of human rights. It is recognized since the adoption of the Universal

¹⁸⁰ Jennifer Smith and Michael Gompers, Realizing Justice: The Development of Fair Trial Rights in China 2 U Pa .E Asia L Rev 108 2007 <http://scholarship.law.upenn.edu/ealr/vol2/iss2/4/>> accessed 24th January 2019

¹⁸¹ Ibid

¹⁸² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).

¹⁸³ Omondi, S the Right to Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya (2014) 2 Journal of Research in Humanities and Social Science 38.

Declaration of Human Rights (UDHR) in 1948¹⁸⁴, and its codification in the International.

Covenant on Civil and Political Rights (ICCPR) in 1966. Article 10 of the UDHR provides that,

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The right to fair trial is also protected under article 6 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR))¹⁸⁵. Article 8 of the American Convention on Human Rights (ACHR) and article 7 of the African Charter on Human and Peoples' Rights (ACHPR), which Tanzania is the member state party. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, are embodied as pre-trial rights, rights during trial and rights after trial¹⁸⁶. The right to fair trial must be protected throughout the trial to ensure justice prevails.

The right to a fair trial is considered as one of the most essential and fundamental human rights in all countries that respect the rule of law. Its applicability on a criminal charge does not start when charges are actually presented to court, but from the first

¹⁸⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

¹⁸⁵ Mwimali, B.J Conceptualization and Operationalization of the Right to a Fair Trial in Criminal Justice in Kenya ,Doctor of Philosophy, University of Birmingham, United Kingdom 2012

¹⁸⁶ Biomdo.K J, Judicial Enforcement of the Right to a Fair Trial without Unreasonable Delay under Article 50 of Constitution of Kenya LLM Thesis, University of Nairobi Kenya 2013.

contact between the suspect and state authorities that are involved in investigations¹⁸⁷. It embodies aspects of both institutional and procedural fairness in the determination of criminal cases in order to ensure achievement of justice¹⁸⁸. This right does not exist in isolation but is anchored on and acts as a safeguard for other important rights such as the right to life, liberty, and freedom from torture, cruel and degrading treatment.

The study also discovered that the right to fair trial is not subject to any kind of limitation. The Human Rights Committee in its General Comment 13 on fair trial declared that certain aspects of the right to a fair trial under Article 14 could not be the subject of derogation even under emergencies. The Committee was of a further opinion that under the principles of legality and the rule of law, the fundamental requirements of fair trial must be respected at all times.

Also, the study observed that according to the African Union (AU), the general principles and guidelines applicable to legal proceedings are; public hearing, fair hearing, independent tribunal and impartial tribunal the right to fair trial constitutes various safeguards. The underlying concept of fair trial lies in affording an accused person a fair and public hearing by an independent and impartial court established by law. It generally comprises the following basic fundamental rights the right of access to court and, consequently, to be heard by a competent, independent and impartial tribunal the right to equality of arms ÷; the right to a public hearing the right to be heard within a reasonable time, the right to counsel, and the right to interpretation.

¹⁸⁷ Ibid

¹⁸⁸ Ibid

The study has also shown the indispensable role played by High Court in the fair administration of justice, a role which runs like a thread through this whole research. The essential role both of prosecutors and of defense lawyers has also been emphasized whenever relevant.

But the High Court Judge is not only responsible for his or her own actions *stricto sensu*. He or she is also to some extent responsible for those of prosecutors and defense lawyers, to the extent that where the judge has any indication that the prosecutor has erred in the course of the criminal inquiry by resorting to unlawful means of investigation, or that the defense lawyer has not duly consulted with his or her client or simply has not acted professionally that judge has a duty to intervene to correct those errors or insufficiencies since such action may be essential in order to guarantee a fair hearing and equality of arms between the prosecution and the defense. The rights of fair trial dealt in this study are manifold and it is difficult or even impossible, to single out some as being more important than others. These rights indeed form a whole and together with fair trial rules they constitute the foundation on which a society respectful of human rights in general including the rule of law is built.

In this part of the report, the focus is on access to a lawyer, legal aid, translation and interpretation, and accessible information for suspects on their rights competent independent and impartial court, equality of arms presumptions of innocence, right to appeal and understand the charges. The study's findings and recommendations seek to provide a basis for practical and workable proposals that will enhance efficiency in the justice sector.

5.2 Observation in the High Court in Dar es Salaam

The practice in High Court over fair trial in Tanzania firstly can be adduced from the two primary sources of law, which are Acts of Parliament and case laws. Two main principal legislations are discussed which are Civil Procedure Code and Criminal Procedure Act; these two laws are allowed to be used in High Court as long as civil matters and criminal matters are concerned.

Fair trial should be observed even in civil matters and this can be evidenced from the Code where the words of section 23 allows defendant to have an avenue to defend his/her case as well as from order five the court together with the party to frame issues to help to know which are matters in contest as well as issuance of summons so as defendant to either file his defense or come and defend his case in personal.

Order eight is concerning with Written Statement of Defense where is also a chance to defendant to file his defense in a written form. But also Order eighteen is about hearing of the suit and examination of the witness which is also great avenue for defendant to defend his case and adduce evidence. Moreover, from section 70 the Code gives avenue of Appeal, which is one of the rules of fair trial.

Hence, in practice as long as civil matters are concerned High Courts do follow and observe the Code when dealing with civil matters but still there are problems existing in observing those procedures to ensure it is fair. As there are several technicalities that society complains that High Court does not follow /adheres fair trial. As the court is said to be full of technicalities that a lay party who is not represented, may end up

suffer hence go against the rules under Tanzania Constitution Article 107A (2) (a -e). A good example from the case of Charles Sugwa v Daniel Lucas¹⁸⁹.

In the Criminal trials, the law which is applied in High Court is Criminal Procedure Act particularly part eight the case for defense from section 294 where accused person is given chance to defend by himself or through an advocate and allowed to adduce evidence if any. And also, may cross examine reexamine witness. After that accused may close his case waiting for court to give its judgment. Hence, by practice the High Court do follow the law to observe fair trial to an accuse. But still through case law the study has observed that to some extent High Court do not follow the fair trial rules.

As Tanzania legal system allows applicability of Substance of Common law, Doctrine of Equity, Statutes of General application enforced in England as per section 2(3) and 9¹⁹⁰ one among the elements/substance of common law is the use of precedents/case laws. And being one of the primary sources of legal research the study has reveals through case law decided by High court most of them from Dar es salaam registry and the apex court, Court of Appeal the real practice of fair trial in the High Court and here the study will assess the extent of adherence of fair trial to the High Court.

