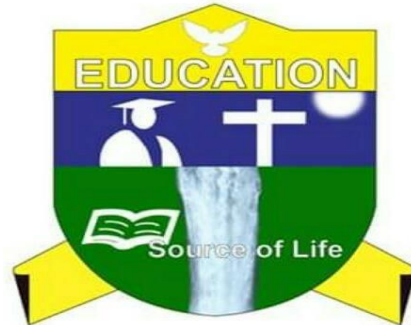


**RUAHA CATHOLIC UNIVERSITY (RUCU)**



**FACULTY OF LAW**

**CRITICAL ANALYSIS OF EVIDENCE OF A CHILD OF TENDER AGE IN  
TANZANIA.**

**Research Paper Submitted in Partial Fulfillment of the Requirements for the Award of  
the Bachelor of Laws Degree (LLB) of Ruaha Catholic University**

**BY ANNASTAZIA HENRY NDEGE**

**523/LLB/T/2017**

**Prepared Under the Supervision of**

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**At the Faculty Of Law (FOL)**

**July, 2021**

**CERTIFICATION**

The undersigned certifies that, he has read and recommend for acceptance by Ruaha Catholic University, research paper titled: Critical Analysis of evidence of a Child of tender age in Tanzania. In fulfillment of the requirements for award of Degree of Bachelor of Laws (L.L.B) of Ruaha Catholic University.

Signature.....

Ms. Sholastica Mality

(Supervisor)

Date.....

**DECLARATION**

I, ANNASTAZIA HENRY NDEGE, declare that this dissertation is my original work. It has not been presented at to any University for a similar or any other degree award.

Signature.....

Annastazia Henry Ndege

(Researcher)

Date.....

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## **DEDICATION**

I dedicate this work to my beloved parents namely Henry Ndege Sweya and Tatu M. Magoda.

I also dedicate this work to Zawadi Ibrahim, Paul Sweya and to all relatives for their patience and tolerance. Thank you so much for pure love and support, I real love you so much.

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To my parents, especially my father Henry Ndege Sweya for his financial support and other support he extended to me I really, really thank his support, and for his struggle to me, it was not easy for me to reach this level, but now I can stand as a person among persons.

Also, I would like to give thanks my friends for their support and encouragement that they give it to me in order to come up with is this research, those include, Sheli Haji, Salimini Juma, Ahmidiwe Panja, Josinia K. Mgwabati, Belado and Frank Nkosi.

May God bless all who mentioned and who are not mentioned hereinabove but they contributed in one way or another to make sure this work is archived.

## ABSTRACT

The research is based on the evidence of a child of tender age in Tanzania. The law of evidence of Tanzania allows any person to testify provided he or she is competent. The duty of determining the competency of the witness is upon the court to all persons except where the rules of evidence do not qualify the witness as competent. Despite the fact that all persons are competent in some circumstances some witnesses are exempted for reasons of age, sickness and others upon courts consideration. The court while receiving an evidence from a child, is required to ask a child random questions to determine the competence of the child.

The study found that in taking the evidence from the child witness of tender age in Tanzania, the courts are required to consider the child's promise of speaking the truth and not lie without taking an oath as new requirement of the law of evidence. The main reason is to determine if the child has sufficient intelligent and if understand the duty of speaking the truth. Also, it appears that there is a need of making an analysis to the laws that governing the evidence of a child witness of tender age in Tanzania. Due to the reason that there is no a rule or specific statutory provision to be followed at the time a child giving evidence after giving the promise of telling the truth.in finding the researcher used both library research and field research to collect data that relating on the evidence of the child of tender age special focus in Tanzania.

The study suggests that the government required to make sure the laws governing evidence have been amended. Because some of the trial magistrate or judge takes the evidence of child witness of tender age in improper way and result to more appeals as a common ground for appeals. So, there is the necessity of having special rules that provide clear procedures to be followed by the court at the time taking the evidence from the child witness especially of a tender age.

## **STATUTES**

The Constitution of the United Republic of Tanzania of 1977 as amended time to time

The Criminal Procedure Act (Cap 20 R.E 2019) Tanzania Law

The Indian Evidence Act of 1872

The Law of the Child Act (CAP 13 R.E 2019)

The Magistrate's Court Act (CAP 11 R.E 2019)

The Tanzania Evidence Act (CAP 6 R.E 2019)

## **INTERNATIONAL INSTRUMENT**

The United National Conventional on the Rights of the Child 1989.

The African on the Rights and welfare of the Child 1999.

**CASES**

*Hamisi Shabani @ Msanja Republic (2019) Crim. App. No. 122 of 2019*

*Issa Salum Nambaluka V Republic (2018) Crim. App. No. 272 of 2018*

*Lazaro Damiani V Republic (2018) Crim. App No. 202 of 2018h*

*Mohamed Sainyeye Republic of (2010) Crim. App. No 57*

*Paul Bagyese V. Uganda (1965).Criminal Appeal No.83of 1965*

*Republic V. Palamba Fundikira (1947) 4 EACA 96*

*Samwel V Republic (2006) Crim. App No.105 of 2006*

*Scott V Scott (1913)A.C 417.*

*Masound Mgosi V. Republic (2010) Crim. App No. 195 of 2018*

*Shaibu Nalinga V. Republic (2019) Crim. App No.34 of 2019*

**LIST OF ABBREVIATIONS AND ACRONYM**

Art	-	Article
C.A	-	Court of Appeal
Cap.	-	Chapter
Crim. App	-	Criminal Appeal
CPA	-	Criminal Procedure Act
HC	-	High Court
HCD	-	High Court Digest
<i>Ibid</i>	-	<i>Ibidem</i>
LLB	-	( <i>L. Legum Baccalaureus</i> ) Bachelor of Laws
MCA	-	Magistrates' Court Act
No	-	Number
Pg.	-	Page
R.E	-	Revised Edition
RUCU	-	Ruaha Catholic University
TLR	-	Tanzania Law Report
UN	-	United Nations
URT	-	United Republic of Tanzania
V	-	Versus/against
Vol	-	Volume

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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.0 Introduction.

Under this chapter of the research, there are number of things which are going to be discussed. The first part is about the background of the problem which give the legal history about the research problem. The second part is the statement of the problem. Also, the third part of the research contain the literature review that mean the part contain books of different authors who wrote on examination of child witness of tender age and what they say and they did not say. Other parties under this chapter includes the hypothesis, research objectives, significance of the research, Research methodology, scope and limitation of the research, chapterisation and the last part will be the conclusion.

#### 1.1 Background of the Problem.

In law the term evidence defined as any form of the material items or assertions of fact that may be submitted to a competent tribunal/court as a means of ascertaining the truth of any alleged matter of fact under investigation before it<sup>1</sup>. The use of evidence in the world started at very long period of time. Where scientists discovered a wealth of evidence concerning with the human evolution that comes with many forms like, human behavior<sup>2</sup>. It help to create the broader and deeper public knowledge to prove or disapproval by used the human evolution<sup>3</sup>. It resulted to the development of the rules of evidence in history that intended to establish

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<sup>1</sup> [www.britannica.com](http://www.britannica.com) (accessed on 23 February, 2021)Also, see to the book written by Martine Hannibal and Lisa Mountford., "*Criminal Litigation 2019-2020*) 5 Ed. Published by Oxford University Press.(2019) pg. 286

<sup>2</sup> <https://humanorigin.si.edu> (accessed on 23 July, 2020)

<sup>3</sup> *ibid*

standards and requirements of proving cases<sup>4</sup>. Most rules of evidence required presentation of evidence from witnesses that were directly involved with the fact in issue.<sup>5</sup> The witnesses also were required to be competent in reasoning and by age and could include any person from young age<sup>6</sup> to older age.<sup>7</sup> But, many believed that children lack a matured understanding of law and as a result their adjudication was considered to lack the precision and general probative value for conviction and thus children were not permitted to testify as witnesses.<sup>8</sup>

Examination of child witness started to be recognized during Liberalization of the rules of evidence in the modern world.<sup>9</sup> The modern rules established the presumption that, all people are competent to testify.<sup>10</sup> The rules categorically established requirements for courts when dealing with children.

In the late 19<sup>th</sup> and early 20<sup>th</sup> century, it was the turning point of conducting on examination of child witnesses (*voir dire* examination) since it was the period of reformation and introduction new of legislations<sup>11</sup>. The laws declared a child to be a competent witness if the court satisfy itself of his sufficient intelligence and understand the duty of speaking the truth. Many states adopted own approaches by others making it mandatory like Tanzania.

In 1967 the law of evidence of Tanzania established at the first time and approximately ninety percent of the Tanzania Evidence Act (TEA) comes directly from the Indian Evidence Act of

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<sup>4</sup> John H.L., *The Historical Foundation of the Law of Evidence: A View from the Ryder Sources*, (1996) at Pg. 1171.

