CHILDREN'S RIGHTS IN THE ADMINISTRATION OF JUSTICE

BY

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A dissertation submitted to the University of Zambia in partial fulfillment of the requirement for the award of the Degree of Bachelor of Laws (LLB)

THE UNIVERSITY OF ZAMBIA
9th APRIL (2010)
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I, MOSES KAUNJIKA, do hereby declare that this research paper represents my own work, and where other people’s work has been used, due acknowledgements have been made. This paper has not been submitted for any academic awards to the best of my knowledge.

MOSES KAUNJIKA

DATE

7/04/2010
This dissertation/thesis of MOSES KAUNJIKA is approved as fulfilling the requirements or partial fulfillment of the requirements for the award of the (Degree) in the School of Law by the University of Zambia

RTD JUDGE KABAZO CHANDA (SUPERVISOR)
ABSTRACT

The paper examines Children’s Rights in the Administration of Justice. Children all over the world have been abused in one way or another. Often times their human rights have been trampled upon by adults. Most of the abuse that goes is either hidden or it’s never punished by the judiciary or the executive wings of the government. But what happens if a child has committed a crime or is subject to various civil abuses. Does the domestic law or the international human rights instruments offer any help? How effective are the domestic laws in enhancing children’s right in the administration of Justice? The paper will briefly look the Zambian Legislation that touches on children. These include the Juvenile Act, Penal Code and many others. The paper examines the “Children’s Rights in the Administration of Justice”. It shows that the legal protection accorded by various international Human Rights instruments and also the various laws in Zambia that deals with children. In particular, the Penal Code, Criminal Procedure Code Zambia and the Juveniles Acts. Zambia has indeed ratified most of these Human Rights instruments but has not done enough in terms of actual protection of children’s rights in practice through civil and criminal procedures. The paper consists of five chapters. The First chapter inter alia, considers the context and statement of the problem. The chapter also discusses the rationale for the research and submits that children need to be protected in the administration of justice as they are vulnerable. The justifications as well as the objectives of the research are also set out in this chapter. In addition, the chapter discusses the meaning of the term child and the age of majority. In addition, it also looks the CRC and its History. Lastly the age of criminal responsibility and liability of a child shall be considered. Chapter two deals with the criminal rights of a child starting the point of arrest and/or detention to the point of prosecution should there be need. It also emphasizes that detention should be the last resort and the need to treat a child as such except for felonies such as murder and aggravated robbery among others. Lastly should a child be deprived of liberty, what are the Childs rights? Chapter Three deals with the civil rights of a child in comparison to international instruments. These rights include compensation, consent when being adopted. It discusses these rights in relation to common principles of tort in particular, false imprisonment and negligence Chapter Four discusses the effects of children when they are victims or witnesses in court. It looks at sad examples of children who have suffered mental anguish and broke down in court. Specifically, South Africa shall be used as a case study. The effects of cross examination on children shall also be discussed. The point stressed is that though children are vulnerable, this didn’t exempted them from giving evidence. The need for all judicial officers to protect them in court from the attacks and bulling of the prosecution and defence counsel was emphasized. The Fifth and final chapter contains conclusions and recommendations
DEDICATIONS

To my late mother and father Mrs. Faides Mukosha Kaunjika & Mr. Stephen Jones Kaunjika whose love and care was endless. I run out of words whenever I want to describe the kind of people they were. Mom and Dad without you, I would not be where I am today and for that I am forever indebted to you.

You may be gone, but your love and care will forever remain in me. I know you are in the safe hands of the Lord and that you guide me each day of my life. I love and miss you each day. Till we meet again, rest in eternal peace.

To my children Taonga, Tapiwa, Takondwa and Daliso and his mother (Ireen Makondo, you are the source of my inspiration. My children, I pray that you grow up to be a responsible and God fearing. I love you guys.

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CHAPTER ONE

1.0 INTRODUCTION

Children all over the world have been abused in one way or another. Often times their human rights have been trampled upon by adults. Most of the abuse that goes on is either hidden or it’s never punished by the judiciary or the executive wings of the government. But what happens if a child has committed a crime or is subject to various civil abuses. Does the domestic law or the international human rights instruments offer any help? How effective are the domestic laws in enhancing children’s right in the administration of Justice? The paper will briefly look the Zambian Legislation that touches on children. These include the Juvenile Act, Penal Code and many others. The paper will examine the theme “Children’s Rights in the Administration of Justice”. It shows the legal protection accorded by various international Human Rights instruments and also the various laws in Zambia that deals with children. In particular, the Penal Code, Criminal Procedure Code Zambia and the Juveniles Acts. Zambia has indeed ratified most of these Human Rights instruments but has not done enough in terms of actual protection of children’s rights in practice through civil and criminal procedures.

The paper consists of five chapters. The First chapter *inter alia*, considers the context and statement of the problem. The chapter also discusses the rationale for the research and submits that children need to be protected in the administration of justice as they are vulnerable. The justifications as well as the objectives of the research are also set out in this chapter. In addition, the chapter discusses the meaning of the term child. Further, it also looks the CRC and its History.

Chapter two deals with the criminal rights of a child starting the point of arrest and/or detention to the point of prosecution should there be need. It also emphasises that detention should be the last resort and the need to treat a child as such except for felonies such as murder and aggravated robbery among others. Lastly should a child be deprived of liberty, what are his or her rights?
Chapter Three deals with the civil rights of a child in comparison to international instruments. These rights include compensation, consent when being adopted. Chapter Four discusses the effects of children when they are victims or witnesses in court. It looks at sad examples of children who have suffered mental anguish and broke down in court. Specifically, South Africa shall be used as a case study. The effects of cross examination on children shall also be discussed. The point stressed is that though children are vulnerable, this didn’t exempt them from giving evidence. The need for all judicial officers to protect them in court from the attacks and bulling of the prosecution and defence counsel was emphasized. The Fifth and final chapter contains conclusions and recommendations

1.1 STATEMENT OF THE PROBLEM

Although the Convention on the Rights of the Child has proved a major milestone in the universal promotion and protection of the rights of the child, numerous challenges remain to be overcome in many countries before the rights of the child can become a living reality, including in particular in situations where children come into conflict with the law. Police violence against children is not uncommon,\(^1\) nor is arbitrary detentions\(^2\) and the use of imprisonment for minor infringements of the law on very young children, despite the fact that Imprisonment should be used only as a means of last resort.\(^3\) Contrary to international law, children are also often detained in unacceptable conditions,\(^4\) subjected to violence while in detention, including corporal punishment as a disciplinary measure. Young female offenders are particularly vulnerable and their needs must be effectively addressed. The challenges ahead are thus considerable, and in order to make progress in this important field of legal protection, vigorous, concerted and effective efforts are required at both the international and national levels. The effective implementation of the rights of the child is

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\(^1\) Zambia Daily Mail, 23rd June 1996
\(^2\) LRF rescues a boy detained at Police over a Debt
\(^3\) Ibid the boy had been in detention for over a week
\(^4\) Post Newspaper. 18th December 2009
thus the responsibility of all Governments and members of the legal professions as well as of all adults who deal with children, such as parents, relatives, friends and teachers. If parents, teachers and guardians are allowed at common law to use force to chastise their children, what are the limits available to them? In recent past a child was beaten by the mother and a neighbor to the point of losing her legs for sleeping out and she eventually died after having her legs amputated\(^5\). What has been the reaction of the government?

1.2 SCOPE OF THE STUDY

The paper examines Children’s rights in the Administration of Justice. It is a well known fact that the term justice means equality before the law and the rule of the law amongst other meaning. So a child needs to be protected because it’s vulnerable as compared to an adult. The paper examines the rights a child has when it is brought before the courts of law or when the police and other law enforcement officers are affecting an arrest. These include the right to legal representation, the right to be presumed to be innocent until he is proved or has pleaded guilty; to be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged. A child has the right to be brought before a juvenile court promptly as per provisions of the Juvenile Act. Why are juveniles and hard core criminals put in the same jail? Lastly, The common law principles relating to tortuous liability and criminal liability of a child shall also be examined. Children in Zambia and in many states have been denied legal representation because it’s either expensive and/or there are no enough lawyers at the Department of Legal Aid. What happens when a child is a victim of a tort? They are usually sidelined or denied any compensation mostly because their patens and/or guardians opt to have an out of court settlement to the detriment of the child. Lastly the common law principles on how children should

\(^5\) The Post Newspaper, 20\(^{th}\) September 2009
present their evidence in court and how the court can make them comfortable before the courts shall be examined. Thus the roles of judicial officers and prosecutors as well as lawyers have to be enhanced so that children find the court as friendly as possible.

1.3 RATIONALE FOR THE RESEARCH

The rights of a human being including that of children are a critical ingredient of any democratic state and Zambia is no exception. It is for this reason that the Constitution and other international instruments have emphasised the enhancement and protection of human rights. Has Zambia done enough to enhance and protect the rights of children in particular? In the post newspaper ⁶ is a story of a woman who left her eight month baby on the road because she was too drunk and had a quarrel with her husband whom she claimed to have been drinking with is another example of the gross violations of children’s right that go on everyday. There is a need to take a leaf from other jurisdictions on how they have succeeded in educating its masses on the need to protect children’s rights. Children for example are not even consulted when adoption orders are made by courts of competent jurisdiction. This will be discussed later.

