

## AN ECLECTIC PARADIGM IN THE LAW OF EVIDENCE AND ITS REFORM IN TANZANIA: COMPETENCY OF A CHILD WITNESS

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### INTRODUCTION: A NEW EVIDENCE CODE, A PARADIGM SHIFT

Any revision to a country’s evidentiary laws will generate fundamental economic and social developments. This Article examines how Tanzania’s adoption of a new evidentiary code to replace its current Evidence Act (“TEA”)<sup>1</sup> may fundamentally change how Tanzania handles the testimony of children of tender years.<sup>2</sup>

A brief examination of how other countries approach child testimony demonstrates that many jurisdictions are still grappling with the issue.<sup>3</sup> There is no universally accepted gold standard for the admissibility of child testimony.<sup>4</sup> Many jurisdictions struggle with determining whether children are even competent enough to testify in court at all.<sup>5</sup> One lesson to draw from this analysis of child testimony is that it was important to incorporate into the new proposed Tanzanian Evidence Act (“Proposed TEA”) specific

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\* Chief Justice of the United Republic of Tanzania.

<sup>1</sup> See generally Evidence Act, Act No. 6 of 1967, codified as amended at Cap. 6 R.E. 2002 (Tanz.).

<sup>2</sup> *Id.* § 127(5) (defining “a child of tender age” as a child younger than fourteen years old).

<sup>3</sup> See *Ky. v. Stincer*, 482 U.S. 730, 742 n.12 (1987); see also Youth Justice and Criminal Evidence Act, 1999, c. 23, § 53 (Eng.) (governing child testimony).

<sup>4</sup> Compare *Stincer*, 482 U.S. at 742 n.12, with Youth Justice and Criminal Evidence Act, § 53 (Eng.).

<sup>5</sup> Compare *Stincer*, 482 U.S. at 742 n.12, with Evidence Act (Tanz.).

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recommendations that resolve certain identified problems rather than to blindly adopt the evidentiary rules of other jurisdictions.<sup>6</sup> Tanzania adopted its laws governing child evidence from the laws of India and the common laws of England and Wales, which have been modified by judicial interpretations, giving rise to various injustices.

This Article will show the steps taken by the Court of Appeal, Tanzania's highest court, in *Kimbutu Otiniel v. The Republic* to rectify the statutory and technical anomalies that have been imposed on child testimony.<sup>7</sup>

This Article also proposes that a comprehensive update to the TEA will require a complete reimagining of how Tanzanian courts determine the relevance and probative nature of certain evidence, such as child testimony. The current Tanzanian evidentiary laws focus too intently on the prejudicial effects of child testimony, where a question still remains as to the competence of child witnesses. New evidentiary rules should allow for the admission of all relevant and probative evidence, including testimony by children. A more liberal standard of admissibility will enhance factfinding in court proceedings and ensure more just trial outcomes, which must underpin any reform of Tanzania's evidentiary laws.

#### I. WITNESSES AND THE COURT

Witness testimony is fundamental to the outcome of many judicial proceedings. Judicial decisionmaking involves more than a mere finding of whether a particular witness is telling the whole truth, a half-truth, or a lie. In cases of sexual violence or abuse of children, the testimony of the child victim is often the pivotal piece of evidence that sways the factfinder in deciding whether to convict or acquit.<sup>8</sup> Substantive and procedural law must recognize the highly probative value of child testimony.

Tanzanian law derives from judicial decisions that have been made within an adversarial process, a set of precedents inherited from Tanzania's English colonial history.<sup>9</sup> One outstanding feature of the nineteenth century English evidentiary law was, "the extent to which it prevented potential witnesses from giving testimony."<sup>10</sup> Tanzania's early common law reflected this feature, allowing only for the admission of the testimony of

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<sup>6</sup> See Proposed Final Draft: Tanzania Evidence Act 2014, § 9.3 (2014) [hereinafter Proposed Tanzania Evidence Act], available at <http://www.bu.edu/ilj/reforming-the-law-of-evidence-of-tanzania-part-three>.

<sup>7</sup> See *Otiniel v. Republic*, Crim. App. No. 300 (Ct. App. Tanz. 2011) (unreported).

<sup>8</sup> See *id.*

<sup>9</sup> See *Judicature and Application of Law Act, 2002*, § 2(2), codified at Cap. 358 R.E. 2002 (Tanz.).