As for the judiciary, the role of the old generation High Court and Court of Appeal judges in upholding fair trial rights is acknowledged. A few of their cases deserve

¹⁸⁹ Commercial case no 5 of 2015(Unreported)

¹⁹⁰ Judicature and Application of Laws Act cap 358

mention. In *DPP v Pete*¹⁹¹, the first case decided by the apex of the Tanzanian judiciary, the Court of Appeal affirmed the right of the accused to bail in conformity with the presumption of innocence principle. Similarly, in *Nwangunule v Republic*¹⁹², the Court of Appeal ruled that appellant's conviction and sentencing for an offence he did not commit was a travesty of justice.

In *Dibagula v Republic*¹⁹³, the Court of Appeal quashed the decision and set aside a conviction of 18 months imprisonment in favor of the appellant, after the trial District Court and later the High Court failed to observe the right to a fair hearing. The Tanzanian judiciary has also treated the issue of legal representation with much weight. In Tanzanian jurisprudence, a trial is a nullity whenever an accused is convicted without legal representation.

But concerning practice though the High Court do follow the law the legislative Act which are enacted by Parliament. Then half of criminal appeals heard by apex court /Court of Appeal leads to decisions that trial were nullity or fatally defective in some way and that conviction and sentence must be set aside then it is totally open there is problem. This is the situation in Tanzania where the court of appeal considered almost 30 criminal appeals between 29 November and 14 December 2018 and threw out the results in 13 of these cases because of some major defect during the trial in the court below. Strange to relate, however, neither Tanzania's highest court nor the country's

¹⁹¹ Criminal Appeal No 28 of 1990 [1991] TZCA 1 (16 May 1991).

¹⁹² *Dibagula v Republic* (Criminal Appeal No 53 of 2001) [2003] TZCA 1.

¹⁹³ *Laurent s/o Joseph v R.* [1981] T.L.R 352. Also see *Haruna Said v R* 1991 TLR 124 (HC).

justice authorities have reacted to what appears an urgent even critical systemic problem¹⁹⁴.

The numbers indicate the prevalence of these problems in the trial courts: From November 29 to December 14 2018, the Court of Appeal delivered 44 judgments. Of these 15 involved civil appeals, and the balance 29 in all were criminal appeals. Of the criminal appeals nine were not actually heard by the court because the case was not ready, was not properly before the court or for some other reason. In five cases the appeal was dismissed. In two cases the sentence was changed¹⁹⁵.

5.3 Research Findings on the Extent of Adherence to Fair Trial in High Court

As of 20 September 2017, there were 78 pending cases, all contending that Tanzania is in violation of fair trial standards provided for in various international human rights instruments.¹⁹⁶ Six fair trial cases concerning Tanzania have been decided on the merits, namely, *Abubakari v Tanzania*¹⁹⁷ (the *Abubakari* case) *Jonas v Tanzania*¹⁹⁸ (the *Jonas* case), *Nganyi v Tanzania*¹⁹⁹ (the *Nganyi* case), *Onyachi v Tanzania*²⁰⁰ (the *Onyachi* case), and *Thomas v Tanzania*²⁰¹ (the *Thomas* case). *Kijiji Isiaga v Tanzania*²⁰² Other cases, also dealing with fair trial rights, namely, the *Chacha* case²⁰³ and

¹⁹⁴ <https://africanii.org/article/2019> accessed on 15th April 2019

¹⁹⁵ Ibid

¹⁹⁶ Possi A, it is better that ten guilty persons escape than one innocent suffers: The African Court on Human and Peoples Rights and Fair Trial in Tanzania (2017)1 African Human Rights Yearbook 311-336

¹⁹⁷ Application no 7/2013

¹⁹⁸ Application no 11/2015

¹⁹⁹ Application no 6/2013

²⁰⁰ Application no3 /2015

²⁰¹ Application no 5/2013

²⁰² Application no 32/2015

²⁰³ Application no 3 /2012

*Omary v Tanzania*²⁰⁴, were dismissed as inadmissible. The *Chacha* case is the first matter that alleged a violation of fair trial rights against Tanzania. Chacha, remanded without trial for over five years, alleged a violation of his right to liberty and also complained about the seizure of his property.

Within the domestic system, there was a long fought legal battle between the applicant and the prosecutors. The applicant took legal and administrative measures to claim his rights. He persistently filed a number of applications to the High Court claiming a violation of his rights in the eight overlapping criminal charges against him, which were pending before the Arusha District Court. It is also a matter of record that the applicant wrote a number of letters to the judiciary, including the Chief Justice, complaining about unlawful arrest and detention, without any response.

On the eight overlapping charges, the prosecuting authority consistently withdrew and reinstated the charges contrary to the *non bis in idem* principle, one of the fair trial safeguards. Eventually, the Tanzanian authorities released the applicant, after he had spent five years behind bars, on the basis of what turned out to be frivolous charges against him. The African Court controversially dismissed the matter for want of exhaustion of domestic remedies.

It would appear that, in this case, the African Court was not aware of the gravity of challenges associated with the country's criminal justice system. At the national level, the applicant's efforts to question the constitutionality of his arrest, detention and

²⁰⁴ Application no 1/2012

seizure of his properties proved futile. In one of the cases, the High Court declined to grant the applicant's prayers on the premises that there were other pending charges against him. In the circumstances of the applicant's case, after his release, he ought to file a fresh case in the local courts.

Such a case would have been for claiming his violated constitutional rights, or alternatively, a civil claim for damages against the government. All these are obviously extraordinary remedies, taking into account of the already made claims to the High Court and the time the applicant had spent in the domestic courts seeking for his rights. In a minority opinion, Judge Ouguerouz expressed the view that the application ought to be adjudicated, on the grounds that the remedies before the national courts were inaccessible and unduly prolonged.

He noted that the rule of exhausting domestic remedies ought to be examined in light of the right claimed to be violated. He further remarked that the rule is to be applied with a certain degree of flexibility and without excessive formalities in respect of the rights alleged to be violated. Following the filing of Chacha's application, a string of similar applications was lodged to the African Court. Seemingly, news of the Chacha application spread to other inmates in Arusha, where the Court has its seat, and the Kilimanjaro region, a few kilometers from Arusha.

This is due to the fact that most applications in subsequently submitted cases are from these two regions, where inmates have become aware of the avenues and possibilities of reaching the African Court, apparently to a much greater extent than in other regions of the country.

The large number of fair trial cases against Tanzania before the African Court is a reflection of the extent to which fair trial rights are overlooked in the country by those involved in the administration of criminal justice of having an influx of fair trial allegations against one country in particular, Tanzania. Tanzania is committed to adhere to human rights standards accorded by various human rights treaties. A perusal of the website of the Office of the UN High Commissioner for Human Rights shows that Tanzania has ratified and acceded to six out of the nine main human rights treaties.