Common law principles of tort and Procedure when children are either victims or witnesses to a crime or violations of their rights have to be discussed so that stake just don’t fall in the umbrella of best interest of the child as it were but that theses statements should become a reality through compensation. Article 3(1) of the Convention on the Rights of the Child ⁷ is the key provision on the principle of best interests and reads as follows:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities

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⁶ Post Newspaper, 17th August 2009
⁷ A United Nationalised Agency on Children
or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 4(1) of the African Charter on the Rights and Welfare of the Child\(^8\) also provides that

“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”.

Although the principle of the best interests of the child is not expressly included in the International Covenant on Civil and Political Rights, the Human Rights Committee has emphasized that “the paramount interest of the children” must be borne in mind in connection even in cases to do with the dissolution of the marriage of the parents.

Thus rationale behind this study is that whilst Zambia has ratified most conventions on the rights of children little has been done\(^9\) to enhance and domesticate children’s rights and hence have no binding effect. Article 17(1) of the African Charter on the Rights and Welfare of the Child provides that

“Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others”

Even Zambian own Laws that are enacted to address the rights of children are grossly ignored to the detriment of the child. Hence a massive education campaign has to be put in place so that all these gross violations are addressed. One of the major violations that Zambia continually faces is that of non separation of children from adults in places of detention. Section 58 of the Juvenile Act\(^10\) says

\(^{8}\) African Charter on the Rights and Welfare of the child
\(^{9}\) CRC report on Zambia 2004 page 40
\(^{10}\) Cap 53
‘It shall be the duty of the Commissioner of Police to make arrangements for preventing, as far as possible, a juvenile while detained in a police station, or while being conveyed to or from any criminal court, or while waiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with an offence, other than an offence with which the juvenile is jointly charged, and for ensuring that a girl (being a juvenile) shall, while so detained, being conveyed, or waiting be under the care of a woman.’

This is one of the major violations as children are mixed with hardcore prisoners. The committee on children’s rights\(^{11}\), reported a total number of 40 children who were detained on trivial charges of loitering and idle standing being mixed with hardcore criminal under the supervision of the so-called cell captain was a convicted criminal and no training in child matters. Concerning issues of evidence and conduct in court, children are at the mercy of the defence counsels who intimidates them to their detriment observes RM Rosentem.\(^{12}\) And often the Judges have watched without protecting children

1.4 JUSTIFICATION FOR THE RESEARCH

This study is justified on the ground that the law as it stands in Zambia in relation to the protection of the rights of children is not in compliance with the set international instruments and the common law principles. Children are abused every day. Even rights to privacy and protection from inhuman and degrading treatment which have guaranteed by many human rights instruments have been violated.

Our own Evidence Act\(^{13}\) has no provisions as to evidence of children before the courts of law and hence common law comes into play. But to what extent is common law binding in our courts of law? It only has influential effect on our laws with no binding effect. It only feels the lacunas in

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\(^{11}\) Ibid 9


\(^{13}\) Cap 43 of the Laws of Zambia
our laws. But it has helped us. By virtue of Cap 11\textsuperscript{14} common law is applicable in Zambia. Children have been tortured leading to some of them dying.\textsuperscript{15} There’s is no proper procedure for arrests of children and their being brought before the courts. Lastly the lack of trained police officers, prosecutors and judicial officers has aggravated the situation at hand as most of them do not know or understand how to deal with children when they are suspects, accused or are victims in a civil liability.

1.5 OBJECTIVES OF THE STUDY

The main objective of the study is to show the various international instruments and common law principles of tort and evidence can be used to promote enhance and protect children’s rights. The study will begin by showing the provisions of the law and then and analyzing it with international instruments and brings practical examples of the situation where these rights have been violated. A child of 18 years is old enough to understand adoption and divorce proceedings and hence need to be consulted when such issues arise. Also it emphasizes the education and alertness of judicial officers and other law enforcement agencies involved in enhancing human rights.

1.6 METHODOLOGY

The method that shall be used in this essay shall be library research of statutes, cases, international instruments and legislation. It shall also include interviews from concerned officials which include prison officers the police and Human Rights groups.

\textsuperscript{14} The English Law (Extent of Application) Act Cap 11
\textsuperscript{15} Ibid
1.8 MEANING OF THE TERM CHILD

The definition of term child has often brought a lot of complications in the judicial system. Many international instruments and indeed laws have defined a child differently. Article 1 of Convention on the Rights of the Child provides that, for the purposes of the Convention,

"A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

The Juveniles Act defines a child as

"Child" means a person who has not attained the age of sixteen years.

The Adoption Act meanwhile defines an infant/child

as "infant" means a person who has not attained the age of twenty-one years, but does not include a person who is or has been married.

The Marriage Act\textsuperscript{16} infers that a person below the age of 21 is a child and therefore requires consent to marry. It provides \textit{interalia} If either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father,\ldots \ldots

Lastly the Penal code\textsuperscript{17} in section 131A.as in this Part "child" means a person below the age of sixteen years. A child (plural: children) is a human being between the stages of birth and puberty. The legal definition of "child" generally refers to a minor, otherwise known as a person younger than the age of majority. The age of majority like that of a child differs from one jurisdiction to another. Whatever the position of who a child is and what the age of majority is, this essay shall take the definition of a child to mean any person below the age of 18 as per provisions of the CRC. It should be pointed out though, that the different definitions of the term child, has brought so much confusion not only in Zambia but in other states. UNICEF\textsuperscript{18}, has recommended that

\textsuperscript{16} Marriage Act Cap 50
\textsuperscript{17} Penal Code Cap 87
\textsuperscript{18} UN specialised organ for children report of 2000 p 786
though it is up to domestic law to determine the real definitions, it has encouraged member
countries to come up with one piece of legislation that shall harmonies the situation.

1.9 WHAT IS THE CRC

The United Nations Convention on the Rights of the Child (UNCRC) is a comprehensive,
internationally binding agreement on the rights of children, adopted by the UN General Assembly
in 1989. It incorporates children's: civil and political rights (like their treatment under the law);
social, economic and cultural rights (such as attaining an adequate standard of living); and
protection rights (from abuse and exploitation).
The Preamble sets out the major underlying principles of the CRC and provides a context for it.
The substantive articles, set out the rights of all children and the obligations of governments. it also
acknowledges the family as the fundamental unit of society and the natural environment for the
growth and well-being of children. The Preamble also states that the family should be afforded the
necessary protection and assistance so that it can fully assume its responsibilities within the
community.

1.9. 1 the Substantive Articles

There are also the main substantive articles each of the substantive articles, details a different type
of right. A common approach to the UNCRC is to group these articles together under the following
themes:

1. **Survival rights:** include the child’s right to life amongst others. A child has rights just like
an adult. The problem with most African states including Zambia is that this right to life is
usually trampled upon. Many youths and adults abort or terminate pregnancies in
conjunction with medical and witch doctors. A report leased by Ministry of Education
should that many girls dropped out of school due to pregnancies and out of 10,000 girls,
2000 died in attempted abortions. Human Rights activities are still not decide if unborn child has rights. I would argue that it has life and hence rights because life begins at conception

2. **Development rights**: include the right to education, and basically social and political rights. In Zambia a child has a right to education but the government is not under any obligation to provide education. Most of the social rights have been put under the constitution but are not justiciable. It means the government cannot be taken to court for failing to provide an education. It does it at its own time when it has money. This is a misplaced priorities because the government spends a lot of money on non important things such as hearses, NCC allowances and so on

3. **Protection rights**: ensure children are safeguarded against all forms of abuse, neglect and exploitation. Law enforcement agents are the worst culprits in child abuse and exploitation. Children have been detained on trivial matter and mixed with adults contrary to the provisions of the Juvenile Act and International Human rights instruments. Cases of defilement have continued to rise because relatives and neighbours have joined in child sexual abuse. This is because there is lack of protection by the government on children.

4. **Participation rights**: encompass children’s freedom to express opinions, to have a say in matters affecting their own lives, to join associations and to assemble peacefully. This is Zambia does not arise contrary to Article 12 of the CRC which states that and that the child’s view must be considered and taken into account in all matters affecting him or her

The only time children are allowed to express their opinion on issues affecting them is when we have occasions such as Youth Day, Children’s Day, and International Day of Children Broadcasters. Even then, their cry falls on deaf eyes. It is cumbersome for a child who has reached
16 years to even get An NRC. The idea of speaking through parents should only be for children who have not grown mental faculties.

### 1.9.2 General Principles

Within the UNCRC, four articles are afforded special emphasis, as they are basic to the implementation of all other rights. These four articles are often referred to as 'general principles'.

1) These are: that all the rights guaranteed by the UNCRC must be available to all children without discrimination of any kind (Article 2); 2) That the best interests of the child must be a primary consideration in all actions concerning children (Article 3); 3) That every child has the right to life, survival and development (Article 6); 4) And that the child’s view must be considered and taken into account in all matters affecting him or her (Article 12).

### 1.9.3 History of the Convention on the Rights of the Child (CRC)

According to the American Heritage Dictionary, the roots of the UNCRC can be traced back to 1923 when Eglantyne Jebb, summarized the rights of children in five points. Her Declaration of the Rights of the Child was adopted by the League of Nations in 1924 and the five points subsequently became known as the Declaration of Geneva. Following World War II, and its atrocities, the United Nations (UN) concentrated on producing the Universal Declaration of Human Rights, which was adopted in 1948. Although the rights of children were implicitly included in this Declaration, it was felt by many to be insufficient and that the special needs of children justified an additional, separate document. In November 1959, the UN General Assembly adopted the second Declaration of the Rights of the Child. This consisted of ten principles and


20 Founder of the save the children trust
incorporated the guiding principle of working. This consisted of ten principles and incorporated the guiding principle of working in the best interests of the child. However, this 1959 Declaration was not legally binding and was only a statement of general principles and intent. Ten years in the making; the UNCRC was adopted by the UN General Assembly in 1989, exactly thirty years after the 1959 Declaration. On 2 September 1990 it entered into force as international law. And which, as of 8 February 2002, had been ratified by 191 States.