<sup>10</sup> C.W.J. ALLEN, *THE LAW OF EVIDENCE IN VICTORIAN ENGLAND* 1 (J.H. Baker ed., 1997).

certain groups of people.<sup>11</sup> Other categories of people, such as atheists and infidels, were altogether barred as witnesses, or the law imposed significant barriers for them to testify.<sup>12</sup> Moreover, English law prevented the court from hearing testimony from a witness that had not sworn an oath, a requirement that reflected the prominence of religion in the law of evidence during the colonial period.<sup>13</sup> Competency to testify and the reliance on oral evidence are part of Tanzania's British colonial past, which continues to play an important role in Tanzania's evidentiary laws.<sup>14</sup>

During the early development of the law of evidence in many common law jurisdictions, children were considered unreliable witnesses. Their testimony was traditionally viewed with tremendous suspicion, especially in sexual assault cases.<sup>15</sup> A number of the features of criminal evidence rules, such as competency, hearsay, and corroboration, ensured that child witnesses went unheard, or if they were heard, disbelieved.<sup>16</sup> These features engendered the creation of technical, judge-made rules for use in determining the reliability of child testimony and to ensure the legitimacy of criminal convictions.<sup>17</sup> It took decades for these judge-made rules to lose their importance and for new evidentiary conceptions to emerge that recognized that children were capable of providing accurate and reliable evidence of the events that they witnessed or experienced.<sup>18</sup>

A convenient starting point for a discussion on child testimony in Tanzania is Section 198(1) of the Criminal Procedure Act.<sup>19</sup> Reflecting early common law's emphasis on oral evidence and oaths, Section 198(1) provides:

Every witness in a criminal case or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act.<sup>20</sup>

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<sup>11</sup> JOHN H. BUZZARD, ROY D. AMLOT & STEPHEN MITCHELL, 10 PHIPSON ON EVIDENCE 602-04 (11th ed. 1970).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 50.

<sup>14</sup> Evidence Act, §§ 61, 127 (Tanz.).

<sup>15</sup> See *R v. Wallwork*, [1958] 42 Cr. App. R. 153 (Eng.).

<sup>16</sup> John R. Spencer, *Child Witnesses and Cross-examination at Trial: Must it Continue?*, 3 ARCHBOLD REV. 7 (2011).

<sup>17</sup> CHILDREN AND CROSS EXAMINATION: TIME TO CHANGE THE RULES? 1 (John R. Spencer & Michael E. Lamb eds., 2012) [hereinafter CHILDREN AND CROSS EXAMINATION].

<sup>18</sup> See STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 1 (1995); Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. SCI. 125 (1984).

<sup>19</sup> Criminal Procedure Act, Act No. 9 of 1985, § 198(1) (Tanz.).

<sup>20</sup> *Id.*

Additionally, competence to testify as an evidentiary principle was included in Tanzanian evidence law as part of the country's aforementioned English common-law heritage.<sup>21</sup> The purpose behind the threshold competency requirement was to exclude worthless testimony at the outset on the ground that an incompetent witness lacks the capacity to communicate his or her evidence to the court.<sup>22</sup> Section 127(1) of the TEA permits the court to find that a witness is incapable of testifying if

he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease whether of body or mind or any other similar cause.<sup>23</sup>

Section 127(1) was modeled after Section 118 of the Indian Evidence Act of 1872.<sup>24</sup> Section 118 must be read together with Section 5 of the Indian Oaths Act of 1873<sup>25</sup> as the former governs child competency to testify and the latter deals with the administration of an oath, including any irregularity in compliance with the oath under Section 118. Furthermore, the Oaths Act has as a secondary objective the need to impress upon witnesses the duty of speaking the truth.<sup>26</sup>

Section 127(2) of the TEA specifically addresses whether the evidence from children of tender years may be recorded in the proceedings:

[W]here in any criminal cause or matter a child of tender age 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, which opinion shall 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.<sup>27</sup>

Section 127(2) borrows heavily from England's Children and Young Persons Act of 1933 and Section 30 of the much older Irish Children Act of 1908, which was amended by Section 28(2) of the Criminal Justice Act of 1914.<sup>28</sup> This provision establishes a two-prong test to determine the

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<sup>21</sup> See *Judicature and Application of Law Act* (Tanz.).

<sup>22</sup> *R. v D.A.I.*, [2012] S.C.R. 149 (Can.).

<sup>23</sup> See *Evidence Act*, § 127(1) (Tanz.).

<sup>24</sup> *Indian Evidence Act*, No. 1 of 1872, § 118, *INDIA CODE* (1872), vol. 5; see *Rameshwar v. State of Rajasthan*, A.I.R. 1952 S.C. 54 (India).

<sup>25</sup> The *Indian Acts (Application) Ordinance* of 1920 was specifically enacted in then Tanganyika (Tanzania Mainland) to modify and apply several Indian Acts; the *Indian Evidence Act* of 1872 and the *Indian Oaths Act*, No. 10 of 1873, § 5, *INDIA CODE* (1873), were amongst the laws of India that were modified to apply in Tanganyika.

