

Maximum when convicted under 444(1) – Imprisonment of up to one year or a fine of 1000 Sh.So.

Maximum when convicted under 444(2) – Imprisonment of between 3 months and 5 years.

Statutory aggravating circumstance: Affray is caused for political reasons or by rivalry between ethnic groups.

THESE GUIDELINES SHOULD BE READ IN CONJUNCTION WITH THE OVERARCHING PRINCIPLES DOCUMENT RELATING TO THE TREATMENT OF JUVENILES AND WITH THE JUVENILE JUSTICE LAW AT THE FOREFRONT OF THE SENTENCING JUDGE'S MIND.

GRAVITY OF THE OFFENCE

Matters to take into account that may increase or decrease the seriousness of the offence could include, but are not limited to the following:

Art 110 1. a) The nature, character, means, object, time, place and any other circumstances of the act

You should consider factors that could increase the seriousness of the offence such as:

- The length of time that the affray took place over, with lengthy incidents likely to be more serious.
- The degree of fighting or violence used created substantial fear to others. Likewise low-level violence may be less serious.
- Weapons being used or objects being thrown.
- Conduct was used that *could have* resulted in serious injury to others. Any actual injury will result in a charge under Article 444(2).
- The conduct took place in the presence of a vulnerable person / people (for example children)
- Damage was caused to property

Art 110 1. b) The gravity of the injury or of the danger caused to the party injured by the offence

This will be relevant for offences under Article 444(2). The more serious the injury the longer the sentence is likely to be. Cases involving the death of a person are likely to be at the top end of the sentencing bracket unless there are other mitigating features.

Art 110 1. c) The intensity of criminal intent, or the degree of culpa (Art 24 PC)

- Was the affray premeditated?
- Consider the offender's specific role in the affray. Peripheral involvement may be less culpable.
- If the offender did not instigate the trouble they may be less culpable.
- Was there any provocation that caused the offender to become involved in the affray that would make him less culpable?
- Stopping as soon as the police became involved could lessen the culpability.



**OFFENDER'S CRIMINAL
CAPACITY**

Article 110 2. (a-d) The Judge shall take into account the offender's criminal capacity:

- Age and maturity of the offender.
- What were the offender's motives for committing the crime?
- His general character.
- His past criminal record.
- Remorse demonstrated.
- Co-operation with the police.
- His personal circumstances i.e. his family, his employment.



On the basis of your assessment of the gravity of the offence you should reach a starting point and then increase or reduce that starting point accordingly if there are any aggravating or extenuating circumstances.



**AGGRAVATING
CIRCUMSTANCES**

Aggravating circumstances can be found in Article 39 PC.

If there is one aggravating circumstance the sentence that you impose should be increased by one third. (Art 118, PC)

If there is more than one aggravating circumstance the sentence that you impose cannot be more than three times the maximum sentence fixed by law.

At this stage you should also consider recidivism (Art 61 and 124 PC)

No child should be sentenced to more than 15 years imprisonment, even in aggravated circumstances (Art 12, JIL)



EXTENUATING CIRCUMSTANCES

Extenuating circumstances can be found in Article 40 PC.

When one extenuating circumstance is present you should reduce the sentence by up to one third (Art 119 PC)

When more than one extenuating circumstance exists the punishment should not be less than one quarter of the maximum punishment (Art 121 PC)



PROPORTIONALITY

An exceptionally important consideration is Article 11 JIL - Punishment for commission of an offence by a child must be **proportionate** to the circumstances of the child, the gravity and the nature of the offence

Under Article 86 JIL a child cannot be detained unless certain conditions are met. In respect of affray these conditions will not be met unless the child is a recidivist or a dangerous character to the community.

Where you are considering imprisonment for a child the sentencing judge should also have at the forefront of their mind Articles 6 and 8 JIL. **The best interests of the child are the primary consideration and detention should be a last resort.**

UNLESS THE CHILD IS A RECIDIVIST OR A DANGEROUS CHARACTER YOU MUST CONSIDER DIVERSION (ART 69 JIL)

The relevant options can be found in Article 71 JIL

If imprisonment is the only option the sentencing judge should bear in mind that no Children's Rehabilitation Centres as required by the JIL exist at present and so any time spent in prison is likely to have an extremely detrimental effect on a child. Any such sentence should be kept as short as possible.



CONSIDER THE IMPOSITION OF A JUDICIAL PARDON (ART 126 CPC), A SUSPENDED SENTENCE (ART 127 CPC) OR AN EQUIVALENT PECUNIARY PUNISHMENT (ART 109 PC) IF IMPRISONMENT IS THE ONLY OPTION.

Article 126 may apply to an offence under 444(1) or 444(2).



Consider whether you are required to make any ancillary orders.
Include the consideration of damages under Article 131 CPC and interdiction from Public Office under Article 102 PC if the term of imprisonment warrants it.



DECIDE SENTENCE & GIVE REASONS

- Review your decision and ensure that it is proportionate and within the guidelines prescribed by law.
- State in your decision on sentence which aggravating and extenuating factors you took into account.
- Give the reasons for coming to the decision that you have, and the same for any ancillary orders.
- Announce your decision in open court.
- Remind the offender of his right to appeal.