This Convention has developed into an essential world wide legal tool for the enhancement of the rights of the child in general and, inter alia, those children who are affected by the administration of justice through criminal, separation or adoption proceedings. The Convention was an overdue response to the urgent need to elaborate a legally binding document that would focus exclusively on the specific needs and interests of the child, which, as will be seen below, differ in important respects from those of adults. Prior to the adoption of this Convention, the child had been at the centre of the brief 1959 Declaration of the Rights of the Child, which does not, however, cover the various issues relating to the administration of justice per se.

1.10 AGE OF CRIMINAL LIABILITY.

The CRC has given discretion to member countries to fix the age of criminal liability of children. However it should be too low. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal liability; that is, whether a child by virtue of her or his individual discernment and understanding can be held responsible for essentially anti social behavior. In Zambia the Penal Code in section 14 (1) says

A person under the age of eight is not criminally liable for any act or omission.

Section (2) provides that
‘A person under the age of twelve years is not criminally liable for an act or omission, unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do or make the omission.’

In the *People v Zimba*\(^ {21}\) The Subordinate Court of the First Class in Chipata sitting as a juvenile court, found the juvenile offender, aged 13 years, guilty of careless driving and of driving without being the holder of driving licence and convicted him on both count the Court held that A juvenile offender cannot rely on the fact that he was too young to be an experienced driver.

1.11  **CIVIL LIABILITY OF CHILDREN**

A child can sue and be sued. But he can only sue through a next of kin\(^ {22}\). However the law of tort brings out certain qualification as to what the court considers when a child is sued for Negligence. Thus, in *Yachuck v Oliver Blais Co Ltd*\(^ {23}\). A boy who lied when buying gasoline from the defendant that his mother wanted it but was injured when he went to play with it, it was held that the defendants were liable in negligence for supplying gasoline to the kid who neither knew the properties gasoline had and hence not blameworthy. The standard and duty of care for children is very high.

**CONCLUSION**

The paper has tried to examine the CRC which is the most powerful International Human Rights instrument on children because it shall widely refer to it in this study. The paper has also tried to look at the meaning of the term child by different laws in Zambia and has emphasised the need to harmonies the meaning of the term child. Lastly in passing, it has shown that state parties to the CRC have been given the right to determine their own age of criminal liability and has brought out the age of criminal liability in Zambia.

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\(^{21}\) (1976) Z.R. 86  
\(^{23}\) (1949) A C 386
CHAPTER TWO

2.0 PROPOSED PROCEDURE WHEN INVESTIGATION A COMPLAINT AGAINST A CHILD

2.1 INTRODUCTION

This chapter shall endeavor to discuss the procedure that has to be adopted when making an arrest and possible prosecution of the child. Secondly it shall endeavour to discuss the rights of a child who has been accused of any crime. The case study shall be taken from our neighbour, Botswana which has in place a detailed statute that deals with the procedure that is taken before and when arresting a child.

It is well settled in international human rights law that children in conflict with the criminal law must be treated and dealt with in a manner consistent with promotion of their sense of dignity and wealth. They must be dealt with within a framework that recognizes that the main purpose of dealing with them is to rehabilitate them and/or reintegrate them into society. International human rights law and instruments mandate state parties to promote and establish procedures, authorities and institutions which are specifically geared towards recognizing the vulnerable positions of children in conflict with criminal justice.

2.2 THE MINIMUM STANDARDS OF A JUVENILE JUSTICE SYSTEM UNDER INTERNATIONAL LAW.

The earliest international human rights instrument which specifically alludes to child offenders is the International Covenant on Civil and Political Rights (ICCPR). It mandates state parties to ensure that juveniles and/or children are treated in a manner appropriate to their age and legal status and be tried in a manner that takes into account their age and the desirability of promoting
their rehabilitation\textsuperscript{24} It further provides or requires that accused children or juveniles be afforded a speedy trial and be separated from adults.

The above themes and standards have been expanded and developed by the CRC. The CRC reiterates the requirement that a juvenile justice system should aim to encourage the well being of children in conflict with the criminal law and to deal with them in a manner that proportional to their circumstances.\textsuperscript{25} It further provides that a good juvenile system should reinforce child offender's respect for human rights and fundamental freedoms of others. Further, it should also promote their integration into society. State that state parties should also establish laws, procedures, authorities and institutions that are applicable to children.\textsuperscript{26} The privacy of a child must be respected at all times\textsuperscript{27}.

Lastly the CRC requires that whenever appropriate, children should be diverted from formal trial procedures and that alternatives to institutional care which include a variety of dispositions such as care, guidance counseling probation foster care, education and vocational training programs should be in place to ensure that child offenders are accorded treatment proportionate to their circumstances and offence\textsuperscript{28}. The provisions of the CRC are many but for want of space, others will deal with at a later stage. As much as we have such provisions, Zambia has failed to set up special units to counsel and deal with child offender. In the 2005 child justice report\textsuperscript{29}, an attempt was made to have three police stations in Lusaka as a pilot project to deal with children's matters under a special unit which would be filled with qualified people to deal with children. These being Central, Kabwata and Matero Police respectively. To date what was intended to be a good

\textsuperscript{24} ICCPR Article 10
\textsuperscript{25} Article 40(1)
\textsuperscript{26} Articles 40(3a)
\textsuperscript{27} Article 40(2)(b)(ii)
\textsuperscript{28} Article 40(4)
\textsuperscript{29} Report on the child justice system in Zambia by Lukas Muntingh
initiative has lamentably failed as all stations and most of them are manned by unqualified personnel in Lusaka deal with children only unit that tries to help out is the Victim Support Unite which handles diverse problems. Zambia has only managed to set reformatory centers\textsuperscript{30} which deal with convicted children who are kept at the Presidents pleasure and are full of problems ranging from financial to human resource related matters. In \textit{Gideon Musonda \& Chisha Chishimba \textit{v} The People} \textsuperscript{31} Three juvenile offenders aged 16, 15 and 13 were found guilty of burglary and theft. The trial magistrate on the recommendation of a probation officer ordered that they be sent to a reformatory. They were first offenders had pleaded guilty and the value of K97.40 involved was recovered. It was held:

'A reformatory order is a very severe punishment and should only be made when other methods of reformation are in the circumstances entirely inappropriate or have proved to be in vain in the past."

One would pray that many centers are established in police station with specially trained staff to deal with cases of children.

\textbf{2.3 PROPOSED PROCEDURES TO BE TAKEN BEFORE ARRESTING A CHILD}

Though in Zambia, there is no specific procedure that is used when arresting a child. A leaf can be taken from Botswana which has procedure that is embedded in its statute. Siamisang Thebe\textsuperscript{32} states that the Children's Act of Botswana which was enacted in 1981 provides that any person having a

\textsuperscript{30} Francis Mayaba \textit{v} The People (S.C.Z. JUDGMENT NO. 5 OF1999) where the juvenile after being convicted of manslaughter was sent to a reformatory center

\textsuperscript{31}(1979) Z.R. 53 (S.C.)

\textsuperscript{32} Juvenile Justice in Botswana,1999 Zambia Law Journal Vol 31 p 140-141
reasonable belief that an offence has been committed by child or juvenile shall make a complaint to a juvenile or District Commissioner in the District in which the offence has been committed. If in the view of the Commissioner a prima-facie case has been established, he shall direct a Probation Officer to enquire into and to report to on the general conduct, home environment, school records and medical history of the child. Only after this report can a Commissioner commit the child to court for trial.

The Juvenile Act in comparison to the above legislation makes no procedure whatsoever when investigating and committing a child to court. The only similarities are that the District commissioner and Secretary can be a juvenile Commissioner\textsuperscript{33}. It’s submitted that Zambia like Botswana should amend the Juveniles Act to include such a procedure so that the law enforcement agencies are guided on how to deal with complaints that have been brought before them. The common law principles of tort have prescribed how an arrest should be made and even our own Criminal Procedure Code\textsuperscript{34} has, but they all fall short of the provisions of International human rights instrument in that they make no distinction regarding the treatment of children. In short they have no specific reference to child offenders under criminal law.

In practice however, police in Zambia do not give cognition to International Instruments. Child offenders are arrested the same way as adults. Police ignore the constitutional provisions of speedy trial, presumption of innocence and many more as guaranteed by Article 18. Once arrested, children are taken to police stations, which are open to the public and have no facilities to protect their privacy and identity contrary to Article 40 of the convention. These are the same offices where adult criminals are taken, and so these children are not separated from adults. It is very rare that a parent, social worker or even a child’s legal representative is present when the juvenile/child

\textsuperscript{33} Juveniles Act Cap 53 section 5
\textsuperscript{34} Criminal Procedure Code Cap 88 of the Laws of Zambia
is charged. In *The People v Nephat Dimeni* 35 in which a juvenile was charged with murder and
the prosecution sought to produce a statement recorded from him by a Police constable under warn
and caution. The same statement was recorded in the presence of two Police officers. The court
held that

‘It is desirable to have the parent or guardian present when a statement is being
taken from a juvenile and in cases where the juvenile has no parent or guardian, it
would be desirable in the interest of justice to have some other person other than a
Police officer.”