<sup>26</sup> See *Rameshwar v. State of Rajasthan*, A.I.R. 1952 S.C. 54 (India).

<sup>27</sup> *Evidence Act*, § 127(2) (Tanz.).

<sup>28</sup> Section 38(1) of the *Children and Young Persons Act*, 1933, 23 & 24 Geo. 5, c. 12, §

competency of a child witness:

[I]f a child witness did not, in the opinion of the Court, understand the nature of an oath, his evidence could still be received, albeit unsworn, if in opinion of the court, he was possessed of sufficient intelligence to justify the reception of his evidence and understood the duty of speaking of the truth.<sup>29</sup>

## II. EVIDENTIARY GUARANTEE OR A BOOBY TRAP?

The preliminary hurdles encountered by Tanzanian courts, and perhaps the courts of other jurisdictions that are similar to Tanzania, are the introduction of evidence from children of a tender age, and the determination of children's competence to testify by a *voir dire* examination.<sup>30</sup> Section 127(2) of the TEA requires two thresholds of competence, one for a child to give *sworn* testimony and another for *unsworn* testimony.<sup>31</sup> These competency thresholds for children under fourteen are determined by examination in a "Dutch action." In the Dutch action, the presiding judicial officer must first determine if a potential child witness understands the nature of an oath, and if so, have the child swear the oath. If the child understands the nature of the oath and swears the oath, the child may give sworn testimony. If the child does not understand the nature of the oath, the child may still give unsworn testimony.<sup>32</sup> To admit unsworn child testimony, the judicial officer must decide whether the child possesses sufficient intelligence *and* whether the child understands the duty of speaking the truth before the court.<sup>33</sup>

Application of Section 127(2) to child witnesses has confused many magistrates.<sup>34</sup> The TEA provides no guidelines on how to conduct its two-part test.<sup>35</sup> Difficulties first arise in administering the oath or affirmation, an area of the law that has been subject to restrictive judge-made law.<sup>36</sup> For instance, while Section 127(2) requires a child to understand the nature of an oath, judicial decisions in some jurisdictions with similar evidentiary

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38(1) (Eng.), was repealed by Section 52(1) of the Criminal Justice Act of 1991. Section 53 (witness competence) of the Youth Justice and Criminal Evidence Act, now governs child testimony. Youth Justice and Criminal Evidence Act, § 53 (Eng.).

<sup>29</sup> JOHN A. ANDREWS & MICHAEL HIRST, CRIMINAL EVIDENCE 215 (2d ed. 1992).

<sup>30</sup> Otiniel v. Republic, Crim. App. No. 300, at 3 (Ct. App. Tanz. 2011) (unreported).

<sup>31</sup> Evidence Act, § 127(2) (Tanz.).

<sup>32</sup> *Id.*

<sup>33</sup> J.R. SPENSER & RHONA H. FLIN, THE EVIDENCE OF CHILDREN: THE LAW AND THE PSYCHOLOGY 52 (1990).

<sup>34</sup> See Jafason Samuel v. R., Crim. App. No. 105 (Ct. App. Tanz. 2006) (unreported).

<sup>35</sup> Evidence Act, § 127(2) (Tanz.).

<sup>36</sup> Otiniel v. Republic, Crim. App. No. 300, at 1 (Ct. App. Tanz. 2011) (unreported).

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rules have developed an additional condition: that the child must understand not only the nature of the oath, but also the consequence of taking the oath.<sup>37</sup> There is also some debate on the age limit below which a child may give sworn or affirmed evidence.<sup>38</sup>

Concerning the oath, it is important to note *R v. Hayes*,<sup>39</sup> a watershed case, which eliminated the requirement that a child understand the religious underpinnings of the oath's divine sanctity, which had been characteristic of earlier English evidentiary law.<sup>40</sup> In *Hayes*, the Court of Appeal of England and Wales stated:

The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is invoked in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.<sup>41</sup>

The decision in *Hayes* shifted the competency test away from the religious understanding of an oath towards a more practical understanding of the importance of honesty.<sup>42</sup> The Irish Law Reform Commission ("ILRC") in its *Consultation Paper on Child Sexual Abuse* also went on to observe that to insist on the religious significance of an oath would result in "the evidence of a young, ignorant or unbelieving but competent witness" having "less weight . . . than the evidence of a young, believing, competent witness."<sup>43</sup>

Further, how magistrates conduct the second part of the Section 127(2) inquiry for unsworn evidence is a matter of judicial style<sup>44</sup> and is dependent on the magistrate's good sense and discretion.<sup>45</sup> The intimidating formality

<sup>37</sup> Evidence Act, § 127 (Tanz.).