<sup>5</sup> <https://Lega-dictionary.thefreedictionary.com>. (assessed on 23 July, 2020)

<sup>6</sup> Section 127 (1) of the Evidence Act (CAP. 6 R.E 2019)

<sup>7</sup> *ibid*

<sup>8</sup> St. Poul Mann, *Evidence Rules and California Evidence Code*, Western Publishing Company, (1995), Pg. 96

<sup>9</sup> Othman M. C., “*An Eclectic Paradigm in The Law of Evidence and its Reform in Tanzania: Competency of a Child Witness*” (2015) Pg. 105.

<sup>10</sup> Sarkar M.C and Sarkar S.C., *Sarkar on Evidence*, Fifth Edition (2004), Pg. 1953. Refer also S. 127(1) of the Law of Evidence (CAP. 6 R.E 2019), Section 198 of the Criminal Procedure Act [Cap 20 R.E 2019] Tanzania Law

<sup>11</sup> Tanenhaus S. D and Bush. W, *Toward a History of Children as Witnesses* Scholarly Works (2007), Paper 1059.

1872<sup>12</sup>. In Tanzania all matters concerning with evidence are governed by the Tanzania Evidence Act.

In relating to the evidence from the child witness of tender age in Tanzania, the court testify the child before the trial in order to determine the competency of the child on whether he has sufficient intelligent and understand the duty of speaking the truth as the requirement of the law of evidence. Before amendment of The Law of Evidence of Tanzania at Section 127(2),<sup>13</sup> requires the court to examine a child witness of a tender age with oath or making affirmation, but required to consider only the sufficiency intelligent and duty to speak the truth but later on this section was amended by Written Laws Misc. Amendment Act No. 4 of 2016 under Section 127 of Tanzania Evidence Act<sup>14</sup>, the law allow the child of tender age to give evidence without taking oath or affirmation but shall before giving evidence promise to tell the truth to the court not tell any lies<sup>15</sup>.

Therefore, it is true that the law is not silent on the issue concerning with the evidence of a child witness of tender age the law of evidence as provided under Section 127(2) of the Tanzania Evidence Act<sup>16</sup> but there is no any rule/any statutory provision that provide for the procedures to be followed when a child giving the promise for telling the truth not lies. So the examination to a child of a tender age done depends on good sense and discretion of judicial officers.

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<sup>12</sup> Ronald J. Allen., “*Reforming the Law of Evidence of Tanzania(Part three):Foundations of the Law of Evidence and their Implications for Developing Countries*”(2015)pg. 101

<sup>13</sup> The Evidence Act, 1967, R. E. 2019

<sup>14</sup> Written Laws Misc. Amendment No. 4 of 2016 under Section 26, Also see at Section 127 of the Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>15</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019) See in the case of *Lazaro Damian V The Republic (2018) Crim.App No 202 Of 2018*, *Issa Salum Nambaluka V Republic (2018) Crim.App. No 272 of 2018*, *Hamisi Shabani @Masanja V Republic (2019) Crim.App No. 122 Of 2019*

<sup>16</sup> Tanzania Evidence Act (CAP 6 R.E 2019)

## 1.2 Statement of the Problem.

In Tanzania the evidence provided by the child of tender age is admissible. However, there are no clear procedures of procuring evidence of a child at the time giving the promise of telling the truth but leaves it under discretionary powers of the courts. Before amendment of the law of Evidence<sup>17</sup>, the courts was used *voir dire* test to established whether the witness of a tender age understood the meaning of an oath, had sufficient intelligence for reception of his evidence and the duty of speaking the truth. Then came the amendment of the Act No. 4 of 2016 which repealed 127(2) of the Evidence Act<sup>18</sup> as state that;-

“127(2) a child of a tender age may give evidence without an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies”<sup>19</sup>

Although the law was amended but it is seen that the law contain the old position. By using different cases to both sides before and after amendment of the law in order to find out if there is a gape to the law as shown below :-

In the case of *Samwel V. Republic*<sup>20</sup> the appellant was charged with and convicted of the offence of rape, contrary to S.130(2) (c) of Penal Code then after he appealed to the HC. The non-compliance with S.127 (2) of Tanzania Evidence Act was among of the grounds for appeal, in previous court the trial magistrate conduct *voir dire* and recorded that “*PWI Elizabeth Shija, adult (?), age 8yrs, the girl does not know the meaning of oath*” but this was not sufficient to enable the learned trial magistrate to determine whether a child witness of

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<sup>17</sup> Section 127(2) of the Tanzania Evidence Act 9CAP 6 R.E 2019)

<sup>18</sup> *ibid*

<sup>19</sup> Section 127(2) of the Tanzania Evidence Act as amended by 26 of the Written Laws (Miscellaneous Amendment) Act No.4 of 2016. See Also, Section 127(2) of the Tanzania Evidence Act( CAP 6 R.E 2019)

<sup>20</sup>Samwel V Republic (2006)Crim. Appeal No.105 of 2006

tender age was possessed of sufficient intelligence and understood the duty of speaking the truth. So, in the Court of Appeal was agreed that the *voir dire* was not properly conducted.

After amendment of the Tanzania Evidence Act<sup>21</sup>, in the case of *Shaibu Nalinga V. Republic*<sup>22</sup> where the appellant Shaibu was charged with an offence of rape, he was convicted and sentenced to life imprisonment. He aggrieved with the decision and appeal up to the Court of Appeal. Among of the grounds was that whether the evidence of a child was properly taken. The previous trial received the evidence of a child with oath with nothing more. The Court of Appeal says that, the trial court conducted *voir dire* test which was is no longer a requirement of the law, after it was satisfied that a child did not understand the nature of an oath, it ought to have required her to tell the truth and not to tell lies. So, it was observed that the evidence of a child was fatal irregularity, in supporting the point the court referred in the case of *Godfrey Wilson V. Republic (2018) Crim.App.No.168 of 2018*, said that

“In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of Section 127(2) of the Evidence Act as amended by Act No.4 of 2016. Hence, the same has no evidential value”

In the case of *Issa Salum Nambaluka V. The Republic*,<sup>23</sup> the appellant Issa Salum Nambaluka was charged with and convicted of the offence of incest by male contrary to S.158 (1)(a) of the Penal Code and rape contrary to S.130 (2) (e) of Penal Code. The case was appealed to the High Court with 3 grounds, among of them was that the previous court failed to comply with mandatory provision of S.127 (2) (5) and (7) of Tanzania Evidence Act. In this case a child gave her evidence on affirmation and the record does not reflect that she understood the nature of oath. The court say, the current position of the law require that if the child witness

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<sup>21</sup> Tanzania Evidence Act (CAP 6.R.E 2019)

<sup>22</sup> *Shaibu Nalinga V. Republic (2019) Criminal Appeal No. 34 of 2019*

<sup>23</sup> *Issa Salum Nambaluka V. The Republic (2018) Criminal Appeal No.272 of 2018*

does not understand the nature of oath, she or he can still give evidence without taking oath or making an affirmation but promise to tell the truth and not tell lies. Therefore, the court allows this ground of appeal due to the reason that the evidence of child was received contrary to the provision S.127 (2) of Tanzania Evidence Act.

In the case of *Hamisi Shabani @ Masanja V. Republic*<sup>24</sup> in this case the appellant was charged with an offence of rape contrary to the law, and he was sentenced to 30 years for jail imprisonment. He was not agree with the decision then he appealed with 6 grounds including that evidence of the child was received by the court under repealed provision contrary to the amendment of the Act of 2016. In this case the victim failed to speak and remain mute, but the victim required to promise to speak the truth not otherwise and it was found that the ground has merit.

Therefore, there is the need of having the specific rules that has to be followed by the court at the time a child of tender age giving the promise of speaking the truth before the court of law. Simply because its observed that after and before the amendment of the law of evidence still the law contain the old position. The absence of clear rules influence more appeal of cases on the ground that the evidence of the child witness of tender age received in improper way

### **1.3 Literature Review.**

This research use different reading made by the prominent writers and other researchers as far as the problem of conducting examination to child is concerned. The aims of using literature review is to acknowledge a researcher on what has done in order to avoid unnecessary and any intentional duplications on what has already been done. Henceforth the followings were literatures a researcher pass through in relation to the problem in hand as follow;

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<sup>24</sup>Hamisi Shabani @ Masanja V Republic (2019) Criminal Appeal No. 122 of 2019

**Deus Edius**<sup>25</sup>.The author believes that if the subordinate courts will follow proper procedure of admitting evidence of tender years for conviction, it will reduce number of appeals that proceed before the Higher Courts. It's true that the subordinate courts could follow the procedures of receiving the evidence from the child witness of tender age. Where now the study actually will find out about way the subordinate courts and high court receive evidence before the court of law from the witness child of a tender age and suggest the need of having the specific rules to be followed by the court at the time a child giving the promise of telling the truth not lie rather than by using the discretionary powers of courts only. Due to the reason that it will reduce burden of expenditure to innocent Tanzanians, laymen, especially from costs of paying counsels as well as other costs associated with appealing to Higher Courts.

