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INTRODUCTION

What is Criminal Procedure?

Criminal procedure is the way in which substantive law is applied. It is the way upon which the prosecution conducts its case, also the way in which the courts handle criminal matters that are within their jurisdiction. It is also the modality upon which criminal justice is put into effect. Laws concerning crimes are divided into two branches:

Substantive laws

Those which create and define offences and offer penalty/punishment to the offenders E.g. Penal Code, Cap. 16

Adjective laws

They are those, which concern with proof and procedure. They concern such matters as to how a case is to be framed, in what court it shall be tried, when is to be tried. They govern the rights of parties before, during and after the actual hearing and the role of the magistrate and police officers and witnesses in relation to the trial.

The Importance of Criminal Procedure

Criminal procedure is the procedure, which is used, in criminal cases as a means by which the public and the accused person can obtain their rights granted by law.

It shows the duties and rights of both the state and the accused person when dealing with criminal offences.

It strikes a balance between an individual's liberties versus public interest. An individual's liberty is safeguarded when proper rules of finding the truth are followed so that one can not be deprived his freedom without justifiable cause.

Every person is presumed to be innocent until proved guilty, thus has the right to enjoy his freedom of movement unless law curtails it. This freedom is curtailed by arrest when an individual is suspected to have committed an offence. Thus it is important for police to have a fair knowledge of the laws governing arrest, and the use of force in effecting arrest. In addition, the officer has to know the laws concerning search of person and property. Furthermore the officer must know the rules of instituting criminal proceedings and the procedures of conducting such proceedings. This is important since criminal procedure deals with criminal trials, duties and rights of both, the State and an individual from the time one is arrested to the time the matter is final disposed off, i.e.; from arrest to judgment or withdrawal.

It is therefore our responsibility to know, adhere and to implement the law of criminal procedure so as to be able to help in the administration of justice in our various offices.

Sources of Criminal Procedure

Criminal Procedure Act, Cap.20

This is the main source of criminal procedure, which is more detailed and exact. Its contents fall into two categories:

a) It contain mandatory provisions for those involved in criminal trials as to what shall be done in certain circumstances, hence if these provisions are not adhered to then the trial become a nullity.

b) Those provisions, which are discretionary as to what action, may be taken. These provisions may permit a magistrate to act within certain defined limits. E.g. the power to sentence

The Legislations

There are other enactments, which are relevant to the effect of criminal trials, these include;
The Magistrate's Court Act, Cap.11

The Minimum Sentence Act, Cap.90
The National Security Act, Cap. 47
The Economic and Organized Crime Control Act, Cap.200

International Law

The world is slightly becoming homogenous, thus the laws dealing with; piracy genocides, money laundering and laws dealing with extradition.

NB: *These laws are not universally applicable; the country has to sign a treaty.*

Case laws

The subordinate courts are bound by the decisions of the superior courts under the doctrine of judicial precedent; these decisions are of two kinds:

a) Those, which affect the interpretation of the CPA.

b) Those, which affect matters relating to criminal procedure which are not contained in the CPA.

Court system

In Tanzania we have two sets of laws that create the court system we have. On one hand we have the constitution of the United Republic of Tanzania, which create the Court of Appeal of Tanzania and there are other statutes that create courts to deal with subordinate courts and other courts to deal with specific offences or specific type of persons.

The Court of Appeal of Tanzania

The court is established under Art.117 of the Constitution, Cap. 2. It was established in 1979 after the collapse of the East Africa Community. The C.A.T. is empowered with:

a) Jurisdiction to hear appeals from the High Court and subordinate court with extended jurisdiction.

b) Jurisdiction to revise the decision of the above said courts as per Appellate Jurisdiction Act 1979 as amended in 1994.The C.A.T. has no original jurisdiction. The C.A.T. is the highest and final court of appeal in every case except:

   i) It cannot determine cases involving Islamic matters from Kadhi's court, as per s.98 (2) (a) of Constitution of Zanzibar.

   ii) It cannot hear and determine cases involving the Government of Tanzania and Zanzibar per Art.117 (2) C.U.R.T. Such cases are reserved for the Special Constitution Court per Art.125C.U.R.T.

The High court

It was established under Art.108 C.U.R.T. According to S.2 of the Judicature and Application of Laws Act, Cap.453, the High Court has unlimited jurisdiction and also has original jurisdiction on certain cases where the law expressly states so, as per Art.108 (2) C.U.R.T.

The High Court has the following powers:

a) Has power to determine appeals from subordinate courts under SS.359 CPA; 25(1)(a), 43(1), 31 and43 (2) of the M.C.A

b) Has a revisionary power of decisions of subordinate courts, as per SS.372 C.P.A; 43(2), and 31 M.C.A.

c) Has a supervisory power over the subordinate courts per SS.30 and 44(1) (a) M.C.A.

The Resident Magistrate's Courts:

The RM'S court is established under section 5 MCA by the order of Chief Justice. This order must be published in the Government Gazette and must specify the designation and area of jurisdiction as per SS.5 (1), (2) and (3) M.C.A. The powers of the RM'S court are;

a) RM'S court and District courts according to S.41MCA are empowered to exercise the same powers.

b) RM in charge has the revisionary powers per SS. 44(2)(3) and 30(2)(a) MCA.

c) RM can be given extended jurisdiction per SS.45 MCA and 173 CPA.

District Courts

District court is established under S.4 MCA. The DC normally exercise jurisdiction within the relevant district unless such jurisdiction is extended by the Chief Justice as per S.4 (5) MCA.

District courts have the following powers:

a) Powers to try all cases covered by the Penal Code or other cases specified by any other law, SS. 40(1) and 42(a) MCA.

b) Powers to hear appeals and revision over the decisions of the primary courts in their relevant districts SS.20-22 MCA.

c) Powers to sentence convict brought to them by primary courts under the Primary Court Criminal Procedure Code.

d) Appellate powers on all matters involving points of law from the Ward Tribunal under the Ward Tribunal Act, 1985.

Primary Courts

Primary courts are established under S.3 MCA, however the CPA does not govern them but the Primary Court Criminal Procedure Code governs the procedures, which is the third schedule to the MCA.

Primary courts are required to sit with two assessors and before the final verdict is passed, the magistrate must consult them as per S.7 (1) MCA and Rule 3 of GN.No.2of 1988.

Primary courts have no general criminal jurisdiction except for what is covered by the first Sch. to the MCA as per S.18 (1) MCA. Under S.18 (3) MCA the minister may increase the list of offences triable by the primary courts where he deems fit.

Primary courts act as a final court of appeal from all appeal originating from the Ward Tribunals in their respective areas as per Ward Tribunal Act, Cap. 206. However, where the primary court specifies that a particular matter involve a point of law a further appeal may lie to the Primary court under S.20 of the Ward Tribunal Act, Cap.206.

Other criminal courts

Court Martial and Court Martial Appeal Court:

Court martial are military tribunals, which are trying servicemen who commit service offences in their course of duties or assignments. The National Defense Act, Cap. 192 creates these tribunals. Regulations of procedures are made under S.66 N.D.A. The president under S.96 NDA convenes the tribunals. These tribunals have exclusive jurisdiction to deal with service offences as per Art.111.5 of the Regulations.

Appeals from the decision of the court martial go to the court martial court of appeal, which is in the actual sense the full bench of the High Court. Per S.146 N.D.A

Economic Crimes Court

This court is established under S.3 of the E.O.C.C.A. 1985, general it is the High Court sitting as an economic crimes court, and its constitution include one judge and two laymen u/s.4 E.O.C.C.A.

Under S.13 (3) due to amendments made in 1987, District Courts can now sit as economic crimes courts, subject however, under the certificate of the D.P.P.

Juvenile Courts

These courts are established under the Children and Young Persons Act Cap.13 to deal with juvenile offenders. Normally the District Courts in Tanzania are juvenile courts. The aim here is to save the children from the rigors of procedures involved in respect of adults, thus a need to establish special courts for that case, also this is in line with international laws on the rights of children.

Jurisdictions

Meaning of jurisdiction

Simply jurisdiction means the extent to which or limits within which a court can lawfully exercise its powers. It is the powers and limits of courts, magistrates or judges to entertain cases and pass a particular sentence. The law must prescribe these powers or limits and the court must make sure that it has power before exercising such jurisdiction. Read **R.V. Samwel [1982] TLR324.**

The limits of the court may be geographical or pecuniary or categories of cases to be entertained by such courts. Thus it is very important for the magistrate before taking cognizance of any case to make sure he/she has jurisdiction to entertain such case. The consequences of trying a case without jurisdiction is that any decision made by a magistrate will be illegal and with no legal effect.

Types of Jurisdiction

Original Jurisdiction

Original jurisdiction refers to the powers conferred on a court to try a case at a first instance. By this we mean that a case must be instituted and tried by a lower court first, and if a need arise, move to the next court higher in ladder. This can be by way of appeal, revision or transfer.

The court enjoying original jurisdiction has several powers, such as issuing necessary court processes, e.g.; warrant of arrest, search warrant and summons. However even if the court is not empowered to exercise original jurisdiction, it can issue court processes E.g. primary court has no power to entertain murder cases, but can issue warrant of arrest to apprehend the suspect of murder.

Appellate Jurisdiction

This is the power given to a higher court in a ladder to deal with a case from a lower court sent to it by way of an appeal. According to Art.13 (6) (a) C.U.R.T. appeal is a constitutional right to any party to a criminal proceeding if he is aggrieved by a decision of a court. The court on appeal may exercise the following powers:

- May maintain, alter or reverse the lower court's finding and or Sentence.
- May acquit or discharge the accused and thereby order a retrial, or direct for committal proceedings or make any amendment or any consequential or incidental order that may appear just and proper under the circumstances of the case. Read ss.366CPA and 21, 29, MCA.

The appellant may further appeal to the next higher court if not satisfied. This depends on a number of circumstances e.g.; it is not possible to appeal beyond the Court of Appeal; this is the final court in the ladder. Another instance is where the High Court certifies that no point of law is involved and the matter originates from the Primary Court, or where the High Court rejects the appeal summarily under s.364 CPA.

Extended Jurisdiction

This is the type of jurisdiction that is conferred on magistrates. This jurisdiction is given when the minister responsible for legal affairs extends the appellate or ordinary jurisdiction of a Resident Magistrate under section 45 MCA or 173 CPA. This enables the magistrate to be able to hear appeals or to determine any categories of offences or cases other wise determinable by the High Court.

Once the jurisdiction has been extended, the magistrate carries all the powers, limits and duties per section 174 CPA of the High Court in terms of trying and sentencing the accused.

Revisionary Jurisdiction

This is the power of the higher court to call for the records of any criminal proceedings before any lower court for the purposes of ascertaining the regularity of the proceedings, correctness, legality or propriety of the subordinate court's finding, sentence or order recorded or passed in respect of the proceedings.

If during revision the court finds any error, it is empowered to correct it for the interest of justice. In calling for the records, the court may act on its own motion or of the parties or of the court that dealt with the proceedings.Ss.372-376 CPA &Ss.22-31 MCA.

Summary Jurisdiction

This is the power of the court to deal with the case without taking evidence. Normally this happens when dealing with petty offences. The court is only allowed to exercise this power when it is fully satisfied that the allegations are true and the decision will occasion no injustice to the parties. E.g.; contempt of courts S. 213 CPA.

Sentencing Jurisdiction

When it comes into the question of sentencing, some courts have limited powers—S 170 CPA. When the circumstances calls for a greater punishment the accused must be committed to the High Court for sentencing-S170 CPA. Where the magistrate is exercising extended jurisdiction, the sentence of death passed shall have the same effect as the one passed by the High Court-S175 CPA. Act No.32/94.

Committal Jurisdiction

This is a situation where a subordinate court undertakes preliminary inquiry over a case in order to ascertain whether sufficient evidence exist so as to send the case to the higher court for trial. Normally all cases triable by the High Court should be initiated by way of committal proceedings in the District Court. Ss. 243-263 CPA

Exclusive Jurisdiction

This is the power given to certain court to try certain cases. E.g., offences punishable by death are exclusively domain of the High Court; service offence cases against military men in the course of their duties are exclusively triable by the court martial under the National Defense Act.

Concurrent Jurisdiction

In criminal cases, criminal courts are empowered to try certain matters concurrently. E.g., High Court enjoys concurrent jurisdiction with other subordinate courts to try all cases triable by such courts, as per section 164(2) CPA, First Sch. to the CPA & section 63 MCA.

Pecuniary Jurisdiction

This is the limitation of power of court by the value of the subject matter E.g. in civil matters. In criminal matters pecuniary jurisdiction applies to sentences of fine by subordinate courts. S. 170 (1) CPA. For primary courts see Third Sch. MCA Part 111.

Territorial Jurisdiction

This refers to the geographical limits of the courts. It is the locality upon which a given court is to discharge its powers per section 177 CPA.

Section 6 of the Penal Code gives an exception to this class of jurisdiction to try cases committed outside Tanzania.

S.6 (b) for any offence committed by a citizen of Tanzania.

S.6(c) for any offence committed by any person on an aircraft registered in Tanganyika.

In the case of **Nestory Lutta v. R. Cr.App.No.186/87 (HC) (MZ*)***, the appellant and two others were charged with robbery with violence c/ss.285&286 of the Penal Code. The first accused was acquitted while the second accused and the appellant were found guilty and convicted. According to the established facts, the alleged offence was committed at MSIBA village, RUNGA region in the Republic of BURUNDI. The issue was whether the NGARA District court in KAGERA region in TANZANIA had jurisdiction to try the case. MWALUSANYA, J. held that under section 177 CPA two situations might confer jurisdiction:

a) Where the offence is committed within Tanzania and the accused is within the local limits of the court's jurisdiction.

b) Where the offence is committed outside Tanzania but some law confers jurisdiction to the court to try the case.

The first situation is less problematic.

The second situation needs a specific law that should confer jurisdiction upon the court to try the case. According to MWALUSANYA that law is contained under section 6 of the Penal Code particularly S.6 (b) &(c).

In regard to subsection (c) the judge held that the provisions were restricted to international law crimes like, piracy, hijacking, slave trade as well as injury to submarine cables.

R.V. Ismail s/o Hamisi (1969) HCD No. 8 accused pleaded guilty in a district court to a charge of intentional endangering the safety of persons traveling by railways c/s 224(2) P.C.

It was held that the criminal code requires that such offences be tried by the High Court. A District Court may hold preliminary inquiry and commit the accused to the High Court, but may not take a plea or sentence the accused.

R.V. Pangavas s/o Liprima (1968) H. C. D. No 178 after convicting the accused of causing death by dangerous driving. The District Magistrate doubted whether he had jurisdiction to have ever heard the case. Accordingly he forwarded the proceedings to the High Court for necessary action in revision.

S.44 (2) of Cap.68 provides for the hearing of cases such as this one by Resident Magistrate. This term only embraces RM'S and SRM'S. As the DM had no jurisdiction to hear the case, the proceedings were declared a nullity and purported conviction quashed

POWERS AND DUTIES OF POLICE OFFICER WHEN MAKING INVESTIGATIONS

Introduction

For a case to be prosecutable, sufficient and detailed facts about the alleged crime, the accused person, the victim, locality of the crime (*locus on quo*), the time and witness, must be known to the prosecutor. The reason is that the case for the prosecutor must base on concrete facts and findings. For this reason therefore, it is always important to carry out a systematic examination/study of the criminal allegation before making the decision to prosecute, unless the accused is caught red handed or in front of a willing witness.

Investigation is usually carried out by the police department in the powers conferred to it by the Criminal Procedure Act, and The Police Force and Auxiliary Services Act, Cap. 322 and other public officers may as well carry on investigation, particularly, public officers with responsibilities to enforce specific laws, such as customs and tax laws, Ant-Corruption Bureau.

Police when making investigations have to bear in mind provisions of the Constitution of the United Republic of Tanzania, regarding human rights like presumption of innocence and the right of enjoyment of freedom. Also they have to bear in mind provisions regarding human rights provided in the International Instruments like The Universal Declaration of Human Rights—Art.11 (1), 10, & 12, International Covenant on Civil and Political Rights—Art.14, The African Charter on Human and People's Rights—Art.7 (1) on presumption of innocence, public trials.

Powers of the Police

According to section 5(1) of the Police Force and Auxiliary Services Act, the police are allowed to use force under the following circumstances;

- For the purpose of preserving peace,
- Maintenance of order
- For the purpose of prevention and detection of crimes
- The apprehension and guarding of offenders
- Protection of property.

The provisions of section 27(3) CAP. 322 provides that any police officer is duty bound to take all necessary steps to prevent the commission of offences and public nuisance and to apprehend all person whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exists.

In performing the powers imposed on him, police officer is required to comply with PART II of the CPA. Failure to comply with this part will render the officer to be prosecuted for criminal trespass and also on civil action.

Inspector General of Police is empowered under section 7(2) CAP. 322 to make orders for general administration of the police force, ranks, duties, enlistment, transfers etc.

Powers to Receive Reports and Information

Any person who becomes aware of an offence punishable under the Penal Code, then according to section 7(1) (a) CPA is duty bound to give information to the police officer, or a person of authority to such locality. A person of authority may be a ten-cell leader, village chairman, ward and divisional secretaries and justice of peace. This report is known as First Information Report (F.I.R.). This report is normally produced at the trial. This practice was said in the case of **Shabani Bin Donald V R (1940) EACA 60,** where it was said;

> *"…In case like this, and indeed in every case, in which an immediate report has been made to the police by some one who is subsequently called as a witness evidence of the details of such report (save such portions of it as may be admissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most*

valuable, sometimes as corroboration of the evidence of the witness under section 157 of the Evidence Act…. and sometimes as showing that, he is now purporting to identify a person who he really did not recognize at the time…."

According to section 7(2) CPA, the reports given to the police by such person about a crime are fully protected by the law; such reports are free from civil or criminal proceedings and as such are privileged or justified. In the case of **Yohana Mujuni V Isaya Bakoli (1969) HCD. No.23**, the plaintiff sued the defendant for defamation, malicious prosecution and trespass. The parties were neighbours whose relation had all along been characterized by disputes. Such relation in one occasion compelled the defendant to report to the police that the plaintiff had threatened violence to his person c/s 89(1) PC. The police arrested the plaintiff and put him in prison for two days on top of a criminal charge against him. The defendant with the assistance of the police officers also uprooted his crops with the view of making good the dispute. But at the end of the day the plaintiff was acquitted of the criminal charges. He then sued the defendant for damages. The District Court awarded damages for uprooted corps but deferred him on other claims to loss of work and defamation. This position was upheld by the High Court on the ground that the defendant reported to the police an alleged offence and the police then took the action, which injured the plaintiff. The defendant had done what is perfectly justified, that is to say, to make a report that the appellant had been threatening him with violence, which is in law amounts to a crime. This case shows that in absence of an actual malice when a report is made to the police, no liability will arise to the reporter.

Another case is that of **Tumainiel V Aisa d/o Isaia (1969) HCD No.290**, where the parties were quarrelling over a custom that a person who makes unproven allegation should be condemned to compensate the other for injuries done to his person and reputation. The High Court overruled that custom in favor of modern criminal law and procedure which require that where there is a reasonable suspicion that an offence has been or is likely to be committed, a citizen has a duty to report the same to the police and he will not be liable for the allegation(s) even if the same is not formally proved, unless is maliciously instigated.

Furnishing false information could be punishable under section 102 or 106 PC. In this case the person affected by the information may sue the false informer for damages ensuing there from, particularly if the information results into an arrest and/or prosecution of another person.

How to Deal with Criminal Information

Information regarding to the commission of an offence may be given orally or in writing to a police officer, and the receiver of that information has to record it in the manner prescribed under section 10(3) CPA--S.9 (1) & (2) CPA. Then an entry in the R.B; name of the reporter, name of the victim, suspect of the offence committed, place and time and the name and rank of the officer receiving the information.

Police officer is empowered under section 10(1) CPA to visit the scene of crime, make investigation and arrest the offender.

Any police officer conducting an investigation is empowered under section 10(2) CPA to order in writing any person who is within the limits of the station and who is acquainted with the circumstances of the case to attend before such police officer. And the person so acquainted shall attend.

According to section 10(3) CPA the police officer is required to examine orally any person who is acquainted with the facts or circumstances of the case. And then he (the police officer) is supposed to reduce into writing any statement made by such person so examined. The statement may be in English or Kiswahili or in any other language familiar to the person examined. After recording such statement, it has to be shown or read over to him and such person shall be at liberty to alter or correct the statement. He (the person making the statement) signs that statement immediately below the last line and may call upon any person in attendance to sign as a witness of his signature.

The police officer recording the statement will put the following certificate below each statement;

"I…. hereby declare that I have faithfully and accurately recorded the statement of the above named…."

The police officer is required under section 10(4) CPA before writing the statement, to caution the person examined/interviewed to answer all questions and tell the truth even if they expose him to a criminal charge, penalty or forfeiture.

Police officers under section 10(5) CPA are not allowed to offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence, so that he can make any statement with reference to the charge against him.

According to section 10(6) CPA statements taken by police officer in the course of investigation may be used in court subject of course to the rules of adduction and reception of evidence, however it should not be used for the purpose of corroborating the testimony of that person in court.

Section 10(7) CPA provides that, the production of a certified copy in any proceedings of the information referred in section 9 and section 20 will be a prima facie evidence of the fact that the information was given or the statement was made to the police. It is further provided that it is not necessary to call the police officer that recorded such statement as a witness solely for the purpose of producing the certified copy.

Powers to Investigate

The police officer is required to proceed to the scene of crime after receiving a report about the commission of any offence and to investigate the facts of the case, and circumstances of the case. Furthermore according to section 10(1) CPA the officer is required to take all necessary actions for the discovery and arrest of the offender.

The facts and circumstances of the case may require either a warrant of arrest or search warrant to be issued for the discovery and apprehension of the offender. If the victim was injured PF 3 has to be issued. It is advisable that a complicated case be investigated by a police officer that is higher in rank.

Powers to Interrogate

When the police officers are looking for the circumstances, which led to the occurrence of the offence, they need to interrogate people who are familiar with the case. The police officers are empowered to summon any relevant person within the local limits of their police station or any of the adjourning stations to appear before them for the purpose of examination as to the facts and circumstances of the case—S.10 (2) CPA. Such person so summoned must attend as directed failure of which could attract charges such as failure to obey lawful order c/s 124 PC.

After the attendance of that person, the examining police officer is supposed to reduce into writing any statement made by a person examined including the clarification as per section 10(3) CPA, just like writing a statement.

Before examination it will be the duty of the police officer to inform the person examined that he is bound to answer truly all questions relating to the case put to him by the police officer. And that he may not decline to answer any question relating to the case put to him and that he may not decline to answer any question on the ground that the question has a tendency of exposing him to a criminal charge, penalty or forfeiture—S.10 (4) CPA.

Powers to Ask Questions and Make Other Investigation Actions

According to section 48(1) CPA, a police officer is empowered;

- To ask questions
- To take other investigative actions;

in respect of any person who is under restraint in respect of an offence. The police officer is required to abide by the time/period available for interviewing of the person and not otherwise.

The period available for interviewing a person according to section 48(2) CPA, shall not be taken to:

- Make lawful the holding of the person under restraint during any period otherwise such provision, which make lawful the holding lawful.
- Authorizing the asking of any question or taking of other investigative action in relation to the person during a period of the investigation within which case those provisions which led to the holding and asking questions or taking other investigative actions will turn the holding of that person under restraint unlawful.