<sup>38</sup> Compare N.Y. CRIM. PROC. § 60.2(2), with Youth Justice and Criminal Evidence Act, § 53 (Eng.).

<sup>39</sup> *R v. Hayes*, [1977] 1 W.L.R. 234, 237 (Eng.); see also *R v B.R.R.* (Unreported, Supreme Court of Queensland, 15 May 2009) (Austl.); *R. v. Bannerman*, [1966] 55 W.W.R. 257 (Can.).

<sup>40</sup> *Hayes*, 1 W.L.R. at 234.

<sup>41</sup> *Id.* at 237.

<sup>42</sup> ANDREWS & HIRST, *supra* note 29, at 216; see also *Bannerman*, 55 W.W.R. 257.

<sup>43</sup> THE LAW REFORM COMM'N, CONSULTATION PAPER ON CHILD SEXUAL ABUSE ¶ 5.41 (1989) (Ir.), available at [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpChildSexAbuse.htm](http://www.lawreform.ie/_fileupload/consultation%20papers/cpChildSexAbuse.htm); see also THE LAW REFORM COMM'N, REPORT ON CHILD SEXUAL ABUSE ¶ 5.32 (1990) (Ir.), available at [http://www.lawreform.ie/\\_fileupload/Reports/rChildSexAbuse.htm](http://www.lawreform.ie/_fileupload/Reports/rChildSexAbuse.htm); QUEENSLAND LAW REFORM COMM'N, THE RECEIPT OF EVIDENCE BY QUEENSLAND COURTS: THE EVIDENCE OF CHILDREN 103 (2000) (Austl.).

<sup>44</sup> *Jafason Samuel v. R.*, Crim. App. No. 105, at 9 (Ct. App. Tanz. 2006) (unreported).

<sup>45</sup> *R. v. Pawlyna*, [1948] 2 D.L.R. 327, 329-30 (Can.); *R v. Campbell*, [1956] 2 Q.B.

of the courtroom atmosphere; the overwhelming presence of the presiding judicial officer; the physical presence of the accused aggressor; the use of legal language; and the inappropriate lines of questioning that are directed at the child all require a herculean effort on the part of the child to respond suitably to the second Section 127(2) inquiry.<sup>46</sup> Children who must undergo this *voir dire* examination likely find it to be a traumatizing experience. The *voir dire* examination poses difficulties for courts as well. The examination is riddled with booby traps as many magistrates have little experience or expertise in interviewing child witnesses, and have even more difficulty interviewing children who have been the victims of sexual violence.<sup>47</sup>

A third complication arises not in Tanzania, but in other jurisdictions with evidentiary codes upon which the TEA was modeled. These jurisdictions disagree about whether a *voir dire* examination should be mandatory to test a child's competency.<sup>48</sup> In England and Wales, such an examination is necessary for all child witnesses up to the age of fourteen,<sup>49</sup> however in Ireland, the Supreme Court held that a preliminary examination of a potential child witness was not necessary.<sup>50</sup> The Supreme Court of India held that each court is free to determine whether a *voir dire* examination should be performed; the failure to conduct this examination is a mere procedural irregularity that does not render the child's testimony inadmissible.<sup>51</sup> Nevertheless, a *voir dire* examination is mandatory in Tanzania.<sup>52</sup>

Given the legal and technical hurdles involved in administering the test for determining a child's competency to testify under Sections 127(1) and 127(2) of the TEA, trial courts often err on the side of exclusion as they lack the experience to deal properly with the unique difficulties that child witnesses present.<sup>53</sup> These courts either discount or expunge a child's testimonial evidence after *voir dire* examination. This judicial practice of exclusion insulates sexual predators from conviction and creates a kind of

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432, 438 (Eng.).

<sup>46</sup> See Spencer, *supra* note 16.

<sup>47</sup> See CHILDREN AND CROSS EXAMINATION, *supra* note 17, at 1.

<sup>48</sup> Compare R v. Reynolds, [1950] 1 K.B. 606, 607 (Eng.), with R v. Khan, [1981] 73 A.C. 190, 193 (Eng.).

<sup>49</sup> See Reynolds, 1 K.B. at 606 (swearing in an eleven-year-old child); see also Khan, 73 A.C. at 192 (swearing in a twelve-year-old child).

<sup>50</sup> See CAROLINE FENNELL, THE LAW OF EVIDENCE IN IRELAND 81 (1992).

<sup>51</sup> See Rameshwar v. State of Rajasthan, A.I.R. 1952 S.C. 54 (India); M.C. SARKAR ET AL., 2 SARKAR'S LAW OF EVIDENCE 2132-36 (17th ed. 2010).