In *Mbewe v The People* 36 the court held the similar views when it held that

‘It is desirable, whenever possible, in the interests of both the police and the juvenile to
have a parent or guardian present at the police station when a statement is being taken from
juvenile.”

Juveniles are like adults detained on grounds that the police are carrying out investigations. In such
instances where the police cannot justify the detention of a child, like adults a child through its
next of kin can sue for unlawful detention, and /or false imprisonment, malicious prosecution if
prosecuted and acquitted and can be awarded damages as the court deems fit.

The common law principles of negligence and duty of care can and should guide people dealing
with children. The court in *The People v Edward Samuel Zulu* 37 where an accused was charged
with causing death of a child by dangerous driving affirmed the tort and common law principles by
holding that

‘The duty of care owed to a child is much higher than that owed to an adult and
failure to anticipate that a child waiting to cross at the road side may suddenly
run into the road is negligence.”

It is submitted that this awarding damages in contract and tort cases involving children would help
in a way or another to deter the overzealous police officers into taking the law into its own hands.

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35 (1980) Z.R. 234
36 (1976) Z.R. 317
37 (1982) Z.R. 159
2.4 THE RIGHTS OF AN ACCUSED CHILD

When considering the rights of an accused child it is important to remember that the aims of juvenile/child justice are the child’s rehabilitation and social reintegration. It is the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society. It should be noted that there should be no discrimination in the way human rights are administered with those of adults. Children must be granted the same rights as adult’s at all relevant stages of the criminal procedure.

The Constitution of Zambia in Article 18 has spelt out the rights of an accused person. These include, the right to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law, the right to be presumed to be innocent until he is proved or has pleaded guilty; right to be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged; to be given adequate time and facilities for the preparation of his defence; shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge; and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

The paper shall now examine just of the few rights.

2.4.1 The Right against Torture

Zambia has acceded to the Convention Against Torture (CAT) and the Convention against inhumane and degrading treatment. It is saddening to note that though this freedom has been enshrined in our constitution, the law enforcement officers have continued to violate the same.

38 CRC article 40(1)
39 The Constitution of Zambia Cap 1 of the Laws of Zambia
Other culprits include teachers and parents under the guise of chastising their children or pupils. It is also saddening to note that the Education Act\(^{40}\) make no provision of punishment against torture. In London a case, which dealt with child chastisement, a child was brought before the court in the case of A v United Kingdom\(^{41}\) where the applicant, a child was on numerous occasions severely beaten by his step father with a garden cane the European Court of Human rights held in its landmark ruling when it held that

‘Ever since the Costello Roberts case an increasing number of countries have ratified the UN Convention on the Rights of a child which by Article 19 requires state parties to take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse or maltreatment. This is indicative of the increasing international trend of rejecting and banning the use of physical violence against children in any form and for any purpose including punishment because of the inhuman nature of such violence. And I believe that it is high time to reconsider the existing approach regarding corporal punishment of children as established by the jurisprudence and to adopt a view that such punishment, regardless of the degree of severity, is by its nature inhuman and degrading treatment.’

In the Zimbabwean case of A juvenile v The state\(^{42}\), the court held that imposition of corporal punishment on a juvenile/child was unconstitutional. It is submitted that torturing of children when they are arrested and/or accused of committing a crime is unconstitutional and contrary to article 15 of the constitution. In the earlier case Mbewe v The People the court conducted a voire dire to determine the voluntariness of a child who was tortured by the police after being arrested. Similarly in Bernard Chisha v the People\(^{43}\) the court ordered a voire dire and held that a child’s evidence should be corroborated. Illegally obtained evidence by torture, threat duress and/or coercion is not admissible in court. It is important to be aware that acts which may not be considered to constitute unlawful treatment of an adult might be unacceptable in the case of

\(^{40}\) Education Cap 137 of the Laws of Zambia  
\(^{41}\) (1999)27 E H H R R 611  
\(^{42}\) GJ NAIDI constitutional Development in Zimbabwe and its compatibility with international human rights 1991 p 371  
\(^{43}\) 1980 ZR 36
children because of their specific sensitivity and particular vulnerability. According to article 39 of the Convention on the Rights of the Child, the States parties have a legal duty to

‘Take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... torture or any other form of cruel, inhuman or degrading treatment or punishment. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child’.

In the view of the Committee on the Rights of the Child, this torture and inhumane and degrading treatment deserves greater attention, and programs and strategies should therefore be developed to promote the physical and psychological recovery and social reintegration of, inter alia, children in the system of administration of justice.

On the interpretation of article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee has held that the prohibition on ill-treatment must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure\(^4\), emphasizing, moreover, that this article on torture and degrading and inhumane treatment protects, in particular, children, pupils and patients in teaching and medical institutions. It is therefore submitted that a child has at all times an absolute right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition includes corporal punishment imposed as punishment for an offence or as an educative or disciplinary measure.

2.4.2 The Right to Prompt Information and the Right to Legal Assistance

Article 40(2) (b) (ii) of the CRC proclaims the right of the child

‘To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or

\(^4\) Human Rights Committee Report No 179/2003
other appropriate assistance in the preparation and presentation of his or her defence.

Articles 9(2) and 14(3) (a) of the International Covenant on Civil and Political Rights however differs with the Convention on the Rights of the Child in that if appropriate, the child may be informed through his or her parents or legal guardians and be awarded legal assistance. The African Charter on the Rights and Welfare of the Child provides in this respect that every child accused of infringing penal law

‘Shall be informed promptly in a language that he understands and in detail of the charge against him’ and shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence.’"

The Juvenile Act in section 64. (1) Provides that where a juvenile (including a child) is brought before a juvenile court for any offence other than homicide or attempted murder, the case shall be finally disposed of in such court.

The Juvenile Court is the Magistrate court. It can be inferred that there are only two crimes that the juvenile court cannot handle. These being murder and attempted murder. It should be however noted that there are age restrictions as established by the Penal code regarding criminal liability of a child as provided in section 14 which says *interalia that* a person under the age of eight years is not criminally responsible for any act or omission a person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission and male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

Outside these provisions all the other cases are tried by the juvenile court which has no mandatory legal representation. So only the parents that can afford to hire a lawyer can have legal
representation in court. The Legal Aid Act\textsuperscript{45} makes it mandatory for anyone person appearing in the High Court for a criminal offence to be represented by a lawyer unless the accused dispenses with such and opts to presents him/herself or in view of the court it is not necessary to have the accused represented taking into account the circumstances of the case\textsuperscript{46}. If the best interest of a child is to become a reality, it is submitted that, the Juvenile Act be amended to make legal aid mandatory. More so, it should be mandatory that no case should proceed in the absence of the child’s parents and/or social workers report. It is also submitted that more lawyers and other judicial worker be tried and deployed to specifically handle such all cases affecting children

\textbf{2.5 THE CHILD AND DEPRIVATION OF LIBERTY}

Deprivation of the liberty of a child poses a special problem in that the child, who is still at a very sensitive stage of development, may suffer serious and even irreversible adverse psychological effects if removed from its family for purposes of detention. For this reason, international human rights law tries to reduce the deprivation of liberty of children to a minimum. In order to mitigate the negative effects of the deprivation of liberty when it occurs, international law likewise provides special rules based on the best interests of the child concerned.

Like wise the Juvenile Act prohibits the use of terms such as convicts and sentence in respect to convicted juveniles/children\textsuperscript{47}. It is submitted that this done so as to remove the stigma attached to convicts so as to achieve the prime goal of social reform and integration. As much we have such a law, the situation is different on the ground. A case study conducted by Paul Mulenga of the Legal

\textsuperscript{45} Legal Aid Act Cap 34 of the Laws of Zambia
\textsuperscript{46} Legal Aid Act Cap 34 Section 9
\textsuperscript{47} Juvenile Act Cap 53 section 68
Resources Foundation\textsuperscript{48} has revealed that convicted street kids once released from custody are often being stigmatised by the public\textsuperscript{49}

2.5.1 The Meaning of Deprivation of Liberty

The notion of deprivation of liberty as applicable to children and juveniles is defined according to Rule 11(b) of the United Nations Rules, as deprivation of liberty to

' Mean any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at, will, by order of any judicial, administrative or other public authority.

The rules are applicable to all forms of deprivation of liberty in whatever type of institution the deprivation of liberty occurs.'\textsuperscript{50}

2.5.2 Deprivation of Liberty: A Measure of Last Resort

Article 37(b) of the Convention on the Rights of the Child provides, first, that no child shall be deprived of his or her liberty unlawfully or arbitrarily. Secondly, it specifies in this respect that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. In order to be consistent with international standards, it is submitted that the deprivation of liberty of a child must consequently:

(1) be lawful and not arbitrary and
(2) be imposed as a measure of last resort, i.e. when no other appropriate alternative measures are at the authorities' disposal to deal with the child concerned. Finally, it should last only for the shortest appropriate period of time. The rule that the deprivation of liberty of a juvenile shall be a measure of last resort is confirmed in Rules 1 and 2 of the United Nations Rules. Rule 2 further provides that the deprivation of liberty should be

\textsuperscript{48} A Non Governmental Organisation dealing with Legal Aid
\textsuperscript{49} Juvenile Delinquency in Zambia page 25
\textsuperscript{50} Narnia Bohler Women and Children in, detention Durban (1990)
for the minimum necessary period and should be limited to exceptional cases. Lastly, according to this rule, the length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

Our own law vides the Juvenile Act have the same if not almost all the above provision except they are not followed. In fact section 72 says no child shall be sentenced to imprisonment or to detention in a detention camp. The LRF news letter of November 2008 revealed a saddening situation where a boy aged 13 years had been in been remanded in custody for over 4 years pending his appearance on a charge of theft of a cell phone. It had to take representations from lawyers from the above organization to have him unconditionally released.