When a Person not to be Taken Under Restraint

Section 49CPA says that, a person who has previously been under restraint in respect of any offence shall not be taken under restraint, except under the following reasons;

- A police officer does so in consequence of matters that have come to his knowledge after the person last ceased to be under restrain.
- Reasonable periods have passed since the person ceased to be under restraint.

Period Made Available for Interviewing Persons

According to section 50(1) CPA, the basic period available for interviewing the person is four hours. This period of four hours will commence at the time when such person was taken under restraint in respect of the offence.

When the basic period under section 51(1) CPA expires;

- Such police officer may extend the time to eight hours, but must inform the person to be interviewed accordingly;
- The police officer may make an application before the magistrate either before the expiration of the original period or that of the extended period for further extension of the period.
- According to section 51(2) CPA, where the police officer extends the period frivolously or vexatious, the person whose basic period is so extended may petition for damages or compensation.
- Where the application by a police officer has been made to the magistrate to extend the basic period, according to section 51(3) CPA he is supposed to give the person or his advocate an opportunity to make submissions in relation to the application and if satisfied that:
  - The person is in lawful custody
  - The police are doing their best to make sure that the investigation is being carried out as expeditional as possible,
  - Given the circumstances, it would be proper to extend the period may proceed to extend the time for such further period as the court deem reasonable.
- Section 50(2) CPA, provides that in calculating the basic period for the interviewing, the following periods should not be counted as part of the interview;
  - The time when the person is being taken to the police station provided that the police officer escorting that person does not ask him questions.
  - The time that person takes to arrange for his lawyer.
  - The time the police takes to communicate with a lawyer a relative or a friend as requested by such person to do so under section 54(1) CPA.
  - The time that person takes to communicate with any person whom he is legally entitled to communicate.

- The time taken to arrange for a person who is required by law to attend during the interview.
- The time spent for waiting for his lawyer or any other person authorized.
- The time spent by the person under restraint in consulting with his lawyer.
- The time that person is caused to do any other act of investigation action.

Duties When Interviewing Suspects

According to section 52(1) CPA, police officer is empowered to ask suspect questions, this section also binds the police officer to inform the suspect that he has the right to refuse to answer any question put to him. This will apply on whether the police officer believes with reasonable grounds that the suspect has committed a serious offence or that such information is really implicating the suspect in the commission of a serious offence. This procedure is not applicable to those offences under section 14 CPA.

When the police officer has informed the suspect that he has the right to refuse to answer any question put to him such police officer shall ask the suspect to sign or thumb print an acknowledgement that he (the suspect) has been informed of this right. The acknowledgment has to be in a prescribed form, bearing the date on which and the time at which he is so informed—S.52 (2) CPA. The form is prescribed in PGO 235.

The court may reject the evidence if the police did not follow/comply with the provisions of section 52(1) (2) CPA. If the police fail to produce the acknowledgement to show that the person was informed, the court shall presume that the person was not so informed unless the contrary is proved —S.52 (3) CPA.

Section 52(4) CPA applies where the suspect refuses to answer questions or disclose any information while the police in course of interrogation believe that such suspect has committed an offence and there is sufficient evidence against him, then the police officer shall charge him accordingly and caution him either orally or in writing. The police officer is required to inform the suspect that failure to answer such questions or disclose any information an adverse inference may be drawn to him and hence may be charged at that stage. However this is only done where there is eminent evidence implicating the suspect but such suspect is refusing to answer the questions put to him knowing that the answers may directly implicate him.

Persons Under Questioning to be informed their Rights

According to section 53 CPA, police officer is not allowed to ask any question to a person under restraint or do anything in connection with an offence unless he (the police officer) has complied with the following;

- Such police officer has informed him his name and rank
- Such police officer has informed him in the language he is fluent and if possible orally, that he is under restraint, and the offence for which he is under restraint.
- Such police officer has cautioned him and in the language that he (the suspect) is not obliged to answer any question asked other than a question seeking particulars of his name and address. He may communicate with a relative or a friend. This caution may be either in writing or orally.

The Right of a Suspect to Communicate with a Lawyer or a Relative

Section 55(1) CPA, requires that all persons under restraint should be treated with humanity and with respect to human dignity.

Section 55(2) CPA, prohibits persons under restraint to be subjected to cruel, inhuman or degrading treatment. Example of these acts may be beating, electrification and any other type of torture.

According to section 55(2) CPA, the police officer is required to take reasonable action to ensure that if the person under restraint request to be provided with medical treatment, assistance or advice in respect of illness or an injury is provided with such service. Also this applies where it appears to the police officer that such person under restraint requires medical treatment, assistance or advice in respect of illness or injury.

Recording of Interviews

When a police officer is interviewing a person in order to ascertain whether he has committed an offence has to record or cause such interview to be recorded. This requirement is mandatory unless it is in all circumstances impracticable to do so. According to section 57(2) CPA, when the person interviewed in order to ascertain whether he has committed an offence, makes a confession either orally or in writing relating to an offence, the police officer shall either immediately during the interview or immediately after the interview is completed make a record in writing setting out the following;

- The questions he asks and the answers given by the person
- The particulars of any statement the person make which is not prompted by a question from the police officer
- If the person writes a statement in his own hand during the interview, the time he started writing the statement
- The caution given to the person before he made the confession, the time it was given and the answer given by the person to the caution
- The time the interview started and the time when it was completed, if there was any interruption in between, the time it was so interrupted and recommenced.

After recording the interview, according to section 57(3) CPA, the police officer is required to write or cause to be written at the end of the record a certificate in accordance with the prescribed form and if the person can read then he shall;

- Show the record to the person and ask him to read it and make alterations, corrections or additions he thinks fit
- Sign the certificate at the end of the statement
- If the record extends more than one page, then he should initial each page.

If the person refuse or fails to comply with such requirements the police officer shall record in the statement what he has done and the refusal or failure to comply with the requirements.

When the person interviewed is unable to read or refuses to read or appears to the police officer not to read the record when it is shown to him, then according to section 57(4) CPA, the police officer shall;

- Read the record or cause the record to be read to the accused
- Ask the person if he want to alter, correct or add anything to the statement
- Make such alterations or additions the person want to make
- Ask the person to sign at the end of the record
- The police officer shall certify at the end of the record what he has done in compliance with this section.

Statement by Suspects

If the person under restraint inform the police officer that he wishes to make a statement then according to section 58(1) CPA, the police officer;

- Shall furnish him with any writing materials

- If the person has been cautioned before he proceeds to write the statement he should set out the terms of the caution made to him as far as he recalls.

According to section 58(2) CPA, where a person under restraint furnishes the police officer with a statement that he has written out, the officer shall write or cause to be written at the end of the statement a certificate in a prescribed form as required under section 57(3) CPA.

When the person under section 58(3) CPA refuses to read or appears to the police officer not to read a statement shown to him then the same procedure as provided under section 57(4) CPA, will apply.

Other Investigative Actions

Powers to take fingerprints, photos etc of suspects

According to section 59(1) CPA, police officer in charge of a police station or any police officer investigating an offence has been given power to take or cause to be taken measurements of points of the hand, fingers, feet, toes, recording of the voice, photographs, samples of the handwriting of any person reasonably believed to be necessary for identification of the person for affording any other material evidence as to the commission of the offence.

The police officer in charge of a station or the police officer who is investigating an offence, may take the measurements or prints as provided above of any other person who is not charged with a crime if on reasonable ground, it is believed that it is necessary for identification of the person or for affording any other material evidence as to the commission if the offence—S.59 (2) CPA.

If a person refuses his measurements or prints being taken, then according to section 59(3) CPA, the police officer concerned may take reasonable steps including the use of reasonable force to secure such prints or measurements.

A person who refuses his measurements, prints or sample taken as required in this section is guilty of an offence, and on conviction will be liable to a fine of ten thousand shilling or imprisonment to twenty-four months or to both—S.59 (4) CPA.

According to section 59(5) CPA, a person having custody of the measurements, prints, photographs, recording or sample or their copies is required to destroy them under the following reasons;

- The person arrested is not prosecuted or if prosecuted is acquitted
- The person arrested is not charged with any offence and is no longer required to facilitate further investigation.

Power to Hold Identification Parade

The police officer in charge of a police station or the officer conducting an investigation is empowered under section 60(1) CPA to hold an identification parade for the purposes of ascertaining whether the witness can identify a person suspected of committing an offence.

The police officer in charge of a station or the officer in charge of the investigation may require any person to attend and participate in an identification parade if is of the opinion that the participation of such person is necessary for the investigation of an offence—S.60 (2) CPA.

If a person is required to attend and participate is not required to object or to refuse to attend and participate in an identification parade.

A person is guilty of an offence if without just cause or unreasonably refuses to attend and participate in an identification parade, and on conviction he will be liable to a fine not exceeding two thousand shillings or to imprisonment not exceeding six months or to both.

Conviction on Mistaken Identity

Where a person is convicted, prosecuted, punished on mistaken identity or suffers any loss or injury due to mistaken identity has to be compensated as a victim of the crime. If such person dies his legal representative will be compensated. This mistaken identity rising to compensation has to be established on evidence. The assessment of compensation and manner of payment shall be governed by section 37 CPA.

Medical Examination

Upon an application of a police officer, a magistrate may allow a medical officer to examine a person in lawful custody in respect of an offence or may allow a medical officer to take and analyse any specimen from such person if he has reasonable grounds that the examination or analysis would provide evidence to the offence—S.63 (1) CPA.

After examination the medical officer shall submit a written report to the court—S, 63(2) CPA.

The court may in any proceeding order that any person who is a party to or a witness to the proceedings submit himself for medical examination—S.69 (3) CPA.

The medical officer after examining that person the court has ordered, to transmit a written report to the ordering court—S.63 (3) CPA.

ARREST

What is arrest?

It is the act of depriving an individual his freedom of movement. Lawful arrest is the depriving of an individual of his liberty by taking him to lawful custody with a view of bringing him before a court on a criminal charge, or for the purpose of investigating his liability in respect of a criminal charge.

An arrest can either be made prior to a charge being preferred, (an arrest without warrant) or after a charge has been preferred and a warrant of arrest issued by a magistrate instead of a summons—section 13 CPA.

All arrests must be in good faith and in public interest and not maliciously or for personal interests. In all cases arrest must be made when it is absolutely necessary.

A person is said to be deprived his freedom of movement if he is put under restraint. A person is under restraint if:

i. He is in the company of a police officer for the purposes connected with the investigation of an offence and the police officer would not allow him to leave if he wishes to do so. A person is under restraint even if the police officer has no reasonable grounds to believe that the person has committed an offence or is under lawful custody—S.5(1) CPA.

ii. He is under restraint as a result of lawful arrest.

iii. Is in restraint in respect of an offence and the police officer:

   a. Have reasonable grounds to believe that he has committed an offence.

   b. Section 14 CPA would allow him to arrest for the offence.

iv. Is in restraint if he is waiting at a place at the request of a police officer in respect of investigation of an offence—S.5 (2) and (4) CPA.

Mode of Arrest

I. Normally, an arrest is made by touching or confining the body of the person to be arrested. In certain circumstances the arresting person/officer may not be able to touch the suspect, these are;

   a. The person to be arrested submits himself to custody either by words or conducts.

   b. If the person to be arrest forcibly resists endeavours to arrest him or attempt to evade the arrest. Under this circumstances the arresting officer is allowed to use reasonable force to effect the arrest—S.11 CPA

In **Beard & Another V. R. [1970] E.A.448** the appellant owned some land which he used for game conservation. The second appellant was employed to help patrol the area. Complainant was surprised setting a snare but managed to run away. He was tracked down to his area of employment. He admitted the offence and agreed to accompany the appellants back to the spot. However on reaching the spot he retracted his admission, hence the appellants decide to arrest him. They tied him in the tree with wire and put a gag in his mouth which later was removed. Complainant remained there for hours until his shouts were heard and rescued by others. Appellants were convicted of assault causing actual bodily harm and wrongful confinement.

On appeal it was held that complainant had peaceful submitted himself to arrest and should have been taken immediately to the nearest police station. There was no justification even for touching him, much less bind him to a tree.

II. It is the duty to the arresting person to tell the person to be arrested the reasons for his arrest. The arresting person must tell the substance of the offence for which he is being arrested-must be told the true reasons or grounds of his arrest. There are exception to this;

a. Given circumstances under which he is being arrested, that person ought to know the substance of the offence.

b. If he makes impracticable for the arresting person to tell him the substance of the offence, such as running away or putting up a fight against the arresting person—S.23 CPA.

In the case of **Mwangi Njoroge V.R [1954] EACA 377** the arresting officer only asked the accused his name and never questioned him until at the police station.

It was held that if a police officer arrests without warrant he must in ordinary circumstances inform the arrested person of the true grounds of arrest. A police officer is not entitled to keep the reasons to himself or give reason which is not true reason. If a person to be arrested is not given the reasons, then in certain exception, a police officer is liable for false imprisonment.

Grounds for Arrest

As said earlier, an arrest is the act of taking away of one's liberty, thus the person making arrest must consider seriously whether or not to arrest. After all, the power to arrest is only discretional —"**may**" and not "**shall**" arrest. This means that the arrest should only be made when it is necessary. Another thing to bear in mind is that the power to arrest whether with or without warrant is an alternative procedure since all criminal proceedings can be commenced by summons.

When the reason exists for arrest to be made, the following circumstances or grounds may be considered:

i. The gravity of the offence or charge and the increased likelihood of the accused to abscond.

ii. Where the summons has been issued and it is likely not to be served, e.g. where the accused is evading the service or is of no fixed abode.

iii. Another ground may be for the interest of the accused himself such as his own protection or to remove him from potential physical or moral danger e.g. persecution.

iv. Arrest may be for the end of justice e.g. to prevent the accused from disposing off evidence, stolen property, warning an accomplice or frightening away witnesses or bribing them.

v. Interest of the public e.g. if the accused is a danger to the society thus arrest is made to remove danger or nuisance to the public or the risk of the offence being repeated.

vi. The need to obtain evidence—where there is a possibility that search might reveal essential evidence e.g. stolen property, forged documents, instruments of forgery etc.

vii. The need for corroboration e.g. as to physical conditions of the accused person, to verify address, to obtain fingerprints, to conduct identification parade or to pursue inquiries regarding other offences.

Thus it is important for the arresting person to consider serious whether it is important to arrest or not. The arresting person should not exercise these powers—which are enormously—without reasonable grounds.

Types of Arrest

Arrest with warrant

The warrant of arrest is issued by a magistrate. Any magistrate is empowered to issue a warrant of arrest after:

i. A complaint has been made upon oath or by a police officer or by an authorized officer of a local authority. The complaint should state that the person to be arrested has or is reasonably suspected to have committed an offence.

ii. A warrant of arrest may be issued after a charge has been signed by the magistrate to compel the attendance of the accused person—Ss 110 &130 CPA.

iii. A warrant of arrest may be issued by a magistrate, ward secretary or secretary of a village council, pursuant to information on oath that a person on reasonable ground has committed an offence.

Arrest without Warrant

This type of arrest is made for arrestable offences i.e. those offence which a police officer may arrest without warrant—S 2 CPA.

There are a varieties of offences stipulated under the ***Criminal Procedure Act*** for which a police officer, magistrate, private person, regional commissioner and district commissioner may arrest without warrant, those are offences under sections 14, 16, 17, 18, 25, 28 and 26 & 1st Schedule to the CPA Parts A & B.

Categories of persons who can effect arrest

Arrest by police officers

Generally, powers of police officers to arrest any person suspected of committing an offence are provided under section 14 of the CPA. Under this section, a police officer may arrest any person without warrant who commits cognizable (arrestable) offence as listed in the 1st Schedule, Parts A&B to the CPA. A police officer may also arrest a person who commits a warrant (non-cognizable) offence in order to ascertain the offenders name and residential address—S.29 CPA.

Arrest by private persons

Any private person is empowered under section 16 CPA to arrest another person who in his presence commits any of the offence which a police officer may arrest without a warrant. Section 22 CPA protects private person who has arrested another person if later it is found that the person arrested had in fact committed no offence.

Arrest by magistrate

Any magistrate is empowered to:

a. Arrest any person whom he reasonably believes that he has committed an offence within the local limits of his jurisdiction.

b. Issue a warrant to direct the arrest of such person

c. Arrest any person who commits an offence in his presence—S.17 & 18 CPA.

Arrest by Regional and District Commissioners

The arrest by Regional Commissioner is provided under section 7 of Cap. 461. The arrest by District Commission is provided under section 7 of Cap. 466.

Treatment of persons under arrest

All persons under restraint must be treated with humanity and with respect to human dignity. No inhuman or degrading treatment or cruelty should be done to a person under restraint.

Any police officer should take all reasonable actions as is necessary to ensure that any person under restraint who request to be provide with medical treatment, advice or assistance in respect of an illness or an injury is provided as required—S. 55 CPA.

Any person arrested of an offence or involved in criminal investigation should be treated with utmost humanity and all kinds of unpleasantness should be avoided—Article 13(6) (d) COURT.

Disposal of arrested persons

i. All persons arrested, as a general rule, should be properly and speedily disposed off, either by;
   a. Absolute release
   b. Release on bail
   c. Taken to court within 24 hours after arrest or as soon as practicable—S.33 CPA.

ii. Section 30 CPA provides that persons arrested by police officers should be sent to the nearest court within the jurisdiction of the police station.

iii. Under section 32 CPA a person arrested without warrant for offence which is not serious may be release on bail.

iv. Persons arrested with warrant;
   a. The officer to whom the warrant is directed may take security and release the arrested person from custody under section 113(1) CPA.
   b. The officer executing the warrant shall without delay bring the person arrested before the court—S.118 CPA.
   c. Arrested person may also be released on police bail—S.64-79 CPA.
   d. Those arrested by magistrate—S.55 MCA.

NB where a person is held longer than 24 hours without appearing in court he is entitled to apply for Habeas Corpus.

Unlawful arrest

Unlawful arrest results from contravention or failure to comply with the provisions of the law of Criminal Procedure concerning arrests. Every arrest is a personal responsibility of the person who makes the arrest. Unlawful arrest results from:

i. Arresting a person without a lawful authority.

ii. Arresting a person without informing him the grounds for his arrest.

iii. The use of unlawful, unreasonable or unnecessary excessive force in arresting.

iv. Unlawful detaining him for a longer period without releasing him on bail or taking him to court.

v. Subjecting the suspect to unnecessary restraint, indignity treatment, cruelty and inhuman acts.

Effects of unlawful arrests

i. Being criminal charged for assault, homicides, wrongful confinement, abuse of office, malicious damage to property etc.

ii. Being sued in civil for torts, like assaults, false imprisonment, malicious prosecution, trespass on land or goods etc.

iii. Being charged disciplinary for professional misconduct.

iv. Being beaten up such as in self-defence, mistaken as a thief or rogue.

In the case of **R.V. Nicas Lulenga [1983] TLR 434**, the accused was charged with unlawful wounding with an arrow during an attempt by police to arrest him. Police approached accused's house secretly and surrounded it apparently to surprise him. Accused being unaware of the nature and character of those purporting to arrest him, chose to resist the forceful attempt to arrest him in self-defense.

During the trial there was no independent corroboration to support prosecution's claim that the accused was warned to surrender before any force is used.

It was held that in determining whether the arrest was lawful, the court does not have to be satisfied that the accused was guilt of an offence. Where there is evidence that the police were acting as law enforcement officers, the court is entitled to assume that they were acting lawful, the accused need not know that the arrest is lawful, all he has to know is the intention to arrest him.

> *Since the accused used an arrow to answer the might of a gun, it can not be said that he exceeded himself in doing what he did.*
>
> *In law every person is entitled to defend himself and his property against unwarranted attack so long as he uses no more than reasonable force;*

In the case of **Joseph Adu V. The Queen (1954) 14 W.A.C.A 462**, it was said that a person who is being unlawful arrested has an inherent right to defend his liberty with reasonable force, if he oversteps the bounds of reasonable force and thereby causes the death of the person seeking to arrest, the offence is manslaughter and not murder.

From the above authorities we see that if a police officer is acting unlawful, and, it happens that he is injured, he will have no remedy in law than being charged disciplinary for professional misconduct. Even where he intends to effect an arrest and he is killed, if it later transpires that the arrest was unlawful, the accused will only be guilty of manslaughter and not murder, since in law a person has the right to defend himself from unwarranted arrests.

Use of force in making arrest

As said earlier, the provisions relating to arrest are not mandatory but discretionary, hence when circumstances become clear that arrest must be made, the arresting person is allowed to use force. When physical force is to be used in effecting arrest, it must be proportionate to the force and the circumstance of the case.

The use of force in effecting arrest is governed by section 21 CPA whereby a police officer or any other person is required not to use excessive force than is necessary to make the arrest or to prevent his escape after he has been arrested. Furthermore a police officer shall not in the course of arrest do the act likely to cause the death of that person, unless on reasonable grounds, he believes that it is necessary to protect the life or prevent serious injury to other persons.

In considering whether the degree of force used was reasonable or means used were necessary, courts normally look at the gravity of the offence which had been or was being committed and the circumstances in which such offence had been or was being committed by such person.

In **R.V.P.C Jones Wambura 1978 L.R.T. N.** *52*, while chasing the deceased, the accused shot a pistol in the air twice while giving order for the deceased to stop, but the order was not heeded. He aimed the third shot above the deceased's head which become the fatal shot. Accused was charged with murder. In this case the judge held that:

- *The gravity of the offence committed must be taken into account when considering whether the means used to effect an arrest were in the circumstances necessary.*
- *The accused did not act unreasonably in arming himself with a pistol when he was going to confront a man he suspected of a burglary.*
- *Since the deceased was determined to evade arrest it was not unreasonable given the distance, to shoot above the deceased's head.*
- *The degree of force used was not excessive.*

In the case of **Mohamed Ally V. R. (1969) HCD No. 54,** the appellant was convicted of unlawful wounding c/s 228 PC and sentenced to nine (9) months imprisonment. Appellant had a coconut

shamba and for sometimes had been troubled by thieves. On the day in question he decided to mount guard with a shot gun. He heard sounds and fired his gun and wounded the complainant.

The court held that if a person attempt to avoid arrest, he was entitled to use reasonable force to arrest. He was not reasonable because he could have fired in the air before aiming.

Another case which is concerned with the use of force in effecting arrest is **R.V Kayanda (1070) HCD No.147,** where the accused was charged with murder. The facts were that, accused's father house had been broken and Tshs. 2,000 stolen. The father told the accused about the theft, who set out to look for the thief. The accused met the deceased on a road with a handbag. He told the deceased that he suspected his handbag. On reaching a nearby bush, the deceased stopped and said "if you follow me I will stab you" since he had a knife. Accused picked a stick and followed the deceased. Deceased hide himself in the bush and while the accused holding a knife ready to strike. Accused hit the deceased with the stick he was holding, deceased fell to the ground, and he later died from the blow.

The court held that the accused was acting lawfully under section 16 CPA in that he spoke to the deceased, told him that he suspected him. He walked some distance with the deceased, and the deceased ran away in the bush dropping the bag. The fact that the accused was only armed with a stick which he picked on the way when he was threatened shows that the instrument was not unreasonable.