<sup>52</sup> Evidence Act, § 127(2) (Tanz.); Otiniel v. Republic, Crim. App. No. 300, at 15 (Ct. App. Tanz. 2011) (unreported).

<sup>53</sup> Evidence Act, § 127 (Tanz.).

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functional immunity on their behalf.<sup>54</sup>

In *Kimbute Otiniel*, we interpreted Section 127 to require greater inclusion of child testimony in light of the legislative intent behind the TEA, which seemingly permitted courts to admit child testimony despite an “irregularly administered oath or affirmation”<sup>55</sup>:

Section 127(2) should be read together with section 127(1) and in their proper context. In our respectful view, section 127(1) is also at the root of child competency. There is nothing in section 127(2) which makes it a master sub-section on child competency or that the legislature had intended it to override the clear terms of section 127(1). Nothing therein says that section 127(1) is subject to or submissive to section 127(2).

. . .

We re-emphasize, as we must, that as “intelligibility” is involved in the conduct of a voir dire under section 127(1) and (2), the misapplication or non-direction on section 127(1) may be atoned or fully remedied by the proper application of section 127(2). Surely, a child witness who can satisfy a court on a voir dire that he or she understands the nature of an oath or the duty of speaking the truth, would also obviously be one capable of understanding questions and providing rational answers to them and thus possessed of sufficient intelligence. By construing and applying those provisions that way, repugnancy is avoided and section 127(1) and (2) is best reconciled.<sup>56</sup>

In other words, we noted that although the administration of an oath or affirmation was one of the tools to ensure the trustworthiness of witness testimony, an oath did not guarantee that a witness would not lie.<sup>57</sup> Thus, trial courts must consider the entirety of the evidence in assessing the truthfulness of a witness’s testimony, including the witness’s demeanor, the inconsistency or cogency of the evidence, its credibility and reliability, and the testimony’s probative force.<sup>58</sup> We on the Court of Appeal also expressed concern that the requirements for determining competency under Sections 127(1) and 127(2) had been erroneously narrowed and conflated in

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<sup>54</sup> *Id.*

<sup>55</sup> *Otiniel v. Republic*, Crim. App. No. 300, at 68 (Ct. App. Tanz. 2011) (unreported).

<sup>56</sup> *Id.* at 65.

<sup>57</sup> LAW COMM’N, EVIDENCE OF CHILDREN AND OTHER VULNERABLE WITNESSES 8 (1996) (N.Z.), *available at* [http://www.lawcom.govt.nz/sites/default/files/publications/1996/10/Publication\\_60\\_179\\_PP\\_26.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/1996/10/Publication_60_179_PP_26.pdf) (“[Not] everyone who takes an oath or affirmation tells the truth, even when aware that lying on oath is an offence. . .”).

<sup>58</sup> *Otiniel*, Crim. App. No. 300, at 71.

prior judicial decisions.<sup>59</sup> We believed that Sections 127(1) and 127(2), as previously interpreted, had strayed too far from their original intent and purpose. The time was ripe for urgent legislative intervention.

### III. SOLUTIONS TO THE PUZZLE

Some jurisdictions have reformed their approach to child testimony based on research in social science and other fields. In *Queen v. W.J.F.*, the Supreme Court of Canada candidly acknowledged that early presumptions and suspicions about child testimony were misdirected:

The law once refused to take cognizance of the special problems young witnesses face [when testifying] and the corresponding difficulties those who seek to prosecute crimes against young children consequently encounter. Child witnesses were treated like adults—indeed even more severely. Not only did they have to take the oath, but also, unlike adults, they were subjected to grilling on whether they understood its religious implications. If they failed this hurdle or the others that might appear down the road, like corroboration, their evidence was completely lost. The law, in recent decades, has come to realize that this approach was wrong.<sup>60</sup>

In *R v. Barker*, the Court of Appeal of England and Wales followed suit:

Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness.<sup>61</sup>

If evidentiary law changes from a presumption that children *are not* competent witnesses to one in which they are, then we need to decide whether the TEA's competency test should still be used to determine if a

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<sup>59</sup> *Id.* at 74.

<sup>60</sup> *R. v. W.J.F.*, [1993] 3 S.C.R. 569, 591 (Can.).

<sup>61</sup> *R v. B.*, [2010] EWCA (Crim) 4, [40] (Eng.).

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child is capable of giving truthful and reliable testimony.<sup>62</sup> If we should depart from the TEA's test, what should the new test be? When a child witness is to testify, should there still be two separate thresholds, one for sworn and another for unsworn testimony? However the new test may look, we would need to know whether it would facilitate factual accuracy and the search for truth in the administration of justice, and avoid a miscarriages of justice.