At the AU level, Tanzania has ratified all three major human rights instruments. Therefore, Tanzania is responsible to fulfill whatever it has committed itself before these human rights instruments. Applicants who have been claiming for fair trial rights against Tanzania before the African Court had previously attempted to free themselves before the Tanzanian national courts, faulting national laws to contravene articles 13 and 15 of the constitution. For instance, before Chacha approached African Court for his right to liberty, he contested prosecuting authorities' actions of depriving his right to liberty were contrary to sections 32, 33, 50(1), 51(1), 52(1) & (2) & (3), of the Criminal Procedure Act Cap 20.

Unfortunately, Chacha like most lay applicants had his constitutional applications struck out by the Tanzanian High Court, due to the procedural technicalities provided under section 5 of the Basic Rights and Duties Enforcement Act. When attempting to reach the African Court, his application was deemed incompetent for want of exhaustion of domestic remedy requirement, a fate likely to be experienced by most

applicants whose fair trial cases against Tanzania are pending before the African Court.

On a light note, fair trial rights include rights of those in remand awaiting trials as well as convicted prisoners. Conditions of Tanzanian custodies seem to be a forgotten agenda. In a way, prison conditions have turned to be an additional punishment, which is a violation of fair trial standards. Prisoners' dignity needs to be respected and maintained. On the contrary, correction officers treat inmates harshly as additional punishment of their guilt. Accommodation, food, water, sanitation and healthcare are issues that need special engagement for improving humane prison standards.

This part explores the extent to which the African Court has dealt with, and in the process nurtured fair trial norms in Tanzania. It does so by identifying seven essential elements of fair trial safeguards, and by assessing the six merits decisions (the *Abubakari, Jonas, Nganyi, Onyachi, Thomas and Kijiji Isiaga decisions*) by the African Court against Tanzania, to determine the extent to which these eight elements feature and are used in these decisions to nurture fair trial rights in Tanzania.

5.3.1 Equality of Arms

The 'equality of arms' principle is an integral part of the broader fair trial phenomenon. The principle is the bedrock for ensuring fairness in the dispensation of justice. Article 14(1) of the ICCPR expressly entitles everyone to a fair trial and a public hearing. In the process, parties must be treated equally. This principle is most applicable in the adversarial judicial system, where two parties are involved in a

dispute. The rule seeks to strike a balance between the opposing parties, demanding that they be treated with substantial and procedural equality.

Article 7 of the African Charter affirms the equality of arms principle, by guaranteeing accused persons the right to be heard before a competent court, the right to defense, as well as the right to be tried before an independent and impartial court. In a broader sense of interpreting the Charter, the equality principle overlaps with other fair trial rights. For instance, the African Charter guarantees the equality of all persons before the law, as well as prohibiting any form of discrimination emanating from, among others, the *fortune* or *status* of an individual.

Equilibrium in the opportunities afforded to parties in a criminal trial is a major test of this rule. In the cases decided by the African Court against Tanzania, applicants have managed to successfully establish a violation of the equality of arms principle. In the *Abubakari* case, particularly, there were a number of omissions that persuaded the African Court to find a violation of this principle. One of them was the failure by the prosecution to promptly avail the accused with the indictment and witness statements, causing the applicant to be in an unequal position to prepare his defense.

Lack of adequate stationary was used as an excuse by the respondent state in justifying the delay, which the Court strongly condemned. The African Court found that failure to provide the accused with indictment and witness statements, basing a conviction on a single prosecution witness, and disregarding an alibi defense contradict the principle of *equality of arms* between the parties in matters of evidence.

The matter of equality of arms as one of the elements of fair trial was well positioned and discussed in the case of *Alex John v Republic*²⁰⁵ decided on June 2009 by Rutakangwa J. A. The court found out that High Court of Tanzania Dar es Salaam Registry was wrong by not affording the appellant fair trial as per the requirement of the law.

Where the Court of Appeal dealt with two issues

- (i) Whether the appellant was denied a fair trial, as guaranteed under
- (ii) Article 13(6) (a) of the Constitution, and
- (iii) Whether the appellant's conviction was based on cogent and watertight Identification evidence.

In Court of Appeal view, the provision enshrining the fundamental right to a hearing, must be given a liberal and purposive construction, if it is to be held to be in conformity with the provisions of Article 13 (6) (a) of the Constitution, which was indeed the intention of the Legislature. In including this section in the Act, the Legislature intended to impose a duty on a trial court to create or provide an environment for a fair hearing or a fair trial (both phrases are often used interchangeably).

So, an accused's right to give evidence on his own behalf simply means that he must be given a fair trial. This right would be illusory were an accused person ordered to conduct his defense without being afforded reasonable opportunity to present his case

²⁰⁵ Criminal Appeal no 129 of 2006(Unreported)

fairly and fully to the court. Such opportunities include, being supplied with copies of court proceedings when requested. Acceding to such a request, unless expressly provided otherwise, in our settled view, would be a sure facilitation to the effective enjoyment of the constitutionally guaranteed right of access to equal justice by all and a statutory right to be heard in defense.

In *Ndyanabo v Attorney General*²⁰⁶, this Court held that in Tanzania a person's right to unimpeded access to courts can be limited only by a legislation which is not only clear but which is not violating the provisions of the Constitution. There is no law barring court from providing accused persons with copies of court proceedings during the course of the trial, which happened to the appellant so as to enable them to conduct an effective defense. On the contrary, section 231 of the Criminal Procedure Act guarantees this right. If there was any such law, the same would be held to be violating the constitutional right to a fair hearing.

What was requested by the appellant was within the powers of the trial court to meet. The appellant needed the notes of the evidence to prepare himself properly. This, in Court considered opinion, would have helped further the interests of justice. The cogency of the reason for the rejection of the request flew in the face of the fact that it took three months before the accused persons were called upon to defend, when almost all of them had no case to answer. The appellant was, therefore, denied his right under section 231(1) of the Criminal Procedure Act to defend himself. In short, he was denied a fair trial. For this reason, only, the court upholds the ground of appeal and allows the appeal.

²⁰⁶[2001]2 E.A 485

It is settled law which binds Tanzania that fair trial guarantees must be observed and respected from the moment the investigation against the accused commences until the final determination of the proceedings, the appeal process inclusive. But here High Court failed to guarantee the right to appellant. The court of Appeal emphasized that that fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It went on to hold that a fair trial also envisages that the court or tribunal hearing the parties' case should be fair and impartial without it showing any degree of bias against any of the parties. So, a fair trial, first and foremost, encompasses strict adherence to the rules of natural justice, whose breach would lead to the nullification of the proceedings.