See also PGO 276 *use of Arms by Police Officers.*

SEARCH

What is search?

Search in general or ordinary meaning means to look over or through in order to find something. In criminal investigation it means the examination of person's body or premises with a view of discovering some evidence for the purpose of connecting the person with the offence suspected to have been committed.

Authority to search is provided under the CPA and the PGO. The police officer is empowered to search persons, premises, stop and search and detain vehicles, seizure of offensive weapons, search in emergency, inspection of licenses and search of vehicles.

Search of Persons

Search of persons is conducted in order to obtain and preserve evidence connected with the crime. Evidence connected with the crime may be a thing stolen or unlawfully obtained. Search is also conducted for the purpose of protecting the suspect or to avoid injury to others.

Under sections 27 and 41 CPA police officers are empowered to search a person and place in safe custody all articles other than necessary wearing apparel found on that person. The search is also done after a person has been arrested by a police officer or by a private person and handed over to the police officer.

According to section 27 CPA, the police officer or any other person making the arrest is empowered to take from the arrested person any offensive weapons and deliver them to the court.

Section 26 CPA provides that a woman should be searched by a fellow woman. This provision is mandatory, and strict regard has to be paid to decency.

General Guides when Searching Persons

It is important that when searching a person several factors should be observed and taken into consideration. When searching a person great care should be taken for if proper procedures are not taken, the search can be employed by the accused person to raise accusations of brutality or unethical treatment. It is important thus to note that search of person should be conducted only on the following circumstances:

a) Where there is legal justification,

b) They should be carried out according to the procedures, which will minimize the risk of fabricating accusations against the security forces.

The following are the general methods used in searching the person's body.

- A person arrested should be searched immediately (at the place of arrest) and later at the arrival at the police station.
- A female should be searched by a woman police or other respectable female and out of public sight.
- When conducting the search, police officer should always stand behind the suspect.
- Police officer should order the suspect to stand with his feet apart and his hands above the head at the full stretch of the arms.
- Search should be conducted from head and work downward. Officer should search the head, hair, mouth and pockets. Then shall run his hands all over the outside clothing to detect anything hidden underneath. If necessary the suspect's shoes and socks will then be searched.
- The suspect may be stripped off his clothes if there is reason to believe that he is hiding weapons or pieces of evidence under his clothes or on his body. Body search must be carried out with the utmost decency not in view of public in police station.

The officer carrying search shall:

- Take possession of any weapon, poison, matches or other articles, which might be used as weapons;
- Take and careful preserve any article or documents or suspected stolen property which may have been connected with any offence;
- Enter in his notebook an accurate list of all property he takes from the prisoner provided that he is accompanied by at least one other police officer that will guard the prisoner. After that he will hand over the prisoner, every article or property taken from him to the C.R.O. in charge.

Search of Premises

Search without Warrant

According to section 38 CPA, the officer in charge of a police station (OCS) may search himself or issue a written authority to any police officer under him to search building, carriage vessel etc. The search can only be done if there is anything in respect of which:

- An offence has been committed,
- There are reasonable grounds to believe that it will afford evidence to the commission of the offence
- Is intended to be used for the purpose of committing any offence.

When there is authority to search, such police officer shall as soon as practicable report the issue of the authority, the grounds on which it was issued and the result of any search made under it to the magistrate.

Search in emergency is provided under section 42 CPA where the police officer may enter upon any land or premises and search. This however must be made on reasonable grounds of belief.

In the case of **Olotho V.R. (1970) HCD No.204,** the appellant was convicted of being in unlawful possession of piwa .It was contended that, the complainant, a police constable, had no search warrant to search the appellant's premises, hence the search was illegal.

It was held that in considering whether evidence is admissible, the test in whether it is relevant to the matters in issue, and if it is relevant, the court is not concerned with the method it was obtained.

NB: When OCS or other officer authorized by the OCS exercise powers conferred by S.38 CPA no prosecution resulting from the execution of those powers shall commence without the consent of the DPP—S.38 (5) CPA.

Search of Premises with Warrant

PGO paragraph 2 give powers to OCS or OC—CID or investigating officer to make an application to the magistrate for search warrant. The officer concerned may do so when he considers that search of private premises is necessary in order to;

- Take possession of anything or article by which an offence has been committed.
- Take possession of anything or article connected with the commission of the offence.

The person named in the warrant is the one who is supposed to conduct the search.

The search warrant can be used on any day between the hours of sunrise and sunset. If it is to be used at any other time, the court may permit upon an application by the police officer—S.40 CPA

Anything seized during the search has to be detained until the conclusion of the investigation or case and reasonable care should be taken for its preservation.

It is not necessary that the owner of the premises be present when the search is conducted. Person who is in charge of the premise should allow ingress and egress therefrom—S.43 CPA. If ingress

and egress cannot be obtained, the police officer executing a warrant may proceed under sections 19 & 20 CPA.

In **Rajabu Athumani V. R. (1967) HCD No.449,** accused was convicted of burglary and stealing. The issue raised on appeal was that the stolen property was found in the accused's house when he was not present, hence conviction should be quashed.

It was held that it is desirable but not necessary that a search by police officer of private premises be conducted in the presence of the owner or inhabitant. It is of course a simple safe guard for the searching officer to be accompanied by independent person of the locality who can be called to give evidence that the search was properly and fairly conducted and no question of planting any property on the premises can be raised.

Search of Motor Vehicle, Aircraft etc

Under section 25 CPA any police officer may stop, search and detain;

a) Any vessel, boat, aircraft or vehicle for which he has reasons to suspect that:

- There are stolen goods,
- There is anything used or intended to be used in the commission of an offence.
- There are any offensive weapons, an article of disguise or any article prohibited under any law.

b) May arrest any person suspected of having or conveying in any manner any of the articles mentioned above.

NB: Even where the police officer has no suspicion that the vehicle, aircraft or vessel is conveying unlawful goods, still his finding of the goods will be accepted, as was in the case of **Athuman Bin Salim V. R. (1946) 22 K.L.R 49**, a police officer stopped a lorry coming out of an earth road proceeding to the main road at 3.00 AM. The lorry was found to contain a large number of goods the origin of which accused failed to explain satisfactorily police officer later stated that he hadn't originally suspected the lorry contained anything unlawfully obtained; he stopped it because it was on the road where it shouldn't have been, and at a very peculiar time, so was suspicious.

On appeal it was held that, the police officer had properly exercised his power of search and so upheld the conviction.

Search Warrant

According to section 45 (1) CPA, the provision of sections 112 (1) & 114, 116, 119, 120 & 121 CPA should also apply to all warrants issued under section 38CPA. Thus these sections must be read together with s.45 CPA to appreciate the power of the courts to issue search warrant.

The form, content and duration of the search warrant; s.112 (1) & (3) CPA

- Every warrant is to be issued under the hand of the judge or magistrate.
- Every warrant shall bear the seal of the court.
- Every warrant shall shortly describe the thing to be searched or seized.
- Every warrant shall be in force until executed or cancelled by the authority that issued it.

To whom warrant of search is directed; S.114 CPA

- One or more police officers of the area or to one police officer within which the court has jurisdiction.
- An authorized officer of any local government within the court's jurisdiction. This is where no police officer is immediately available and the execution of such warrant is immediate.
- Any other person/persons.

Execution of warrant directed to police office; S.116 CPA

If the warrant is directed to any police officer, it may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Where warrant may be executed; S.119 CPA

It may be executed anywhere within the United Republic of Tanzania.

Forwarding warrant for execution outside the jurisdiction; S.120 CPA

The warrant may be forwarded by post to where it is to be executed or by any other means. The magistrate, to whom it is forwarded, shall endorse it and cause it to be executed in the above prescribed manner.

Warrant directed to police officer for execution outside jurisdiction; S. 121 CPA

Such police officer shall take the warrant for endorsement to the magistrate's jurisdiction is to be executed.

Such magistrate shall endorse his name on it and such endorsement shall be sufficient authority to execute it.

If there is reasonable belief that delay in obtaining endorsement will prevent its execution, such police officer may proceed to execute it without endorsement.

Every search warrant is to be returned to the court with an endorsement on it showing the manner and time of its execution and what has been done under it, S.45 (2) CPA.

What may be seized during search?

During search a police officer may seize anything connected with an offence; these are:

a) All those things in respect of which an offence has been committed or is suspected to have been committed,

b) All those things, which are believed that they will afford evidence of the commission of an offence,

c) All those things, which are on reasonable grounds, believed that they are intended to be used for the purpose of committing any offence. —S.39 CPA.

d) All those things described in the warrant.

e) Any thing searched in pursuance of S.24 CPA upon taking the person into lawful custody in respect of an offence.

f) Under section 42 (2) CPA upon stopping a person.

g) In pursuance of an order made by a court.

NB: In the course of search a police officer may seize other items other than those named in the warrant. What is required here is that the police officer must have reasonable grounds to believe that the items are stolen property or suspected of being stolen property.

In **Chic Fashions (West Wales) Ltd V. Jones [1967] 1 All E.R 229**, the police officers had a search warrant entitling them to enter a certain shop to search for garments stolen from the factory. None of these were found in the shop, but other items reasonable believed to have been stolen were seized instead. On an action for trespass against the police;

It was held that a police officer may seize any goods reasonably suspected of having been stolen and not merely those he is searching for.

In **Paundi V R (1966-1968) 4 A.L.R. Mal.242**, the appellant was convicted on his own plea of guilty for resisting arrest and search into his house. Police had come into his house to search

for some stolen property; they had neither search warrant nor any other authority. Paundi refused them entry, police tried to push their way upon which a struggle ensued giving rise to the charge.

On an appeal, it was held that a householder is lawfully entitled to resist entry into his dwelling house to search without a warrant or permission.

POLICE BAIL

Introduction

The reasons for granting police bail is the presumption that every person is innocent until proved guilty by a competent court. The freedom of any person should not be restricted unless there is legal justification for doing so. Thus we find that before conviction i.e., from the time of arrest and during the trial one has the right to preserve his liberty for bail is the right and not a privilege to the accused or suspect. Before going any further, let us discuss some of the terms used in this topic;

Bail

Simply bail is an agreement entered into between an accused person and the court or police for releasing him from custody and entrusting him to the custody of the surety/sureties. The accused person pledges that he will pay to the government a certain sum of money fixed by the police or court should he fail to attend his trial on a specified date. When an accused person is granted bail he is not completely free but is only released from the custody of law officers. In order to ensure the attendance of the accused before the court or at the police station bail is usually attached by some conditions. The conditions may be in the form of a bond, recognizance and sureties.

Bond

Is an agreement in a deed by which an accused person binds himself to the court or police to pay a sum of money specified therein in case he fails to perform a thing specified in the bond.

Recognizance

Is an obligation entered into and recorded before a court or magistrate by which a person engages himself to perform some act or observe some conditions, such as to appear when called on or to pay a debt or to keep the peace. Usually a certain amount of money is attached to it and may be forfeited if the person neglects to observe the conditions.

Sureties

Sureties are persons who enter into recognizance to produce the person who has been bailed. It is a pledge by another person to pay a fixed sum of money to the government if the accused person does not appear before the court or the police station on a specified date and time.

Security

It is the amount of money that the surety will be required to pay should the accused person default.

Police Bail

i) Under S.32 (1) CPA Police officer in charged of a police station is required to grant bail to a person who has been arrested with or without warrant where that person;

a) Has been arrested for an offence other than an offence punishable with death,

b) Where it is impracticable to bring that person before an appropriate court within twenty-four hours after he was arrested,

c) After due inquiry into the case, and that the offence appears to be of not serious nature.

The same section requires that the person should be released on bail after,

- He has executed a bond with or without sureties,
- The amount of bond should be reasonable,
- The time and date for appearing before the court should be mentioned in the bond.

ii) Where a person is arrested by a police officer on reasonable grounds that he has committed an offence, such person should according to section 64(1) CPA be released immediately when:

a) The arresting officer believes that the person has actually committed no offence, or there are no reasonable grounds on which to continue holding that person in custody.

b) It is believed that the arresting officer has in fact arrested a wrong person.

c) Twenty-four hours has passed and no formal charge has been laid against that person unless he was arrested on a serious offence.

iii) Section 64 (2) CPA provides that the person arrested after a charge has been laid before the court against him, may be released on bail after executing a bond with or without sureties, where:

a) The person though subject to prosecution was arrested without warrant,

b) The offence for which he was arrested was not of a serious nature,

c) There is no sufficient evidence to proceed against the accused,

d) There is a need to conduct further investigation or inquiries must be carried out, and cannot be completed within a reasonable time.

iv) Where the person arrested is under the age of fifteen years then according to section 64(3) CPA he may be released on bail only after his parent, guardian or a relative has entered into recognizance on his behalf.

v) According to section 64(4) CPA, no fee or duty shall be chargeable upon bail, bonds, recognizance to prosecute or give evidence or recognizance for professional appearance or otherwise issued or taken by a police officer in respect of police bail.

vi) It is the duty of the arresting officer to tell the person arrested his rights to bail. —S.64 (5) CPA.

Criteria for Granting Police Bail

According to section 65 CPA, police officer before granting bail to the suspect, he should take into consideration the following;

i) The police officer concerned has to consider the probability of the person charged with an offence to appear before the court to answer the charge. In doing so the officer will have to look at;

- The background of the suspect, his police record if any, his community ties, his employment etc.
- The circumstances in which the offence was committed,
- The strength of evidence against the accused,
- The seriousness of the offence charged.

ii) The police officer has also to consider matters related to the interest of the person, such as;

- The time he will spend in custody if he is not granted bail,
- The condition under which he will be held in custody,
- The need for that person to prepare for his defense i.e. obtaining legal advice,
- The protection of his life, either due to intoxication, use of drugs, injury etc

iii) Protection of society, that is to say;

- The likelihood of the person to temper with evidence,
- Intimidating witnesses,
- Hindering police inquiries in any other way.

Conditions of Police Bail

Before a person arrested by police officer is granted bail, he has to fulfill the following conditions laid down under section 66 CPA;

i. Has to agree in writing to appear at a specified court at a specified date and time to be notified to him by a police officer,

ii. Has to agree in writing to observe a specified requirement as to his conduct while out on bail,

iii. If another person acceptable to a police officer acknowledges that he is acquainted with the suspect and that he is a responsible person, who is likely to appear before the court to answer the charge,

iv. Either the person charged or another acceptable person enters into agreement without security to forfeit a specified sum of money if the person charged fails to appear in court,

v. Either the person charged or another acceptable person enters into agreement and gives security to forfeit a specified sum of money if the person charged fails to appear in court,

vi. The person charged or another acceptable person deposits with the police officer a specified sum of money to be forfeited if the person charged fail to appear in a court.

Refusal to Grant Police Bail

Police officers are empowered by section 67 CPA to refuse bail to arrested person, under the following circumstances;

1. The person arrested is unable or unwilling to comply with any of the conditions, subject to which bail is granted,
2. The person is unable or unwilling to arrange for another person to comply with the conditions of bail,
3. When bail is refused, the police officer should do the following;
   a. Send that person to the magistrate as soon as practicable to be dealt with according to law,
   b. When a person is refused bail and is in police custody, request for facilities to make an application for bail to the magistrate, the police officer should within twenty-four hours or within such reasonable time bring such person before a magistrate.
   c. Where a police officer refuses bail he should record his reasons for doing so in writing.

NB: If a person is refused bail while in police custody he cannot apply for bail to the magistrate. In **R.V. Madhur Kapadia (1969) HCD No.103,** police officer was instructed to search a store of the accused upon information that certain goods stolen in Tanganyika had been smuggled to Zanzibar. Search was carried out and some goods were recovered. Accused was arrested without warrant so that the other godowns would be searched, his advocate applied for bail, police refused. He applied to the magistrate.

It was held that until the accused has been charged with specific offence, a magistrate's court has no power to grant bail.

Revocation of Police Bail

According to section 68 CPA, police officer may revoke bail granted to a suspect under the following circumstances;

i. When the police officer in charge of a police station believes on reasonable grounds that he is absconding.

ii. Has failed to comply with or is about or likely to fail to comply with an undertaking given to him as a condition of his release.

Once the bail has been revoked, such person may be arrested.

Breaches of Conditions of Bail

1. Section 69 CPA creates the offence of breaching the conditions of bail.
2. If a person released on bail, willfully and unreasonably fails to comply with the conditions of bail, is guilty of an offence.
3. On conviction he shall be liable to a penalty not exceeding the maximum penalty that could be imposed on him upon conviction for the offence in respect of which he was arrested and released on bail.

CHARGES

Definition

A charge is a written accusation against the accused of an offence or an allegation of an offence, which he is said to have committed. It specifies and furnishes necessary details in a summary form. Once the complaint has been laid down before the court, and the magistrate is satisfied that the accused person is likely to be prosecuted, then the charge is prepared and filed together with the complaint.

It is very important that a charge must be preferred before the trial commences. It is unthinkable that an accused be tried without a charge being laid down against him.

Functions of the charge

A charge is a result of a decision by a police officer to prosecute. Once a decision has been made, the charge should be drafted in a precise and detailed form to contain all the ingredients of the offence. The drafting of a charge in this way serves the following purposed;

i. To inform the accused person about the offence for which he is charged, i.e., the charge contains particulars of such accusations, these include, time, date, place, names and the manner in which the offence was committed.
ii. To enable the accused to prepare for his defense.
iii. To enable the accused to decide rationally whether or not to plea guilty.
iv. To enable the court to issue necessary court processes, like summons.
v. To confer jurisdiction to the court to proceed against the accused.
vi. To avoid taking the accused by surprise.
vii. For the purpose of record—criminal records are normally kept, thus a charge is convenient for that purpose.

Parts of a charge

Generally a charge has three main parts;

Particulars of the accused,

Here particulars of the accused person(s) are given, thus the name, age, tribe, nationality and his address.

Statement of the offence,

This part should describe the offence shortly in ordinary language and without necessarily stating all the essential elements of the offence. This part states the offence alleged to have been committed and a citation of the section, rule or order of the law alleged tÿÁhave been violated. **E.g. Arson c/s. 319 of the Penal Code, Cap.16**

Particulars of the offence,

This part should contain a brief but clear and ordinary language, the elements/ingredients of the alleged offence. It should state what acts or omissions were done or omitted to be done. The particulars should state the following: date, time, and the place the alleged offence was committed, the act or omission complained of, the name of the victim (if any), the value of the property (if applicable). **E.g.**

> **Haraka s/o Mwendapole, on the 5th day of November 2003 at about 02:00 hours, within the Municipality of Tabora willfully and unlawfully set fire to a house belonging to one Sabuni s/o Kabati located at No.10 Ng'ambo Street in the suburb of Tabora Municipality.**

Drafting a charge

According to section 135 CPA and 2nd Sch. to the CPA a charge has the following parts;

i) Title: e.g., **The District Court of Ilala**

At Samora Avenue

Criminal Case No.220/2004

ii) Parties: e.g., **Simba s/o Mkalimoto**

iii) Name of the document: **Charge sheet**

iv) Statement of the alleged offence: e.g., **murder**

v) Statement of the law i.e. section and law contravened e.g., s.196 **of the Penal Code, Cap.16**

vii) Particulars as to time and place where the alleged offence was committed, and the victim and the property involved.

viii) Particulars as to the manner or mode in which the alleged offence was committed, e.g. was the act intentional, fraudulent or otherwise, unless it is one of strict liability or is an offence whose mental element is imputed.

ix) Description; name, address and signature of the person lying the charge and the date the same was prepared. A space must also be left for the court to put in the date in which the charge so prepared was filed and admitted in court.

However, it is important to know that, it is not easy to know for sure what particulars should be given in a charge; this is because it depends upon the circumstances of the facts of each case.

What is important is that a charge should be as simple as possible, and the use of abbreviation should be avoided. Some sections creating offences do define them, thus if the offence is defined by the law, it is sufficient to name it only. But if it is not defined, then define it, but at the same time adhere to the charge as much as possible.

EXAMPLE

Name of the accused: **Michael s/o Songambele**

Age: **27 years**

Tribe/Nationality: **Mzaramo/Tanzanian**

Religion: **Christian**

Address: **Nzasa Street, No.10, Temeke District**

Offence Section and law: **stealing c/s 265 of the Penal Code**

Particulars of offence: Michael s/o Songambele, on or about 9th January, 2004, at about 6:00 HRS, at Tandika within the District of Temeke and Dar es salaam Region, did steal a T.V set valued at Tshs.250, 000 the property of Tumaini d/o Bahati.

Date & Place …….

Public Prosecutor

Particulars of a charge must allege facts covering ingredients of the offence as defined in the relevant section. Here are examples of cases where the court said that the charges were defective because the prosecution omitted the essential ingredients of the offences.

In **Omari V.R (1968) HCD No.421** a charge of false accounting c/s 317 PC was held to be irreparable defective for failing to aver '***intent to defraud'***

In **Bulutumika V R (1968) HCD No.392** a charge of causing grievous harm c/s 223 PC was defective for failing to allege that the act was done ***'wrongfully'***.

In **Anthony V R (1970) HCD No.339,** the charge of wrongful confinement was defective for failing to aver that confinement was done ***'wrongful'***.

In **Said Kika V R [1985] TLR 136**, the appellant was charged with transporting agriculture products without permit c/ss 387 of the NMC (Specified Products) (Control Transport) Order 1976, GN No.80 of 1986. Maximum limit permitted by the law without the permit was 30 kilogrammes.

Particulars were: 3 sacks of paddy and 3 bags of rice. Facts given by the prosecution showed 3 sacks of rice only. Appellant was sentenced to a fine of 800/= and the rice was forfeited. On appeal;

> *While the charge and the statement of fact are inconsistent in their description of the nature of the offending object, none of them specify its weight i.e. the essential ingredient of the offence charged. By failing to specify the weight, neither the charge nor the statements of facts disclose any offence. The plea of guilty was therefore equivocal and not capable of supporting a conviction.*

In **Msafiri s/o Kulindwa V R [1984] TLR 276**, the appellant was convicted on four counts of obtaining goods by false pretences. The charge did not aver that the pretences were made with intent to defraud. On appeal it was argued whether or not the absence of words 'with intent to defraud' in a charge is fatal to conviction.

> *It was held that intent to defraud is an essential ingredient of the offence of obtaining by false pretences and it is therefore essential that such intent to defraud must be alleged in the particulars of the offence.*
>
> *A charge of obtaining by false pretences, which does not include an averment that the pretences were made with intent to defraud, is a charge, which disclose no offence at law.*

Joinder of Counts

According to section 133 CPA, where it appears that an accused has committed more than one offence, those offences may be charged in a single charge provided that they are founded on the same facts or form or are a part of a series of offences of the same or similar character.

When these offences are charged together in a single charge, each offence should be set in a separate paragraph of the charge called a count, containing a statement of the offence and particulars.

Counts are a number of offences one may have committed and put under one charge in a criminal case.

If the offences were committed on different places and times, they should not be joined together in a single charge; doing so will render your charge bad for misjoinder of charges/counts.

EXAMPLE 1

Mchovu s/o Mvivu is alleged to have broken into the dwelling house of one Chausiku Kazi with intent to commit offences therein, that having broken into the said house he had carnal knowledge with one Mpole d/o Huruma, a girl below the age of fourteen years, and that thereafter he stole clothes valued at 20,000/=.