In England and Wales, Sections 53(1), 53(3)(a), and 53(3)(b) of the Youth Justice and Criminal Evidence Act of 1999<sup>63</sup> state that any person is competent to testify in criminal cases no matter his or her age.<sup>64</sup> A very young child may be rejected as incompetent only if the court determines that the child is unable to understand the court's questions and provides answers that the court cannot understand.<sup>65</sup> The standard is the ability to give "intelligible testimony."<sup>66</sup> There is no longer a requirement for the witness to appreciate the difference between truth and falsity.<sup>67</sup> Children under fourteen are precluded from taking an oath and may only give unsworn evidence.<sup>68</sup> In *Barker*, the court explained that

[t]he question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand . . . every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he

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<sup>62</sup> Nicholas Bala, Kang Lee, Rod Lindsay & Victoria Talwar, *A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses*, 38 *OSGOODE HALL L.J.* 409, 409 (2000) ("Child competency inquiries are demeaning to children, do not promote the search for the truth, and result in unnecessary appeals. The child competence inquiry should be abolished, though a judge should give a child simple instructions about the importance of truth telling, and ask the child to promise to tell the truth.").

<sup>63</sup> Youth Justice and Criminal Evidence Act, §§ 53(1), (3)(a)-(b) (Eng.).

<sup>64</sup> *Id.* § 53(3)(a)-(b).

<sup>65</sup> *Id.* §§ 53(1), 53(3).

<sup>66</sup> JOHN A. ANDREWS & MICHAEL HIRST, *ANDREWS & HIRST ON CRIMINAL EVIDENCE* 221 (4th ed., 2001); *see also* Youth Justice and Criminal Evidence Act, § 55(8) (Eng.).

<sup>67</sup> *R v. MacPherson*, [2006] EWCA (Crim) 3605, [18] (Eng.); JAY LINDA & MOHAMED RAMJOHN, *UNLOCKING EVIDENCE* (2013).

<sup>68</sup> Youth Justice and Criminal Evidence Act, § 55 (Eng.).

understands cannot themselves be understood he is not.<sup>69</sup>

It has been suggested that under Section 53 of the Youth and Criminal Evidence Act, a child can, in principle, give evidence as soon as he or she is able to speak.<sup>70</sup> An infant who could only communicate in verbal babble would not be competent, but a young child who spoke and understood Basic English and could converse with strangers would be.<sup>71</sup>

In Canada, under Section 16.1(1) of the Canada Evidence Act, a child under fourteen is competent to testify.<sup>72</sup> Under Section 16.1(3), a child can give evidence if he or she is able to understand and respond to questions.<sup>73</sup> Before permitting such a witness to testify, the court is required to obtain from the child a promise to tell the truth.<sup>74</sup> However, the court is not allowed to ask the child any questions regarding the child's ability to understand the nature of his or her promise to tell the truth if the purpose of such questions is to determine whether the child's testimony will be admissible.<sup>75</sup>

In Ireland, under Sections 27(1) and 27(3) of the Criminal Evidence Act of 1992, a court may admit the testimony of a child under fourteen in any criminal proceeding if the court is satisfied that the child is capable of giving an intelligible account of events that are relevant to the court proceedings.<sup>76</sup>

In New South Wales, Australia, all persons are competent to give evidence under Section 12 of the Evidence Act of 1995.<sup>77</sup> However, if a person does not have the capacity to give intelligible answers to factual questions, that person is presumed incompetent to testify.<sup>78</sup> A person can give unsworn evidence if, among other things, the court informs that person that it is important to tell the truth.<sup>79</sup>

In South Africa, under Section 164(1) of the Criminal Procedure Act, a child who is competent may testify under oath, provided that the court has decided that the child understands the nature and importance of the oath.<sup>80</sup>

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<sup>69</sup> R v. B., [2010] EWCA (Crim) 4, [38] (Eng.).

<sup>70</sup> CHILDREN AND CROSS EXAMINATION, *supra* note 17, at 8.

<sup>71</sup> R v. MacPherson, [2006] EWCA (Crim) 3605, [27] (Eng.).

<sup>72</sup> See J. Virginia Schuler, *Child Victims and Witnesses in Court – The Canadian Experience*, 18 COMMONWEALTH JUD. J. 28, 28-33 (2009).

<sup>73</sup> *Id.*

<sup>74</sup> Canadian Evidence Act, R.S.C. 1985, c. C-5 § 16.1(6).

<sup>75</sup> *Id.* § 16.1(7).