But hearing both sides and parties as a gesture of complying with this right, is not enough. To be meaningful the parties must be given, in full equality, the minimum guarantees, mentioned in Article 14(3) of the ICCPR. One of those minimum guarantees is an entitlement by the accused to "adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choice." There must be what has come to be known in international human rights jurisprudence, "equality of arms" between the defense and the prosecution, throughout the trial.

In the recent case of Attorney General v Jeremiah Mtobesya²⁰⁷ Judgment delivered on February 2018. The right to a fair hearing by its very nature requires there be equality between the contestants in the proceedings. There can be no true equality if the

²⁰⁷ Civ Appeal No 65 of 2015(Unreported)

legislature as Court of Appeal said allows one party to deprive the other of his personal liberty merely by her say so. In this case High Court observed fair trial as their decision was upheld by the Court of Appeal.

5.3.2 Fair Hearing before a Competent, Independent and Impartial Tribunal

Accused persons are entitled to a public hearing before a competent, independent and an impartial tribunal. In exceptional circumstances, the public may be excused from the whole or part of a trial. These circumstances might be due to public order, morality and national security. Also, it is established that an atmosphere in a court room is an important factor determining the fairness of a public hearing, especially when a particular atmosphere is likely to damage the accused's defense.

It is also within the scope of the right to a fair trial that a judgment should be delivered in public. Transparency and judicial integrity are some of the reasons for having a public eye on both trials and judgments. Other grounds might be for protecting the accused's interests, or enhancing public confidence in the criminal justice system. In the *Abubakari* case, the African Court considers a judgment to be made public when it is rendered in a premises or open area, provided the public is notified of the place and the latter can have free access to the same.

A competent, independent and impartial tribunal is indispensable for a fair hearing. Criminal proceedings are considered to be fair when carried without any form of inducement or influence. The notion of independence and impartiality in the administration of criminal justice extends also to the prosecuting authority. Article 7 of the African Charter guarantees the right to a fair hearing before a competent, independent and impartial tribunal.

Article 7(1)(d) of the Charter expressly makes mention of 'competent national organs' referring to the level of expertise of the adjudicators, as well as the legitimacy of the laws under which they adjudicate. With respect to the phrase 'court or tribunal' the Charter reaches out to all ordinary and specialized judicial bodies. In the *Abubakari* case, the applicant had gone through a criminal trial presided over by a prosecutor who allegedly had a relationship with one of the complainants. Court records revealed that the applicant had requested that the prosecutor be replaced.

The African Court found Tanzania to be in breach of the accused's rights to a fair trial, due to the failure of the national courts to adequately consider the prosecutor's conflict of interest. The African Court's finding complements the African Commission's earlier ruling which had found that the failure to enable courts to be presided over with qualified persons is a denial of the right to be tried by a competent and an impartial body.

Also, in the case of *Oroondi Juma v Republic*²⁰⁸ Court of Appeal sitting in Dar es salaam by Mbarouk J.A emphasizes on the court to be competent and positioned that High Court of Tanzania Dar es salaam Registry was not competent to comply with mandatory requirements of the provisions of the law which were sections 235(1) and 312(2) of Criminal Procedure Act Cap 20. As Judgment of trial court was incompetent and High Court was not supposed to dismiss the appellant's appeal as the judgment sought to be appealed was incompetent.

²⁰⁸ Criminal Appeal no 236 of 2012(Unreported)

And this rule is important in civil case as well in the case of Maulid Shaban v Temeke Municipal Executive Director and Another²⁰⁹ decision given on April 2018 fair trial was observed by High Court as it was independent impartial and competent in this case where after finding error as applicant sued wrong person which is a defect hence sustain a preliminary objection and observe Article 107A(2) of the Constitution from (a- e) then the court did not dismiss the application and gave the chance to applicant to be at liberty to file a proper suit.

5.3.3 Right to Free Legal Aid

Legal representation through free legal aid is paramount to the realization of the right to a fair trial. The availability of legal representation facilitates due legal process when dispensing justice. States are urged to guarantee the right to free legal aid at the highest level possible, including in their Constitutions. Ideally, states should ensure that all accused persons who cannot afford legal representation are provided with legal aid at each stage of the criminal justice process. Individuals facing serious criminal charges who cannot afford the services of a lawyer are mostly granted free legal assistance.

Legal aid is pivotal to any country claiming to observe the rule of law The African Charter does not expressly recognize the right to free legal assistance. However, article 7(1) (c), read together with article 2 of the Charter, could be construed as guaranteeing the right to free legal assistance. Article 7(1)(c) establishes the right to defense and article 2 mandates member states to ensure the enjoyment of rights

²⁰⁹ Misc Land Application no 1020 of 2017(Unreported)

provided under the Charter without any form of discrimination based upon, among other factors, fortune. The term "fortune" in the Charter may include an individual's financial status, which is key in determining eligibility for the provision of free legal assistance.

Thus, states arguably have an obligation of ensuring that the right to defense is realized regardless of one's fortune. In the *Thomas* case, the African Court applied article 7(1)(c) of the African Charter, which does not expressly accord the right to have free legal assistance, together with article 14(3)(d) of the ICCPR, to include the right of an accused to have legal aid.

The African Court made it clear that the onus is on the judicial authority to ensure that an accused is given legal assistance by first informing that particular accused of the right. The African Court emphasized that an accused need not to complain of the lack of legal representation or desertion of a counsel. As a general rule, accused persons are entitled to the legal counsel of their choice. Whenever it is established that an accused person cannot afford legal services, such person has to be informed of the right to have free legal assistance. The right should be practical and effective. States are not responsible for the shortcomings of a lawyer providing legal assistance.

When a legal aid counsel fails to effectively represent a client, judicial authorities have to intervene for ensuring effectiveness of the right. The Tanzanian Constitution, legislation and numerous High Court and Court of Appeal decisions have accorded for the right to have free legal assistance. Inadequate resources to hire a lawyer, seriousness of any possible sanction, as well as interest of justice are major factors

that may lead for an accused to be given legal aid by state authorities. A mere nomination of an attorney to represent an indigenous accused is not adequate. The expected representation must be effective. When being notified of a non-committed legal aid attorney, appropriate authorities are supposed to take prompt measures to remedy the situation.

Free legal assistance is applicable in all stages of criminal proceedings, regardless whether a matter is at the pre-trial, trial or appellate stage, as long as conditions which would warrant legal assistance exist. When it comes to the knowledge of the authorities that an accused is unable to have legal representation on a serious criminal offence or whenever there is a likelihood of injustice, it is the obligation of the authority to provide the accused with legal assistance.