2.5.3 A Child has a right to be separated From Adults

A child that is deprived of liberty should be separated from adults. Article 37(c) provides in this respect that “in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”, while, according to article 17(2)(b) of the African Charter on the Rights and Welfare of the Child, the States parties “shall ... ensure that children are separated from adults in their place of detention or imprisonment. Section 58 of the Juvenile Act says

'It shall be the duty of the Commissioner of Police to make arrangements for preventing, as far as possible, a juvenile while detained in a police station, or while being conveyed to or from any criminal court, or while waiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with an offence, other than an offence with which the juvenile is jointly charged, and for ensuring that a girl (being a juvenile) shall, while so detained, being conveyed, or waiting be under the care of a woman.”

The above provisions are not followed in practice as juvenile and children are mixed with adults in vehicles taking them to court and even when they are in police cells awaiting appearance in courts, they are put in the same cells as adults. In remand prisons there are no facilities for recreation,
work or education programmes and this seriously affects the juveniles since they miss out on education. Furthermore the uncertainty of the outcome of their case as well as not knowing the length of the detention puts the juvenile in a gruesome situation. Worse still for convicted children are mixed with adults in prisons. Remand prisoners are often not held separately from convicted prisoners and juveniles are regularly mixed with adults. Furthermore severe overcrowding combined with poor sanitation, inadequate medical facilities, meager food supply and lack of drinkable water often results in outbreaks of different diseases such as tuberculosis and malaria. These harsh conditions in the prisons lead to several deaths among the detainees. According to the Committee Against Torture the conditions in the prisons are extremely bad and can be said to constitute torture.\textsuperscript{51}

The Post Newspaper of 18\textsuperscript{th} December 2009 carried a story in which a 17 year boy hid in the court premises after coming out of court for fear of being taken back to prison where he is mixed with adults who abuse him and even sodomised him. It is argued that children end up coping the behaviors of these hard core adults criminals and the prime aim of integrating bask to society is lost. The Zambian Government has attributed this to lack of adequate transport and reformatory schools owing to lack of money and yet it has money to buy hearses. It would rather send people to the grave than improve on infrastructure. In most instances, no probation orders are given to these children and their age is mostly not considered for children who appear to look like adults and yet they are children within the definition of the Juvenile Act.

\textbf{2.5.4 The right of the child to remain in contact with his or her family}

Lastly but not the least, a child that has been deprived of liberty has the right to be in constant touch with his / her family. According to article 37(c), of the CRC every child deprived of liberty "shall have the right to maintain contact with his or her family through correspondence and visits,\textsuperscript{51} CAT/C/47/Add2, para 161
save in exceptional circumstances”. These exceptional circumstances must be examined in the light of the basic principles underlying the Convention, including, in particular, the best interests of the child. The 2005 report revealed that some of the children at Kamfinsa prison, who were detained and even convicted of offences such as loitering and idle standing, were from different towns such as Lusaka, Nakonde and Chipata to mention but a few and so logistics could not allow their parents to visit them. Other problem encountered was that some parents didn’t even know that their children were jailed.

As good as these provisions might be children have sentenced and sent to prisons outside the districts where their parents are residing. With this economic melt down, most parents are living below the poverty datum line and cannot even afford to buy a stamp so as to communicate to their children. Even the few reformatory schools that are available in Zambia are far outside the reach of many parents. It is submitted that the government build more reformatory schools and/or make sure that all sentenced or convicted children are sent to prisons within the reach of their children

**CONCLUSION**

The chapter has tried to discus the rights of children from the point they come into conflict with the penal laws of their countries. It has outlined the few of the many rights available and the critics to our own laws. The chapter has also tried to point out that the common law principles of tort in cases of assault battery and unlawful detention can be used to foster compensation for affected children and also to serve as a warning to would be offenders that no one is above the law. The juvenile Act is a rich legislation but has goods provisions but however the old adage that says the law on paper is different from the law in practice should prevail in the circumstance.
CHAPTER THREE

3.0 REMEDIES FOR CHILDREN WHO'S RIGHTS HAVE BEEN VIOLATED AND ADOPTION

3.1 INTRODUCTION

The essay has in the last chapter endeavored to show the rights available to child offenders who come into conflict with the penal laws of their respective countries. This chapter shall attempt to address the civil rights that children have under the international and domestic laws respectively. Notwithstanding the remedies available in cases of false imprisonment, assault contract and battery, the other issues that affect the motion of the best interest of a child and adoption. It is interesting and to note with dismay that the Juvenile Act does not address civil rights and their violation of children's rights but only concentrate on the criminal rights of children and juveniles. International instruments have given certain guidelines where issues of adoption. The paper in passing will discuss in passing the said fields of civil law and later adoption.

3.2 COMPENSATION

Under this heading, the essay will try and discuss a few common law principles that deal with compensation and/or damages. So every violation of any human being children inclusive entitles one to receive compensation and/or damages. Child victims are entitled to prompt redress for the harm suffered and, to this end, they have the right of access to various kinds of assistance to meet their needs during the legal proceedings and thereafter. Child victims should be able to obtain redress through formal or informal procedures that are prompt, fair and accessible, and they and/or their legal representatives should be informed about the availability of such procedures. Children who are victims of human rights violations have a right under international human rights law to an
effective remedy for the harm suffered.” As reported by Human Rights Committee on Children’s Rights52

If the theme of achieving justice for a child is to be achieved, it is submitted that every violation that is so proved by a tribunal or a competent court of jurisdiction should by be atoned for by paying damages in civil matters and imprisonment as a last resort in criminal matters. Below are some of the common law principles that are available for children to use when there rights are violated through detentions and torture. It should be mentioned though that in the law of tort a minor is much liable as an adult and can be sued in the same way as an adult. In Gorely v Codd,53 the court held that a boy of 16 years had been negligent when he accidentally shot the plaintiff with an air rifle in the course of larking about

3.2.1 False Imprisonment

According to Rogers54 false imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by the law. Personal liberty is important and our own constitution has guaranteed the same in Article 18. Knowledge of one being imprisoned is irrelevant. Thus in Meering v Grahame-White Aviation Co Ltd 55 which case is of the plaintiff who was accused of stealing a keg of varnish from the defendant. Two police officers got the plaintiff and he assented to it and took him to the company officers and locked in up so that he could not go out. In an action for false imprisonment, the defence argued that the plaintiff was perfectly free to go where he liked and that that he knew it but did not desire to go. The court however held that defendants were liable because the plaintiff from the moment that came under the influence of the police was no longer a free man.

52 (1997) HRC report on page 50
53 (1967) 1 W L R page 19
54 Winfield & Jolowicz on Tort 4th edn page 63
55 (1920) 122 L T 44,51,53
There is so much to write on about this tort but for lack of space, it shall not be discussed further. In *Chimba v Attorney –General* 56, the plaintiffs were detained under regulation 33 of the Preservation of Public Security Regulations. While in detention the plaintiffs were removed from a lawful place of detention and taken in a closed van to an unknown place. They sued the Attorney-General for false imprisonment. The court held that false in this context means wrongful and this tort is committed by imprisoning a person in an unauthorized place. Secondly that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty. In the Botswana case of *R v the Attorney General*, 57 A child who was wrongfully detained on allegations of theft was awarded damages by the Court.

Having set the ground for this tort, it is submitted that children through their next of can sue for damages in false imprisonment and be awarded damages. Children are usually beaten or even detained by law enforcement officers who later release them unconditionally. 58 Although this claim is not statutory written down and is optional, it is submitted that children who are wrongly detained can use their detainers under this tort. Should a child choose not to sue then he has chosen not to do so and equity does not aid one who sits on his rights. Should damages be issued by the court, justice would have been done and hence the best interest of a child as guaranteed by the C R C would be achieved. In *Attorney-General v Kakoma* 59 where the plaintiff was detained a number of hours the court held that he was entitled to damages because he had been unlawfully deprived of his liberty for 23 hours.

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56 (1972) Z.R. 165 (H.C.)
57 (1990) HR reports p 234
58 Unicef report on child abuse in Zambia 2007, p 34
59 (1975) Z.R. 212 (S.C.),
3.2.2 Battery and Assault

Battery according to Brazier\(^6\) is the form of trespass to the person in which an act of the defendant directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff's consent. For a case of battery to subsist, the conduct of the defendant must be beyond the bounds of generally physical conduct acceptable in the ordinary conduct of everyday life.

Assault on the other hand is an act of the defendant which causes the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant. It is worth noting that in popular language, the word assault is used to describe either or both of these torts. Thus many cases in the Zambian courts have used these torts interchangeably. In The Attorney-General v Felix Chris Kaley\(^1\) where the respondent cross-appealed against the quantum in award of damages of K100 for false imprisonment and K50 for assault and battery. He had been arrested by the police as a suspect in a case involving the killing of a police officer and assaulted in custody; only being released nine hours after witnesses failed to identify him, the Court held that the assault of the respondent by many police officers while he was detained is a serious matter which may be taken as an aggravating circumstance in the assessment of the damages. In short all these remedies that are available to adults are also available to children since the constitution does not segregate between children and adults and that God considers everyone to be one

3.2.3 Negligence

Negligence can be defined as a breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. In Blyth v Birmingham Waterworks Ltd,\(^2\)

\(^1\)Brazier Street on Tort 1990 9th edn p 24
\(^2\)(1982) Z.R. 1 (S.C.)
\(^3\)(1856) EX 781,784
Negligence is defined as the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is undoubtedly the backbone of the law of tort. Section 168 of the Penal Code provides that

‘Any person who being the parent, guardian or other person having the lawful care or charge of a child being able to maintain such child, willfully and without lawful or reasonable cause deserts the child and leaves it without means of support commits an offence and is liable, upon conviction, for a first offence to imprisonment for a term not exceeding three years, or for a subsequent offence to imprisonment for a term not exceeding seven years.