From the above facts Mchovu Mvivu will be said to have committed three distinct offences, namely; housebreaking, stealing and rape. Thus the charge will be as follows:

COUNT 1

Offence section and law: Housebreaking c/s 294 (1) of the Penal Code.

Particulars of Offence: Mchovu Mvivu on 2nd March, 2004, at about 2:00hrs at Majengo within Moshi Municipality did break and enter the dwelling house of one Chausiku Kazi with intent to commit offences therein, namely, theft and rape.

COUNT 2

Offence section and law: Stealing c/s 265 of the Penal Code

Particulars offence: The said Mchovu Mvivu on the aforesaid date, time, and place having broken into the said house, did steal there from ten dresses all valued at 20,000/=, the property of Chausiku Kazi.

COUNT 3

Offence section and law: Rape c/s 130 (2) of the Penal Code

Particulars of offence: The said Mchovu Mvivu, on the date, time and place aforesaid, having broken into the said house, did have carnal knowledge of Mpole d/o Huruma a girl aged twelve years.

A charge drafted like this one is correct because the offences were committed in the course of the same transaction and are drafted in three different and separate counts.

EXAMPLE 2

It is alleged that on 10th February 2004, Mpenda s/o Bure stole a bicycle outside Shoprite Supermarket along Samora Avenue. It is also alleged that, the same person on 13th February, 2004 assaulted one Mpole s/o Huruma at Manzese, and on 15th February 2004 at Temeke he stole 500,000/= from the person of Zubaa s/o Uchekwe.

The charge as set, read as follows:

COUNT 1

Offence section and law: Stealing c/s 265 of the Penal Code

Particulars of offence: Mpenda s/o Bure on or about 10th February 2004,at shoprite supermarket along Samora Avenue within the District of Kinondoni and the Region of Dar es salaam, did stole a bicycle, frame No.510067, valued at 70,000/=, the property of Mwenda s/o Mbio.

COUNT 2

Offence section and law: Assault causing actual bodily harm c/s 241 of the Penal Code

Particulars of offence: The same person on or about 13th February 2004,at Manzese within the District of Kinondoni and Region of Dar es Salaam did unlawfully assault and cause actual bodily harm to one Mpole s/o Huruma.

COUNT 3

Offence section and law: Stealing from the person of another c/s 265 of the Penal code.

Particulars of offence: The same person on or about 15th February 2004 at Temeke District and Dar es Salaam region, did stole 500,000/= from the person of one Zubaa s/o Uchekwe.

This charge is bad for misjoinder of counts. The three offences were committed on three different places three different dates and extending over a considerable period of time. Further more they are not continuous—they are not found on the same facts or form; neither were they committed in the course of the same transaction. Thus the proper procedure was to charge them on separate charges and trials to be conducted separately.

Reasons for joining counts:

- Where the offences are committed on the same transactions the evidence available to prove on charge will evidently be relevant to prove the second charge as well.
- If separate trials were necessary this would entail bringing witnesses to testify a second time on the same matters and other similar communication.

Where the two offences, although different in character but are founded on the same facts, and committed in the course of the same transaction can be joined and tried together. In **Dalip Singh s/o Siam Singh (1943) 10 E.A.C.A 121**, the appellant was found in possession of some woods and a sufuria stolen from Kenya and Uganda Railways and was arrested. On the way to the police station he tried to bribe the arresting officer to release him. He was charged and convicted of theft and corruption. On appeal misjoinder of charges was argued; offences were dissimilar and founded on different sets of facts.

The court said that the joinder was proper in that the offences were founded on the same facts, in that bribe was offered within a very short time after the appellant had been arrested and while they were still on their way to police station.

In order to determine whether the offences were committed in the course of same transaction, time is of essence. In **R V Gulamhussein Dharams (1946) 3 E.A.C.A 107**, the accused was tried on two counts; (1) of obtaining money by false pretences on or before a certain date, (2) of making false report some ten days later that his house has been burgled and money stolen. On appeal;

> *"Since some ten days had elapsed between the obtaining of the money and the alleged false report it was doubtful whether the charge in respect of the false report could be said to be founded on the same facts as the other charges and it might more properly have been made the subject of a separate trial, but such irregularity was curable".*

It is to be noted that the court has discretion to order separate trials, even if the offences were founded on the same facts or committed in the course of the same transaction. The court may do so if it is of the opinion that the accused will be prejudiced or embarrassed—S.133 (3) CPA.

It is important to note further that it is not desirable to charge more than one offence in a single charge sheet, if the offences are punishable by death. However, it is not illegal to charge those offences; courts have discretion to try those offences jointly, provided that the discretion is exercised judicially.

In Tanzania it is inadvisable that one charge should contain more than two offences of manslaughter or murder. In **Aikael s/o Alifayo V R (1954) 21 E.A.C.A 371,** the appellant was charged on five counts, two being for manslaughter. All charges arose out of a motor accident. On appeal;

> *"The rule that no other count should be joined where an accused is charged with murder or manslaughter, should in Tanganyika, be followed and regarded as a rule of practice amounting almost to a rule of law".*

But a court of appeal will not necessarily set aside a conviction for breach of the rule if no prejudice results.

Duplicity of Charges

This is the situation whereby the charge as laid, contains two distinct offences but is made as one count. Such a charge is double, therefore bad for duplicity. It is a serious error to allege more than one offence in a single count because sometimes the accused person may be guilty of one offense and not the other, and this also will make it difficult for the accused person to enter a proper plea of guilty or not guilty. This means that each act committed by an accused person, which constitutes a complete offence in itself, should be the subject of a separate count.

In the case of **Erasimu Daudi v Republic 1993 [TLR] 102** the Appellants were charged with and convicted of breaking into a building with intent to commit an offence therein, namely theft c/ss.

297 and 265 of the Penal Code. A girls' school dormitory was broken into one night and personal belongings of some school girls were stolen. After mounting a search some of the stolen items were picked from different places. A schoolgirl's skirt was found in the Appellant's homestead. Trial Court record showed that the offence of breaking into a building with intent to commit an offence therein, and the offence of theft, were charged in one count.

When the building broken into with intent to commit an offence therein is a dwelling house, as in this case, the offence is housebreaking, and because it was committed at night, the charge should have been of burglary, not breaking into a building with intent to commit an B offence therein;

Breaking into a building with intent to commit an offence therein and theft are two separate offences which should be charged in two separate counts; by putting the two in a single count the charge was bad for duplicity

In the case of **Adamu Mwambalafu V R [1966] E.A 459,** the appellant was charged on alternative counts with arson and attempted murder c/ss.211 of the Penal Code. The particulars of the charge of arson stated that the appellant set fire to two houses, one of K and the other of N. the house of N was more than a hundred yards from K's house. The particulars of the charge of attempted murder stated that the appellant attempted to cause the death of K and his wife by setting fire to two houses one of K and the other of N. After the assessors had given their opinions and before judgment was delivered, the trial judge noticed that both counts were bad on account of duplicity, but considered it was too late for the irregularities to be corrected by amendment. The judge purported to invoke section 346 of the Criminal Procedure Code in relation to first count of arson and held that the first count although bad on account of duplicity had occasioned no failure of justice. As regard the duplicity in the second count, referring to the setting on fire of more than one house, the judge disregarded the reference to the burning of N's house. The appellant was convicted on two counts, notwithstanding that the two counts were stated in the information to be in the alternative, and were sentenced to concurrent terms of six years imprisonment. On appeal it was held that:

i) So far as arson is concerned, the burning of two houses, i.e. of K and N, might have formed the subject of one count, if the same act of arson caused both houses to ignite, but the house of N was more than one hundred yards from K's house, and caught fire as a result of a separate act of arson and should therefore have been the subject of a separate count.

ii) The alleged attempted murder on two occasions of K and his wife, first by burning K's house and then by burning N's house when K and his wife took refuge after K's house was destroyed, should have been the subject of a separate counts, and each count should have charged the attempted murder of either K or his wife and not both together.

iii) The appellant could and should have been charged with two offences arising out of the two acts of arson but the charging of these two offences, as one had not occasioned a failure of justice.

iv) The duplicity in the second count and the judge's disregard of the reference to the burning of N's house were irregularities curable under section 346 CPC (s.388 CPA)

v) The judge erred in invoking section 346 CPC (s.388 CPA), whose provisions can only be used by the court sitting 'on appeal or revision'

In the case of **Mongela s/o Ngui V. R. (1934) E.A.C.A 152**, the accused set fire to a house, knowing that some six people were asleep inside. All six people were burned to death. The accused was charged with murdering the six persons in a single count and was convicted .On appeal the issue was whether the charge was bad for duplicity.

i) It was clear that all deaths resulted from the single act of setting fire to the house.

ii) Each death was, as it were, a separate offence of murder.

The court found that the accused in any case had not been prejudiced by the charge even if it was duplex.

The court however pointed out that it was undesirable to charge more than one offence carrying the death penalty in a single count.

The same question arose again in the same court five years later in the case of **Ngidipe Bin Kipirama (1939) 6 E.A.C.A 118** where the accused persons were charged in one count with murdering three victims. The killing occurred in the course of a single attack in a party of men.

The court held that the charge was improper—bad for duplicity –but as the accused were not prejudiced by the irregularity, the convictions were upheld.

In **Ibrahim Loya V R [1991] TLR 162**, the appellant was charged and convicted on three counts:

1) Corruption contrary to paragraph 2 of the 1st schedule to and sections 56(2) & 59 (2) of the Economic and Organized Crime Control Act No.13/84 and sentenced to four years in prison.

2) Personating a public officer c/s 100(1) of the Penal Code and sentenced to six months in prison.

3) Attempt to extort c/s 290(1) of the Penal Code and sentenced to three years in prison. On appeal:

> *Having been proved that the appellant had falsely represented himself as a policeman and that the complainant had agreed to give out money because of the appellant's personating as a policeman, the offence of attempt at extortion c/s 290 PC was a duplication of the second count of personating a public officer c/s 100(1) PC.*

There are some problems that one may face in drafting charged. This happens where a definition in a penal statute is worded in such a way that it leaves room for doubts as to whether it is creating a single offence or several distinct offences of a similar character.

Example: S.319 PC--the offence of arson,

'Any person who willfully and unlawfully sets fire to;

(a) Any building or structure whatever, whether complete or not; or

(b) Any stack of cultivated vegetable produce or of mineral of vegetable fuel; or

(c) A mine or the workings, fittings or appliances of mine is guilty of a felony.

Thus if one drafts a charge which states that an accused person willfully and unlawfully set fire to a house or a stack of hay would be charging two distinct offences—thus duplex.

Example: S.311 (1) PC—is defined to cover 'any person who receives or retains any Chattel'

S.258 (1) PC—covers situation where a person 'takes or fraudulently converts any property'.

From the above examples we see that the confusion is occasioned by the use of the word 'OR'. When we look at the case law we find that there is no settled opinion on this issue.

In the case of **Cherere s/o Gukuli V R (1955) 22 E.A.C.A 478**, the accused was convicted during the anti-colonial revolution in Kenya on two counts of 'Administration or being present and consenting to the administration of an oath relating to the unlawful society commonly known as MAUMAU' and received a compulsory sentence of death under the emergency laws.

The court held that the charge was bad for duplicity and quashed the conviction it reasoned that the section in question created two offences and not one.

In the case of **Joseph Chapala V R (1970) HCD No.49**, the accused who was a court clerk was charged with a corrupt transaction with agent. The charge alleged that he had obtained a sum of money 'for himself or otherwise on account of the Resident Magistrate'. The trial court held that the charge was bad for duplicity, reasoning that corruptly obtaining money for oneself and corruptly obtaining money for another are two distinct offences. On appeal:

> *The High Court rejected this reasoning as a misapplication of the principle underlying the CHERERE decision. It pointed out that 'the substantial offence is the corruptly obtaining money, and whether it was for himself or on account of the Resident Magistrate is merely the commission of the offence in either capacity.*

In **Kauto Ally V R [1985] TLR 183**, the appellant, together with another were convicted with the offence of obstructing a police officer in the execution of his duty. The framing of both charge and the particulars of the offence were such that a number of separate and distinct offences were lumped together in the same single count. Charge as laid reads:

Statement of the offence: Obstructing a police officer in the execution of his duty c/s 243 (b) & (e) PC.

Error: S.243 (b) & (e) create separate and distinct offences. At most offences under these paragraphs may be charged in the alternative but not in the same single count as was done here.

Particulars: The persons jointly and together …. Did willfully resist the lawful arrest…. as a result they assaulted the said police officer in his right leg and all arms by pushing him from the bus… and caused him to suffer grievous harm.

Error: There are three overt acts lumped together in the charge, i.e. willful resistance to arrest—section 243(b); assault—section 243(a) and doing grievous harm—section 225 of the Penal Code.

> *The High Court held that the lumping together of separate and distinct offences in a single count as was done in this case may render a charge bad for duplicity and it enhances the possibility of criminals getting away in-adequately punished or unpunished at all, purely on technical grounds.*

From the case law above, we find that it is unsafe to draw up a charge that avers certain matters in the alternative. It is advisable that in most cases the use of the word "OR" should be avoided. Where one is faced with the difficult of deciding that of the several alternatives mentioned in the definition of the offence is applicable to the facts of the case, the only safe way is to draw up several alternative counts.

Joinder of Accused Persons

This is the practice of joining more than one accused persons in one charge and try them together. The categories of persons who can be joined together are provided under section 134 CPA.

- Persons who have committed the same offence in the course of one transaction.
- Those accused of abetting or attempt to commit the same offence and those who are charged of committing it.
- Who committed different offences in the course of the same transaction.
- Those accused under the Economic and Organized Crime Control Act, 1984.
- Those accused of any offence under Chapter XXIV to XXX of the Penal Code.
- Those accused under Chapter XXXVI of Penal Code.

NB: Persons who have been committed for trial separately can be joined in one charge or information and tried together if they are persons who fall under any of the categories specified above.

In the case **Andrea Kimbulu V R (1968) HCD No. 312**, the accused were convicted of the offence of breaking, on a charge that they broke into a service station in Kigoma on the night of 22nd/23rd, October, 1966. At the same trial two other persons were convicted of breaking into the same station on the night of 17th/18th, October, 1966. On appeal;

i) Because the appellants were not concerned in the transaction which was of the charge against the accused persons, the charge against them should not have proceeded together.

ii) The defect is not curable since it is difficult to avoid the conclusion that the appellants were not prejudiced by their joint trial. The trial therefore was a nullity.

In the case of **Mopuyan Olendotoo & Others V R (1970) HCD No.74**, some 19 head of cattle stolen from the NDC Ranch near Arusha were found in various cattle bomas of the six accused most of whom were women, 3 with the 1st accused, 4 with the 2nd accused 6 with the 3rd accused and so on, each with the share of the stolen cattle. The accused were charged in a single count of receiving stolen property c/s 311 of the Penal Code and were convicted. On appeal;

It was no part of the prosecution case that the accused jointly stole all the cattle, all they could show was that each accused independently received those beasts found with her, so the separate counts should have been drawn up.

In **Itta s/o Lewangwa & Another V R (1969) HCD No.74**, the complainant Anna (A) was accosted by ITTA (I) one afternoon while walking home, who threatened, gagged and took her to a coffee shamba where he forced her to have sexual intercourse. She was about 11 years. He (I) took her to a nearby club where he (I) announced to Eliwario (E) second accused, that he (I) was "selling his Ng'ombe". They took A to E's room and slept with her having sexual intercourse (I) returned the next morning and took A away, later deserted her exhausted on a river bank. They were both convicted of defiling a girl under 12 years c/s 136 of the Penal Code.

On appeal it was argued that the joint charge appeared bad in that two acts of defilement were quite separate and E had nothing to do with the original seduction.

The prosecution argued that the charge was concerned with the second act of defilement, which although committed by E, was done with the common intention of both accused i.e., I brought A to E "for sale". Helped to take her to E's room and picked her up the next day. On this basis the convictions were upheld.

In another case of **R V Stephen Mweji & Lugangiza Ndaro [1983] TLR 195**, the two accused were jointly convicted of corruption. The two accused were principals and agent gave an inducement to a public officer so that he could do them a favour of deviating from the normal procedures. The charge did not charge them under separate sequential numbers—the names on the charge sheet showed—MAGOBE MAILA & MUNYAGA MAPESA and STAPHEN s/o MWEJI & LUGANGEZA NDARO, i.e. two accused while in fact there were four. Furthermore, the charge did not state the relationship of the agent and principal that existed between them. On revision;

- *Where more than one accused are jointly charged their names and addresses should be contained in the charge sheet separately and sequentially numbered.*
- *Failure to point out an agent/principal renders the charge defective, but such defect is not fatal if the omission does not prejudice the accused to the extent of miscarriage of justice.*

The court found that there was no miscarriage of justice because;

i) The accused knew that they were corruptly giving money to PWI a person employed in public service.

ii) They clearly knew that this money was meant to be an inducement to PW I to deviate from known normal procedures to allow them to pass through a short cut.

Alternative Counts

Alternative counts are drafted where the accused person has committed only one offence, which however might be interpreted as constituting any of the different offences.

EXAMPLE

A house has been broken at night and properties have been stolen. In the course of your investigation you happen to find a person with those things stolen in the house. Since you are not sure if this is the very person who committed the offence your charge will be like this:

1st COUNT

Statement of the offence: Burglary c/s 294 of the Penal Code.

Particulars of offence: Mitikasi s/o Mingi on or about 12th day of January 2004, at Mtoni within Temeke district and Dar-Es-Salaam region, broke and entered into a water pump building station with intent to commit an offence therein, that is stealing.

2nd COUNT

Statement of the offence: Theft c/s 265 of the Penal Code.

Particulars of offence: Mitikasi s/o Mingi on or about 12th day of January 2004 at Mtoni within Temeke district and Dar es Salaam region stole one starter valued at Tsh.2,000,000 and one main switch valued at Tsh.2,500,000 all totaling Tsh.3,00,000 the property of DAWASCO.

IN THE ALTERNATIVE

Statement of the offence: Receiving stolen property c/s 311 of the Penal Code.

Particulars of offence: Mitikasi s/o Mingi on or about 12th January 2004 at Mbagala, Temeke district and Dar-es-Salaam region received on starter valued at Tsh.2,000,000 and one main switch valued at Tsh.1,500,000, all totaling Tsh.3, 500,000 knowing the same to have been stolen.

Since it is not clear if the accused is the one who broke/committed the offence of burglary or the receiver of stolen property, the prosecutor should charge the accused with both offences in the alternative and let the court decide which offence is the appropriate one in law.

When an offence is charged in the alternative, this fact should be clearly indicated in the charge sheet. Where the alternative counts are brought against an accused, the court should convict on one only and make no finding on the other counts alternative to it and acquittal should not be entered on the other counts.

In the case of **R V John Katua [1981] TLR 257**, the court said the following:

> *"It is now settled law that where there are alternative counts and conviction is entered on one count then no finding should be made on the other…. It is clear therefore that the trial magistrate erred in acquitting the appellant on the alternative count. That is to say, once he convicted on the first count then he should not have made a finding on the second alternative count".*

This allows the court on appeal to take a fresh view of the mater and if necessary to substitute its own opinion for that of the trial court as to which of the alternative count is appropriate.

In **Kisalu Mtaki V R [1982] TLR 195**, the appellant was charged with and convicted of four counts by the trial court—namely;
1—causing actual bodily harm.
2—wearing army uniform without authority.
3—escape from lawful custody.
4—being in possession of property suspected of having been stolen. On appeal;

i) To avoid contravening section 21 of the Penal Code which prohibits double punishment for the same offence, where a set of facts creates an offence against two or more sections charge should be preferred in the alternative.

ii) Where an accused has been charged in the alternative, the court may enter a verdict on one of the alternative charges and should not enter a verdict or make any finding in the other.

Counts 2 & 4 should have been in alternative.

NB: For count No.4 to be applicable, the police officer must have stopped, searched and detained the appellant—section 312 (1) of the Penal Code. However, the appellant was arrested by prison officers and brought to police station. Thus PW2 (a police officer) cannot be said to find appellant being in possession of the army uniform.

In **Issa Athumani Mduya V R [1983] TLR 336**, the appellant was convicted of corrupt transaction by agent:

1) On 13.8.82 the appellant corruptly solicited Tsh.500 from one person as an inducement to forbear from instituting criminal proceedings against that person for making pombe business in unlicensed premises.

ii) To have received Tsh.200 on the same occasion from the same person in the same connection.

iii) To have received Tsh.100 in the same connection from the same person.

On appeal:

- *It is improper to charge a person of both soliciting and receiving as distinct offences when they arise out of the same facts.*
- *Where the facts disclose both soliciting and receiving the proper charge would be that of receiving only.*
- *Where the prosecution in some instances is not certain whether receiving as such can be established, the proper practice is to charge both soliciting and receiving as alternative offences leaving the court to enter a conviction on whatever of the two offences is proved.*

NB: When there is allegation of corrupt transaction by agent, the charge should mention the fact that the accused was acting in relation to his principal's affair, the omission of which is serious as the relation is an ingredient of the offence.

Defective Charges

Misquotation of Section Numbers

It is the duty of the prosecutor before signing a charge sheet to make sure that section numbers are correctly cited in the statement of offence. However failure to quote a proper section number is not fatal unless it is shown specifically that there was a miscarriage of justice i.e. the accused was prejudiced.

In the case of **Ndegwa Masiku & Another V R L.R.T N.21**, the appellants were charged on two counts;

i) Unlawful possession of Moshi c/s 30 Act No.6/66

ii) Corrupt transaction with agent c/s3 (1) Act No.16/71.

Section 3(1) deals with soliciting, accepting or obtaining a bribe.

Section 3(2) deals with the giving, offering or promising a bribe.

On appeal it was held that –where a charge is brought under a wrong subsection and the court is satisfied that the appellants understood the charge and were able to defend themselves the defect is curable.

Non-quotation of Section Numbers

It is important that proper sections must be quoted in the charge. Non-quotation is a curable irregularity but it should not be encouraged, as it will cause incompetence and recklessness on the part of the prosecutor. This irregularity is curable if;

- The accused was not prejudiced
- It was just a slip if the pen.
- It was not a result of mistake of law.

Citing non-existent Section

The prosecution sometime does this defect. The irregularity may or may not be curable. This will depend on the facts and circumstances of each case.

In the case of **Abdulrasul, G. Sabur V R [1958] E.A 126**, the appellant was convicted of the offence of exceeding speed limit. The prosecution charged him under section 39(1) of the Traffic Ordinance instead of section 40(1).

The court on appeal held that, though the charge was defective, but the particulars of the offence were adequate to inform the appellant of the offence with which he was charged, and thus no failure of justice. The defect was curable.

In the case of **Uganda V Keneri Opidi [1965] E.A 614**, the appellant pleaded guilty to two counts,

1) Failing to display 'L' plate

2) Being a learner driver, driving while not accompanied by a competent driver.

The 1st count was laid under section 9(b) 123 of the Traffic Ordinance and the 2nd count under section 9(a) & 12 of the Traffic Ordinance, 1951. However in respect of the 1st count, there was no section 9(b) of the Ordinance there was section 9 which itself did not create an offence. The prosecution contended that probably the framers of the charge meant section 9(b) of the Traffic Regulations.