**Commonwealth Secretariat**<sup>26</sup>, The author explains that the court has duty to determine the whether child witness of tender age the given evidence is admissible or not. Also the court supported to consider if there is the need of corroborate evidence of tender age according to the nature of an offence in order to prove beyond the reasonable doubt.

According to the idea of the author it's true the courts has the duty to examine a child witness of tender age and emphasized the corroboration evidence if is necessary as shown in the case of *Patrick Basaga V.Uganda of 2002 (CACA) No.42*, The court emphases that a requirement to corroborate the evidence of a single identifying witness for sexual offence is unconstitutional.

But the author does not show the procedures that direct the courts to examine a child of tender age as the big challenge to the courts, In Tanzania the evidence the law allow courts to make

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<sup>25</sup> Deus Edius.“*Voir Dire Examination in Evidence*”. University of Dar es Salaam-Tanzania[2018]  
[www.academia.edu](http://www.academia.edu) (PDF)

<sup>26</sup>Commonwealth Secretariat. “*Case Law Handbook on Violence Against Women and Girls in Commonwealth East Africa;Kenya,Rwanda,Tanzania and Uganda*” Published by Commonwealth Secretariat(2019)  
<https://books.thecommonwealth.org.E-book> (PDF)

examination of child witness but have never being a specific statutory to guide the process of taking the evidence from a child witness of tender age rather than the procedures is left to courts on their own discretionary powers and proves difficulty in understanding the required standards and are fulfilled, where now in the study will explain the area that the author does not explain.

**T. M. Melsheimer and C. Smith**<sup>27</sup>, The author says examination of child witness of tender age is conducted depend on nature of a certain jurisdiction. In federal courts examination of child witness is done by judges using their discretionary powers while in taxes state it done by attorney using rules and he explain that when conduct by attorney examine a child witness actually seen as the best and in other side attorney not allowed in all courts.

However, the author explain examination of child witness widely but it seen that there is a problem due to the reason that he believe judge examine child witness in a way that not as effective as attorney.

Where now in the research will not deal much on whether trial magistrate, attorney nor judge is the best one in conducting the examination of a child witness but will find out if there is the need of having the specific rules for making the promise from the child before the trial. Due to the reason that in Tanzania examination of child witness is done by courts using their discretionary power, So will suggest the presence of the specific rules for making promise from the child witness of tender age as its explain by author that attorney use rules as why attorney seen to be the best one rather than judge who use discretionary powers only.

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<sup>27</sup>T.M.Melsheimer and C.Smith, "*On the Jury; Principles and Practices for Effective Advocacy*" Published by University of North Texas Press.(2017).5.  
[https://books.google .co.tz](https://books.google.co.tz).

**Tasha A. Lane**<sup>28</sup>, the author explains clearly on how is gender salient throughout the process of taking evidence of a child. Also, he says that gender within the examination of child witness is present through the use of potential juror's marital titles. Also, he discussed that through attorney's reaction to gender expectation and it impacts gendered attorney presentation style through their differing use of repetition of questions and responses for female and male. It is true that there is the need of understanding about gender in taking evidence of a child witness but the author does not show how its conducted. Therefore, In the research actually will not base much on the gender in relation to the examination process to child witness of tender age rather than will explain the process used to conduct examination to a child witness in Tanzania that done by courts discretionary powers only in order to see whether there is a need of having a specific rules that will be followed at the time a child provide a promise that he could tell the truth and not lies.

**Martine Powell and others**<sup>29</sup>, the authors explain on the ability of child when required to give evidence before the court of law. They say that the ability of child sexual abuse complaints to give quality evidence is crucial for successful prosecution, but it can be problematic for complaints to give such evidence. Also, says for the both child and adult complaints, a willingness to engage in the justice process, and the accuracy and usefulness of the evidence they give, can be affected by anxiety and stress, delays in the trial process and how professionals question them. Different jurisdiction has attempted to address these concerns by introducing alternate measures and guidelines for eliciting evidence from child sexual abuse complaints. The authors provide a comprehensive, holistic and contemporaneous picture of this process such the use and effectiveness of alternative measure on how complaints are questioned when evidence is elicited. In the research will not base only on the

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<sup>28</sup> Tasha A. Lanne, "*Gender and Voir Dire Process*" published by Portland State University. Portland (2019) Pg 1-43.

<sup>29</sup> Martine Powell and others., "*An Evaluation of How Evidence is Elicited from Complaints of Child Sexual Abuse*" Published by Royal Commissions into Institutional Responses to Child Sexual Abuse.(2016)

evidence from child sexual abuse complaints but will deal with the evidence of the child witness of a tender age when required to proved evidence before the court of law in Tanzania.

**Peter Edward**<sup>30</sup>, The author of the book talks about the process of examining a child witness or conducting examination to child witness by showing some of the prohibitions. He says the counsel and pro se party not allowed to ask some kind of questions at the time the court receiving the evidence from the child of tender age during such as repeated questions that asked and answered are not allowed. Actually persons who taking that kind of evidence must follow the requirement of the laws, a researcher intended. In the research will deal much on the process of taking evidence of a child who has at the tender age and find out if there is any rule or statutory provision that guides the judicial officers to examine a child witness.

**Eric J. Davis**<sup>31</sup>, The author based much on evidence that given to the court based on race, the evidence of the child witness of tender age actually seen to very difficult to conducted by the court because people remain silent on it due to the presence of discrimination and classism especially in America. He says a better use of our time allotted for the examination of child witness always trying to find out what people's attitudes are.

In the research will not base on race because in Tanzania examination of a child witness is done by discretionary powers of the courts without based on race. So through that will find if the discretionary powers of the courts are rational or not and make an analysis on it in order to see if their need of having the specific rules that could guide the examination of the child witness.

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<sup>30</sup> Peter Edward., “*Wyoming Rules of Civil Procedure 2021*” published by Peter Edwards, Esq. America(2021)

<sup>31</sup> Eric J. Davis, “Race Matters II: The Impact of Race on Criminal Justice”, NACDL’s 2<sup>nd</sup> Annual Seminar(ed), *Race and Voir Dire*, published by Judicial Opinions, America.(2019).14.  
[www.nacdl.org](http://www.nacdl.org)>getattachment.PDF

Lee,<sup>32</sup> the author of this book says that at the time the court takes the evidence from the child before trial, sometimes court officers lie, this is observed when the author says that even if jurors lie in a way that conceals bias, juror impartiality is adequately assured. Also, says any statement made during jury deliberation is an inquiry into the validity of a verdict or indictment, by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ non-juror evidence of bias before the verdict is rendered as observed in the case of *Warger v. Shauers*, 135 S. Ct. 521 (2014) in this case the court held that on a motion for new trial, a juror's affidavit regarding foreperson's conduct during deliberation was an internal matter and therefore, it was not admissible under the law.

Also, the author says that if a prospective juror's responses to a question asked of a child questioning reveal a bias so strong as to convince the judge that the juror cannot render impartial jury service, the judge should dismiss the juror for cause as seen in the case of *Marshall v. City of Chicago* 762 F. 3d of 2014 in this case explained that in determining whether a juror's prior belief about the law warrants disqualification, the court must determine whether a prospective juror manifests a prior belief that is both material and contestable, meaning a rational person could question its accuracy.

The author does not tell on how the court takes the evidence from the child. Therefore in the research is where now will explain the part that does not discussed by the author in order to make the process of taking evidence from the child of tender age to be known by all judicial officers and suggest the necessity of having the specific rule for making the promise of the child before the court of law.

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<sup>32</sup> Lee, 2 ed "Handbook of Section 1983 Litigation" Published by Wolters Kluwer. (2017)

**P. Edward and Missouri Legal Publishing,**<sup>33</sup> Authors of the book explain about the six Juror nondisclosure during the trial that is there must the presence of the proposed questions, reasonable investigation, opportunity to investigate, procedure when non-disclosure is suspended, Waiver and Post-Trial Proceedings. On the matter concerning with the child witness the judicial officers supported to propose questions especially to a part seeking to inquire as to the litigation history of potential jurors shall make a record of the proposed initial questions before receiving the evidence from the child. The authors help to understand that failure to follow this procedure shall result in waiver to inquire as to litigation.