In the *Jonas* case, the African Court emphasized that states should offer *proprio motu* and free of charge legal services to an indigent individual who is under criminal prosecution where the offence is serious and the law prescribes a severe punishment. An accused does not need to request for legal aid, when it is clear that there is inability to have legal representation. Administrators of justice should be alert on that regard.

In the *Kijiji Isiaga* case where the applicant Mr. Isiaga who is a national of Tanzania serving 30 years imprisonment following his conviction for the crimes of inflicting bodily harm, and aggravated robbery in ruling dated March 21 the African Court held that Tanzania violated the Mr. Isiaga right to a fair trial by failing to provide free legal aid contrary to Article 7(1) of the charter.

In an attempt to remedy the situation Tanzania has recently enacted the Legal Aid Act. The Act envisages regulating and coordinating the provision of legal aid services to indigent persons, as well as formalizing paralegals.

One of the complained issues from legal aid providers is remuneration. Looking at the new Act, it establishes a number of disjointed offices of which their coordination might be a challenge. The established board by the Act ought to be given an expansive role in administering legal aid services. The board should also have been entrusted with a fund-base for remunerating legal aid providers, a role which is still left to the judiciary, which time and then is under budgeted.

5.3.4 Trials without an Inordinate Delay

Criminal trials should not be unduly prolonged. An inordinate delay during criminal proceedings is in conflict with international human rights standards. Rendering justice through excessive delays may undermine the effectiveness and credibility of any judicial process. Prosecutors have developed a habit of not being mindful of the time spent in dispensing with criminal matters under article 7(1) (d), the African Charter expressly affirms for the right to be tried within a reasonable time.

Nevertheless, there is flexibility when considering a reasonable time in disposing of criminal matters. Computation of time commences as soon as a charge is issued against the accused, and ends when the execution of a judgment from the highest body is successful. Various human rights bodies have established the following factors that a court can use to determine the reasonableness of time: complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of

the State, and what is at stake for the applicant^ø are. The African Court is of the view that many accused persons in one criminal charge does not necessarily render a matter complex.

In the *Nganyi* case, the African Court held that ~~the~~ lack of due diligence by the national judicial authorities^ø leading to the prolonging of a matter, is a violation of article 7(1)(d) of the African Charter. Highlighting the importance of the speedy determination of criminal matters, the African Court stressed that ~~the~~ deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time^ø. Innocent suspects, in particular, have a huge interest in the speedy determination of their innocence.

In the *Thomas* case, the applicant claimed that his fair trial rights were infringed after delays in appellate and review proceedings in the national courts, when battling to quash a 30 years^ø sentence of imprisonment. The applicant spent a great deal of time struggling to properly lodge an appeal to the Tanzanian Court of Appeal: It took him eight years to process an appeal of a decision of the High Court to the Court of Appeal. During the hearing before the African Court, counsel for the state responded to the allegations by shifting the blame to the applicant^øs technical inability to file the required document.¹⁴⁴ When determining the matter, the African Court found that there were inordinate delays in processing the applicant^øs appeal contrary to the letter and spirit of the African Charter.

In its judgment, the Court observed as follows: It was the responsibility of the courts of the respondent to provide the applicant with the court record he required to pursue

his appeal. Failure to do so and then maintain that the delay in the hearing of the applicant's appeal was the applicant's fault is unacceptable. The applicant's case was not a complex one, the applicant made several attempts to obtain the relevant records of proceedings but the judicial authorities unduly delayed in providing him with these records.

The African Court faulted the way Tanzanian domestic courts handled the applicant's matter, finding that the Tanzanian courts violated Alex Thomas's fair trial rights. Thomas had done more than enough to ensure his appeal and review proceedings were not prolonged. Thus, it is submitted that it is at the court of law where justice is dispensed. Courts are noble institutions of which their acts should reflect that nobility. The *Thomas* case has exposed a chronic problem within the Tanzanian judiciary, with delays having become a normal occurrence.

5.3.5 Presumption of Innocence

The presumption of innocence is a cardinal principle in criminal law. An accused is presumed innocent until found guilty. The guilt must be determined through fair and just proceedings, as well as established law. The responsibility is vested upon the prosecuting authority to prove the charge against an accused beyond reasonable doubt. This principle not to condemn an accused when not yet proven guilty extends to the general public and the press. Importantly, public officials should refrain from making statements which will or are likely to prejudice the rights of an accused.

Article 7(1)(b) of the African Charter recognizes the presumption of innocence principle as fundamental in the realization of the right to a fair trial. Prosecution must

prove a criminal charge without leaving any doubt about the accused's guilt. Failure to do so will grant the accused the 'benefit of doubt' as a result of the 'burden of proof' resting on the prosecution. Thus, it is tantamount for judicial officers presiding in a criminal trial to strictly adhere to the principle.

There are incidences in which Tanzanian courts had failed to adhere to the principle, until the African Court was granted the opportunity to enforce its application to the benefit of the victims. In the *Abubakari* case, it was discovered that the evidence relied upon to convict and sentence the applicant in the national courts was based on the testimony of a single witness; the evidence was riddled with inconsistencies and no attempt was made to obtain corroboration.

Such an oversight was held to be against the presumption of innocence principle. Another anomaly from the same matter relates to an alibi defense. The applicant unsuccessfully invoked the defense of alibi before the national courts. Before the African Court, the applicant argued that he was admitted at the hospital during the dates stated in the charge sheet, a fact that was ignored by the national courts. A perusal of national court records by the African Court revealed that a discharge sheet from the hospital and a bus ticket from Dar es Salaam to Moshi were tendered during trial as evidence before the national courts, which was unfortunately treated by a trial magistrate as an 'afterthought'

In fact, the applicant started to raise the defense of alibi at the time of the police investigation. In its decision, finding that the applicant's fair trial rights had been violated, the Court observed that judicial authorities and the prosecution ought to

seriously consider any alibi defense, since it is key when determining the guilt of the accuse.

5.3.6 Right to Appeal or Review

Any person who disagrees with a court's judgment has the right to an appeal or review before a higher body. Article 14(5) of the ICCPR does not explicitly mention "appeal" as a right, but the phrase "according to the law" in the provision acknowledges the modalities established by domestic laws under which a review or an appeal is exercised. In instances where review by a higher body is possible after several appeals, an accused is entitled to have access to each stage without restrictions. Article 7 of the African Charter identifies the right to appeal as the first safeguard in ensuring one's cause to be heard.