Section 169 provides Any person who being the- parent, guardian; or person in charge; of a child that is unable to provide for itself, refuses or willfully neglects to provide, being able to do so, sufficient food, clothes, bedding or other necessities for such child, and thereby injures the health of such child, commits an offence and is liable, on conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a term not exceeding three years or to both.”

It is clear that both of these sections deal with the aspect of negligence. If Zambia could strictly adhere to its own laws, it would fulfill international obligation and the question of street kids would not being there. A lot of parents and guardians in Zambia are guilty of such violations and the police rarely prosecute such offenders saying that it was the duty of the social welfare department. Often times mothers have gone to their employers work place to complain that their husbands disappear whenever they get paid such that their own children become malnourished and are kicked out of school. That being the case, it is submitted that the two sections above be repealed to provide for both imprisonment and/or compensation. A course a child can sue separately for damages for desertion and willful neglect but the marrying of both imprisonment and compensation would act as a stronger deterrent in the circumstances. In other cases a child can be compensated for damages arising from negligence. Thus in *Davies Chisenga suing as next of
kin for a minor vs. Golden Breweries Limited and 2 others64 were a driver of the defendant company negligently drove a motor vehicle which hit the minor and fractured him, the minor was awarded damages through the vicarious liability of the defendants driver. The law on negligence is vast and cannot be dealt with in this piece of research.

3.3 ADOPTION

Adoption involves the creation of the parent-child relationship between individuals who are not naturally so related.64 The effect of adoption is that the adopted child is given the rights, privileges, and duties of a child and heir by the adoptive family. Adoption is a process whereby a person assumes the parenting for another who is not a kin and, in so doing, permanently transfers all rights and responsibilities from the original parent or parents.65 Unlike guardianship or other systems designed for the care of the young, adoption is intended to effect a permanent change in status and as such requires societal recognition, either through legal or religious sanction.

Judges and lawyers and other law enforcement officer may have to deal with children not only in the administration of criminal justice and proceedings, but also in connection with proceedings concerning the separation of a child from its parents and adoption, Article 9 of the Convention on the Rights of the Child provides for the exceptional separation of children from their parents in the following words:

‘States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

63 (2001/HP/0110) UNREPORTED
64 www.wikipedia.com
65 Charles G Adoption, a present challenge London; Oxford (2000) p 15
Given the child-oriented approach adopted by the Convention, it is logical that the basic principle flowing from this provision is that the separation must be necessary for the best interests of the child. It is noteworthy, however, that the words against their will refer either to the parents' will or to the parents' and the child's will together, but clearly does not mean only the child's will. Article 20 mentions adoption as one of several ways of caring for children deprived of a family environment, but the Convention, as such, does not take a position on the desirability of adoption.

Adoption must be based on the informed consent of the persons concerned is important in order to prevent children from being wrongfully removed from their parents. In an unreported case in Zambia, a 16 year old girl was adopted vide the magistrate order by a South African who paid money to its guardian and was taken to South Africa to be used as a slave sex worker. The girl ran away from the brothel and reported the matter to the police who later took her to the Zambian High Commission who later facilitated her return to Zambia and is currently enrolled at SOS children village. The guardian was arrested and jailed. Further investigations revealed that she was forced to go. Notwithstanding the failure of domestic law including Zambia to contain a proper consent clause, a lack of informed consent to an adoption might in any event violate the right of both the child and his or her natural parents As to the views of the child itself, they are, as previously mentioned, required under article 12 of the Convention and must be considered essential also in connection with adoption procedures envisaged under article 21.

Adoption shall be regulated by domestic law, which must give paramount consideration to the best interests of the child, to the exclusion of other interests such as economic gain. In Zambia, the Adoption Act was enacted to deal with adoption and it takes preeminence to international law but it should be in conformity with it.

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66 Human Rights Report 2005 p 47
67 Adoption Act Cap Cap 54
It is therefore important that a child that is fully grown and can make informed decisions be given an opportunity to consent to being adopted. It is a well known fact that children of today are growing older than their normal age and have developed mature mental faculties. In the Sunday edition of the Post Newspaper\textsuperscript{68} was a story of a 14 year girl who completed her grade 12 and already has a first degree in computer programming. Surely such a person should be given rights to consent to being adopted if the need arises in the best interest of the said child. Concerning the aforementioned issue of informed consent and for the reasons given above it is submitted that children should be allowed to give their consent so that their rights are not violated.

The views of the mature child itself, are, required under article 12 of the Convention and must be considered essential also in connection with adoption procedures envisaged under article 21. A leaf can be taken from Mongolia, where the agreement of the child has to be secured if he or she is nine years old or more\textsuperscript{69}. In the Canadian province of Nova Scotia the law provides that in situations where the person proposed to be adopted is twelve years of age or more, written consent must be obtained,\textsuperscript{70} from the child himself. Lastly in Croatia the attitude of the child over 10 is relevant with respect to his or her agreeing to be adopted\textsuperscript{71}. The Committee on the Rights of the Child has recommended that States parties ensure that their domestic legislation is in conformity in particular with articles 3, 12 and 21 of the Convention\textsuperscript{125} and that, accordingly, children be granted broadened involvement in family decisions affecting them, including in proceedings relating to family reunification and adoption.\textsuperscript{72} In as much as Zambia has good legislation on adoption it should take a leaf from the recommendations so mentioned and obtain consent from children who an understanding of what adoption is and its consequences after being counseled by well trained

\textsuperscript{68} 10\textsuperscript{th} December 2009
\textsuperscript{69} UN doc. CRC/C/3/Add.32, Initial reports of States parties due in 1992: Mongolia, Para. 136
\textsuperscript{70} UN doc. CRC/C/11/Add.3, Initial reports of States parties due in 1994: Canada, Para. 1129
\textsuperscript{71} UN doc. CRC/C/8/Add.19, Initial reports of States parties due in 1993: Croatia, Para. 103
\textsuperscript{72} UN doc. CRC/C/15/Add.43, Concluding Observations: Germany, Para. 29; and UN doc. CRC/C/15/Add.2
and qualified educators and counselors. It is further submitted that Zambia repeals its law to include consent of the adoptee.

**CONCLUSION**

The essay has attempted to show how the principles and doctrines of common law such as tort and the branches thereof can be used to bring about justice to a child whose rights have been affected. Secondly it has emphasized the need for consent in some instances when a child has to be adopted and has given practical examples to that effect. It is submitted that Zambia should take a leaf so that children are consulted on decisions that affected their lives.
CHAPTER FOUR

4.0 THE EFFECTS OF CHILDREN IN COURT AS WITNESSES AND/OR VICTIMS

4.1 INTRODUCTION

Having considered several aspects of compensation in the previous chapter, the research will now focuses on issues pertaining to evidence by children in courts of law. Can they be forced to testify? If yes what safe guards are there for them to freely testify in criminal and civil matters where they are the victims themselves. What is the role of the Judge and court officials?

The appearance of a child as a victim or witness in judicial proceedings causes special problems since he or she is at a sensitive age when contact with the justice system might be deeply traumatic. Notwithstanding principles of compatibility and corroboration of a child’s testimony, the paper examines international instruments as a guide on the seriousness of having a child testify and tries to point certain areas in which Zambia can try to follow so as to attain a full and meaningful protection of child’s victims and witnesses in court.

4.2 COMPETENCE

Peter Murphy 73 brings out the following the following.

‘The question of children of tender age giving evidence hinges on whether they would testify coherently and understand the importance of telling the truth in the court of law. At common law, the competence of a child to testify in court depended on the judgment of the presiding judge. He would ask a child questions in the presence of the jury. This brought a lot of confusions. Later the question was answered by in the case of R v Hayes. 74 Where the court held interalia that the important question which we think when a judge has to decide whether a child should be sworn and give evidence is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and

73 Murphy on Evidence (2000) p 431
74 (1977) 1WLR 234
above the duty to tell the truth which is an ordinary duty of normal social conduct."

In the Zambian case of *Goba v the People* 75 the court held that

‘When a child 'of tender years' is brought forward as a witness, the court must conduct a voire dire to determine whether the child understands the nature of an oath, and, if not, whether the child (1) is of sufficient intelligence to justify the reception of his evidence; and (2) understands the duty of speaking the truth. Failure to carry out this procedure will result in the appellate court's discounting entirely the child's evidence.'

Similarly in supporting the decision of *R V Hayes*, the court in *Zulu v the People* 76 the court held that If, having decided that the proposing witness is a child of tender years, the court is not satisfied that the child understands the nature of an oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify the reception of his evidence and that he understands the duty of speaking the truth; if the court is satisfied on both these matters then the child's evidence may be received although not on oath, and in that event, in addition to any other cautionary rules relating to corroboration (for instance because the offence charged is a sexual one) there arises the statutory requirement of corroboration contained in the proviso to section 122 (1). But if the court is not satisfied on either of the foregoing matters the child's evidence may not be received at all’

In short, a child’s competence to testify in court depends on whether he understands the solemnity of telling the truth and that he should have sufficient intelligence to testify in court. Outside these two basic requirement in a court of competent jurisdiction does, then it mean that the child would have to keep quiet or that other non formal procedures be adopted in order for the court to adduce evidence from a child? Court has to conduct a *voire dire* in order to determine the two conditions set above

75 (1966) Z.R. 113 (C.A.)