Also, in this book authors does not show the exactly procedures that supported to be followed by the court when taking the child's evidence although they says it important to follow the proposed questions at the time taking the evidence of the child. Therefore, in the research is where will explain the part that does not discussed by the authors by showing the necessity of having special rules for making the promise of speaking the truth from the child witness that stipulated by the law.

**Peter Edward,**<sup>34</sup> The Author of the book explain on the child's evidence that it must be received by the courts officers by asking some kind of question to determine his or intelligence. Also, he say that there is no any statutory provisions that direct the court at the time taking the evidence from the child of tender age. At the end the author talks that the evidence of the child of tender age determined by the trial court.

It's true that the evidence from the child of tender age must be determined by the trial magistrate or judge first before the trial to see the intelligence and the promise of speaking the truth as the requirement from the law and there is no existing provision that sow the clear

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<sup>33</sup>P. Edward and Missouri Legal Publishing., "*Missouri Rules of Civil Procedure 2021*" Published by Peter Edwards.Esq.America (2021) Pg 138.

<sup>34</sup> Peter Edward., "*Tennessee Rules of Civil Procedure 2021*" Published by Peter Edward,Esq. America. (2021) Pg 149

procedures that direct the trial judge or magistrate to perform that duty and rather that it remain on the court's discretion. So, in the research will show if it is necessary to have a specific rule and showing the effects for the lack of having a rule that can provide procedures of taking the evidence from the child

#### **1.4 Hypothesis**

It appears that there are no rules which were set to guide the procedures to be considered in receiving the evidence from a child of tender age and the same are left at the discretion of the court.

#### **1.5 Research Objectives**

The objective of this research is categorized into two categories that is; the main objectives and specific objectives as follows:-

##### **1.5.1 General objective**

- To conduct a research on the evidence of the child witness of a tender age in Tanzania.

##### **1.5.2 Specific objectives**

- To analyze how the evidence of the child witness of a tender age is taken.
- To find out if there is the need of having the specific rules that could be guide the judicial officers in taking evidence from a child witness of tender age before the court of law.

## **1.6 Significance of the Research/Study**

- This research intended to raise awareness to the government and law making organ to the impact of law that governing the evidence of a child witness of tender age in Tanzania.
- Also, this research intended to show the importance of having the specific rules. This is because in Tanzania there is no a specific statutory provision/rules that guide the court at the time a child giving the promise of speaking the truth then it left to courts on their own discretionary powers.

## **1.7 Research Methodology**

The study used various library resources to search the relevant materials, books and many other publications. Also, a researcher collected the data from the field in order to make the research to sound more current, the data analysed qualitatively in order to draw conclusion and verification. This was achieved through:-

### **1.7.1 Primary source.**

Under this part the researcher used the laws that enacted by the United Republic of Tanzania and international laws actually, to show that study originated from the laws.

### **1.7.2 Primary methods of data collection.**

The primary methods of data collection used to collect data/information direct to the field as shown below:-

### **1.7.2.1 Interview**

A researcher used face to face interview method to collect data to get information. Through asking the questions from the interviewee including the judicial officers, advocates and other people who have the knowledge about the laws. Also, the interview conducted to the judicial institutions, and advocate offices from 2020 to 2021 during the field time.

### **1.7.2.2 Questionnaire**

The researcher uses the questionnaire method to collect data. A researcher gets different views from respondents about the study. Also, the questions was asked to the different participates including judicial officers, police officers and advocates.

### **1.7.3 Secondary source.**

Also, Under this part a researcher used books, Journals, Articles and other relevant materials that discuss, elaborates, criticize and emphasis on the primary data.

### **1.7.4 Secondary method of data collection.**

The data were collected from literature materials that found from different places including in library and internet sources. The researcher used the library of Ruaha Catholic University (RUCU) to make an analysis to the law concerning with the evidence of a child witness of tender age in Tanzania. Therefore it helps a researcher to know what others have covered and what is not covered.

## **1.8 Scope and Limitation of the Research/Study**

### **1.8.1 Scope of the research.**

The scope of the research based on the evidence of the child witness of a tender age in Tanzania. Also, the research conducted at Iringa Municipal where references were easily collected.

### **1.8.2 Limitation of the research.**

In this study the researcher faced with the main limitation that, the problem is not much documented particularly in Tanzania hence hardship in preparing the literature review. Because some materials expected were not available.

## **1.9 Chapterisation**

The general introduction of the work will be found in chapter 1, while Chapter 2 will be purposely dealing with, an overview of child as witness in Tanzania. Chapter 3 will be the laws and examination of child witness in Tanzania, Chapter 4 will be the Major finding on the evidence of a child witness of tender age in Tanzania. Conclusion and recommendation will fall under Chapter 5, which will be the last chapter of my work paper.

## **1.10 Conclusion**

This chapter provides the general introduction of the research. It is seen that the judicial officers allowed conduct examination to the child witness of a tender age in order to determine whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. But there is no a specific statutory law or rule that guide judicial officers to conduct the examination of a child witness of tender age.

## CHAPTER TWO

### AN OVERVIEW OF CHILD AS A WITNESS IN TANZANIA

#### 2.0 Introduction

This chapter provides the meaning of key terms concerning a child . Also, it explain about the historical development of law concerning with the evidence of a child witness in Tanzania by looking into different period of time as well as the importance of examination of child and its power. And lastly will be the conclusion under this chapter.

#### 2.1 Definition of key terms

##### 2.1.1 Who is a child?

The word child come from the old English word called *cild*, which mean “infant.”<sup>35</sup>A child is defined in various contexts depending on the nature and scope of relevant legislative scheme. Child means a young person, male or female<sup>36</sup>.The laws of Tanzania do not provide the uniform definition about who is a child but the definition of a child defined by different laws of Tanzania depending on the context of a certain statute. The Criminal procedure Act<sup>37</sup> in respect of criminal investigation, defines a child, as a person who has not attained the age of sixteen (16) years. While, the Evidence Act <sup>38</sup> provides the definition of a child of tender years as below the apparent age of 14 years. But, the most important of all in respect of the meaning of the child is the law of the Child Act<sup>39</sup> which has brought about a very progressive definition of the child as defined under Section 4(1) of the Act<sup>40</sup> that a person below the age

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<sup>35</sup><https://www.vocabulary.com> (Accessed on 22 January, 2021)

<sup>36</sup>Ibid

<sup>37</sup>Section 2 of The Criminal Procedure Act (CAP 20 R.E.2019) Also, refers to section The Children and Young Person Act CAP 13

<sup>38</sup> Section 127(4) of The Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>39</sup> The Law of the Child Act (CAP 13 R.E 2019)

<sup>40</sup>Ibd

of eighteen years shall be as child. So, a child has taken as someone who is not yet an adult<sup>41</sup>. All in all it's a truism that a child by reason of his physical and mental immaturity needs special safeguards and cares from the community at large and from the statutory regime in particular.

### **2.1.2 Who is a Witness?**

A witness means a person who is required to come to court to answer questions about a case<sup>42</sup>. The answers provided by the witness before the court of law are called evidence, but before giving the evidence the witness must promise to tell the truth<sup>43</sup>. In Tanzania our law of evidence does not provide the clear meaning of a witness but it show who may testify as a witness by the court as stated under section 127(1) of the Tanzania Evidence Act.<sup>44</sup> That every person is competent to testify unless the court considers that a person is not capable for the same. It is under that circumstance that the court can take other procedures of testifying. For example, a child of tender age may give evidence without taking an oath or making affirmation but shall, before giving evidence, promise to tell the truth to the court<sup>45</sup>.

### **2.1.3 Who is a child witness?**

A child witness is the one who at the time of giving testimony is below the age of eighteen years<sup>46</sup> Or can be defined that anybody under the age of 18 who is expected to testify in court about something he or she experienced, saw or heard<sup>47</sup>. So a child witness determined as the person below the age of majority who perceived the evidence by his own sense that is

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<sup>41</sup>[www.idoconline.com](http://www.idoconline.com) (Accessed on 8 February, 2021)

<sup>42</sup>[www.justice.gov](http://www.justice.gov) (Accessed on 12 January 2021)

<sup>43</sup>ibid

<sup>44</sup> Tanzania Evidence Act (CAP 16 R.E 2019)

<sup>45</sup> Section 127(2) of the Evidence Act (CAP 6 R.E 2019)

<sup>46</sup>[www.lateslaws.com](http://www.lateslaws.com) (Accessed on 13 December 2021)

<sup>47</sup> Alison Cunning and Lynda Steven., "*Helping a Child be a Witness in Court*" Published by the Centre for Children and Families in the Justice system. London.(2011) Pg 3 also it can be found at [www.tcvcm.ca](http://www.tcvcm.ca) (Accessed on 18 February,2021)

eyes, skin through touching, ears, nose and tongue and tend to produce such evidence before the court of law for the purpose of funding justice. All in all, the court officers must be satisfied that the child is competent to be witness before giving evidence to the court<sup>48</sup>.