The court held that;

> *the error was a fundamental one of law in that the accused was charged with non-existent offence, that there being no section 9(b) of the Traffic Ordinance but only section 9 (which however did not create an offence) the particulars set out as constituting an offence however clearly stated of themselves could not create an offence.*
>
> *It was not competent for the court to prosecute on the intention of framers of the charge, but must be guided in determining such intention by the expressions contained in the record of proceedings*.

In **Avon V Uganda [1969] E.A 129**, the appellant was charged with three counts;

1) Obtaining credit by false fraud c/s 292 of the Penal Code (s.292 created three different offences and the correct citation should be s.292 (a)).

2) Forgery c/s 326(1) of the Penal Code. (The correct citation should be section 320)

3) Personating c/s 360 of the Penal Code (the correct section was 360(1)).

On appeal the court held that these were serious defects, which, however, did not occasion any failure of justice because the appellant fully understood the substance of the charge and the essence of the charge against him, and so the defects were curable.

Insufficient Particulars

This is one of the omissions which render charges defective. This happens when the public prosecutor fails to include the most essential element of the offence. This omission renders your charge defective in substance and section 388 CPA cannot cure it.

In the case of **Mkindia V R [1966] E.A 425**, the prosecution omitted the words "with intent to defraud" where the accused was charged with the offence of obtaining money by false pretences. On appeal the court said:

"Our view is that a charge of false pretences which does not include an averment that the pretences was made with intent to defraud is a charge which disclose no offence at law, and is not merely an irregular or defective charge which can be put right by the application of section 382 CPC (S.388 CPA).

In **Sospeter Opale s/o Isiawo V R [1962] E.A 661**, the appellant was charged with and convicted of the offence of arson. The particulars did not allege that the appellant's act was either willful or unlawful. On appeal:

"To constitute the offence of 'arson' as defined in section 307 of the Penal Code (Uganda), the act of setting fire must both be unlawful and willful. It will be observed that there is no allegation in the particulars of offence that the appellant's act was either unlawful or willful, so that the facts as alleged in the particulars do not of themselves constitute the offence of arson.

Charge on a Repealed Law/Section

A charge on a repealed law/section is curable, provided that,

i) The offence is in every essential the same under the old and the new law/section.

ii) No failure of justice may result from the alteration.

iii) The charge and the particulars are clear.

However if the old and new law/section differ, and do not repeat in similar terms the language of the old law/section the defect cannot be cured.

In **Lukaka Ndege V R Crim. App. No.258/90 (HC MZ*)* Unreported**, the appellant was convicted of being in unlawful possession of Government Trophy c/ss.49 (1) & 53(1) (a) of the Fauna Conservation Ordinance, Cap.302. On appeal he claimed that the trial magistrate was drunk at the trial and thus failed to appreciate the case before him. The court held:

i) In the first place it seems to have escaped the attention of the trial senior district magistrate that Cap. 302 was repealed and replaced by the Wildlife Conservation Act, 1974. And even if that were not so, the sentence pronounced by him had no basis in the Ordinance.

ii) If that were the end of the problem, these errors and irregularities could have found a remedy, for although the Ordinance was repealed, this court could substitute a conviction under the W.C.A. if the offence and the sentence were in substance the same under the later legislation.

NB: No certificate from the DPP as per Act No 10/89.

In **Magesa s/o Mjunja v The Republic 1986 TLR 10** The appellant was charged and convicted under a repealed law for being in possession of Part I poison. The District Court relied on a report by a medical doctor that chloroquine injection is Part I poison.

A charge and conviction under a repealed law is an irregularity which is curable if the repealed section is re-enacted in identical words in the current statute such that it cannot be said that the accused has in any way been prejudiced by the irregularity

Variance Between Charge and Evidence

Variance between charge and evidence renders the charge defective in substance, unless it is amended and the amendment causes no injustice to the accused and as long as the accused person had notice of the amendment.

In **Daudi s/o Othiambo V R (1979) HCD No.221**, the accused was charged with stealing a bicycle c/s 265 of the Penal Code. At the closure of the prosecution case, the magistrate added a conversion not amounting to theft in relation to the bicycle c/s 284 of the Penal Code to which the accused pleaded guilty. On appeal against the conviction:

Variance between a charge and evidence led in support of it can make a charge defective so as to justify the exercise of the power to add or substitute another charge if it appears in the interest of justice to do so.

Remedies Available when the Charge is Defective

Amendment of charges

According to section 234(1) CPA, the court is empowered to order alterations of a charge at any stage of the trial if it finds that the charge is defective. The charge may be defective either in form or substance. The alteration may be by way of amendment, substitution and addition.

The purpose of alteration is to meet the end of justice, thus if it is shown that the alteration will cause injustice to the parties, then the magistrate is required not to make them.

According to section 234(1) CPA, the alteration may be made when the charge is defective either in substance or form.

A charge may be defective in substance when for example the evidence adduced discloses an additional offence to the one charged or it discloses a different offence to the original one.

EXAMPLE

1. The original offence is attempted rape. The evidence so far adduced discloses the offence of rape, i.e. accused did achieved penetration. At this stage the magistrate may order substitution of a charge—from that of attempted rape to that of rape.
2. The offence charged is stealing. The evidence discloses that stealing was done in the course of committing burglary. The magistrate may order the alteration of a charge to include a charge of burglary in addition to the charge of stealing.

A charge may be defective in form if for example, the date and time cited as of the commission of the offence is different from the time and date cited by the witnesses, or where a wrong section or subsection has been cited or where the amount of value of property involved is less or more than that disclosed in evidence.

When a charge can be amended?

Section 234(1) CPA provides that a charge may be amended at any stage of the trial. However the court cannot order the alteration of a charge after all the evidence has been taken and what remains is the preparation of a judgment. This was the position in the case of **R V Salehe Ruhuna 1973 L.R.T N.32**, where the magistrate amended the charge after the trial and in the course of preparing a judgment. It was held that;

"Where at any stage of a trial…which means what it says, that at any stage of (a) trial a court may in certain circumstances amend the charge, but not when a trial has been completed as it was in this case".

When the charge is amended /altered, the court has to comply with

- The court must call upon the accused to plead afresh to the altered charge. This is according to section 234(2) (a) CPA. In the case of **R V Salehe Ruhuna 1973 L.R.T N.32**, the court said,

  "When a charge is altered it assumes new characters or new charge. Thus the contents of this new charge must be known to the accused and thus he will be able to re organize his defense or sometimes even change his plea"

- The accused has the right to request that any witnesses be called to give their evidence afresh or to be cross-examined by the accused or his advocate. It is the duty of the court to inform the accused of this right. The prosecution has also the right to re- examine the witnesses on any matters arising out of such cross-examination.

- The prosecution may recall and examine any witness who may have been examined.

Failure to comply with this procedure will invite the court on appeal to declare the trial a nullity.

In **R V Jumanne Mohamed [1986] TLR 231**, the accused was charged with unlawful wounding. After the prosecution witness had testified, the public prosecutor substituted a fresh charge of causing grievous harm, without complying with section 234 the magistrate convicted him.

> *It was held that failure to comply with the provisions of section 234 was a serious error capable in law of vitiating the decision arrived at by the trial magistrate.*

In another case of **Thuway Akonay V R [1987] TLR 92**, the appellant was originally charged with threatening violence but the charge was withdrawn and a new charge alleging arson was substituted thereof. The appellant was not called to plead to the new charge. On appeal;

> *It is mandatory for a plea to a new or altered charge to be taken from an accused person; failure to do that renders a trial a nullity.*

NB: the **Republic v Athumani Rajabu & Others 1989 TLR 44** This was a complaint lodged against the trial magistrate for being biased against one, Raphael Binali. In the original case three people were charged with shop breaking and stealing c/s 296(1) and 265 of the Penal Code. When PW1 was testifying in court he mentioned one, Raphael Binali as being one of the persons from whom the stolen items were recovered. At this juncture the trial magistrate ordered that the charge be amended and the said Raphael Binali be joined as one of the accused persons. It is this step that led to the complaint.

> *Section 234(1) of the CPA only empowers the court to amend the charge where, on the face of it, it appears to be defective either in substance or in form but does not empower the court to order that a person be included in a charge sheet;*
>
> *by ordering the inclusion of Raphael Binali in the charge sheet the magistrate had usurped the powers of the prosecution and for that reason he was biased.*

Withdrawal and Re-Institution of a charge

The public prosecutor does this at any stage of the proceedings before a judgment is pronounced—S.98 CPA. A public prosecutor may withdraw the charge after obtaining the consent of the court or may be instructed by the Director of Public Prosecution.

The public prosecute may withdraw a charge either generally or in respect of one or more offences with which such person is charged.

The withdrawal is done where the charge is defective with a view of instituting a proper charge.

In **Pegi Msemakweli V R [1997] TLR 331**, the court said that when the charge is withdrawn before the accused has not defended himself, he might be discharged. This discharge will not operate as a bar to subsequent proceedings against him on account of the same facts.

Nolle Presque

The Director of Public Prosecution is empowered to withdraw charges/information under section 91(1) CPA. If the DPP decides to stop the prosecution of the accused, he is discharged. The discharge is not a bar to any subsequent proceedings against him based on the same facts should the need arise.

NB: Withdrawal of a charge under sections 91(1) & 98(a) CPA was discussed in the case of **R V Nicholaus Mamuu [1996] TLR 154**. While the police investigations were still under way, and after he had been charged with murder, the accused escaped from custody. About a year later and on application by the public prosecutor the District Court of Rombo withdrew the charge against the accused in terms of section 98(a) CPA. On revision;

i) Section 98 speaks of withdrawal of the charges on respect of any trial before a subordinate court, and given that crime of murder is only triable before the High Court, the trial on the charge could only have been properly brought before the High Court and thus section 98 could not have been used to withdraw the charge.

ii) The withdrawal of the charge in question should have been brought in terms of section 91(1) CPA.

The order of the district court was quashed and set aside and the charge of murder against the accused restored.

CONTROL OF CRIMINAL PROCEEDINGS BY THE DPP

The Director of Public Prosecutions

Appointment of the Director of Public Prosecution

The DPP is a public officer in the Government who is appointed by the president of the United Republic of Tanzania under Article 59B (1) of the Constitution of the United Republic of Tanzania.

Function of the Director of Public Prosecutions

The functions of the DPP are provided under section 9 NPS and these are,

i) The DPP has the power to decide whether to prosecute or not in respect of an offence.

ii) Has the duty of instituting, conducting and control prosecution of any offence except a court martial

iii) To discontinue any such criminal proceedings instituted or undertaken by him or any other authority or person at any stage before the judgment.

iv) To direct the police or any other investigative organ to conduct investigation of any criminal nature and to report to him immediately.

v) To take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority.

The above functions may include institution and conduct of summary proceedings, committal proceedings and preliminary proceedings under the CPA, MCA or any other law relating to criminal matters.

The DPP may exercise the above functions personally or through officers of his department acting in accordance with his general or specific instruction.

In exercising the powers, the DPP is required to take into consideration public interest, the interests of justice and the need to prevent abuse of the legal process (section 8 NPS).

The DPP is supposed to exercise his discretion in execution of the powers conferred on him, and is not to be subject to the directions or control of any person except the president.

- The DPP according to section 23 NPS has powers to delegate his powers to a member of the NPS or a public prosecutor. Such power delegated when performed by a delegatee shall be deemed to be exercised by the DPP.

The delegation must be in writing. Revocation by the DPP of the powers conferred on those officers should also be in writing.

Public Prosecutor

Who is a Public Prosecutor?

A public prosecutor is an official appointed to conduct criminal prosecutions on behalf of the state. According to section s of the NPS, public prosecutor "means any person appointed in accordance with this Act to conduct prosecution of a criminal case in the court of law".

Appointment of Public Prosecutors

The DPP is empowered to appoint public prosecutors for Tanzania by notice to be published in the Gazette. The appointment may be generally or for a specified case, area or class of cases.

The DPP may appoint a public prosecutor from other departments of the government or local government or private practice to prosecute a specified case or cases on his behalf.

Every PP shall be under the superintended and control of the DPP, Law Officer or State Attorney in charge of the zone, region, etc.

Powers of Public Prosecutor

The public prosecutor is empowered to appear and plead without any written authority before any court in which any case he has charge is under inquiry or trial or appeal.

The public prosecutor also has powers under section 98 CPA to withdraw a case he is prosecuting, either generally or in respect of one or more offences, which the accused person is facing in court. He can do so at any stage of trial before judgment and with the consent of the court or on the instruction of the DPP.

When withdrawal is made under section 98(a) CPA, the magistrate will discharge the accused. Such discharge is not a bar to any subsequent prosecution on the same facts.

If withdrawal is made under section 98(b) CPA The accused is acquitted.

When the application is made under section 98(a) CPA the public prosecutor must have good reasons and except in exceptional circumstances a magistrate will not withhold consent to the application.

The reasons for withdrawing under section 98(a) CPA may be:

- Unavailability of sufficient evidence, and
- Disappearance of the accused person where the police believes that he will not be re-arrested in the immediate future.

The reasons for withdrawing a case under section 98(b) CPA may be

- Where it is shown that the person(s) charged was not in fact the person who committed the offence, or the act complained
- Where it is clear that the act constituted no offence against the accused.

The exercise of powers under section 98(b) CPA is very rare and will normally be applied in the express instruction s of the DPP.

Duties of Public Prosecutors

- Preparation of charges against alleged offenders and prosecute them.
- Perusal of the contents of his case file in order to be conversant with all relevant facts ,elements of the offence facing the accused, the witnesses he is going to call them to the witness box.
- He is supposed to make sure that all witnesses are summoned to appear to court on the hearing date.
- Prepare and arrange with the witness all relevant documents, which are going to be tendered in evidence.
- Make sure that all exhibits relevant to prove the case are brought to court on the hearing date.
- Check and list the witnesses who have attended to testify on the hearing date.
- Interview separately witnesses so as to ascertain whether they remembers the evidence they are going to give.
- When the witness is called to the witness box, to interview him effectively in order to extract all relevant evidence. He must bear in mind rules of evidence governing examination in—chief, cross—examination, and re—examination etc.
- To write short notes as witnesses proceed to testify, questions and answers given during cross —examination as well as during re—examination etc.
- To ensure that every case that needs further investigation is sent to the investigator immediately together with the relevant directives.
- To address the court after conviction so as to enable the court assess proper punishment.
- To endorse on the case file the result of the trial and sentence when trial is concluded.
- To file notice of intention to appeal if there is reason to do so.

INSTITUTION OF PROCEEDINGS

Who can Institute Proceedings

All criminal cases whether privately or publicly prosecuted are instituted in the name and on behalf of the state. The state is the complaint; the victim of the crime is just a prosecution witness.

Any person may institute criminal proceedings provided that he has reasonable grounds to believe that any person has committed an offence. He may do so by laying a complaint to a magistrate having competent jurisdiction. —S.128 (2) CPA.

How Proceedings are instituted

According to section 128(1) CPA, criminal proceedings may be instituted in any of the following ways;

a) By making a complaint whether verbal or in writing. A complaint must contain a statement of the offence. It is from these facts that the magistrate can proceed to draw or cause the charge to be drawn. A complaint must therefore allege an offence.

   ⇨ Where a complaint is made verbal the magistrate has to or cause it to be reduced into writing, and must be signed by the magistrate and the complainant—S.128 (4) CPA

   ⇨ Where a complaint is made to a magistrate who is not competent to take cognizance of the offence if it is in writing will return it to the complainant with directions to be filed before a competent court. If is verbal will direct the complainant to present it to the proper court—S.128 (3) CPA.

b) By a police officer bringing the arrested person to court to answer the charge.

c) By a police officer or a public prosecutor making a complaint against the person before a magistrate and require the court to issue a warrant of arrest or accused summons.

What is a complaint? Read section 2 of The Criminal Procedure Act

Where to Institute Proceedings

Generally, all proceedings have to be instituted in a competent court having jurisdiction to try the offence. Every court has authority to cause to be brought to it any person who is charged with an offence and is within the local limits of such jurisdiction—S.177 CPA. Thus the offence has to be tried where it was committed, the accused was arrested and the accused has appeared in answer to a summons lawful issued charging him with an offence.

Sections 180—184 CPA, provide for situations whereby territorial jurisdiction is said to exist. Briefly these sections provide that:

- The offence has to be inquired or tried within the local limits of jurisdiction where the offence was committed—S.180 CPA.

Example, A steals a cow in Temeke, Dar es Salaam, and the Temeke District court will have jurisdiction to try him.

- Within the local limits of jurisdiction where the accused was apprehended –S.180 CPA

Example, Although **A** stole the cow in Temeke but was arrested at Ilala, the Ilala District court will have territorial jurisdiction to inquire on the matter.

- The accused is in custody on a charge for the offence—S.180 CPA.

Example, A who stole the cow in Temeke, is arrested in Ilala but remanded in Kinondoni, because Ilala has no prison facilities, the court in Kinondoni can deal with him territorial.

- The accused has appeared in answer to a summons lawfully issued charging him with an offence—S.180 CPA.

Example, A having committed an offence of cow stealing went at large and summons was issued for his appearance at a nearest court, if **A** submits himself to a court in Arusha, the court there will have territorial jurisdiction to try the case.

- The act or consequence takes place in two different areas then either court where the act or consequence takes place has jurisdiction to try the matter—S.181 CPA.

Example, A poisoned chocolate is prepared at Arusha by **A** and sold to a passenger traveling to DSM, the passenger eat the chocolate somewhere between Chalinze and DSM but does not get sick immediately until on reaching DSM where he seriously get sick and is hospitalized, either of the court in Arusha or DSM will have territorial jurisdiction.

- The act is an offence by reason of its relation to any other act which is also an offence or would be an offence if the doer were capable of committing an offence, then either court within whose local jurisdiction either act was done has jurisdiction—S.182 CPA.

Example, Theft and receiving or retaining property. The act of receiving takes place in Ilala, the act of retaining takes place in Kinondoni and theft took place in Temeke, either of the district courts in Ilala, Kinondoni and Temeke will have jurisdiction over the case.

- The offence is committed partly in one area and partly in another or it consist of a series of acts done in different local areas, then either court within whose jurisdiction whether of the act or series of acts is/are committed may try the case—S.183 CPA.

Example, conspiracy—a portion of it may be done in Ilala, another portion in Temeke and the final one in Arusha, either court within whose local jurisdiction of the portion of conspiracy was done will have jurisdiction.

- The offence is committed on a journey, any of the courts within whose local limits of jurisdiction the accused person passed can try the case—S.184 CPA.

Example, Traveling on a fake ticket on a bus from Dar to Arusha.

Where Jurisdiction is Uncertain

Where there is uncertainty of court's jurisdiction the matter should be referred to the High Court for direction as per S.185 CPA. The decision of the High Court is final and conclusive on the point.

Its conclusiveness may be challenged where the accused person raises the objection that no court in Tanzania has jurisdiction over him. In this case some evidence must lead to show that the court has or has no jurisdiction.

Transfer of Cases

The provisions from both the CPA and the MCA govern transfer of cases.

Transfer from court to court

This type of transfer occour where the cause of action arose outside the jurisdiction of the court. As discussed above under ss.180—184 CPA, the court may have jurisdiction to try the offence, but the cause of complaint arose outside the court's territorial jurisdiction—E.g. Cow theft at Ilala-the cause of complaint arose in Ilala, but the accused was arrested at Temeke. The court in Temeke has jurisdiction to try the case by virtue of section 180 CPA, but because of witnesses' availability, the Temeke court may decide to transfer the matter to the Ilala court so that it is expediently tried—S.189 CPA.

Primary court may at any time

- Before the judgment
- With the consent of the District Court or Resident Magistrate Court,

Transfer the proceedings to such District Court or Resident Court or to some other Primary Court. This is the situation where the case is transferred from Primary Court to another court—S.47 (1) MCA.

According to section 47(b) MCA, the Primary Court is required to transfer to the District Court any proceedings of a criminal nature if the accused person so elects. An election under this section will have to be made before the accused pleads to the charge.

The court will entertain this election only if the accused

- Is charged with an offence punishable in the primary court by imprisonment for more than twelve months,
- If he is an adult punishable by corporal punishment.

Failure to comply with the request of the accused person to have the case been transferred will render the trial void ab initio.

In the case of **Elias V R [1983] TLR 423**, the appellant was charged and convicted by the primary court of cattle theft. At the beginning of the trial, before the appellant had entered his plea, he requested the court to transfer the case to the district court because he intended to engage a counsel. Though the court acceded to his plea, it later entertained the case requiring the appellant to enter his plea, which he did and then the court proceeded to hear the case without taking into account the appellant's plea to have the case transferred. During the trial the appellant declined to cross—examine prosecution witnesses and defended himself. He however reminded the court of his request. The court found the appellant guilty and sentenced him to five years imprisonment. The appellant's appeal to the district court failed as the court was of the view that by entering his plea of not guilty when the charge was read over to him for the second time, the appellant had impliedly submitted to the jurisdiction of the primary court. On appeal to the High Court,

- *The provisions of section 41(2) MCA'63 [s.47 (2) (b) MCA'84] are mandatory and is signified by the use of the term "shall"*
- *the ingredients of section 41(2) MCA'63 [s.47 (2)(b) MCA'84] are that the accused must elect to have the case transferred and such option has to be exercised before entering his plea, and the offence charged had to be one that is punishable by imprisonment for more than twelve months.*
- *The effect of satisfaction of these ingredients is to remove from the primary court the jurisdiction to try the case.*
- *Even belatedly the court can still transfer the case after the accused has entered his plea if it is clear that the accused has not abandoned his initial wish to have the case transferred.*
- *The errors, omissions and irregularities section 32(2) MCA'63 [s37 (2) MCA'84] is intending to cure are those that flow from the exercise of lawful jurisdiction.*
- *Where jurisdiction of the court has been taken away there is no trial as such, and therefore section 32(2) MCA'63 [37(2) MCA'84] cannot apply as there is nothing to cure.*

Another situation is where the district court or the resident magistrate court may order the transfer the proceedings from the primary court to itself provided that the primary court is situated within its jurisdiction.

The case may also be transferred from, another court to the primary court. This happens where the proceedings have been instituted in either the district court or resident magistrate court or the High Court and it appears that the primary court has jurisdiction to try it. Thus either the district court, resident magistrate court or the High Court, may order the case to be transferred to the primary court having jurisdiction to try the case—S.48 MCA.

Power of the High Court to Change Venue

The power of the High Court to order change of venue is provided under section 191(1) CPA. Under this section the High Court may order any offence to be inquired into or tried by a court not empowered under Part VI CPA but in other respect competent to inquire into or try such case.

The High Court may make such order where it is of the opinion that:

- A fair and impartial trial cannot be held in any court subordinate thereto,
- Some question of law of unusual difficult is involved,
- Such order is expedient for the end of justice,
- The order will tend to the general conveniences of the parties,
- A view of the place where the offence was committed may be required for the satisfactory inquiry into or trial of the same.

Change of venue is different from transfer of cases

- Change of venue is in respect of the orders made by the High Court for change in the place or court the matter is supposed to be tried, while transfer of case is in respect of one court transferring the case to another court for trial, simply because the cause of action/complaint arose outside the territory of the transferring court.
- While change of venue may be prompted by such factors like the need to promote fair and impartial hearing, competence, convenience of the parties and their witnesses and the expedience of justice, transfer of case is normally done by parties, the lower court or the High Court on its own motion—S.191 (2) CPA.