<sup>76</sup> Criminal Evidence Act, 1992 (Act No. 12/1992) (Ir.), §§ 27.1, 27.3, available at <http://www.irishstatutebook.ie/1992/en/act/pub/0012/index.html>.

<sup>77</sup> Evidence Act 1995 (NSW) § 12 (Austl.).

<sup>78</sup> *Id.* § 13(1).

<sup>79</sup> *Id.* § 13(5).

<sup>80</sup> Criminal Procedure Act 51 of 1977 § 164(1) (S. Afr.).

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A child may give unsworn testimony if he or she is unable to understand the nature and importance of the oath, and the court must also warn the child to speak the truth.<sup>81</sup>

In the United States, the test to determine the competency of child witnesses varies from state to state. Some states allow children to testify without a prior competency examination, while others provide that all persons are competent to testify unless they are otherwise deemed incompetent by statute.<sup>82</sup> For example, the test in Kentucky involves ascertaining (1) whether the child is capable of observing and recollecting facts; (2) whether the child is capable of narrating facts to a court or jury; and (3) whether the child has a moral sense of the obligation to tell the truth.<sup>83</sup> In Ohio, trial courts test a child witness's competency by examining the child's ability to (1) receive an accurate impression of facts or observe acts about which he or she will testify; (2) recollect those impressions or observations; (3) communicate what was observed; (4) understand the difference between the truth and lies; and (5) appreciate his or her responsibility to be truthful.<sup>84</sup>

Angela Evans and Thomas Lyon summarized the requirements for determining the competence of a child witness in the United States as follows: "The United States probably requires the most intensive process for child witnesses: some form of oath or affirmation is near-universally required (only two States allow unsworn testimony) and truth-lie competency inquiries are still very common."<sup>85</sup> In those states where the rules of evidence still require courts to determine the competency of child witnesses—apart from measuring a child's cognitive ability (i.e., observation, memory, and recollection)—courts must also measure the child's understanding of the difference between truth and falsehood, and the moral obligation to tell the truth.<sup>86</sup> Rule 601 of the Federal Rules of Evidence marked a welcomed departure. Under Rule 601, every person is competent to be a witness unless otherwise prohibited.<sup>87</sup> Under Rule 603, "[b]efore testifying, a witness must give an oath or affirmation to testify truthfully."<sup>88</sup> The Advisory Committee Notes for Rule 603 explain that "[t]he rule is designed to afford the flexibility required in dealing with"

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<sup>81</sup> *Id.*

<sup>82</sup> *See* *Ky. v. Stincer*, 482 U.S. 730 n.12 (1987).

<sup>83</sup> *Id.* at 730; *see* *Moore v. Ky.*, 384 S.W.2d 498, 500 (Ky. 1964).

<sup>84</sup> *Ohio v. Fraizer*, 574 N.E.2d 483, 487 (Ohio 1991).

<sup>85</sup> Angela D. Evans & Thomas D. Lyon, *Assessing Children's Competency to Take the Oath in Court: The Influence of Question Type on Children's Accuracy*, 36 *LAW & HUM. BEHAV.* 195, 195-205 (2012).

<sup>86</sup> *See generally id.*

<sup>87</sup> *FED. R. EVID.* 601.

<sup>88</sup> *Id.* 603.

children as well as other categories of witnesses.<sup>89</sup> The Advisory Committee Notes also make clear that “no special verbal formula” for the oath is required.<sup>90</sup>

It is worth noting that the witness competency requirements under the Rules of Procedure and Evidence of the International Criminal Court are significantly lower, allowing the Chamber to exercise its discretion to freely assess all evidence to determine its relevance and reliability.<sup>91</sup> Moreover, witnesses are only required to make a “solemn undertaking;” they are not required to take an oath or affirmation.<sup>92</sup> The undertaking is also secular.<sup>93</sup> Under Rule 66(2), a person under the age of eighteen who does not understand the nature of a solemn undertaking may be allowed to testify if the Chamber determines that the person can describe matters of which he or she has knowledge and understand his or her “duty to speak the truth.”<sup>94</sup>

The Rules Committee of the Judiciary that I established in Tanzania for evidentiary reform has proposed an amendment to Section 127(2) of the TEA. The Rules Committee recommended deleting Section 127(2) and substituting it with the following provision: “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.”<sup>95</sup> Article 9.1, *Competency to Testify in General*, of the Proposed TEA, which consolidates Sections 127 to 131 and 141 to 143 of the TEA, states:

Unless otherwise provided by law, every person who is not qualified as an expert under Article X is competent to be a witness if the person:  
(a) possesses first hand knowledge of a material preposition; (b)

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<sup>89</sup> *Id.* advisory committee’s note.