76 (1973) Z.R. 326 (S.C.)
4.3 CORROBORATION.

Childs evidence must be corroborated. This means that there has to independent evidence that conforms with the child’s evidence. In Bernard Chisha Vs. The People\textsuperscript{77} where the case against the applicant rested solely on the evidence of a boy aged fourteen years. The trial magistrate conducted a perfectly proper voire dire,\textsuperscript{78} at the end of which he was satisfied that the boy was able to give evidence on oath. The issue was whether the sworn evidence of a child is to be treated like the sworn evidence of any other witness. The court held that the sworn evidence of a child requires corroboration.

4.4 INTERNATIONAL INSTRUMENTS

Article 12 of the Convention on the Rights of the Child, according to which:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

This means that juveniles’ views must be given particular weight in the course of proceedings concerning their person.

With regard to the adjudication and disposition of juveniles, Rule 14(2) of the Beijing Rules also provides that

‘The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express her or himself freely.”

\textsuperscript{77}(1980) Z.R. 36

\textsuperscript{78} A trial within a trial
It is however a right that acquires particular emphasis where children are concerned, as special efforts may be needed in order to ensure that a child is genuinely heard.

4.5 ZAMBIAN LEGISLATION

The Juveniles Act \(^{79}\) in section 64 does provide inter alia allows the juvenile child give evidence and also to cross examine witnesses that have in called to testify against him.

Subsection (4) says that at the close of the evidence in chief of each witness, the magistrate shall, if the juvenile is not legally represented, ask the juvenile, and the juvenile's parent or guardian if present in court, whether he wishes to put any questions to the witness. It is appalling that this legislation does not state how and that the child should be given special treatment to ensure that he testifies freely in a friendly atmosphere. The Zambian Courts to the contrary have formal legal procedures and language that is not friendly to a child witness. Further more, not all judges, magistrates and other court officials have formal training in children’s matters.

4.6 THE ROLE OF THE JUDGE

The role of a judge in short is to listen to the evidence presented by both parties and to ensure that the rules of evidence are adhered to. He must remain neutral and see that justice is done. In *Thomson v Glasgow Corporation* \(^{80}\) Lord Justice Clerk Thomson described the role of a judge as

‘Like referees at a boxing contest they see that the rules are kept and counts the points. He, however, is not completely inactive since he has to decided on the admissibility of the evidence and may intervene when necessary to control the proceedings or to ensure the necessary expedition of the trial. He also has the power to put supplementary questions to the witnesses who have not been called by either party but whom he believes will be able to assist in the matter before them’

\(^{79}\) Cap 53 of the Laws of Zambia

\(^{80}\) (1961) SLT 237

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4.7 ARGUMENTS

It is not in dispute that children are sometimes called as witnesses in civil and/or criminal matters. It is further not in dispute that various national laws have in place various legislation regarding children as victims or witnesses in court, Zambia inclusive. It is just that the appearance of a child as a victim or witness in judicial proceedings causes special problems since he or she is at a sensitive age when contact with the justice system might be deeply traumatic, hence the need to place special emphasis on the children as they come before the courts to testify either as victims or as witnesses.

Paragraph 43 of the Beijing Guidelines stipulates that

"States should undertake to ensure that child victims and witnesses are provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance. If applicable, measures should be taken to prevent the settling of penal matters through compensation outside the justice system, when doing so is not in the interests of the child.”

As regards child victims, more specifically, paragraph 45 of the Riyadh Guidelines provides that children

‘Should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered’. Child victims should further “have access to assistance that meets their needs, such as advocacy, protection, economic assistance, counseling, health and social services, social reintegration and physical and psychological recovery services. Special assistance should be given to those children who are disabled or ill. Emphasis should be placed upon family- and community-based rehabilitation rather than institutionalization”

The necessities in criminal law to have the accused child meet his accusers face to face has caused untold difficulties for the child who has in most cases, have to be faced with the very person who assaulted him or whom he witnessed assaulting another. Cross examination is another traumatizing thing that children have to go through in court. In addition, the child has to tell his story in a formal court room that is alien to him. This traumatic effect have been noted and accepted by the many
courts. In the South African case of Horsford v Dejager and Another\textsuperscript{81} where a ten and half year old girl was called to give evidence in an application brought by her mother to enforce an order for custody. Fanning J commented as follows on the experience in court:

‘The elder daughter was called to give evidence. After a short time she broke down and wept in the witness box and, with the consent of the parties, her evidence was heard in chambers in the presence of counsel only’’

In R v S \textsuperscript{82} the court in assessing the a ten year old’s evidence remarked that it must be remembered that he was a child of tender years, was kept in the witness-box for a considerable time, the strain which, it could be seen, told on him.

In Jabaar v South African Railways and Harbours\textsuperscript{83} King AJ made the following observations regarding the evidence of a twelve year old boy

“When having regard to the various factors which must be taken into account, his manner in the witness box was that of a young; he was nervous, unsure of himself, ill at ease and reluctant to be giving evidence. He was testifying of to incidents which had occurred several years back, along time ago in his young life; it was to me quite natural that he should have forgotten much of that unhappy occurrence”

In the English case of R v Stephens\textsuperscript{84} where a twelve year old had been sodomised by his father over a protracted period of time, Lord Dennings had the following comments to make

‘Throughout the hearing the boy demonstrated signs of severe anxiety. He held his hand against his face to blinker out the sight of his father. When asked why he was so upset he said that his father had, on numerous occasions, produced a knife and threatened to kill him if he ever told anyone about what his father had done to him.’’

The point is that children usually go through a lot of mental anguish and torture when they appear in a court room that is alien to them and they have to testify of things that they painfully saw and/or went through. Then one would propose a general rule that a child witness will give evidence in court unless it appears that the child will be exposed undue mental stress or suffering. This does

\textsuperscript{81} (1959) 2 SA 152N
\textsuperscript{82} (1948) 4 SA419
\textsuperscript{83} (1982)4 SA 552
\textsuperscript{84} (1949) 1 ALLER 247
not however mean that children cannot testify in court. The emphasis is that court officials have to be trained on how to handle children in courts so as to avoid children going through mental torture and anguish. These include Judges, prosecutors, interpreters, reporters and the lawyers themselves. Lastly, the effects of children in courts can be summarized in the case of S v Basil Simons. Where Wilson J had the following to say about child witnesses

‘I propose for a moment to digress and to state that it appears to me that it is time that urgent consideration is given to a change in the manner of conducting criminal trials arising out of the sexual abuse of young children. I do not suggest that there should be any substantial changes to the criminal procedure as such, but it appears to me that it would be eminently desirable to evolve a system that when a child is called to give evidence, that child is not required to do so in large austere looking court rooms before judicial officers sitting on a bench above them. In other words in circumstances that are completely strange to the child, and must cause great deal of stress and tension. I would in my view be far fairer both to the State and the defence, if arrangements could be made in such cases of this nature for the child to give evidence in circumstances which are not strange to her, so that he or she, depending on the sex of the child, is not subjected to more traumatic experiences than are absolutely necessary”

4.7.1 Cross examination and its effects on children.
A party is entitled to cross examine all witnesses who give evidence against him and the same applies to children. This is a fundamental right that litigants have and it cannot be taken away from unless with their own consent. Although an accused has a right to cross examine witnesses who give evidence against him, this right is not absolute. In Klink v Regional court Magistrate and Others the court held that the trial court retains a discretion to disallow questioning which is irrelevant, unduly repetitive, oppressive or otherwise improper. In S v Gidi and Another has a good description of what a good cross-examination is in the following words.

‘A proper cross examination does not permit the gratuitous intimidation of an accused. A prosecutor should not bully an accused by insulting him, brow-beating him or adopting an overbearing attitude. A prosecutor should not unnecessarily ridicule an accused or taunt him or offend his sensibilities or provoke him to anger,

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85 (1988) DCLD/84/88
86 (1996) 3 BCLR 402
87 (1984) 1 ALLER 709
or play upon his emotions in order to place him at an affair disadvantage and incapacitate him for answering questions to the best of his ability."

The court has a duty to ensure that an accused child is not subjected to the above stated mental stress and undue influence that are detrimental to his giving truthful testimony in court. In as much as the role of a judge has been likened to that of an umpire, a properly trained judge should intervene where the prosecution and/or defence put questions to a child that hinder his testimony.

The effects of cross examination on children have often been traumatic. Dr Drummonds⁸⁸ had the following to say about a child who was sodomised by his father

‘Had the mother known, she would have doubted the wisdom of laying charges which would result in the boy being subjected to the horrendous secondary abuse he received in court. He was subjected to one and half days of persistent and detailed cross examination about the appalling sexual abuse to which he had been subjected by his father for as far as he could remember. The case was remanded for two and half months and then remanded again because of a change of defence counsel. Finally 14 months later this unfortunate child once again was required again to stand in the witness box and subjected for an hour of grueling cross examination. And within ten minutes he broke down and he covered his face to avoid seeing his father. He was bullied about details he could not remember and was accused of being a liar who made up the whole story. At this stage he completely broke down and asked why the defence could not believe him.’

The above story is indeed a sad one. But should the prosecution and defence relent in trying to prove the guiltiness and innocence of the child. No, in as much each has its own duties; consideration should be made to the demeanor of the child and ensure that a child is not traumatized bullied and stressed.