Compelling the Attendance of the Accused Person

The court after receiving a complaint and signing the charge may proceed to issue either a summons or warrant to compel the attendance of the accused person before a subordinate court having jurisdiction to inquiry into or try the offence alleged.

- By way of court summons.
  Contents of a summons—S.100 CPA.
  Service of summons—S.101 CPA.
  Government/Public Corporation Officers—S.104 CPA.
  Service on company—S.105 CPA.
  Limits of service—S.107 CPA.
  Proof of service—S.108 CPA.

Consequences of disobedience of summons: the court may issue a warrant of arrest—S.111CPA.

- By being brought to court by police officer following an arrest without warrant under sections; 14,25,28,29, &30 CPA.
- By way of warrant of arrest under sections; 110-123 CPA.
- By committal order instructing the prison officer to bring the accused to court—S.126 CPA.
- By court bond—SS.124-125 CPA.
- By Habeas Corpus—S.390 CPA.
- By Extradition order where the accused is in foreign country that has extradition treaty with Tanzania—Extradition Act, Cap.368 R.E 2002.

PLEAS

Definition of a Plea

Plea is a formal statement by or on behalf of the accused person as to his admission or denial of his guilty to the charge. The substance of the charge must be stated to the accused person who will be asked whether he admits or denies the truth of the charge—S.228 (1) CPA.

Plea must be personal, free, voluntary and by a fit person. It must be personal because no body is allowed to plead on behalf of another (including advocates), unless it is;

- A case against corporate bodies—S.109 CPA
- A warrant offence covered by section 193 CPA
- A situation where the accused stands mute in which a plea of not guilty is entered for him —S.216—221 CPA

The law requires that before taking the accused's plea, the court must state and explain the substance of the charge to him. All the ingredients of the offence must be carefully set out. This is because, although the accused may presumably know the facts giving rise to the offence charges, it does not automatically follows that he can determine whether he is guilty of the offence unless its nature is made clear to him. This is especially true where the definition of the offence makes use of concepts and distinctions not readily understood by the layman. This was the position in the case of **Buhimbila Mapembe V R [1988] TLR 174** whereby the appellant was charged and convicted purportedly on his own plea of guilty of the offence of being in possession of government trophy, to wit lion skin, contrary to Paragraph 16 (a) 1st Sch. And ss.56 (1) and s.59 (2) of the Economic and Organized Crime Control Act, 1984 together with ss.67 (1), (2) (a) & (g) of the Wild Life Conservation Act. When the charge was read over and explained to the accused he was asked to plead and he said "it is true" and being briefed to the facts he said, "The facts are correct", the court entered a plea of guilty and convicted him. He appealed to the High Court against the conviction.

- Facts as adduced by the prosecutor; Facts are as per charge sheet, the accused was arrested on 12/3/84 at 4:00 pm. He was found with one lion skin, exhibit PA.
- On appeal it was argued that the appellant's plea was equivocal in that the words "unlawful possession" was not explained to the accused.

The High Court held that;

- *In any case in which a conviction is likely to proceed on a plea of guilty it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it unequivocally,*
- *The words like "it is true" when used by an accused person may not necessarily amount to a plea of guilty, particularly where the offence is technical one,*
- *In this case the facts given by the public prosecutor cannot reasonably be said to have amounted to full disclosure of the ingredients or elements of the offence rather they appear to be more an allegation that the appellant had possession of the lion skin,*
- *Where the offence charged is rather technical and the accused is unrepresented it is desirable that the technical words be adequately explained to the accused before he is asked to plead thereto.*

In this case the public prosecutor failed to state the facts clearly to the accused as a result the accused was convicted for the offence which he never committed when he pleaded guilty, he did not know that the offence contained technical words in the definition. Mere possession of the lion skin was not on itself an offence—possession must be unlawful

NB: Where the accused is charged in several counts a separate plea must be taken from each count, and if several accused are charged each one must be called upon to plead individually. Where accused plead guilty to one count, it is proper for the magistrate to postpone the sentence on that count until the hearing of the second count.

Presence of the Accused

The law requires that the accused should be present in the court through out the trial. Even in cases where the personal presence of the accused is dispensed with still his advocate must be present when the evidence is taken. The meaning of presence of the accused was explained by Lord Reading, C.J; to mean, "the presence of the accused means not merely that he must be physically present, but also that he must be capable of understanding the nature of proceedings", in the case of **R V Lee Kun (1916) Cr. App.** R.293 at p.300

It is the right of the accused to know and understand the charge against him that is why the law requires that the charge should be read over and explained to the accused. This requirement should be taken seriously and not as formality. In the case of **Kanda V Government of Alaya (1962) 2 WLR 1153**, Lord Denning, L.J. said:

> *"if the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them".* P.1162

And in **R V Lee Kun (1916) 11 Cr.App.R.293**

> *"It is for the court to see that necessary means are adopted to convey the evidence to his (accused's) intelligence, notwithstanding that either through ignorance or disregard for his own interest he makes no application to the court. The reason why the accused should be present at the trial is that he may hear the case made against him, and have the opportunity of answering it".*

Consequences of Failure to Take a Plea

It is the requirement of the law that after a charge has been read over to the accused person, a plea must be taken—S.228 (1) CPA. The prosecution of an accused person is not complete until he has pleaded to the charge. Where no plea is taken, the trial is a nullity. The omission to take a plea is an incurable irregularity.

In the case of **Stephen s/o Simbila V R (1971) HCD No.433**, the appellant was charge with and convicted of stealing by a person employed in the public c/ss 270 &265 PC. He did not enter a plea in the court to the charge but was sentenced to imprisonment and ordered to suffer corporal punishment. He appealed against the conviction and sentence.

It was held that –it is well-established law that if no plea is taken before trial commences, such trial would be null and void.

In another case of **Naoche Ole Mbile V R [1993] TLR 254**, the appellant was convicted by the economic crime court in absentia. In fact the entire proceedings were conducted in the complete absence of the appellant from the courtroom, i.e. he was convicted without having been arraigned. On appeal;

> *One of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned i.e. the court has to put the charge(s) to him and require him to plead; Non-compliance with the requirement of an accused person renders the trial a nullity.*

It has further been argued that the magistrate may take a plea afresh even if the accused's plea had been taken on the previous days by the same or different magistrate. See the case of **Akberal Wali Mohamed Damji V R 2 TLR 137**

If a magistrate has already taken a plea in the first proceedings, it is prudent to take again, if the first proceeding is postponed to another date before another magistrate.

Failure to take a plea at all as said above is an incurable irregularity what the court can do on appeal or revision is to order a retrial.

However failure to take a plea afresh where the case has been postponed and the accused has appeared before another magistrate in not fatal. It cannot be said to contravene the provisions of section 228(1) CPA.

Types of Pleas

Plea of Guilty

In simple terms, plea of guilty is a confession to the offence charged. In **Patrick Rimmer V R (1972) 56 Cr. App.196**, the court said,

> *"…. a plea of guilty has two effects: first of all, it is a confession of facts; secondly; it is a confession that without further evidence the court is entitled to and indeed in all proper circumstances will act upon it and result in a conviction".*

It is prudent that before accepting a plea of guilty by the accused, the court must be satisfied that the accused's reply is nothing but a clear admission of guilty—see **DPP V Paul Makujaa [1992] TLR 2.**

The reading of a charge and calling the accused to plead is not enough, the court must make sure that the accused understand the substance of the charge and he must admit all the ingredients of the offence.

The court is required to take a plea of guilty from the accused with greater caution the court must make sure that the accused knows precisely what he is doing. Under section 228(2) CPA, the court is required where the accused pleads guilty to record his admission as nearly as possible in the words he uses.

Furthermore, the accused's plea must be such as to leave the court with no doubt that every ingredient of the offence has been satisfied. In **Kenneth Manda V R [1993] TLR 107**, the court said;

> *"An accused person can only be convicted on his own plea of guilty if it is ascertained as correct facts which constitute the ingredients of the offence charged".*

There are situation where the court will convict an accused person on his own plea of guilty even if his admission of the truth of the charge does not include technical words used in the definition of the offence. The court will do this only if it is satisfied that the accused understand the contents of the charge.

In the case of **Amiri Nathoo V R (1970) HCD No.51**, the accused was charged with corrupt transaction. He gave Tshs. 800 to Regional Education Officer as an inducement for the later giving him copies of the forthcoming standard seven examinations for which his sister was a candidate. In reply to the charge he said, "It is true I gave Tshs. 800 to Mr. Percival Mwidadi so that he could release the 1969 standard seven examination papers to me for the use by my sister Naaz Nathoo". On this plea he was convicted. On appeal it was argued that the plea was equivocal in that it did not admit that the money was given "corruptly".

> *It was held that on the facts it was inconceivable that the accused could have thought the release of the examination paper could be accomplished other than dishonestly or corruptly.*

Here the court was concerned with the knowledge of the accused he knowingly and deliberately admitted sufficient material facts, which established the offence.

However when a plea doesn't conform in all respect with the elements of the offence charged, it may be held equivocal, when it raises some reasonable doubts as to whether in fact the offence was committed.

In **R V Eliphas Jackob [1984] TLR 346**, the accused was charged with driving a motor vehicle without a valid driving license c/s 19(1) of the Road Traffic Act, 1973. He pleaded guilty to the charge. When the facts were read out, they showed that the accused was stopped and asked to produce a driving license, which he did not produce.

> *It was held that failure to produce a valid driving license is a different offence from one of driving without a valid driving license (s.77 (1)), and that since the facts were at variance with offence charged, the conviction cannot stand.*

It is emphasized that when the accused plead guilty to a charge, the prosecution should be called upon to state in some details the facts constituting the offence which are recorded. The accused should be asked if he agrees or disagrees with the facts alleged. If he agrees and if the facts stated support the charge, then and only then should a conviction be entered.

On the other hand, if the accused denied some facts stated which are essential to the charge, then a plea of not guilty should be entered in substitution for the first plea then the case should go to trial.

In some instances the facts denied by the accused might not affect the validity of the charge in which case, if the prosecution is willing to accept the accused's version, the plea of guilty will remain undisturbed, and a conviction be entered.

The facts serve the following purposes:

- Facts enable the magistrate to satisfy himself that the plea of guilty was really unequivocal.
- That the accused has no defense.
- It gives the magistrate the basic material on which to assess the sentence—**Aidan V R [1973] E.A 445.**

In the case of ***Waziri s/o Musa V R 2 TLR (R) 30,*** the judge said

> *"…This subsection has been interpreted as meaning that if a person admits the truth of a charge his plea should be entered as one of guilty and a conviction there upon recorded. In my view, however, such an interpretation is too strict. Before recording a conviction a magistrate should hear and record the facts furnished by the prosecutor. The accused should then be asked if he agrees with them; if he does and the magistrate is satisfied that the accused's answer to the charge should having regard to facts be entered as a plea of guilty then it should be so entered and a conviction recorded…if on the other hand, the accused does not admit certain of the facts and these are regarded as of importance by the prosecutor, then the accused's answer to the charge should be entered as one of not guilty and the charge should be tried".*

The court is required to convict an accused person who pleads guilty and admit the facts of the case. In the case of **DPP V Faraji Hussein 1976 L.R.T.No.54**, the respondent was charged with two offences;

1st count—careless driving, which he pleaded, "It is true, I admit it was my fault"

2nd count—driving a motor vehicle on a public road, which was not in good mechanical condition which he, pleaded, "I admit it was my fault"

Prosecution applied for adjournment to read the facts. For three instances the prosecution failed to supply facts. Prosecution applied to withdraw the charge u/s 98(a) CPA but the magistrate withdrew u/s 230 CPA. DPP appealed. The court held that;

> *When an accused is charged with an offence and unequivocally pleads guilty, the court has no power to acquit him but has the duty to convict him and pass sentence upon him, unless sufficient cause to the contrary is shown.*

As said above; when the accused pleads guilty, the court is required to call upon the prosecution to narrate the facts relating to the offence charged.

The plea of an accused should not be equivocal—equivocal plea is the one, which is ambiguous, or vague or unclear. This plea leaves the court in doubt whether the accused denies or admits the truth of the charge. In **Musau Muya V R [1962] E.A 643**, it was said;

> *"It is well settled that the word 'nilikosa' meaning 'I have done wrong' by itself should not be treated as an unequivocal plea of guilty without inquiring as to what it was that the appellant admitted he had done"*

Other words like 'I admit' or 'I was wrong' 'it is true' should not be treated as unequivocal plea of guilty. It is through these facts that the magistrate will be able to know whether such term by the accused amount to a plea of guilty.

To avoid recording equivocal plea as a plea of guilty, the court in the case of **Mohamed Yusufu V R [1957] E.A 551**, said;

> *"This court has in many occasions stated that before a court accepts a plea of guilty from an accused person who is not legally represented it should carefully explain the ingredients of the offence charged and ensure that they are carefully understood by the accused."*

There are some instances where the accused may enter a plea, which admits facts amounting in law not to the offence charged but to some other offence. Though there is no statutory authority to convict on the other offence, but as a matter of practice, when a plea of guilty to an offence other than that charged is tendered, and if the prosecution accepts this plea, the court may in its discretion convict of the offence. This is frequently done in murder cases where the accused pleads guilty to a lesser offence of manslaughter. It appears that in doing so the court is making use of its powers to alter charge u/s 234(1) CPA. Under this section, the court alone has the discretion to convict of an offence other than that charged and so the consent of the prosecution although normally solicited is not strictly speaking necessary.

Plea of Not Guilty

Plea of not guilty may be necessitated by a number of factors:

- When the accused does not admit the truth of the charge, then a plea of not guilty is entered—S. 228(3) CPA.
- When the accused admits the truth of the charge, but in fact the plea is equivocal—S.228 (2) CPA.
- Where the accused refuses to plead, the court shall order a plea of not guilty to be entered for him—S.228 (4) CPA.
- Where corporation fails to enter appearance, then a plea of not guilty is entered for it—S.106 CPA.
- When the accused enters a plea, which in the opinion of the court raises possible defense.
- When the accused enters a plea, which in the opinion of the court does not constitute a full admission of all the elements of the charge.

The procedures on a plea of not guilty is provided under section 229(1) CPA in that the prosecution is required to open the case and call witnesses and adduce evidence in support of the charge.

The accused or his advocate may put questions to the prosecution witnesses produced against him.

When the accused stands mute, section 228(4) CPA will apply i.e. the magistrate will enter a plea of not guilty for him. There are two reasons why the accused may stand mute;

1) The accused may stand mute out of malice

Here the accused fully understand the charge and can defend himself but he deliberately stands mute. When the accused stands mute, the magistrate is supposed to make inquiry and if he finds the accused mute of malice, he will enter a plea of not guilty and proceed to hear the case.

In the case of **Wachira s/o Murage & Others V R [1956] 23 E.A.C.A 562**, the accused was charged with murder, he refused to plead and created an uproar in the court which raised doubts as to his sanity. When examined by a psychiatrist he was found to be mentally normal and merely simulating disease of the mind presumably with the object of avoiding trial. The appellant created such disturbance that it was not possible to conduct the case in his presence. The judge entered a plea of not guilty on his behalf and ordered his removal. Most of the trial took place in his absence, except that he was brought in for identification, and to be given an opportunity to make his defense, (which he refused to do), to be informed of the effect of the judgment and to be sentenced. On appeal;

> *"In this unusual situation a trial judge may be in doubt as to the correct procedure. We desire to say that in our opinion the course adopted by the learned trial judge in this case, the details of which are careful set out in his notes and judgment, together with the relevant authorities, was not only strictly correct, but may well serve as a model for other judges who may be faced with the same problem"*

2) Accused may stand mute through the visitation of God:

The accused may be mute in this way if he is deaf, and hence cannot hear when the charge is read over to him. If the accused is sane he can be tried in case he can write or if some intelligence can be conveyed to him either though signs or symbols. The procedure to be followed is laid down in the case of **R V Bubu (Dumb Man) [1959] E.A 1094**,

> *"In the first place, as soon as a magistrate becomes aware that the accused is a deaf mute, he should apply his mind to the question whether the accused can be made to understand the proceedings and should make a finding. Understanding the proceedings means, in my opinion, understanding substantially the whole of the proceedings. I say substantially the whole of the proceedings because obviously few accused will fully understand expert technical evidence but they can be made to understand its effect. A deaf mute can be made to understand the proceedings if he can communicate by sign language and for the later purpose a relative or a friend, dully sworn, may be employed to interpret. If the magistrate finds that the accused can be made to understand the proceedings, the trial will follow the usual course with all the proceedings conveyed or interpreted to the accused. If the magistrate finds that the accused cannot be made to understand the proceedings the trial will proceed in accordance with section 169 CPC (section 221 CPA)* per Spry Ag. J.

Plea of Autrefois Convict, Acquit and Pardon

Where the accused pleads that he has been previously been acquitted or convicted or has obtained pardon in law, the court should inquire whether such plea is true or not—section 228(5) CPA.

The court is required to ask the accused to plead to the charge if it finds that the plea is in fact false or the evidence adduced in support of such plea does not sustain the plea.

It is the canon of the administration of criminal justice that no person shall be tried twice for the same offence arising out of the same facts, unless;

- The previous conviction or acquittal has been set aside or reversed under section 137 CPA.
- An error of jurisdiction has vitiated the competence of the court previously tried the case under section 140 CPA

Powers to grant pardon to person convicted is vested on the president, thus it is normally he who may rescind the pardon—Article 45(1) (a) COURT. However courts of law may also rescind the pardon through judicial review basing on error apparent on the records or through a constitutional court action based on the Article 26(a) COURT to challenge the legality of the pardon.

How to prove;

a) Previous Acquittal,

i) A certificate/certified copy of the acquittal order.

ii) A release certificate of the prison department where the accused was in remand before the acquittal.

iii) A certified copy of a judgment—local or foreign.

iv) A prison discharge warrants.

b) Previous Conviction,

i) A certified copy of the sentence or order.

ii) A certificate of the prison department.

iii) A certified true copy of the judgment—S.141 (1)(a)—(d) CPA.

c) Pardon,

i) A certificate by the State House or Home Affairs Ministry.

ii) A certificate by the prison department

iii) A warrant of discharge.

Withdrawal of Plea

The court may allow an accused person to withdraw his plea at any time of the proceedings before the sentence or a final order is made. The court must record reasons for permitting the accused to withdraw his plea. In the case of **Suzana V R (1971) HCD No 209**, the appellant was convicted of unlawful possession of poisonous drug. The trial magistrate permitted the appellant to withdraw her plea of guilty after conviction had been entered. The court on appeal held that:

- *It now transpires that the learned magistrate was full entitled to give the appellant such permission before he has passed a sentence.*
- *It must be emphasized that the court must use its discretionary power judicially. It must record the reasons as the accused used to persuade it to use its discretion in the accused's favour.*

The court may allow the accused to withdraw the plea of guilty even after conviction but prior to the imposition of sentence where facts raised in mitigation constitute denial of the offence.

The power of the court to allow withdrawal of a plea of guilty where it is unequivocal is discretionary i.e. the court can allow or disallow the withdrawal of a plea of guilty. The magistrate is required to apply his mind judicially and that is why he has to record his reasons for refusal and also for allowing the accused to change his plea.

In the case of **Hussein s/o Hassan V R (1921—1952) 1 TLR (R) 355**, the appellant was charged with stealing two drums of petrol c/ss 265&271 PC. He unequivocally pleaded guilty. He was convicted and remanded to custody for sentence. When the hearing was resumed a different magistrate presided over the court. The appellant then stated that he did not steal the property and a plea of not guilty was entered. The case was tried and the accused was ultimately convicted. On appeal:

- *When an accused person had pleaded guilty to a charge and has been convicted on his plea, the court has jurisdiction to allow him, before a sentence, to withdraw his plea and a plea of not guilty entered.*
- *Where the court allows the withdrawal of a plea of guilty a conviction consequent on such plea become a nullity and a defense of autrefois convict cannot successful be raised.*

If a change of plea is from one of not guilty to the one of guilty the magistrate will do the following;

- When the change is made after the prosecution has already given its evidence, and if such evidence discloses the offence, the magistrate is required to sum up such evidence and ask the accused if he admits it. If the accused admit such evidence, the magistrate will convict him.
- If the change in made earlier, the magistrate will ask the public prosecutor to narrate the facts and the procedure will be as usual.

Plea of Co-Accused

Where there are several accused persons charged jointly and some of them plead guilty, the proper procedure is to convict those who plead guilty and proceed to try the others. The issue whether they should be sentenced straight away will depend on whether or not the prosecution intends to call them as witnesses.

In the case of **R V Payne [1950] 1 All E.R 102**, the appellant and two others were charged with housebreaking. The appellant pleaded guilty and the other men not guilty. Sentence of two years' imprisonment was passed on the appellant at once, the other men being put back for trial and sentenced to twelve months and fifteen months respectively. On appeal it was held;

> *"Where several persons are charged jointly on an indictment and one pleads guilty and the other not guilty, sentence should not at once be passed on him who pleads guilty, but should be postponed until after the others have been tried, so that the court being by that time in possession of the facts relating to all prisoners can properly asses the respective degrees of guilty among them".*

The court observed that this discretion would not apply in the exceptional case where a man who pleads guilty is to be called as a witness. Such a person should be sentenced at once so that there can be no suspicions that his evidence is coloured by the fact that he hopes to get a lighter sentence by reason of the evidence he gives.

Plea by Advocate

The general rule is that the plea of an accused should be recorded in his own words—S.228 (2) CPA. However the exception to this rule is section 193 CPA.

Where the court dispenses a person his personal attendance, may plead guilty through writing or an advocate. This plea will be taken only if:

- The person is charged with a warrant offence,
- The offence is punishable by fine,
- The punishment does not exceed six months in prison or combination of both fine and imprisonment.

In the case of **R V Hussein Mohamed Moti (1953) 10 E.A.C.A 161**, the appellant was convicted on two charges of contravention of by-laws, the personal appearance of the respondent was dispensed with. An advocate appeared for respondent and tendered a plea of guilty to both charges, which the Resident Magistrate accepted.

The court on appeal held; section 99(1) CPC (s.193 (1) CPA also provides an exception enabling an accused person to tender an oral plea of guilty through an advocate in cases coming within the scope of the sub-section.

BAIL PENDING TRIAL

Is Bail a Right or Privilege?

There is no general provision that a person charged for committing an offence can automatically be granted bail or refused bail. This will depend on the law under which he is charged. This is because, every trial is conducted under the presumption of innocence that every person charged with a criminal offence is presumed to be innocent until proved guilty by a competent court. Read ***also Article 13(6) of the Constitution of the United Republic of Tanzania, 1977.***

Another thing to bear in mind when dealing with bail is that every person has the right to enjoy his personal freedom as per ***Article 15(1) of the Constitution,*** and also under ***Article 17(1) of the Constitution,*** every person has the right to enjoy his freedom of movement.