<sup>90</sup> *Id.*

<sup>91</sup> See Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, at 10, and Corr. 1 (2002) [hereinafter Rules of Procedure and Evidence]; see also Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (establishing the International Criminal Court).

<sup>92</sup> Rules of Procedure and Evidence, *supra* note 91, Rule 66(1). Rule 66(1) requires that every witness “make the following solemn undertaking”: “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.” *Id.*

<sup>93</sup> *Id.* Rule 66(2).

<sup>94</sup> See *id.*

<sup>95</sup> A similar suggestion has been incorporated into the Drafting Committee Notes of Proposed Tanzania Evidence Act, *supra* note 6, § 9.3. (“When a child does not understand the nature of an oath or affirmation, the child’s evidence may still be received if, in the opinion of the court, the child understands the duty to tell the truth.”). This suggestion is based on the observation that the act of “promising to tell the truth” increases the likelihood that children will tell the truth. Nicholas Bala, Kang Lee, R.C.L. Lindsay & Victoria Talwar, *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform*, 18 INT’L J. CHILDREN’S RIGHTS 53, 58 (2010).

understands the meaning of an oath or the duty to tell the truth; (c) can understand questions put to him or her; and (d) can give rational answers.<sup>96</sup>

Additionally, Article 9.3 requires a witness to take an oath or affirmation.<sup>97</sup>

As previously discussed, an important question remains as to whether a child should be tested with a *voir dire* examination to determine if he or she understands the moral duty to speak the truth, the difference between truth and falsehood as well as his or her ability to understand questions and rationally respond to them.<sup>98</sup> Given the multiplicity of competency tests described above, and the nature of the competence requirement itself, a universally accepted answer remains elusive.<sup>99</sup>

### CONCLUSION

The competency of children to testify and the mode of determining competency in the TEA reflect the exclusionary and restrictive nature of the TEA generally. Sections 127(1) and 127(2) of the TEA governing child competency are based on Tanzania's English common-law heritage,<sup>100</sup> and have been a legal jigsaw puzzle and a barrier to access to justice for children, especially child victims of sexual violence who are often the only witnesses to their own abuse.<sup>101</sup>

The Court's interpretation of the TEA in *Kimbute Otiniel* provided a temporary remedy.<sup>102</sup> A more permanent solution may require legislative intervention and a complete overhaul of the test for child competency. That test must take into account the best interests of the child and the child's right to be heard in a judicial proceeding, full respect for the rights of the accused to a fair trial and due process, facilitation of the court's search for the truth, social science developments, and societal changes.<sup>103</sup> An overhaul of this magnitude may require the adoption of the Proposed TEA that is now being convincingly advocated.<sup>104</sup> There is no doubt that Tanzania may stand to learn much about evidentiary reform from other jurisdictions; however, Tanzania should be wary about blindly importing rules from those jurisdictions without considering its own individual

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<sup>96</sup> Proposed Tanzania Evidence Act, *supra* note 6, § 9.1.

<sup>97</sup> *Id.* § 9.3.

<sup>98</sup> *Id.* § 9.1.

<sup>99</sup> Compare *Ohio v. Fraizer*, 574 N.E.2d 483, 487 (Ohio 1991), with Rome Statute, *supra* note 91, art. 69.

<sup>100</sup> Evidence Act, § 127(1)-(2) (Tanz.).

<sup>101</sup> *Otiniel v. Republic*, Crim. App. No. 300, at 63 (Ct. App. Tanz. 2011) (unreported).

<sup>102</sup> *Id.* at 79.

<sup>103</sup> U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>104</sup> Proposed Tanzania Evidence Act, *supra* note 6.

concerns. The caution noted in Professor Ronald Allen's article, *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, is appropriate: "A new colonization effort consisting of transplanting the U.S. Federal Rules of Evidence into Tanzania would surely be a cure worse than the disease."<sup>105</sup>

The destiny of the reform of the law of evidence is now with the Law Reform Commission of Tanzania ("LRCT"). The LRCT was established under the Law Reform Commission of Tanzania Act No. 11 of 1980, and proposals for the reform of the law of evidence have now been channeled to the LRCT for further consideration. The statutory mandate of the LRCT is to keep the laws of Tanzania under constant review in order to bring them into accord with Tanzania's current circumstances. In reviewing the applicability of the U.S. Federal Rules of Evidence model to Tanzania, the LRCT will bring together key stakeholders (e.g., the Office of the Attorney General, the Office of the Director of Public Prosecutions, universities, and bar associations, such as the Tanganyika Law Society and the Zanzibar Law Society) so that they can contribute to the reform process towards the adoption of a new Tanzanian law of evidence.

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<sup>105</sup> Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, 31 B.U. INT'L L.J. 217, 265 & n. 348 (2013).