However, article 7(1) (a) of the African Charter does not expressly recognize the right to appeal against a criminal conviction, unlike article 14(5) of the ICCPR. Further, article 7(1) (d) of the Charter requires trials to be conducted within a "reasonable time" which should also be considered when determining an appeal or review. The right to have a conviction appealed or reviewed is effective and efficient upon the availability of all the required documents. Such documents have to be obtained without inordinate delays.

In the *Thomas* case, as already indicated above, it took the applicant a period of eight years and three months to be able to file an appeal before the Court of Appeal of Tanzania, and a couple of years to beg for a review of his appeal decision. The applicant spent most of the time struggling to get the record of the court proceedings

necessary for determining an appeal, which he consistently demanded, but was not availed with on time. The African Court found that the applicant's right to appeal and review had been contravened following inordinate delays in the processing of the record of the court proceedings by the officers of the court.

In the case of *Omari Ngwaya v Selina R Kisanga*²¹⁰ High Court of Tanzania Dar es Salaam Registry the right to appeal was well discussed and decision was given on May 2018 and here High Court observed fair trial. Another case that High Court observed fair trial rules especially right to appeal is the case of *Gilbert Kalema v Magdalena Sule*²¹¹ by Ngonya J the Judgment was given on October 2017 where fair trial was well observed.

5.3.7 Right to be informed of the Charges

Understanding the charges and court proceedings is essential in ensuring that an accused person has a fair and equal trial. An accused need to be promptly informed of the nature and context of the charges in a language he or she understands. States are encouraged to provide an interpreter, when the language in use before courts is not familiar to the accused. Although the African Charter does not expressly recognize the right of an accused person to be informed of the charges against him or her, this right is integral to the right to defense provided for under article

7(1) (c) of the Charter.

²¹⁰ Misc Land Appeal no 103 of 2017(Unreported)

²¹¹ Misc Land Appeal no 83 of 2017 by Ngonya J the Judgment was given on October 2017

In the *Abubakari* case, records presented to the African Court could not reveal any efforts from the national courts in tracing a police report detailing the information concerning the applicant's rights while being held in custody. Consequently, the African Court held that Tanzania had violated the African Charter due to the failure to inform the applicant of his fundamental rights while being held in remand. The Court went on to rule that the failure of the police and judicial authorities to diligently and promptly communicate to the applicant all the elements of the charge, amounted to a violation of the applicant's right to a defense.

The African Court recognized that the right of the accused to be promptly informed of the charges against him or her is a corollary of the right to defense provided by article 7(1) (c) of the African Charter. International bodies grant remedies in favor of a litigant whose rights have been found to be violated. Appropriate remedies are mostly granted following a reasoned judgment. It is then up to states to comply with decisions of international bodies. The obligation to provide for an effective and appropriate remedy lies in the hands of every court of law.

Human rights victims are entitled to benefit from appropriate remedies and reparations granted by a human rights institution. A successful party in a judicial dispute has a right to have an appropriate remedy, capable of redressing the prejudice suffered by the complainant. Although the African Charter does not explicitly accord the right to an effective remedy, article 1 provides a basis for enforcing rights provided by the Charter at the domestic level.

Through the African Charter, the right to an effective remedy is implicitly established under article 3(2). An individual is to have effective remedies through the equal

protection of the law, which article 3(2) of the Charter guarantees. The Court Protocol unequivocally states that the Court may make appropriate orders to remedy the violation, whenever it finds that there is a violation of human and peoples rights. The African Court is also required to deliver a reasoned judgment.

In the *Thomas* case, the African Court found that Tanzania violated the applicant's fair trial rights, but left it to the imagination of the respondent state to remedy the situation. In determining the matter, the Court observed that an order for release can be granted upon the Existence of specific and/or compelling circumstances. In the African Court's opinion, the applicant did not substantiate any specific or compelling circumstances that would persuade it to grant such an order.

In deliberating the matter, the Court held as follows: The Court recalls that it has already found violations of various aspects of the applicant's rights to a fair trial contrary to article 7(1)(a), (c), and (d) of the Charter and article 14(3)(d) of the ICCPR. The appropriate recourse in the circumstances would have been to avail the applicant an opportunity to reopening of the defense case or a retrial. However, considering the length of the sentence he has served so far, being about twenty (20) years out of thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice. The Court then instructed Tanzania to take all the appropriate measures to remedy the situation, taking into account the above stated concerns. Under similar circumstances, in the *Abubakari* case, the Court observed that reopening local procedures could jeopardize the applicant's rights, given the fact that the applicant had already served a half of the 30 years imprisonment sentence.

Then, the African Court went on to clarify that the expression "all necessary measures" includes the release of the applicants and any other remedy which would assist in correcting the effects of violations pronounced by the Court and re-establish the rights of the applicants.

5.4 Limitation and Challenges on Right to Fair Trial

Impediments to access to justice and the right to a fair trial significantly affect many Tanzanians, particularly the poor. These impediments include:

- (i) Inadequate number of courts, tribunals, and judicial personnel.
- (ii) Dilapidated justice facilities, especially in remote (rural) areas.
- (iii) Inadequate resources for law enforcement and courts to effectively carry out their duties.
- (iv) Ineffective coordination among the organs of the criminal justice system of the courts, DPP, police, prisons, and social welfare.
- (v) Delays in issuing court records, such as copies of proceedings and judgments, due to lack of equipment and poor and unorganized record keeping systems.
- (vi) Inadequate training on judicial administration for judicial officers.
- (vii) The use of two languages of Kiswahili and English. Poor command of English as a language of records continues to be a challenge to most law enforcement officials.
- (viii) Insufficient number of centralized forensic laboratories and experts, and inadequate resources for those in operation.
- (ix) Limited use of plea bargaining and alternative dispute resolution mechanisms, leading to heavy court caseloads.

- (x) Inefficiency of procedural laws that would hasten disposition of court cases, resulting in untimely dispensation of justice and case backlog.
- (xi) Corruption and other malpractice in the justice sector.
- (xii) Non-adherence to the doctrine of separation of powers.
- (xiii) Lack of public awareness of laws and procedures, especially among rural communities and in particular among rural women.
- (xiv) Lack of effective legal support or representation to the poor and otherwise disadvantaged or marginalized.
- (xv) Cumbersome procedures for redressing human rights grievances, which require that human rights matters be heard by the High Court sitting with three judges.
- (xvi) Lack of jurisprudence defining remedies for cases of human rights violations.

A number of challenges currently hamper the right to fair trial, access to justice and equality before the law. These challenges include limited public awareness of the justice system, inadequate legal representation, and an under-resourced justice sector. To ensure the independence of the judiciary, international law requires that the state provide resources adequate to allow the judiciary to effectively perform its functions²¹².