## **2.2 Evidence of a child witness**

The evidence of a child witness received by the court after determined the two circumstances. One whether the child is sufficiently intelligent to be capable of giving a rational account of what they have seen or heard and Second is that, whether a child witness understands the duty of speaking the truth<sup>49</sup>.

### **2.2.1 Child Witness in Pre Colonial era.**

Pre-colonial period mean a time before a region or country became a colony<sup>50</sup>. Historically in Tanzania before colonialism there was no formal procedure that governed the production of evidence since they had their own traditional mode used to determine the wrong doer as its seen in the case of *Republic V. Palamba Fundikira*<sup>51</sup> in this case a trial by ordeal was conducted to discover who has by witchcraft caused the death of 11 children and to prove their innocence they were subjected to a tradition test of drinking a tradition medicine called MWAVI .By itself MWAVI is not a poison but once taken by a person with an evil mind it become a poison. Upon taking upon taking two women died and other two vomited. They used traditional medicine to determine the women who was involved in the killing children. Therefore, at that time child were not involved in testifying evidence so there is no need of examining children since the children were not adduced their evidence.

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<sup>48</sup><https://www.lawnow.org> (Accessed on 15 February, 2021)

<sup>49</sup> [www.nzlii.org](http://www.nzlii.org) (Accessed on 8 July 8, 2021)

<sup>50</sup> [www.dictionary.com](http://www.dictionary.com) (Accessed on 5 February, 2021)

<sup>51</sup> *Republic V. Palamba Fundikira (1947) 4 EACA 96*

### **2.2.2 Child witness during the colonial era.**

During colonialism in Tanzania many statutes were enacted, on the issue concerning with evidence the British established The Tanzania Evidence Act (TEA) which was based on Indian Evidence Act (IEA) of 1872 through British colonial rules.

Witnesses were required to give evidence before the court of law when the judicial officers deciding different cases, under Section 118 of the Indian Evidence Act<sup>52</sup> provide who may testify, as stated that

“All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.- a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them”

The law allowed everyone to testify their evidence except the lunatic, a lunatic is someone who is either clinically insane or just acting really crazy<sup>53</sup>. So, during colonial era the child evidence in Tanzania was recognized but at that time the Indian Act was not contained the provision which forced the court to consider the promise of speaking the truth not lie

### **2.2.3 Child witness after independence.**

On 9<sup>th</sup> December 1961, Tanganyika became an independent republic and later become known as Tanzania. In 1967 Tanzania passed the Tanzania Evidence Act to govern all matters concerning evidence, then law of evidence was repealed the Indian Evidence Act but still it

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<sup>52</sup> The Indian Evidence Act of 1872

<sup>53</sup> [www.vocabulary.com](http://www.vocabulary.com) (Accessed on 12 February, 2021)

was not settled clear the status of unsworn evidence child, The Evidence Act<sup>54</sup> was provided that every person is competent to testify, unless the courts disqualify him on a certain reasons such ground of tender age, extreme old age, disease or any other similar cause. It was the turning point of requirement of procedures to be incorporated in our law to direct the judicial officers in conducting *voir dire* because the law was provided the presumption that every person is competent to testify. In criminal cause or matters required that all evidence to be given on oath according Section 198(1) of the Criminal Procedure Act<sup>55</sup> but after amendment of the law of evidence allowed the child to testify even without an oath as a requirement of the law at Section 127 of the Act<sup>56</sup> which was states that;

“(2) Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth:...”

This section 127(2)<sup>57</sup> later on was amended by Act No.4 of 2016, after this Act been amended, the law provides that

“A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies”

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<sup>54</sup>Section 127(1) Tanzania Evidence Act of 1967 (CAP 6 R.E 2019)

<sup>55</sup> The Criminal Procedure Act of 1985 (CAP 20 R.E 2019)

<sup>56</sup> The Tanzania Evidence Act (CAP 6 R.E 2019). Also, see in the case of *Issa Salum Nambaluka. V R, Criminal Appeal No.272 of 2018* and in the case of *Geoffrey Wilson V. R, Criminal Appeal No.168 of 2018*.

<sup>57</sup> Section 127(2) of the Tanzania Evidence Act as amended by Act No.4 of 2016 (Cap 6 R.E 2019).Also see in the case of *Geoffrey Wilson V. Republic, Criminal Appeal No.168 of 2018*.

Nowadays the judicial officers take evidence of a child of tender age without conducting *voir dire* examination. But the court required determine the intelligence of the child and the promise from the child that he or she will tell the truth and not lie only.<sup>58</sup>Generally there is no clear rule to be followed.

### **2.3 Conclusion**

This chapter has given some definition of the key terms like child and it shows the brief history of evidence related to the child in Tanzania.

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<sup>58</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019)

## **CHAPTER THREE**

### **THE LAW AND EXAMINATION OF CHILD WITNESS IN TANZANIA**

#### **3.0 Introduction.**

There are various laws that providing the procedures on how the evidence of child as witness can be taken by the court in Tanzania. Hence this chapter tends to analyze the laws concerning with examination of child witness. Also, this chapter shows the procedures of conducting examination to the child witness of tender age in Tanzania as well as the challenges faced by the judicial officers in conducting such examination.

#### **3.1 Laws governing the child evidencing in domestic level**

The country of Tanzania accepted different sources of evidence law which are regarded as a frame work laws of which enshrined a skeleton of how to go about in relation to conduct the child examination before allow a child to be testified, the after this chapter show procedures of conducting examination of child witness in Tanzania and its challenges faced the judicial officers in conducting the examination to the child witness.

##### **3.1.1 The Constitution of the United Republic of Tanzania**

The Constitution of the United Republic of Tanzania is a mother law of the land in Tanzania and all laws that enacted in Tanzania are subjected to it.<sup>59</sup> The Constitution of the United Republic of Tanzania (CURT) was amended and incorporates the Bill of Rights. Article 13 of the constitution<sup>60</sup> explain about the equality before the law as provided that all people are equal before the law and are entitled, without any discrimination, to protection and equality before the law. Since the constitution provide for equality before the law it means all people

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<sup>59</sup> [hrlibrary.com.edu](http://hrlibrary.com.edu) (Accessed on 16<sup>th</sup> January, 2021)

<sup>60</sup> Article 13(1) of the Constitution of the United Republic of Tanzania of 1977 as amended time to time

are equal. For any issue concern the child witness of a tender age in tanzania, the child can be heard before the court of law because all people have the right to be heard and protected by the law as the constitution concern.

Also, the constitution show clearly that in order to ensure equality before the law, the state authority shall make procedure appropriate by considering some the principles that provided under Article 13(6)(a)(b)(c)(d) and (e)<sup>61</sup>,at the Article 13(6)(a)(6) provides for the principle of justice of fairness and the principle of presumption to innocent as stated that

“(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;

(b) No person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence;”

Therefore, to the mater concerning child witness of attender age from that provision it means that child must treated equality with fairness as well as allowed to give evidence in order to prove or disapprove for any criminal offence, in order to protect the right of the accused. The evidence of a child witness is very important that can make a person to prove is guilty or not. All in all it a duty of the court to determine the evidence of a child that is admissible or not and for the purposes of making sure that there is the fair hearing and justice to be not only be done but seen to be done<sup>62</sup>. So the court must make sure that those people who are competent to testify they testify without any discrimination.

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<sup>61</sup> The Constitution of the United Republic of Tanzania of 1977 as amended time to time.

<sup>62</sup> Republic V Sussex Justices, Ex parte McCarthy(1924) 1 KB 256

### 3.1.2 The Tanzania Evidence Act

The Tanzania Evidence Act is the law that governing the matters of evidence, it provide for inter alia legal procedures to be followed by the court to determine which evidence can be admissible or not admissible. Also, it provides who can testify and who cannot testify. Under Chapter V Part I of the Act<sup>63</sup> provides for competency, compellability and privilege of witness. On the same part it provide for the special groups of people and how their evidence can be taken by the court, such groups involve children, dumb person, spouses, accomplice's competence as witness as well as the evidence of spouses.

Also, the law give court the power to determine competence of the person as the law provide for the presumption that all people are competent to testify unless the court disqualify him on ground that they do not understand the question and give rational answers due to reason of tender age, extreme old age, disease or any other similar cause.<sup>64</sup>

On the matter of the evidence provided by the child of the tender age, the law requires that evidence of that child will be given without taking an oath or making an affirmation but shall, before giving evidence must promise to tell the truth to the court and not tell any lies<sup>65</sup>.