It is also argued that cross examination insofar as child witnesses are concerned might not produce accurate evidence. The medium of exchange in the courtroom is a particular form of legal language so steeped in legal language that is alien to adults and even more so to children according to Brennan⁸⁹. Giving evidence in court is a stressful experience for a witness - children

⁸⁸ A Clinical Officer in Child psychology at the University of Pretoria
⁸⁹ Brennan H Strange Language – Child Victims under Cross Examination , Durban; printrite 1988
inclusive. A child like adults will be required to give evidence in the presence of a group of people, previously unknown to him often about embarrassing and intimate details.

Having considered the above effects, it's submitted that better ways of allowing children to testify or stand in the accused box have been suggested. One is the use of video link and the other is the use of intermediaries.

4.7.2 Use of video link

The use of video link has been used in many countries of the world and Africa respectively. In this system the child is prevented from coming into contact with the accused. The child witness usually sits in a separate room from which is usually decorated with all the toys and pictures so as to make a child feel more comfortable. The only people allowed are the child's counsel, parents or guardians and an intermediately. All the evidence is presented through video link and so is the cross examination. The other purpose that video link aims to serve is avoid memory lapses in cases where the trial takes long. When a child is being interviewed at the police it is suggested that all his testimony be stored in a tape and it can be kept at the court and used later in future when trial commences. The Zambian government spent a lot of money trying to hold a trial for Dr Chiluba through video link and the same can be used in trials involving children. In S v Baleka and others\(^90\) the court in South Africa accepted the use of video link when it said and I quote

"I am convinced that the video link can be very a helpful tool to arrive at the truth especially in trials affecting children. It does not suffer from fading memory as do witnesses. The tape records and retains for the benefit of the court not only the words but also the intimation and emphasis of the speaker and the reaction of the audience. A tape sound and video recording can often be more reliable than the collection of witnesses."

\(^90\) (1986) SA 192 T
4.7.3 Intermediaries

An intermediately is a person who is appointed by the court to act as a go between of the child and the prosecutor or defence counsel. The South African criminal procedure code in section 170A expressly provides for the court to appoint intermediaries. Their function is to simply convey the question of the prosecution or the defence to the child in a manner understandable to the child. He is mandated to convey the general meaning of the question is not therefore forced to repeat the exact words that the question was framed in originally. He acts as a safety valve by removing all hostility and aggression from the questions from defence counsel which are meant to intimidate and confuse the child. An intermediately can even change the question to bring it to the level of the child. Though intermediaries might be mistaken for interpreters, they differ in that they are learned people with a maximum of a degree as a qualification. So people like social workers lawyers police officers and anyone who has done child psychology does qualify to as intermediaries as per South African Criminal Procedure code in section 170(A)(6). It is therefore that Zambia and other countries can employ the use of intermediaries so as to cushion the above mentioned effects on children witnesses and/or victims.

CONCLUSION

The paper has tried to explain the effects of children giving evidence in court and them giving it in the presence of the accused or perpetrators of the offence. Secondly the idea of them standing in a court room that is alien to them and the use of legal jargon has compounded the situation. The skill of cross examination has had negative effects on the children as they are intimidated and even bullied by defence counsel. Lastly the paper has also shown that the use of video link and intermediaries can help ease the problems so identified.
It is therefore submitted that Zambia can take a leaf from South Africa and enshrine in its legislation the use of intermediaries and video link so that children find it easy to give evidence in court and other tribunals sanctioned by the law to deal with such.
CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

In conclusion it can be stated that the importance of securing and protecting the rights of children are that they are vulnerable human beings who are entitled to protection of the law and compensation when they are abused. Police violence against children is not uncommon, arbitrary detentions and the use of imprisonment for minor infringements of the law by very young children, despite the fact that imprisonment should be used only as a means of last resort. The principle of the best interest of the child as enshrined in CRC has in many cases lost its true value and meaning. Children are human beings who are entitled to the same protection as adults. The only difference is that they are vulnerable and no one should take advantage of their vulnerability. The effective implementation of the rights of the child is thus the responsibility of all Governments and members of the legal professions as well as of all adults who deal with children, such as parents, relatives, friends and teachers.

Zambia can learn a lot from Botswana and South Africa who have put in place effective children’s Act and procedures that have at least tried to guide its law enforcement offices when a complaint is made against children and when they appear in court and are traumatised.

The paper has also shown the various international instruments in place that Zambia can borrow from and eventually domesticate into its national law so as to make them enforceable.

Common law principles of tort and specific torts were also examined as way of compensating children whose rights had been violated and it proposed that it would act as a deterrent to other would be overzealous violators of children’s rights.

The effects of cross-examination on children as witnesses or victims in courts were also discussed and suggested ways were recommended so as to cushion the impact of such.
RECOMMENDATIONS

5.1 Need to domesticate the CRC and other International Instruments

Although Zambia has acceded to most of these conventions and international instruments, there is need to adopt them and enact them in to domestic law. In short, there is a need to domesticate them. The current problem with international law is that a country that violates these laws can only be treated with scorn and suspended from major decisions. It is without doubt that most of these instruments have provisions that are rich in children’s rights and are far above most domestic laws which form a fraction of these international instruments. One cannot rely on an instrument that has not been domesticated. In certain decided case against Zambia Sugar Ltd before the Industrial Relations Court IRC. The Human Rights Commission in its national plan of 1999-2000 embarked on country wide programmes to sensitize the general populace through work shops, conferences and seminars on the need to domesticate the CRC and the regional African Charter on the rights and warfare of children.\(^91\)

5.2 Need to Amend the Juveniles Act

There is need to amend the Juveniles Act so that the procedure to raise a complaint against children can like the Botswana’s Law is ironically spelt out other than relying on experience of the arresting officers. There is no distinction in practice on the treatment of children by law enforcement officers. Though common law principles of tort have emphasised the high duty of care towards children, this has not been achieved in practice as they are a lot of arbitrary arrests and detention of children.\(^9\)

The current legislation is antiquated and is increasingly an impediment to transformation and improved service delivery. It is therefore recommended that law reform be embarked upon as a matter of priority. The scope of law reform should be determined from the outset and if a comprehensive reform process is not possible, then certain key concepts and standards need to be reviewed. In

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\(^9\) HRC reports 2000 p 25
this regard, special attention should be given to the definitions of child, age of 
criminal capacity, custodial sentencing, remand period, diversion and certain 
ofences."  

Secondly like the South African Laws the juvenile Act should expressly provide for video link and 
the use of intermediaries that have a formal educational background and therefore help the 
children when they are in court as victims or witnesses. There is also no proper also be, in addition, 
a freedom of Information Bill passed into law.

5.3 Need to Enact a Children’s Act

There is also a need to enact a children’s Act to harmonize the various definition of the word child. 
As earlier alluded to in Chapter one the Juvenile, Marriage Act Adoption and the Penal Code all 
have different definitions of the word child. This has caused a lot of confusions on the meaning of 
the term child. Most of the countries in Africa have enacted a specific law that deals with child. 
These include Botswana, South Africa, Tanzania, and Namibia.

5.4 Need to set up a Special Unit that specifically deals with children

There’s a need to establish a special unit under the police that specifically deals with children’s 
issues. Currently the Victim Support Unit deals with such issues. But it should be noted the VSU is 
only found in major Police Stations in the country. Secondly, it deals with other diverse 
programmes apart from children rights.

As stated in the essay police these deal with a lot of cases and hence they is no separation of 
offices and problems. The same offices that are used to interrogate hardcore criminals are also 
used to interview children. In addition, it is submitted that these special units to be set up country 
wide should be equipped with video link facilities so as to record statements from children when 
their memories are still fresh of the incident so complained of. Finally, the government should 
employ a lot of social workers and other child knowledgeable officers and child psychologist who

92 Unicef recommendation 2005
should be stationed at such offices. The Committee on the Rights of the child’s reply to the Zambian government report recommended the introduction of training programmes for all professionals involved with the juvenile justice. ⁹³ A leaf should be taken from the Magistrate Court that has set up a Child Justice Program whose main aim is to ensure that child justice is achieved. Though with the promotion to Registrar of the High Court of its founder member, Honorable Chanda Mwamba, the program that was one well advertised, has just become a sleeping white elephant. The pilot project that was started in 2000 should be followed and enhanced.

5.5 Need for Specialised Training in Child Affairs

Lastly there is a need to train a lot of police officers and other judicial officers and all who are involved in the juvenile system on how to handle children in court. ⁹⁴ Lawyers and other stake holders should be specifically trained and educated on issues to deal with children’s rights and the procedures taken when a child is in court as a witness and/or a victim.

5.6 Need to set up a child Friendly Court

There is also need to set up a specific court that has a child friendly environtment like the American Children’s Court ⁹⁵ that is decorated with all kinds of toys and painting that child like. In this way children can testify in a more relaxed atmosphere. The main purpose of the said court is (1) to have children accused of crimes assessed properly and promptly, (2) to have children’s parents and guardians traced, (3) to operate and conduct court sessions in a child friendly way in accordance with national and international obligations and respecting children’s rights, (4) to be a model and support to other social welfare offices and courts during the transformation process and, (5) to make appropriate orders for children in need of care.

If these recommendations are implemented, then child justice can be a reality in Zambia.

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⁹³ State replies to the number of issues to the committee on the rights of the child-23rd April 2003, part 1 section 7
⁹⁴ Ibid
⁹⁵ www.american children court.com
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