The judiciary in Tanzania faces a critical shortage of court buildings and manpower due to a lack of funds for construction and training. According to a speech of the Chief Justice of Tanzania, there are 1,105 Primary Courts in Tanzania. Out of these,

²¹²Art. 7 of the Basic Principles on the Independence of the Judiciary (BPIJ) of 1985.

only 628 courts have magistrates permanently stationed. The rest are served by visiting magistrates.²¹³ There are ten regions in Tanzania that do not have a High Court Registry and twenty-six Districts with no District Courts. The majority of courthouses are out-dated and dilapidated. These deficiencies have created an unfavourable working environment, which has negatively impacted the quality of justice delivered.

The Government has taken steps to increase access to justice for all Tanzanians, including the implementation of the Legal Sector Reform Programme (LSRP). The vision of the LSRP is *Timely Justice for all*, built around the core principles of:

(i) speedy dispensation of justice; (ii) affordability and access to justice for all social groups; (iii) integrity and professionalism of legal officers; (iv) independence of the judiciary; and (v) a legal framework and jurisprudence of high standards responsive to social, political, economic, and technological trends at both national and international levels. The LSRP has made some progress: during the first phase of MKUKUTA, the number of judges in the Court of Appeal increased from eight in 2005 to fourteen in 2012, and the number of judges in the High Court increased from twenty-four to fifty-nine²¹⁴.

5.5 Conclusion

The right to fair trial in the proposed constitution of the United Republic of Tanzania, 2014, the Proposed Constitution covers more aspects of the rights to fair trial

²¹³ Keynote Address by Mohamed Chande Othman, Chief Justice of Tanzania, on the Occasion of the Annual General Conference of Tanganyika Law Society, 17th Feb, 2012 at Arusha International Conference Centre, p. 8.

²¹⁴ MKUKUTA Annual Implementation Report 2009/2010, p. xvi and recent updates from the Judiciary.

than the current Constitution. It explicitly enshrines the right to know accusation, the right to remain silent, the right to legal assistance and or presentation, the right not to self-incriminate, the right to be treated humanely, the right to be furnished with copies of the judgment and proceedings, The Proposed Constitution also enjoins the Parliament to enact laws to facilitate the issuance of the charge to the accused, determination of bail applications and the issuance of the copy of judgment and court proceedings to prisoners.²¹⁵ governing Appellate court while Constitution act as substantive law only creating or stating the presence of fair trial even though is not exhaustively provides all the minimum elements associated with fair trial.

The study discovered some alarming challenges like police, prosecutorsø magistrate and judges in the trial courts are not observing the procedural demands of Tanzania legal system. And as a result, time after time people convicted and sentenced for serious crime are released because the trial results are declared a nullity by Court of Appeal. There are other numbers of short comings of court in relation to some of which are caused by factors beyond the control of the members and staff of the courts as it has been shown in the previous chapters.

As it is expected court must be a place for better its performance in the future as long as fair trial right is concerned. Because challenges/limitation like corruption that police / investigation machinery are corrupts or taking bribes hence affect the pretrial stage. Ignorant of the law that most of the time accused are not aware of the laws of the land and their rights. Another challenge is litigation system is very expensive both

²¹⁵ Article 48(1), (2) and (3) of the Proposed Constitution

to civil and criminal cases and most of the time parties to case are poor to hire a lawyer. Also, unethical conduct of officers of the court including advocates court clerks, magistrates and judge.

Delay of cases is another challenge, which directly affects justice and, in some instances, renders trials unfair the right to fair trial is all about and the impact of delays in a criminal trial. The right to trial within a reasonable time is another fair trial guarantee of major importance. The main goal of this guarantee is to protect the parties against excessive procedural delays. Also, the effect of an indictment upon the reputation of the person is relevant as well. The reasonable time guarantee starts to run from the moment when an individual is a subject of a charge. This right is persistently being violated by High Court as it has been observed in the previous chapters.

The reasons of delay found by the study including, inherent time requirements of the case, actions of the accused, actions of the Republic and limits on institutional resources and prejudice to the accused. Case backlog continues to be a great impediment of justice since it directly affects the right to a fair trial without undue delay. The Tanzanian judiciary and here the subject matter are High Court has faced persistent difficulties in disposing large pending caseload. This situation has continued to affect the realization of the right to a fair trial without undue delays.

One of the key contributors of case backlog is the lack of a clear understanding of the judicial interpretation of the phrase unreasonable delay. The other lies in identifying the appropriate remedies in the event of an undue delay. Justice is based on respect for the rights of every individual and as such, every government has the duty to bring to

justice those responsible for violation of others' rights. Trial aims at rendering justice to the victims and this constitutes a fair trial.

Another challenge is the issue of jurisdiction, which is very important in fair trial administration where a court lacks jurisdiction to hear and determine a matter. Whatever decision it reaches has no force of law it is a nullity. A vivid example is from the case of *Shminimana Hisaya and another v Republic*²¹⁶. As there was no High Court decision on which an appeal would lie to the Court of Appeal. Appellants convicted at District Court Kibondo appealed to High Court of Tanzania sitting at Tabora but appeal was transferred to Court of Resident Magistrate under section 45(2) of Magistrate Court Act Cap 11 of 1984.

To be heard by Resident Magistrate with extended Jurisdiction but the magistrate had to hear it as the High Court judge. As he was supposed to sit to Court of Resident Magistrate then to have extended jurisdiction deemed as Judge and a court deemed as High Court. But he sat on High Court. Hence Court of Appeal decided the decision entered by this magistrate was null and void and hence quashes the decision.

The problems facing the full realization of the right to fair trial are not entirely attributed to shortcomings in the formal law and cannot be fully addressed from the formal law perspective alone. It impacts factors outside the formal law such as poverty, illiteracy, corruption and cultural perceptions and contextual issues affect the enforcement of the right to fair trial as it has been observed above.

²¹⁶ Criminal Appeal No 6 of 2004 (Unreported)

Also, interpretation of documents is another cause of concern as it undermines fair trial rights in High Court. As the language of the court especially for documentation is English which most of the accused do not understand, the right to an interpreter is the fundamental right to fair trial. If the accused has difficulty speaking, reading or understanding the language used by the court. He or she has a right to interpretation during court proceedings as well as the translation of all relevant written documents. It is very essential for the accused to be able to follow or understand the proceedings especially in situations where the penalty for conviction is serious like armed robbery or murder.