It is obvious therefore that the test to be applied when grating bail or refusing bail should be fairness—fairness to both the accused and the prosecution. Thus, the granting of bail under the ***Criminal Procedure Act, 1985*** should be a rule when the conditions are met. When all conditions are met but still the accused is refused bail, such refusal becomes a punishment. In **R V Charles Rose (1921—1952) TLR 213**, the court said

> *"Bail should never be intended to be punitive, but only to secure the attendance of the prisoner at the trial, and a magistrate is not competent to refuse bail, unless the law sanctions such refusal".*

In **Tito Douglas Lymo V R 1978 L.R.T N.55**, it was held that;

> *"Briefly it can be stated that bail is a right and not a privilege to an accused person unless the court is convinced that by concrete evidence in most cases, if not all, emanating from the prosecution when objecting to an application for bail that to grant bail would result in a failure of justice or that it would result in the abuse of court process".*

D.P.P'S Certificate

When a person is brought to court or at any stage of the proceedings he may be granted bail. The DPP however under section 148(4) CPA has power to object the granting of bail if he believes that doing so will prejudice the safety or interest of the Republic. He can do this by tendering the certificate in writing in court.

It is to be noted that, the DPP is not required to specify or disclose the nature of the interest concerned, see the case of **DPP V Ally Nur Dirie [1988] TLR 252.**

The certificate by the DPP has to be filed when the case is either pending trial or pending appeal. A case is said to be pending when the trial or appeal has commenced whereby accused person appears before a competent court, which has power to convict or acquit, and after he has been informed of the charge and required to plead. When for example the court is not competent to try the case or hear an appeal, the certificate of the DPP will be premature, example District Court trying economic crime case without the consent of the DPP.

Circumstances under Which Court May Refuse Bail Pending Trial

Statutory Restrictions

- According to section 148(5) (a) CPA, if a person before a court is charged with murder, treason or armed robbery shall not be admitted to bail. In addition to that where a person in charge with an offence of illicit trafficking in drugs however this does not include a person who is charged with possession of drugs which was not for commercial or conveyance purposes.[1] Another situation is where a person is charged with an offence involving heroin, prepared opium, opium poppy (papaversetigerum), poppystraw, coca plant, coca leaves, cannabis sativa or cannabis resin

[1] The Drug and Prevention of Illicit Traffic in Drug Act, 1995.

(Indian hemp), methaqualone (mandamx), catha edulis (khat) or any other narcotic drug or pyshoctropic substance specified in the Schedule to this Act which has an established value certified by the Commissioner for National Coordination of Drugs Control Commission, as exceeding ten million shillings. The court also shall refuse bail for a person who is charged with money laundering.[2]

- A person who has previously been convicted and sentenced to imprisonment for a term exceeding three years shall not be granted bail—S.148 (5)(b) CPA.
- A person who has previously been granted bail but has failed to observe the conditions of bail or has absconded shall not be eligible to bail—S.148 (5) (c) CPA.
- A person may be denied bail for his own protection—S.148 (5) (d) CPA In the case of **Athumani Ally Maumba [1988] TLR 114**, the appellant had violated some children and the police objected to bail on the ground that he could be assaulted by the parents of the victims. The District Court refuses bail. On appeal the court said that;

> *Before the provisions of section 148(5) (f) CPA [S.148 (5) (d) CPA] are invoked to the detriment of an accused person the prosecution must clearly show that the accused's safety is in danger and such information must be verified as to its authenticity*.

- According to section 148(5)(e) CPA, where a person is charged with an offence involving actual money or property whose value exceeds ten million shillings, such person before granted bail shall deposit cash or property equivalent to half the amount. Where the property to be deposited is immovable, he shall deposit the title deed, and where it is not available, any such other evidence as is satisfactory to the court. This provision does not apply to police bail.

Judicial Considerations

Apart from statutory provisions on restriction of granting bail, courts normally do consider the following factors before granting bail:

- The court will look on the allegations that the applicant for bail will temper with investigations and prosecution witnesses. In the case of **Mohamed Ali Bhai V R (1921—1052) 1 TLR 138**, the court said;

> *in deciding whether or not to grant bail court should look at the allegations on reasonable grounds that the accused if released on bail is likely to temper or attempt to temper with or improperly influence Republic witnesses, thus interfering with due course of justice. The allegations must base on reasonable grounds.*

It is important that the facts, which the opposition to bail is based, should always be proved by an affidavit. However where it is found that this requirement will cause unnecessary/unreasonable delay in the hearing of the application, an affidavit will not be necessary, it was further said in the case of **Bhagwanji Kakubai V R (1921—1952) 1 TLR 143**, that mere assertion that an accused person has knowledge and documents in his possession which, if used, may upset the smooth course of police investigation is too hypothetical, vague and unsubstantial a reason for refusing bail.

In another case of **Abdallah Nassoro V R (1921—1952) 1 TLR 289** at p 293 the court said the following;

> *The true test is whether the granting of the application will be detrimental to the interest of justice and good order…But such detriment must be satisfactorily substantiated by solid reasons and not based on vague fears or apprehensions or suspicions. And bail should not be lightly refused.*

[2] Money laundering contrary to the Anti-Money Laundering Act, 2006.

- Another factor that may be considered by the court is the likelihood of the accused to commit another offence while out on bail. Here the assumption is that the applicant is guilty of having committed the same offence in the past.

- The court will look whether or not the accused is going to keep peace and good order in the society if released on bail. In **Jayantlal Hemraj V R (1970) HCD No.150**, it was said that the court should look at the danger of the accused committing a breach of peace should his application for bail succeeds.

- The likelihood of the applicant to abscond if released on bail is another factor to be considered by the court. The court will also look at the residence and domicile of the applicant. In **Asoka V R (1971) HCD No.192**, the appellant was charged with stealing Tshs. 2.5m the property of the Government of Tanzania. He was refused bail. The judge on appeal found that:

  "There can be no doubt that the offence with which the accused person is charged is a serious one. Equally, it is my view that it would be unsafe, indeed almost unrealistic, to grant bail pending the hearing of the case. Granting of the application would be detrimental to the interest of justice".

In **Edward D. Y. Kambuga and Another V R [1990] TLR 84**, the High Court granted bail to the first appellant in near impossible conditions and refused second appellant bail on the ground that he was a foreigner. On appeal;

While foreigners should not be treated differently in our courts merely because they are foreigners, we think the High Court was entitled to take into account past experience when deciding finally whether or not to grant bail.

- The court has to consider the weight and the gravity of the charge. In **Mwita s/o Mwita V R (1971) HCD No.122**, it was held that

  "The seriousness of the charge is one of the factors which ought to be considered in bail application…. the test is whether the accused, if released on bail, would appear to take his trial. Nothing on the record suggests that the accused would not appear to take his trial". Bail was granted.

From the decision of this case we find that seriousness of the offence alone is not sufficient ground for refusing bail. There must be other reasons to justify refusal of bail, like the likelihood of the accused to abscond example in the case of **Asoka V R (1971) HCD No.192**, the court found that the accused was a foreigner and also had a substantial business in Uganda, so it was likely that he might abscond, given also the fact that he was faced with a serious charge,

- The courts also look at the severity of the punishment to be imposed on the applicant upon conviction. A man faced with death penalty if convicted, is more likely to abscond than the one faced with a mere fine. In **Edward D Y Kambuga & Another V R [1990] TLR 84**, the court said;

  "…The court must take into consideration the seriousness of the case facing the foreigner, whether it is of such a nature that in the event of conviction, the stipulated penalty is so severe as to encourage escape from justice".

- Another consideration is whether the investigations will take too long to complete and thus the accused will spend a long time in custody. In **R V John Olate (1972) HCD No.198**, the court held that the fear of the prosecution that the accused if released on bail will impede investigations or flee is not sufficient ground for denying bail where the investigations are delayed.

- Other considerations include;
  - Reliability of sureties
  - The age of the accused

- Is reconciliation feasible under section 163 CPA?
- Is the accused seeking legal representative?

Conditions of Bail

- Mandatory Conditions

According to section 148(6) CPA when the court decides to release an accused on bail, it will impose the following conditions:

- The court will require the accused to surrender his passport or any other travelling documents to the police,
- The court will restrict the movement of the accused to the area of town, village or other area of his residence.

- Discretionary Conditions
  - The court may require the accused to report to a police station or other authorities at intervals,
  - To abstain from visiting particular localities or premises,
  - To abstain from associating with certain specified person(s),
  - Not to leave the confinement area without the court's permission.

The Amount of Bail

Except where the law sets the amount of security to be taken from the accused person, each case is to be dealt with according to its merits. However it is the principle of the law that the amount should not be too excessive to the accused to afford hence leading to unnecessary detaining of the accused.

Where a subordinate court imposes conditions that are unnecessary or refuse to grant bail at all the High Court may order the person to be granted bail or vary the amount of bail. Furthermore the High Court may vary the amount of bail or conditions of bail even where the accused had been admitted to bail.

When the person is refused bail by the subordinate court, he may apply to the High Court, that he be admitted to bail. In **Mohamed Alibhai V Rex (1921—1952) 1 TLR (R) 138** it was stated that such an application should be supported by an affidavit, the court further said;

> *"Where a further application for bail is made to the High Court, after it has been refused in the lower court, normally, as a matter of practice and convenience there should be an affidavit in reply to the police officer who opposed bail in the lower court or to any other competent person, showing the facts on which the Crown (Republic) relies in opposing the application".*

Execution of Bonds

- Before any person is released on bail he must execute a bond and shall comply with the conditions specified in the bond—S. 151 CPA.
- As soon as the person has executed the bond he shall be released—152(1) CPA.
- Instead of executing a bond, a person will deposit a sum of money to be fixed by the court—S.153 CPA
- The court may arrest a person released on bail if;
  - Through mistake, fraud or otherwise insufficient sureties have been accepted
  - A surety afterwards becomes insufficient.

Discharge of Sureties

- The surety if becomes aware that the accused person is about or attempts to abscond, he may apply to court to be discharged. When the surety is discharged, the court will ask the accused to find another surety—S.155 (1) CPA.
- When the surety dies, his estate will be discharged, and the accused will have to find another surety—S.156 CPA.
- Surety is automatically discharged on the termination of the case, either through withdrawal, dismissal of the charge or nolle prosequi.
- Surety is discharged on the completion of the proceedings either by conviction, acquittal or no case to answer.

Abscondence or Breach of Bail Conditions

- A police officer is empowered to arrest without warrant any person released on bail if he believes on reasonable grounds that the accused is likely to breach the condition of his bail.
- A police officer may arrest on being notified by the surety that the person is likely to break the conditions of his bail.
- After arrest, such person should be brought as soon as practicable to the magistrate on whose jurisdiction he was arrested—S.157 CPA.
- A person arrested for breaking bail condition will not be considered again for any further bail in the same case—S.158 CPA.

Consequences of Breaking Bail Conditions

- The property movable or immovable, which was the subject of bond, might be confiscated by attachment.
- His trial will proceed in his absence irrespective the stage of the trial when he absconded.

Where the accused fails to appear on an appointed date it is preferable not to forfeit the bond of the surety too quickly, it is best to adjourn the case and allow the surety time to find the accused if he think he can get him.

In the case of Republic v Omari Kibwana [1986] TLR 16, Omari Kibwana stood surety for an accused person. The bail bond was shs. 60,000/=. On one occasion he failed to produce the accused before the Court as required. He himself attended the court and explained that the accused was sick. The magistrate ordered forfeiture of the bond or six months imprisonment. Kibwana was imprisoned. The record of proceedings was called by the High Court for inspection and revision.

> *Where the accused fails to appear on an appointed date it is preferable not to forfeit the bond of the surety too quickly, it is best to adjourn and allow the surety time to find the accused if he thinks he can get him;*
>
> *As there was no reason to make the court think that the surety was lying it was clearly wrong on the part of the learned Senior Resident Magistrate to sentence the surety to a term of imprisonment.*

In the case of **R V George Ruheza [1988] TLR 5**, the appellant stood surety in the sum of Tshs. 50, 000 for Joseph Mapema. The accused failed to appear in court and his wife informed the court that he had travelled to Dar es Salaam in search of a lawyer to defend him but misses a return flight to Mtwara. The appellant was summoned and ordered to pay the expenses of Tshs. 375 for a witness from Bukoba and Tshs 240 for a witness from Masasi or surety to forfeit his bail bond.

On 19th June 1980, the accused was not in court and the trial magistrate was informed by the surety the reasons for the absence of the accused namely the flight from DSM to Mtwara had been cancelled. The court ordered the forfeiture of surety's bond of Tshs 50,000. Surety could not raise the money as a result was committed to prison. He appealed against the order. The court held:

- *The trial magistrate's ruling is not a fair reflection of the facts for it is clear that the absence of the accused had been caused by circumstances beyond his control.*
- *At the time of the hearing there was no advocate resident in Mtwara, the accused's trip to DSM could not viewed as an attempt of the accused to jump bail. In the circumstances, asking the surety to forfeit Tshs. 50, 000 bail bond was not justified.*
- *Not justified also was the order that the surety pay Tshs. 375 for a witness from Bukoba and Tshs. 240 for a witness from Masasi.*
- *It is out of order for the court to order the surety to pay more than Tshs.50, 000 the sum he had undertaken to pay when signing the bail bond.*

Bail Pending Appeal

According to section 368(1) (a) (i) CPA, the court is empowered to release on bail any person who has appealed against any decision of the trial court. The court, which can exercise this power, may either be the convicting or sentencing court or the High Court where the appeal lies. The court is required to record in writing the reasons for granting bail pending appeal.

However, when looking at the decided cases we find that courts have applied this section with greatest qualification, thus it is not common to grant bail pending appeal. The courts have laid down directions of allowing or refusing bail pending appeal.

In **Habab Kara Vester V R (1934) 1 E.A.C.A 191,** the court said; bail pending appeal should be granted under exceptional circumstances.

In **Lamba V R [1958] E.A 337**, the court said;

> *"Where a person is awaiting trial the onus of proving his guilty is on the prosecution and consequently the onus is also on the prosecution of showing cause why bail should not be allowed. On the other hand when a person has been convicted the onus is on him to show why a conviction should be set aside and similarly the onus is upon him to show cause why as a convicted person he should be released on bail".* Per Spry J.

In **Horeau V R [1957] E.A 414**, the court said that where imprisonment is in default of payment of fine and the appeal does not appear to be frivolous or vexatious the court should grant bail.

In **R V Somo [1972] E.A 476,** bail was refused because on the facts of the case there were no overwhelming probabilities of success.

In **Lawrence Mateso V R [1996] TLR 118**, the court said;

- *The principle that bail is a right is applicable only to cases where the accused person has not yet been convicted.*
- *Bail pending appeal can only be granted where there are exceptional and unusual reasons or where there is an overwhelming probability that the appeal would succeed.*
- *Where an argument on the facts needs detailed reference to the text of the evidence of the judgment to support it, it cannot be said that the appeal has overwhelming chances of success.*
- *Since no general principle exists that a person released on bail pending appeal will not be sent back to prison if his appeal fails the court is reluctant to order that a convicted person be released on bail pending the outcome of the appeal.*

- *Conversely to an application for bail pending trial, the onus in an application for bail pending appeal is on the individual, who must satisfy the court that justice will not be jeopardized and that either exceptional or unusual reasons exist for bail, or that his appeal has overwhelming prospect of success.*
- *In deciding whether bail should be granted, this involves balancing the liberty of the individual with the proper administration of justice.*

OPEN COURT

When we speak of open court we mean that, proceedings should be open to members of the public. According to section 186(1) CPA all trials or inquiries should be held in an open court.

This is due to the maxim that "justice should not only be done, but must be seen to be done.

What is an open court?

Simply is a room where inquiries or trials of offences are carried out and the general public has access. In **Willly John V R (1956) 23 E.A.C.A 509**, the trial was conducted in the judge's chambers and no member of the public was present. The court said;

> *There may be good reasons why the courtroom was not used and there was nothing wrong in holding the trials in the judge's chambers provided they were treated as an open court to which the public had access. The test is not whether the court was open to any one who presented himself for admission. At pages 509--510*
>
> *For a building to be used, as a courthouse there is no need for ceremonies, any building can be used as a courthouse. For the purposes of section 186(1) CPA, it can be shown either by presumption or proof that;*
>
> *"…. first, that it is open as of right, to any of the public who may present themselves for admission (although nobody need to have so present himself); secondly, that the public are aware that the building or room in question is either habitually used for the trial of cases or is being or about to be used for the trial of a particular case. Without this second requirement being satisfied, it would be but an empty form of word to say that a room or building seldom or never before used as a place of trial was an "open court" merely because the public would not be excluded from it if they should do so.*
>
> *They must know that there is something to come for, there must be publicity. Without it justice cannot be "open""*—Per. Sir. Ralph Windham, C.J**.** In **Biffo Mandire V R [1960] E.A 965**

The Importance of Section 186 (1) CPA

Section 186(1) CPA as said above is based in the maxim that "justice should not only be done but must also be seen to be done". In **Scott V Scott (1913) A.C 417,** Lord Shaw of Dunfermline said

> *"…. where there is no publicity there is no justice. Publicity is the 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*. At page 477

Thus it is clear that anything done in private or secrecy cannot be presumed to have been seen to be done anything done in private or secrecy tends to raise suspicion. Administration of justice must be open to publicity.

Exception to this Rule

Exception to this rule is provided in the proviso to section 186(1) CPA. This section gives the magistrate discretion to exclude some members of public from attending the trial or inquiry. The magistrate is required to use this discretion judiciously. In **Muriu s/o Wamai & Others V. R. (1955) 22 E.A.C.A 427**, the court said:

> *"Having said this we must emphasize with all the powers at our command that the seemingly wide discretion given to a judge or magistrate under the proviso to section 77 CPC (section 186 CPA) should only be exercised for a most compelling reason. Both sections 77 and 168 (sections 186 and 229 CPA) by the wording used in them indicate that a court of law must ordinarily be open to the public at all times and in exercising a*

> *discretion to exclude we hope that no judge or magistrate will ever overlook the general principle that justice must not only be done but must be seen to be done".* At p. 420

The court may exclude general public or class of people for the following reasons:

- For the interest of public i.e. public safety or public morality,
- For the interest of justice or defense,
- For the interest of children and young persons under the Children and Young Persons Act, Cap.13
- For the protection of private lives e.g. section 186(3) CPA, which requires the evidence in any trial which involve sexual offence to be taken in camera.

Consequences of failure to comply with this rule

There is a risk of declaring a trial a nullity if it is conducted in a place other than an open court if the reasons for doing so are not sufficient.

In the case of **McPherson V McPherson (1936) A.C 177**, the proceedings were held in the judge's law library in the regular courthouse. The judge announced that the trial would be in the "open court". Entry to the library was by two unlocked swinging-doors, on the outer of which was a brass plate with "PRIVATE" written on it.

It was held that by reason of the notice alone, the judge was albeit unconscious denying his court to the public in breach of their right to be present, and that accordingly the trial had not been "in open court" as the law required it to be. In the present case the privacy of the form was announced not perhaps by any explicit notice saying private, but tactically by the very fact of its being situated in a private house and especially in the particular house in question.

In **Biffo Mondirire V R [1960] E.A 965,** the appellant, a room-boy employed at a Government Guest House in DSM, was convicted of attempting to steal a wallet, the property of a guest staying there overnight. A Resident Magistrate opened the trial and the whole evidence of the complainant was taken at 9:30 pm on the day of incident in the library of the government guesthouse. Thereafter the trial was adjourned to the following day, when it was continued and completed in the District Court building. On appeal;

> *Although the later part of the trial was conducted in a regular court house the trial as a whole was not held "in open court" as required by section 76(1) of the Criminal Procedure Code (section 186(1) CPA).*
>
> *Non-compliance with section 76(1) was irregularity not curable under section 246 CPC (section 388 CPA) and consequently the whole trial was a nullity.*
>
> *"…. There is nothing on the record to show that the library of Government Guest House was open to the public from 9:30 pm onwards on the night in question, nor that the public had been informed that the trial was to be held or at least began at that hour and place. And the hour and the place were such that it certainly cannot be presumed that the public would know this or even if they knew that they would realize that they had a right to attend the trial in so normally very private spot."* The whole trial was a nullity.

TRIAL BEFORE SUBORDINATE COURTS

What is a subordinate court?

According to section 2 CPA subordinate courts means any court other than a court martial which is subordinate to the High Court.

Purpose of a Trial

- Trial affords an opportunity to prosecution to prove its case. The prosecution is supposed to prove its case through adducing evidence by giving facts and circumstances, which establish the elements of the offence—the prosecution has to adhere to the rules of evidence.
- The trial also gives an opportunity to the accused to defend himself; i.e. he will have an opportunity to contradict or disprove the evidence adduced by the prosecution.
- The trial also will afford means by which the court will find the truth; i.e. the court will listen to both the prosecution case and defence case and then make its findings.

The Standard Order of Court Proceedings

- Plea taking
- Prosecution opens its case
- Prosecution calls its first witness and examine him
- Defence cross-examine prosecution witness
- Prosecution if wishes re-examine the witness
- Closure of the prosecution case
- Finding by the court whether or not an accused has a case to answer
- The defence opens its case
- The accused if wishes gives evidence
- Other defence witnesses are called examined, cross-examined by the prosecution and re-examined by defence
- Prosecution sums up the case for the prosecution
- The defence sums up the case for the defence
- The decision of the magistrate.

General Provisions

Non-appearance of complainant at the hearing

According to section 222 CPA if on the date set for hearing the accused appear in court, but the complainant, having the notice of time, date and place of hearing does not appear, the court will dismiss the charge and acquit the accused.

However the court may not dismiss the charge, instead it may adjourn the case. The court is required to use this discretion judiciously.

In **DPP V Arbogast Rugaimukamu [1982] TLR 139** the court dismissed the case against the respondent because of non-appearance of the public prosecutor. The DPP appealed on the ground that the dismissal of the case was not based on sufficient cause. On appeal;

> *To dismiss charges at the slightest excuse frustrates the noble duty of the Republic to prove the guilty of the accused.*

The dismissal of the charge and acquittal of the accused under section 222 CPA is not a bar for any subsequent trial. The prosecution can charge the suspect of the same offence based on identical facts.

In all criminal cases especial those in public prosecutions, the complainant is the public prosecutor, i.e. the person who present the case on behalf of the Republic before the court.

In the case of **DPP V Philipo (1971) HCD No. 295**, the respondent was charged with assault causing actual bodily harm c/s 241 PC. The charge was dismissed and respondent acquitted u/s 224 CPA. The DPP appealed against the order of the trial court. The record of the proceedings before the magistrate read as follows:

PROS: Complainant was around here but has now disappeared. I wonder if the provisions lay down in section 198 CPC (s. 224 CPA) could apply.

ORDER: It appears that complainant who is the important witness in this case is not interested in this case and that is why he has absented himself from court. Therefore under section 198 CPC (S. 224 CPA) the charge is dismissed and the accused is acquitted.

On appeal, after quoting the provisions of section 198 CPC (S 224CPA);

> *"…One Karim who was referred in this case as the complainant in a sworn affidavit said that he was neither served with a summons to give evidence on the date fixed for hearing nor was he in the vicinity of the court as alleged by the PP. This evidence is not challenged. I accept it…even if it was accepted as it seemed to have been accepted by the appellant that the witness—victim (Karim), was the complainant, although I do not accept this interpretation, the order…was misconceived in that, inter alia, the magistrate did not satisfy himself that Karim had notice of the time and place appointed for hearing of the charge by examining the case file to see whether Karim was served with a summons or not by any other reasonable means."*
>
> *"In my view the provisions of section 198 CPC (s 224CPA) apply to complainants. For the sake of convenience the victim of crime has often been referred to as the complainant in practice but in fact the complainant is the republic which, as it were, complains to the court of law when it files charges…or, where it is the case of private prosecution brought u/s 87 CPC (s. 99 CPA) the person who complained and who is permitted to prosecute his case…strictly speaking, the complainant as represented by the PP was present and in attendance on the date fixed for hearing and the person who was alleged as absent was the alleged victim who was a mere witness in the case"*

Order of the District Court set aside and a direction made that the case be referred to the said court for the proceedings to continue according to law.