Examination of witnesses procedures are provided under Par II Chapter V of the Act<sup>66</sup>, where by the law provides for the order of production and examination of witness, court to decide on admissibility of evidence, examination of witnesses and it provide for the order and direction of examinations of child witness. But there is no provision that direct the court in receiving the evidence of the child by considering only the presence of promise of the child rather than its remain as the procedures done only by the court discretion only.

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<sup>63</sup>The Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>64</sup> Section 127(1) of the Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>65</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>66</sup> Tanzania Evidence Act (CAP 6 R.E 2019)

### 3.1.3 The Law of the Child Act

This Act deals with all matters relating to a child. The Act is established for the purpose to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote protect and maintain the welfare of a child with a view to giving effect to international and regional convention on the rights of the child; to provide for, affiliation, foster care, adoption and custody of the child; to regulate employment and apprenticeship, to make provisions with respect to a child in conflict with law and to provide for related matters.<sup>67</sup>

Under Part II<sup>68</sup> provide for the rights and welfare of the child, this part of the law shows the rights for the child and general duty of the child. Also, Part IX<sup>69</sup> provide for a child in conflict with law, under this part the law establish the juvenile court through Section 97 of the Act which require the juvenile court to deal only with the matter of child. A juvenile court is vested powers to hear and determine the criminal charges against a child and it deals with the application relating to a child care, maintenance and protection<sup>70</sup>.

In relation to the evidence of the child witness the law provide for the child as witness as stated at Section 115 under Part IX<sup>71</sup>. Actually the Act it requires that if the child witness do not understand the nature of oath then the court may receive his evidence after the court conduct investigation to determine if the child witness is possessed of sufficient intelligence to justify the reception of the law of evidence as well as if the child understand the duty of speaking the truth<sup>72</sup>. This law does not provide on how the court could conduct such investigation in determining intelligence to the child. Generally the Act provides the

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<sup>67</sup>Provided under the long title of the Law of the Child (CAP 13 R.E 2019)

<sup>68</sup> The Law of the Child Act (CAP13 R.E 2019)

<sup>69</sup>ibid

<sup>70</sup> Section 98(1) (a) and (b) of The Law of the Child (CAP 13 R.E 2019).

<sup>71</sup>Ibid.

<sup>72</sup> Section 115(1) of The of The Law of the Child (CAP 13 R.E 2019).

framework on how the child will be prosecuted and how their evidence will be taken before the court.

### **3.1.4 The Criminal Procedure Act**

This Act deals with procedures concerning criminal matters. The Act provides procedures of examining the witness and procedure of taking evidence. Under Part VI of the Act<sup>73</sup>, it provides for general provisions relating to trials and it shows the conduction of the examination of witness before the trial. Also during the examination of witness the law requires that the evidences of witness must be given by oath or affirmation in accordance of the Oaths and Statutory Declarations Act <sup>74</sup>where by the law of the Oaths and Statutory Declarations Act<sup>75</sup> provide for the judicial oaths as stipulated clear under Part II of the Act. Both laws does not stipulate the status of the child as witness and does not provide on how the child can testify before the court of law.

Even though the Criminal Procedures Act is the procedural law that provide the procedures of conducting trials and procedures of receiving evidence from the witness but the law is silent on the issues of the child evidence and there is no any provision that discussing on how the courts officer can conduct examination to child witness. But it's better for the court officers to use specific procedures that direct on how the examination of the child witness could be done so as to testify the sufficient intelligence of a child before the court of law<sup>76</sup>.

Under Section 56 of the Act<sup>77</sup> provides for the special procedures for police officers when interviewing children. The law requires the police officers in charge of investigating a child

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<sup>73</sup>Ibd.

<sup>74</sup> Section 198 of The Criminal Procedure Act (CAP 20 R.E 2019), *Also see* at section 4 of the Oaths and Statutory Declarations Act ( CAP 34 R.E 2019).

<sup>75</sup> The Oaths and Statutory Declarations Act (CAP 34 R.E 2019).

<sup>76</sup>John Snape., "California Family Code 2017" Pushlished by Lulu.Com.(2017) pg. 106.

<sup>77</sup> The Criminal Procedure Act (CAP 20 R.E 2019)

for an offence to inform their parent or guardian of the child about restrain about the offence for which he is under restrain only. Generally the law does not deals with the competence of witness rather than it deals with the procedures of prosecuting the suspected person and providing the procedures of examination of witnesses but also during examination of witnesses there is no any provision deals with the procedures of examining a child witness at all. This Act established to provide for the jurisdiction, powers and functions of magistrate's courts and other related matters. This law established the magistrate court and vest powers to entertain criminal cases and civil cases<sup>78</sup>.

### **3.2 Laws that Governing Child Evidence at International Level**

Tanzania has ratified several numbers of international treaties and conventions that concerning with the protection of the child and for the purpose of protection it gives the child to be heard by the administrative authorities and adjudicatory authorities but the conventions require the child to be competent to testify as shown below;-

#### **3.2.1 The United Nation Convention on the Rights of the Child**

The United Nation Convention on the Rights of the Child (UNCRC) was drafted in 1989 and come into force in 1990. Also, its aim is to recognize the rights of children and ensure that they grow up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity<sup>79</sup>.

The Convention provide for the right to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds<sup>80</sup>. Also, Under article 12(1)<sup>81</sup> it state that

“1. States Parties shall assure to the child who is capable of forming his or own views the right to express those views freely in all matters

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<sup>78</sup> Part II of The Magistrate's Court Act (CAP 11 R.E 2019)

<sup>79</sup> <https://www.togetherscotland.org> (23 January, 2021)

<sup>80</sup> Article 13(1) of UN Convention on the Rights of the Child of 1989

<sup>81</sup> Ibid

affecting the child, the views of the child being given due weight in accordance with the child 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 proceeding 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 is to say that the child has the right to provide the evidence to the court provided that the child is competent to produce evidence. However the convention provides the restriction that the child should have the capacity to formulate his own views but they have rights to be called before the court and testify their evidence. Before the court to allow the child to testify is required if a child is capable of formulating views as required by the convention<sup>82</sup>.

### **3.2.2 African Charter on the Rights and Welfare of the Child**

The convention it provide rights to the child to testify before the court by referring to Article 4(2)<sup>83</sup>, it provide that,

“In all judicial or administrative proceedings touching a child who is able of communicate his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceeding, and those views shall be taken into consideration by the relevant authority in accordance with the provision of appropriate law”

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<sup>82</sup>UN Convention on the Rights of the Child of 1989.

<sup>83</sup> Article 4(2) of the African on the Rights and Welfare of the Child of 1999

That means the convention aim is to allow the child to provide evidence before the court however that convention provides the requirement of complying with the provision of domestic laws that procedures. The purposes of allowing the child to provide their views before the court aim to protect them from those who tend to deprive the rights of the Child<sup>84</sup>.

Therefore, the convention gives the opportunity to child to testify before the court, but the judicial officers are required to conduct examination to the child witness in order to see if he or she is competent to provide his views due to this the court can allow the child to testify.

### **3.3 Importance of promise of the child witness before the trial.**

The following are the importance of giving the promise from the child witness of tender age as follows:-

It help the court to satisfy itself that the child understand the duty of speaking truth and to determine whether he or she understand the nature of questions by giving the rational answers then the evidence will be accepted by the court of law<sup>85</sup>Due to this reason it help the court to form opinions as to whether the evidence of a child can be received or not.

It helps the court to determine if the child has acquired intelligence. The word intelligence comes from the Latin verb *intellegerere*, which means that the acquirement, processing and storage of information. The court examine a child witness by asking questions and a child required to give answers to the asked questions so as to help the court to determine the intelligence of a child<sup>86</sup>. So the examinations of a child witness help the court to determine if the child witness has the intelligence. Through the promise given from a child witness of tender age before the court of law, the promise of speaking the truth and not lies the court

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<sup>84</sup> *ibid*

<sup>85</sup> Section 127 of the Tanzania Evidence Act, Cap 6 as amended by Act No.4 of 2016(CAP 6 R.E 2019)

<sup>86</sup> Section 127(2) of the Tanzania Evidence Act, Cap6 as amended by Act No.4 of 2016.(CAP 6 R.E 2019)

actually it held the court to know if there is a need of evidence of child to be corroborated or not as required by the law of evidence at Section 127(3)<sup>87</sup>

Also, it helps the judges and magistrates to determine a question of law on the basis of the evidence of child witness of a tender age<sup>88</sup>. So through this is where now the courts make decision on whether the evidence of a child witness of a tender age is admissible, or whether it should be rejected.