Therefore, it is the strong beliefs and expectations, that Tanzanian courts or the judiciary shall investigate those challenges, weaknesses, and thereafter find an appropriate way; the appropriate way which shall overcome those challenges and cure the weaknesses so that at the end our courts should obtain the public confidence. Our courts should adhere to its holding that justice should not only be done but should be seen to have been done. And this holding cannot stand without courts to strengthen its legitimacy via the public confidence upon them so as to avoid being bias to the mind of the people who knocks the courts door.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

A number of research questions have been discussed in this study including challenges and limitations facing administration of justice in court. Court of law in relation to adherence to the fair trial right, basic legal standards of fair trial, public awareness on the fair trial right and reforms in the administration of justice. Yet, despite the existence of necessary laws and the required institutions, undue legal process in criminal prosecution is a prevalent concern in Tanzania.

A large number of Tanzanians have lost confidence on the country's criminal justice system, and even more on the judiciary. Hence it has been observed that the extent of adherence of fair trial principles by the High court of Tanzania is very low, yes High Court do observe fair trial principles but still it is very low vivid examples can be drawn from case laws decided by High Court.

Whether the perception against the system is correct or not, there are serious concerns in the country's criminal justice system that needs urgent intervention. Mainly it has been shown that Tanzania is in need of effective National human rights mechanisms particularly on the right to fair trial.

Having passed through the eras of slave trade, and colonialism and now struggling with post-colonial uncertainties, the country needs to direct its attention resources and efforts to the attainment of reasonable standards of human rights, particularly the right

to fair trial. While it is true that Tanzania human rights system has made remarkable progress since its inception much still remains to be done especially on the right to fair trial.

As the country's functions and its attention is to create condition necessary for the development in Tanzania of social found on the principles of freedom, justice, fraternity and concord, and as the court always aimed at shrinking a reasonable balance between the freedoms of the individual and the security of the state. It appreciated in so doing the need for cross fertilization of human rights jurisprudence.

6.2 Recommendations

Tanzania is under constitutional and international obligations to ensure that fair trial rights are realized in theory as well as in practice. Article 26 of the African Charter instructs states to improve appropriate institutions responsible for dispensing human rights. The anomalies revealed by the African Court to Tanzania state necessitate some major reforms in running the country's criminal justice system. The injection of adequate financial resource is a starting point for the reformation process. Even more, this study calls upon judges, magistrates, prosecutors and all those dealing with the administration of criminal justice to strictly and diligently abide by fair trial standards. As Blackstone wrote, the demand of a fair trial should be informed by the notion that fairness overrides pragmatic justifications: -it is better that ten guilty persons escape than that one innocent suffers²¹⁷.

²¹⁷ Ibid footnote 11

Fair trial rights, just as any other human rights, are only meaningful if there are remedies available for those affected. In the case of fair trial abuses, these remedies should be provided by the competent judicial authority and can take several forms, including financial compensation, exclusion of evidence and re-trials.

As fair trial is the right in case one is violated under the International Covenant on Civil and Political Rights which Tanzania state is a party a person has the right to compensation in case of conclusive evidence that he or she has been the victim of a miscarriage of justice ²¹⁸. The victim must not have contributed to the miscarriage of justice. Pardons based on equity do not give rise to any ground for compensation. The following are recommendations that if adhered will help Tanzania in having a well-protected fair trial and High Court which adhere to this right:

- (i) To have Review from Primary Court up to Court of Appeal as up to now we have review in criminal case only in Court of Appeal.
- (ii) The state should have trial observation Mission to monitor trial in the court to see if courts observe fair trial.
- (iii) Legislation should be reviewed to avoid very long and convoluted sentences that are problematic to understand.
- (iv) The use of technical terms in the provisions of procedural and substantive laws should be reviewed with intention of keeping such technical term to the minimum or removing it at all.
- (v) The Civil Procedure Code and the Criminal Procedure Act should be translated to Swahili language which is familiar to almost all the Tanzanians population.

²¹⁸ Article 14(6) of ICCPR

- (vi) Financing and encouraging legal aid schemes. The current existing schemes are mostly based in urban areas and suffer from lack of resources of human and financial.
- (vii) Enabling parties with limited financial means to conduct litigation on a more equal footing.
- (viii) The need for clear lines of judicial and administrative responsibility for the justice system.
- (ix) Designing the structure of the courts and the deployment of judges/magistrates to meet the needs of litigants.
- (x) Increasing the number of competent Judges and Magistrates in order to reduce their workload and deploy them effectively which in turn will help to achieve better case management in the Court of Appeal, High Court and subordinate courts.
- (xi) Specialization is a necessary step towards improving the efficiency of Judges and Magistrates.
- (xii) Providing intensive training to Judges and Magistrates on all aspects of case management and proper remuneration for them.
- (xiii) High Court Judges should have stenographers to assist in taking notes during proceedings and qualified lawyers assigned to them as legal assistants to assist in doing research for the judge(s)
- (xiv) Judicial officers should undergo a comprehensive training on Information and Communications Technology
- (xv) Government should work to create a package of binding minimum standards on the right to a fair trial (the "Roadmap")

- (xvi) The Government of Tanzania should continue to strive to more effectively discharge its three basic duties to respect, protect and fulfil the realization of human rights. *The duty to respect* requires the duty-bearer not to breach directly or indirectly the enjoyment of any human right. *The duty to protect* requires the duty-bearer to take measures that prevent third parties from abusing the right. *The duty to fulfil* which *requires* the duty-bearer to adopt appropriate legislative, administrative and other measures towards the full realization of human rights as fair trial is among those rights.
- (xvii) There should be joint efforts among the Government, the Commission for Human Rights and Good Governance, civil societies, business actors, and the international community to be able to overcome these challenges in order to achieve a just, democratic, and developed society where all human rights are respected, protected and promoted.
- (xviii) To allow smooth functioning of the fact-finding mission in Tanzania, with the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), special procedures undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to States and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations, contribute to the development of international human rights standards, engage in advocacy, raise public awareness, and provide advice for technical cooperation.
- (xix) Providing a statutory definition of the right to a fair trial and put minimum basic elements of fair trial in the constitution in the part of Bill of Rights. Even though fair trial right has been recognized in the Tanzania constitution under Article

13(6) but there is no definition of the right as well as there is no exhaustive list of what entails the minimum basic standard of the right as the way they are provided under the international instruments which Tanzania has ratified.

- (xx) Conducting regular public awareness campaigns One of the factors which contribute to violation of the right to a fair trial is ignorance. Many litigants, especially accused persons in Tanzania are not aware of the existence of the right and hence cannot seek to enforce it. It is recommended that the government, through the department of justice, should embark on conducting public awareness campaigns to educate the public of the right to a fair trial and the minimum basic elements that are embodied in the right. This will inform the general public of their legal rights and enable them to demand strict enforcement in the long run.
- (xxi) To train and engage local lawyers and organizations in the process of justice system.

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