### **3.4 Powers to hear the promise of speaking the truth from the child witness.**

The court officers has given the power to hear the promise of speaking the truth not lies from the child witness of tender age as the requirement from the law as provided under Section 127(2) of the Tanzania Evidence Act<sup>89</sup> in order to determine the competency of the child<sup>90</sup>. At the time a child giving the promise that he or she will speak the truth taken in the court room<sup>91</sup> and the trial judge or magistrate support to record it. As seen in the case of *Paul Bagyese V. Uganda*<sup>92</sup> where by in this case it try to show the necessity taking the record of evidence of a child witness especially of a tender age, and it was held that A Child of tender years must be under fourteen years of age, but not every child under fourteen is “of tender age”, it’s a matter for the good sense of the trial court.

### **3.5 Procedure of taking the evidence from the child witness**

Once the child is called as witness by the court then the court is required to test his competence before allow him to testify. The court receive the evidence of the child of tender

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<sup>87</sup> The Tanzania Evidence Act(CAP 6 R.E 2019)

<sup>88</sup><https://www.judicialcollege.vic.edu.au> (Accessed on 18 February, 2021) Also, see in the case of (*MacPherson V. republic(1981)147 CLR 512;[1981] HCA 46*)

<sup>89</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>90</sup> *ibid*

<sup>91</sup><https://apps.americanbar.org> (Accessed on 29 January, 2021)

<sup>92</sup> Paul Bagyese V.Uganda.Criminal Appeal No.83of 1965

age by referring the law of evidence specifically under Section 127(2) of the Tanzania Evidence Act<sup>93</sup> that

“A child of tender age may give evidence without taking an oath or affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies”

All in All, there is no clear procedures that can direct the trial magistrates and judges in receiving the evidence from the child witness of tender age. But the court required to consider that, if a child of tender is incapable of giving evidence on oath or affirmation, then the court should make sure provide the promise of speaking the truth to court and not lies. This proved in different cases. For example, in the case *Issa Salum Nambaluka V. Republic, Criminal Appeal, No.272 of 2018*, the Court said thus:-

“...under the current provision of the law, if the child witness does not understand the nature of an oath, she or he can still give evidence without taking oath or making an affirmation but promise to tell the truth and not to tell lies”

### **3.4 Challenges that face the court in taking the evidence from the Child Witness**

In Tanzania courts faced by the several number of challenges at the time taking the evidence from the child witness specifically a child of tender age, among of this challenges are as follows:-

There is no existing statutory law to be followed by the judicial officer in receiving the evidence from the child witness before the court. Despite that it is mandatory for the court to consider the promise of speaking the truth from child witness before the trial, but there is no provision that guide the court to do so<sup>94</sup>.This situation it may lead the miscarriage of justice

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<sup>93</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>94</sup> Section 127(2) of The Tanzania Evidence Act (CAP 6 R.E 2019)

due to the reason that the process of taking evidence from the child witness of tender age in Tanzania confuse many judicial officers. Therefore, in one or another it means that the justice cannot be observed when judicial officers will be confused in taking the evidence from the child witness specifically of a tender age. So, there is that necessitate to have statutory provision that will guide procedures at the time a child giving the promise of speaking the truth to the court

Some judicial officers are not willing to follow the decisions of their fellow judicial officers. This is because in Tanzania there is a many case that decided by the higher court concern with evidence of the child of a tender age on the way supported to be done by the judicial officers before trial but among of the judicial officers does not follow the previous decided cases. Then the evidence of the child witness continues to be as the main ground of appeal that the evidence received in improper way by the court in many cases .For example, in the case of Mohamed *Sainyeye V. Republic*<sup>95</sup> in this case it try to show some of the procedures that can be used by the court to take the evidence from the child witness of tender age before the trial, that is one is about on oath where the court officers questions the child to ascertain by considering the age of the child. Second, is unsworn this procedure followed if the child does not understand the nature of an oath, it must before allowing the child to give evidence determine through questioning the child two things (a) the child is possessed of sufficient intelligence to justify the reception of the evidence and (b)the child understands the duty of speaking the truth. And lastly is that in the case the child is incapable to meet the procedures as explained above then court should indicate on the record and the child should not give evidence. So among of the judicial officers does not follow that procedure and after the decision parties aggrieved with the decision and make an appeals on the case concern.

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<sup>95</sup>Mohamed Sainyeye V. Republic (2010) Crim. App No.57 of 2010

Awareness of decided cases. This occurred when judicial officers are not aware with decision made by superior court. For example the case of *Shaibu Nalinga V. Republic*<sup>96</sup>; in this case it shows that *voir dire* examination has been removed. This proved when the court said that, although the appellant complain that *voir dire* was not properly conducted by the court. Court of Appeal argue by saying the procedure was not exist because the law was amended. The court required only to consider the promise of speaking the truth before she testified as the mandatory requirement under the new section 127(2) of the Evidence Act

### **3.5 Conclusion**

It can be observed that, on the issue concern with the evidence of the child of a tender age in Tanzania actually is not clear, although the laws require the judges and trial magistrates to consider only the promise of speaking the truth from the child. No any rule that can direct the trial magistrate and judges at the time taking the evidence from the child of tender age who appeared to the court as witness.

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<sup>96</sup> Shaibu Nalinga V. Republic(2019) Crim. App.No.34 of 2019

## CHAPTER FOUR

### MAJOR FINDINGS ON THE EVIDENCE OF A CHILD WITNESS OF TENDER AGE IN TANZANIA.

#### 4.0 Introduction

Under this chapter the researcher deals with major finding of the research that show the practice of the evidence of a child witness of tender age in Tanzania courts, whether there are existing rules that guide the judicial officers in taking evidence from the child witness, its effects and lastly will be the conclusion.

#### 4.1 The evidence of a child witness of tender age in Practice.

The evidence of a child witness of tender age conducted by the court to determine the competency of a child as requirement from the Law of Evidence of Tanzania under Section 127(2) of the Tanzania Evidence Act (TEA)<sup>97</sup> which state that;-

“A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies”

Under that provision of the law means that, if the court is satisfied that a child of tender age is incapable of giving evidence on oath or affirmation, it should make him promise to tell the truth to court and not tell lies. Also, this provision interpreted by Tanzania courts in different cases as observed in cases shown below:-

In the case of *Shaibu Nalinga V. Republic*<sup>98</sup> in this case Shaibu was charged with an offence of rape contrary to Section 130(1)(2)(e) and 131 (3) of the Penal Code. CAP16.He was

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<sup>97</sup> The Tanzania Evidence Act (CAP 16 R.E 2019)

<sup>98</sup> *Shaibu Nalinga V. The Republic.Criminal Appeal No.34 of 2019*

convicted and sentenced to life imprisonment. He appealed to the High Court and the case was dismissed for lack of merit. Also, he aggrieved with the decision and in his memorandum of appeal raised two grounds and one of ground was that, a *voir dire* test was in respect of a child (PW1) was not properly conducted. The court said that, *voir dire* test was no longer a requirement of the law. But in this case the trial court satisfied that PW1 did not understand the nature of an oath and the duty of speaking the truth. So, it was observed that the trial court ought to have required her to promise to tell the truth and not to tell lies before she testified which is a mandatory requirement under the new Section 127(2) of the Act<sup>99</sup>.

In the case of *Masound Mgosi V. Republic*<sup>100</sup> in this case the appellant Masound was tried and convicted by the court for an offence of rape of a school girl of 11 years and he sentenced 30 years' imprisonment. He was not satisfied with the decision and lodged an appeal again with 8 grounds. Among of that grounds the appellant claim there was irregular reception and reliance on the testimony of a child in the absence of any indication that she understood the nature of oath r had sufficient intelligence of speaking the truth or a promise to tell the truth. It was seen that the first appellate court rightly found that the trial court had strained into an error in conducting the *voir dire* which was no longer required following the amendment to Section 127(2) of the Act<sup>101</sup>. The court held that what was required of the trial court was to require a child to promise to tell the truth and not lies before receiving her evidence which was not done.

In the case of *Lazaro Damian V. Republic*<sup>102</sup> under this case the appellant was charged and convicted of an unnatural offence contrary to 154 of the Penal Code .Cap. 16 and sentenced to 30 years imprisonment. He lodged an appeal to an another court among of the grounds was

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<sup>99</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>100</sup> *Masound Mgosi V Republic of 2018, Criminal Appeal No.195 of 2018*

<sup>101</sup> Section 127(2) of The Tanzania Evidence Act(CAP 6 R.E 2019)

<sup>102</sup> *Lazaro Damian V Repulic (2018) No 202 of 2018*

that “the learned ate grossly erred in holding evidence of a child procured un-procedural where the witness was sworn first before being subjected to *voir dire* test in compliance with mandatory provision of the Evidence Act”. The issue was whether or not the swearing in complied with the legal requirement. The court said, the answer to this question can be deduced from the decision of the Court of Appeal in the case of *Mohamed Sainyeye V. Republic. Criminal Appeal No.57 of 2010* .The Court held that,

“PROCEDURE TO FIND OUT WHETHER A CHILD OF TENDER AGE IS COMPETENT TO TESTIFY:

**A.ON OATH**

1. The magistrate Judge questions the child to ascertain.

(a) The age of the child.

Child to be sworn or affirmed and will note this on the case record:

**B.UNSWORN**

1. If the court finds that the child does not understand the nature of an oath, it must before allowing the child to give evidence determine through questioning the child two things:-

(a) That the child is possessed of sufficient intelligence to justify the reception of the evidence, AND

(b) That the child understands the duty of speaking the truth.

Again the findings of each point must be recorded on the record.

**C.IN CASE THE CHILD IS INCAPABLE TO MEET THE ABOVE TWO POINTS (A & B)**

Court should indicate on the record and the child should not give evidence.

It was seen in the instant case that the evidence was taken as shown below:-

PW: Lucas Damian, 7 years, student resides at Chanika, Christian sworn and states:

**Court:** It is voir dire evidence c/s 127 TEA

-Which school are you studying?

I am Christian Tungini Primary School

-Are you Muslim or Christian?

Pentecostal

-Do you know and believe in God

Yes, I know and believe in God

-Do you know the meaning of telling the truth?

Yes I know

-What do you feel is a person tells untrue story?

I feel bad

**COURT:** I realize that he understands the meaning of the truth.

-He is competent to testify before the court.”

Therefore, the appellant claim that the evidence was taken un-procedurally done. Nowadays the new law of evidence of Tanzania the *voir dire* test has been removed. But there is no clear rules of taking the evidence from the child of a tender before the trial required only to consider the promise of speaking the truth, due to this reason actually confuse many judicial officers as it's seen in the case above.

Also, in the cases of *Godfrey Wilson V The Republic*<sup>103</sup> where the appellant Godfrey was charged and convicted by the District Court of Bukoba at Bukoba of the offence of rape contrary to section 130(1)(2)(e) and 131(3)(a) of the Penal Code, Cap 16. He was alleged to have raped V.D who was aged ten (10) years old. The court referred to the new law of the 2016 amendment through Act NO.4 of 2016 that provides two conditions when the court conducts *voir dire*. One, it allows the child of a tender age to give evidence without oath or affirmation. Two, a child of tender age is mandatorily required to promise to tell to the court and not to tell lies. For emphasis under this case referred in the case of *Msiba Leonard Mchere Kumwaga V Republic, Crim. App No.550 of 2015*(Unreported) as observed that

“...Before dealing with the matter before us, we have deemed it crucial to point out that in 2016 section 127(2) was amended vide Written (Miscellaneous Amendment ) Act currently, a child of tender age give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies”

Generally, it is modus of operandi is done through discretionary powers of the court<sup>104</sup>. Although the law was amended but it still contain the old position. Some trial magistrates or judges take the evidence of child witness of tender age contrary Section 127(2) of the Tanzania Evidence Act<sup>105</sup> due to the reason that there is no clear rules to be followed but remain as a matter of style and courts discretionary powers only.

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<sup>103</sup> *Godfrey Wilson V The Republic* (2018) Crim.No 168 Of 2018

<sup>104</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019) by Written Miscellaneous Amendment Act. No.4 of 2016

<sup>105</sup> *ibid*

#### **4.2 Whether there are Existing Rules for the child witness of a tender age to promise to tell the truth.**

In Tanzania there is no any rules/statutory provision that provide rules/procedures for the child witness to promise to tell the truth. The court required to ask a child witness of tender age some rational questions is put on the child to test its level of intelligent and whether or not he/she understands the meaning of telling the truth<sup>106</sup>. Generally, there is no clear rules/statutory provision to be considered at the time a child witness of a tender age giving the promise to tell the truth and not lies as required by Section 127(2) of the Tanzania Evidence Act.<sup>107</sup>

#### **4.3 Lack of the Rules and its Effects.**

Law of Evidence of Tanzania requires the child witness of a tender age before the court of law to provide the promise of telling the truth not lies<sup>108</sup>, but there is no rule/specific statutory provision that shows the procedures of doing so. However, under Section 99 of the Law of the Child Act <sup>109</sup> provides on procedure for proceedings in Juvenile Court but the procedure should be subjected on the rules made by chief justice on that matter. So, it's not enough to direct judicial officers on the examination of a child witness of a tender age because sometime it confuse on the exactly procedure to be followed.

The lack of the rules for giving the promise to tell the truth and not lies of a child witness of a tender age in Tanzania, it may lead the miscarriage of justice since the law require the court to test the intelligent of the child and to consider the promise from the child that he could tell the

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<sup>106</sup> *ibid*

<sup>107</sup> *ibid*

<sup>108</sup> *ibid*

<sup>109</sup> The Law of the Child Act (CAP13 R.E 2019)

truth and not otherwise<sup>110</sup> but there is no provision that provides procedures and due to this reason it may confuse many magistrate, it means the justice cannot be observed when the judicial officers will be confused on procedures of finding that justice. So for the people to understand the court is there so as to maintain justice the court required to ensure is done, because justice should not only be done but must also seen to be done as its shown in the case of *Scott V Scott*<sup>111</sup> Where Lord Shaw of Dunfermline said

“...where there is no publicity there is no justice. Publicity is a very sound of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial. The security of securities is publicity.”

The absence of specific rule/statutory may lead to injustice, then the justice will not be done and publicity to the people. So it's necessary to have statutory law govern the procedures to be followed but the court at the time the child provide the promise of speaking the truth not lie.

Also, during the field time one of the interviewee name X<sup>112</sup> asked on the question that, have you experienced any challenges(s) concerning with the evidence of a child of tender age? He said that:-

“Most of the children when tendering their evidence it happens that are not well prepared and sometimes the procedures taken are too heavy for them. This led to a child who is tendering an evidence might even not say the truth, lack of confidence and a child be in a position of not knowing on what to address as results of improper procedure to be followed in connecting to a child of tender age.”

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<sup>110</sup> Section 127(2) of the Tanzania Evidence Act (CAP 6 R.E 2019)

<sup>111</sup> *Scott V Scott* (1913)A.C 417.Also, see under Section 186(1) of the Criminal Procedure Act (CAP R.E 2019)

<sup>112</sup> X(not real name), An Advocate

#### **4. 5 Conclusion**

In concluding this chapter it can be observed that, the government should work with specific institutions involving with child welfare and lawyers in formulating guideline that will deal with the evidence of the children of tender age before the court of law and elsewhere for strengthen protection of wellbeing of the child.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATION

#### 5.0 General Conclusion

It's observed clearly that the evidence of the child witness of a tender age in Tanzania is the very big problem on the fact that there is no statutory provision/rules for the promise of speaking the truth to the court not lie that promise supported to be spoken/provided by the child of tender age before the trial.

The courts of Tanzania allowed to take the evidence from the child witness of a tender age before the court of law without taking oath or making affirmation and it consider if a child witness of tender age has sufficient intelligence and understand the duty to speak the truth as stated by the law of evidence,<sup>113</sup> but most of judicial officers take the evidence from the child in improper way and results to more appeals of different cases from lower courts to higher courts.

Therefore, to make sure that the problem is solved the governments have the obligation to amend laws governing evidence.

#### 5.1 Recommendation

In view of what stated in those chapters and basing on finding of the research as critically analyzed in this research, the following are the recommendation to different state authorities to make sure that there is the presence of the clear rules/statutory provision to be followed by the court at the time a child giving the promise of speaking the truth.

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<sup>113</sup> Section 127(2) of The Tanzania Evidence Act (CAP 6 R.E 2019)

### **5.1.1 Amendment of Law on Evidence**

The parliament should amend the law of evidence that is the Tanzania Evidence Act so as to include the provision that showing the procedures that can be followed by the court officers at the time a child of tender giving the promise of telling the truth before the court of law. Due to this reason it will help the judicial officers to take evidence from the child in a good way as a guideline from the law. Also, the presence of clear provision will force the judicial officers to make sure they follow such procedures rather than using court discretionary only.

### **5.1.2 Training and seminars to judicial officers.**

The government is required to establish a short course to train the judicial officers on how they can deal with the child witness of a tender age, this is because sometime the judicial officers takes the child's evidence in improper way because there is no clear procedures from the specific statutory law that guide the procedures so to test the capacity of the child witness of a tender age is very complicated process that why there is the need of training and give seminars to the judicial officers on how to deal with evidence from the child witness of tender age.

### **5.1.3 The government should work together with the Institutions.**

The government should work with specific institutions involving with child welfare and lawyers in formulating guidelines that will be adopted on examination and tendering evidence of the child before the court of law and elsewhere for strengthen protection of wellbeing of the child.

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