Appearance of Both Parties

Section 223 CPA provides that if both parties i.e. complainant and the accused person appear before the court on the time appointed for the hearing of the case, the court will proceed with the hearing of the case.

Withdrawal of Complaint

The complainant is allowed to withdraw a complaint under section 224 CPA, under the following circumstances;

- At any time before the final order is passed
- Must satisfy the court on sufficient grounds
- The offence must be minor one.

Adjournment and Remand of the Accused

Under section 225 CPA the court has discretion to adjourn the case, either before or during the hearing. The adjournment should be stated in the presence and hearing of the parties or their advocates and at the same time the court may commit the accused to remand custody or release him on bail.

The adjournment should not be more than fifteen clear days if the accused is in remand or thirty clear days if he is on bail.

Section 225 CPA is designated to protect and safeguard the liberty of the accused person in a criminal case.

However, the court is not allowed to adjourn the case for an aggregate exceeding sixty days except for the following offences:

- Offences under sections 39, 40, 41, 45, 48(a) & 59 of the Penal Code.
- For offences involving fraud, coins, conspiracy to defraud or forgery.
- If there is a certificate from the RCO stating the need and ground for seeking a further adjournment.
- A certificate from the state attorney is filed in court seeking further adjournment.
- A certificate filed by the DPP stating the need for and grounds for a further adjournment.

In the case of **R.V. Nelson Rupia [1993] TLR 44**, at the expiration of an aggregate of 60 days, the magistrate ordered another adjournment although there was no certificate from the RCO stating the need and grounds for adjournment. The court held that;

> *At the expiration of an aggregate of 60 days and no certificate is filed by the RCO the court must either proceed to hear the case or discharge the accused if the prosecution is unable to proceed with the hearing*.

If the magistrate breaches the mandatory provisions of section 225 CPA it does not automatically vitiate the trial, unless it is shown that the accused person has been prejudiced in his defence or that the adjournment did affect the substance of the conduct of the trial.

In **John Joseph Onenge & Julius Senene V R [1993] TLR 131**, during the trial the magistrate adjourned the case from time to time and remanded the accused in custody for an aggregate exceeding 60 days without certificate stating the need and grounds for such further order of adjournment and of remand in custody of the accused. The court of Appeal considered this issue and the consequence of failure to comply with the mandatory provisions of section 225(1) & (4) CPA, it said;

> *The trial court breached the mandatory provisions of section 225(1)&(4) CPA by making orders of adjournment and remand of the appellant in custody, such breach of mandatory provision which breach does not affect the substance of the trial, does not render the trial a nullity.*

From the above cases, we see that the magistrate has discretion to allow or refuse adjournment after the expiration of 60 days; he is advised to use this discretion judicious.

Furthermore, the magistrate is not allowed to dismiss the charge before the expiration of 60 days.

In the case of **R V Mgena Mnyuya [1992] TLR 48**, the DM dismissed the charge and discharged the accused under section 225(5) CPA after 55 days since commencement of the proceedings. The High Court on revision said;

- *The order for dismissal of the charge and discharge of the accused was null and void. Such order can only be made after the expiration of sixty days.*
- *In the application of section 225(4) (a) CPA, the court has a discretion to refuse to adjourn a case even where a certificate has not been able to show an existence of a real need for an adjournment or the grounds are unreasonable.*

The provisions of section 225(4)(a)(c) CPA are essentially intended to control the speed of hearing of criminal case so that proceedings are concluded within ascertainable period of time.

The sixty days rule does not apply to listed serious offences like treason, committal proceedings before a subordinate court or economic crimes cases under the E.O.C.C.A, 1984.

Non-Appearance of Parties after Adjournment

According to section 226 CPA, the court has discretion to do the following:

- If the accused does not appear at the time and place set for hearing or continuation of the case, the court may proceed with the case as if the accused were present.
- If the complainant does not appear, the court may dismiss the charge and acquit the accused

The court may set aside the conviction where the accused person was convicted in his absence if:

- It is satisfied that his absence was from causes which he had no control or
- If it is of the opinion that the accused had a probable defence on the merit.

The provisions of section 226 CPA will only apply where the accused person had been charged and taken his plea. It is only after the accused person had been arraigned and not before, and after the date has been set for the hearing or continuation of the hearing he absconds.

Furthermore, under section 226CPA, the court has a duty to hear the prosecution case to the end and if it is satisfied that the evidence adduced warrant a conviction it can proceed to convict the accused person in absentia.

In **Warioba Machage V R [1991] TLR 39**, the appellant and another person were charged with the offence of robbery with violence four years after the event. The trial proceeded in the absence of one of the accused though he never entered his plea—the PP prayed to proceed u/s 226 CPA. The court held that;

> *The provisions of section 226(1) CPA can only be invoked in a situation in which an accuse person has had an occasion or opportunity to appear in court after arraignment and had the charge read to him and his plea taken and after a hearing date set for his case.*

Accused may be Convicted and Sentenced in his Absence

According to section 227 CPA, the court is empowered to convict and sentence the accused person in absentia, if he fails to appear in court on the date and place set for hearing or determination of the hearing of the case, or on a date set for passing a sentence.

Before convicting and sentencing the accused person in absentia the court must satisfy itself that the accused's attendance cannot be secured without undue delay or expenses.

The trial court can satisfy itself that the accused cannot be secured without undue delay or expenses by:

- Issuing a warrant of arrest and impossibility of executing the same.
- An alternative to a warrant—the accused's surety if any may shed light on the whereabouts of the accused person –in the course of showing cause why his cognisance should not be forfeited.

In **Maheri Marungu V.R [1984] TLR 209**, the appellant was charged and convicted in absentia. When prosecution closed its case, he was not called to make his defence under section 231 CPA. The case was adjourned for unspecified reasons and went several mentions and adjournments until he lost coordination with the court hence he failed to appear for his defence and at the judgment day. He was re-arrested and sent to prison. He appealed;

> *Before invoking the provisions of section 227CPA, two conditions must be fulfilled:*
>
> - *The accused must have failed to appear on a date fixed for continuation of hearing after the closure of the prosecution's case, with notice of such hearing date;*
> - *The trial court must also be satisfied that the accused cannot be secured without undue delay or expenses.*

The difference between sections 226 and 227 CPA was discussed in the case of **Olonyo Lemuna and Lekitono Lemuna V R [1994] TLR 54**. In this case, the two appellants were jointly charged with the offence of robbery with violence. Just before prosecution closed its case, they jumped bail and the rest of the proceedings were conducted in their absence. They were convicted and sentenced in absentia in terms of section 227 CPA. Their appeal to the High Court was dismissed. On a further appeal to the Court of Appeal they asserted that the trial having proceeded in their absence, they were not given an opportunity to be heard. The Court of Appeal held that:

- *Section 226 CPA makes provision for the court to set aside a conviction entered in the absence of the accused if it is satisfied that the absence was due to causes beyond the control of the accused, this accord to the accused person an opportunity to be heard.*
- *Section 227 CPA which allows the conviction of an accused person in absentia, can only be invoked when an accused person being tried by a subordinate court fails to appear for hearing after the closure of the prosecution case.*
- *Only prior to the closure of the prosecution case are the circumstances set out in section 226 CPA applicable, after the closure of the prosecution case section 226 CPA is inapplicable and section 227 CPA takes over.*
- *As in this case the appellants absconded before the prosecution closed its case, the trial court misapplied the provisions of section 227 CPA, 1985.*
- *Having misapplied section 227 CPA, 1985, justice in this case would be met if the discretionary powers under section 226(2) CPA were invoked and have the case re-opened.*

WITNESSES

Procurement of witnesses

Witnesses' attendance may be procured in the following ways;

- By the party who would like the service of such witness asking him to come to court on specified date and time (this is without summons.)
- By court issuing witness summons under section 142 CPA.
- By a court issuing a warrant of arrest to a witness who is likely not to appear if a mere summons was issued—SS.143&144 CPA.
- By a court issuing an order to produce a person who is in custody for the purpose of examination under section 146 or 390 (1) CPA.

Consequences of Non—Appearance

- The court may issue a warrant of arrest u/s 143 CPA.
- The defaulter may be liable to a fine u/s 147(1) CPA.

Mode of Examination of Witnesses

There are three stages of examination of witnesses, these are:

Examination-in-chief: the party calling the witness does this type of examination. Usually the public prosecutor does this. Examination-in-chief is done by the party calling the witness in order to extract from such witness any thing known by him (witness) in order to prove the party's case.

In examination-in-chief, the pubic prosecutor must adhere to the rules of procedure and evidence. For example, he is not allowed to ask leading questions or cross-examine his witness, unless such witness has turned hostile.

Cross-examination: This is done by the other party i.e. the accused or his advocate cross-examination is used in order to discredit or disprove the witness's story. Here the interest of the cross-examiner is to ask questions to discredit the evidence of the witness. For example he may ask the witness that he has a poor memory, is biased, etc, by asking questions which are favourable to the cross-examiner, this means that he is building up his case; this is done by extracting information from the witness which are favourable to him.

The accused or his advocate is not obliged to conduct cross-examination nor can the court force him to do so.

There are situation whereby the prosecution may call a witness but later decide not to examine him. This witness though not examined by the prosecution, may be cross-examined by the accused or his advocate. If this witness is cross-examined by the defence the prosecution will be entitled to re-examine him.

Re-examination: the party calling the witness does this. The aim of conducting re-examination is to repair damages done by the defence to the prosecution's case during cross-examination. Since damage to the evidence is done during cross-examination, it follows that re-examination will be done only when there has been cross-examination. No cross-examination, no re-examination. In addition to that, the party has discretion to conduct re-examination and the court cannot force him to do so.

Examination of Witnesses

In examining a witness, evidence is to be taken in the presence of the accused person, unless his personal appearance has been dispensed with—S.196 CPA.

Section 197 CPA is an exception to section 196 CPA whereby the court may take evidence in the absence of the accused under the following circumstances:

- Such accused is disorderly and hence trial cannot be conducted in his presence.

- The accused person cannot be present in court due to health problem, but is represented by a council and must consent to the evidence been given in his absence.

All witnesses in any criminal matter are to be examined either on oath or affirmation. Section198 (2) CPA provides that, the court is allowed to draw an adverse inference, where a witness elects to keep silent upon being examined. Furthermore, the court as well as the prosecution may comment on the witness's failure to give evidence.

In a situation where any person either summoned or appear in court by virtue of a warrant or is present in court and is required verbally to give evidence:

- Refuses to be sworn or affirmed,
- Refuses to answer any question put to him or
- Refuses to produce any document he is required to,
- Refuses to sign his deposition,

The court may adjourn the case for eight days and commit such person to prison.

As provided by section 199(2) CPA, if such person is brought to court after or before eight days and again refuses, the court may adjourn the case and commit him to the like period, and so again from time to time until such person consent to do what is so required of him.

The Accused and His Defence

Where the magistrate has ruled out that the accused has a case to answer, the magistrate must explain to the accused the substance of the charge and his rights, namely;

- To give evidence whether or not on oath or affirmation,
- To call witnesses in his defence—S.231 CPA.

Section 231(2) CPA gives right to prosecution to cross—examine the accused despite the fact that the accused elects not to give evidence on oath or affirmation.

Where after the closure of the prosecution case the only witness for the defence is the person charged, then according to section 200 CPA he shall be called as a witness and the court may adjourn the case until other time and place to be appointed in the presence and hearing of the accused.

If the accused elects to remain silent, then section 231(3) CPA gives power to court to draw an adverse inference against him and both the court and the prosecution may comment on accused's failure to give evidence.

The court may adjourn the case and issue process to serve the accued's witness under section 231(4) CPA if;

- It is satisfied that their absence is not due to any fault or neglect of the accused.
- Their presence will give material evidence on behalf of the accused.

Recalling of Witnesses

Court's Power to Summon Material Witnesses

According to section 195(1) CPA, at any stage of the trial, the court may call any person as a witness. The court is also empowered to examine any person present in court though no called as a witness. Furthermore the court may recall and re—examine any person already examined, if it is of the opinion that the evidence of such person is essential to the just decision of the case.

The power of court to recall witnesses should be used judiciously and reasonably and not in any way cause prejudice to the accused. This should be done when the court forms an opinion that certain evidence is essential to the just decision of the case, and hence duty bound to call such a witness(s) to give that evidence.

In the case of **Murimi V R [1967] E.A 542**, the court said that section 151 CPC (S.195 CPA), allows a court to call a witness if his evidence appears to be essential to a just decision and this is so even if it results in strengthening the prosecution's case. Section 151CPC (S.195 CPA) should not be used to empower the court immediately after prosecution has closed its case, to call a witness in order to establish a case against the accused.

Section 214(1) CPA requires the magistrate who takes over the trial proceedings/committal proceedings from the first magistrate to re-summon the witness who has already testified before the first magistrate.

In the case of **Liamba Sinanga v Republic [1994] TLR 97**, the appellant was charged with and convicted of cattle theft. In the court of first instance two magistrates heard the case. The second magistrate continued with the hearing of the case without informing the accused of his right to have witnesses who had testified before the first magistrate re-summoned and re-heard. An appeal by the appellant to the High Court was summarily rejected. On further appeal the Court of Appeal addressed the issue of the accused's right to be informed.

> *The language in s 214(2)(a) of the Criminal Procedure Act is mandatory in that the learned second magistrate was obliged to inform the appellant of his right to demand that witnesses who testified before the first magistrate be summoned to testify before the second I magistrate if the appellant so wished.*
>
> *Had the learned judge been aware of the non-compliance (by the second magistrate) of the mandatory provisions of s 214(2na) (a) of the CPA he would not have summarily rejected the appeal.*

The purpose of recalling witnesses is to enable the succeeding magistrate to make assessment of the witnesses' demeanour.

Under section 214(2) (a) CPA, the accused may demand the succeeding magistrate to re-summon witnesses or any of then and re-hear them. The succeeding magistrate is required to inform the accused person of this right.

According to section 214(2) (a) CPA, when the accused person makes such demand the court has to comply with, the magistrate has no discretion to refuse. In the case of **Francesco Tramontano V R Cr. Rev. No.14/1997, HC (DSM) (Unreported)** the court said that once the accused person has been informed his right under section 214(2) (a) CPA, and makes a demand to have the witnesses recalled, the court has no discretion but to recall them.

However where the magistrate fails to inform the accused person of his rights as provided under section 214(1) (a) CPA, the court on appeal or revision will not invalidate the trial if it is shown that the accused was not prejudiced. In **Rajabu Lemu Selege [1980] TLR 166**, the first magistrate heard the whole of the prosecution case and the accused's evidence in defence and comprehensively recorded the evidence. Then he was transferred to another jurisdiction. The second magistrate recorded the evidence of the only witness of the accused, wrote and delivered the judgment. The second magistrate didn't inform the accused of his right to demand re-summoning and re-hearing of witnesses as required by section 196(1) (a) CPC.

On revision the issue was whether the accused was materially prejudiced by the second magistrate's non-compliance with the provisions of section 196(1) (a) CPC. It was decided that;

> *Since the second magistrate acted wholly on the first magistrate's record, which was comprehensive and contained all the material necessary for the decision, and because such course is permitted by the provisions of section 196(1) (a) CPC, the omission on the part of the second magistrate is curable because the accused was not thereby prejudiced.*

Recalling Witnesses by the Prosecution and the Defence

The prosecution may recall a witness who has already been examined. This should be done by making an application before the court. The application should be made before the closure of the

prosecution case, but the court may allow such application in a very unusual and exceptional circumstances.

The application by the defence to recall a witness may be made at any stage of the proceedings before it closes its case. The court will consider the following when deciding whether or not to allow such application:

- The court will take into consideration the purpose of such recall—will it be essential to the just decision of the case, will it not be prejudicial to the accused.
- Here the magistrate has a discretion to grant or refuse such application, and is advised to use such discretion judiciously.
- Another consideration is the stage of the trial when such application is made and if such recall will not be prejudicial to the accused.

In the case of **R V Ahmed Din (1949) K.L.R 23(2) 128**, the court said;

> *Many of the cases we have examined stress that it is only in special circumstances that the court will permit the prosecution or a plaintiff to recall a witness once the case against the other party has been closed which suggests that an application to recall a witness before the closing of a case will not ordinarily be rejected.*

Defence calling Prosecution Witness as Defence Witness;

The defence (accused or his advocate) may call prosecution witness as a defence witness. This practice however is discouraged and the court will accept it in a very special and exceptional and rare circumstances.

It is discouraged because the defence is expected to have extracted all information that is in its favour during cross—examination. In the case of **John Raymond Vaz V R [1961] E.A 320**, the court said;

> *But although there is no express provision in section 206 CPC (S. 231 CPA) nor elsewhere in the Code, that the defence may not recall as their own witness one who has already been called as a Crown witness, it is implicitly in the whole structure of the procedure for the conduct of a trial, as laid down in the code, that only in special circumstances and by leave of the court will such a course be permitted; for otherwise there would be nothing to prevent the defence calling over again, as defence witnesses, every one of the persons who had testified as Crown witnesses; which would be an absurd proposition.*

Prima Facie Case

Definition

In all criminal trial, the prosecution has a duty to prove its case beyond reasonable doubt against the accused. According to section 231 CPA, if at the closure of the prosecution's case, the court finds that if there is no explanation on the party of the accused is given he could be convicted of the offence charged or a lesser offence, then a prima facie case is established.

Once the court finds that a prima facie case has been established, section 231 CPA requires it to call upon the accused person to make his defence.

However, before ruling out that a prima facie case has been made, the court is supposed to take into consideration the prosecution's evidence and the law applicable to conclude that if no explanation by the accused he can rightly be convicted.

In the case of **Bhatt V R [1957] E.A 332**, at page 334—335, the court said;

> *"Remembering that the legal onus is the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the closure*

of the prosecution the case is merely one 'which on full consideration might possibly be thought sufficient to sustain a conviction'. This perilous near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes that question whether there is a case to answer depends on whether there is 'some evidence irrespective of credibility or weight, sufficient to put the accused on his defence' A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is true as Wilson, J; said, that the court is not required at that stage to decide finally whether the evidence is worth of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only be properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one in which a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defence".

Procedure on a Prima Facie Case

As seen above, in a criminal trial there are two stages

a)The prosecution case.

b) The defence case.

To have a fair trial the court must hear both parties since the purpose of criminal procedure is to give an accused an opportunity to be heard. Since the law requires that no person should be condemned unheard, then if after the closure of the prosecution case the court finds that a case has been made out against the accused, sufficient to require him to make his defence, then it will address the accused in terms of section 231 CPA, like;

The prosecution has now closed its case, and I find that a case has been made out sufficiently to require you to give your defence. There is three alternatives open to you: you may if you wish, give your defence on oath or without taking, or you may elect to say nothing at all in your defence. If you elect to give your defence on oath or without oath, you will be cross—examined by the prosecution or by the court or both. If you elect to make no statement, you will not be cross—examined. The choice is your own. Further, you have the right to call any witness on your own behalf. But if you elect to make no statement, the court is entitled to draw an adverse inference against you. What do you say?

If after the closure of the prosecution case no sufficient evidence has been established, then according to section 230 CPA, the court will dismiss the charge and acquit the accused. This acquittal however is subject to appeal if the prosecution is not satisfied. In the case of **Murimi** the court said that—*it might dismiss the charge and acquit the accused person if at the closure of the prosecution case no case has been made against the accused person sufficiently to require him to make a defence, the court shall dismiss the charge and acquit the accused person.*

The court is supposed to hear the whole of the prosecution evidence before invoking the provisions of section 230 CPA. In the case of **R. V. Palangyo Kaanandumi [1992] TLR 271,** after the prosecution had informed the court that the investigations were complete, they applied for a hearing date. When on two dates the prosecution could not go on with the hearing the magistrate ruled that the accused had no case to answer and acquitted him. On revision the court said;

Before a subordinate court can invoke the provisions of section 230 CPA in dismissing the charge and acquitting the accused it must first hear the evidence from the prosecution side and at the closure of that evidence the court shall make a ruling supported by legal reasons to the effect that the evidence in question has established no case sufficient to require the accused person to enter his defence—the order of the magistrate was premature.

In **Jonas Nkize V.R. [1992] TLR 213,** it was held that, the trial court is enjoined to direct its mind to the evidence adduced by the prosecution when it has closed its case, and if it appears to the court

that the case is not made out against the accused person sufficient to require him to make a defence, the court shall dismiss the charge and acquit the accused person.

NB: The onus of proving a case in all criminal trials is on the prosecution and the standard of proof is beyond reasonable doubt. At no time can this burden shift. In the case of **Jonas Nkize,** before the Kigoma District Court were John Nkize, the appellant and two others charged with stealing in the alternative, Jonas Nkize as a third accused was charged with obtaining goods by false pretences. The arraignment of the appellant in the said court was prompted by the second accused that implicated the appellant in his sworn defence. He called several witnesses to support his story—the prosecution evidence having failed to touch him. Relaying on a sworn evidence of the second accused as confirmed by the witnesses he called, the trial magistrate acquitted the second and first accused, and proceeded to convict the appellant on the second charge on the strength of the same evidence. On appeal to the High Court;

- *While the trial magistrate has to look at the whole evidence in answering the issue of guilty, such evidence must be the first, including evidence against the accused, adduced by the prosecution.*
- *The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lays on the prosecution is part of our law, and forgetting or ignoring it is unforgivable and is a peril not worth taking.*
- *The burden of proving the charge against the accuse is on the prosecution so that the trial magistrate, to say he cannot depend on the prosecution evidence, is to read upside down the authorities, and if it is by design, then it is strange and un-judicial behaviour.*
- *Where in a joint trial the accused goes into a witness box and gives testimony, such evidence becomes evidence for all purposes, including being evidence against his co—accused.*
- *Where the co—accused's evidence implicating the co—accused is tainted by improper motive, such evidence should be received with caution.*

Final Submissions

In the final submissions the parties:

- Make clear what are the issues in the case and the crucial evidence on those issues.
- They will deal with the weaknesses in the testimony of various witnesses.
- The applicable law to various issues.

Right to Legal Representation

According to section 310 CPA, any person accused of an offence in any criminal court other than the Primary Court have the right to be defended by an advocate. Thus the court is required to give an accused person an opportunity to engage an advocate. Where the application is made by an accused person to engage an advocate, the court is supposed to adjourn the trial to another date.

Where an application by an accused is refused unreasonably the conviction entered by a trial court will definitely be quashed.

On the other hand, an application for adjournment by the accused to engage an advocate must be made reasonably. If it is not reasonably, the court can refuse an adjournment. In the case of **Joshwa Nkonoki V R 1978 L.T.R No. 24**, the accused was first brought to court on 9/6/1975 when the charge was read and explained to him. The hearing date was set for 8/7/1975 and he was released on bail on his own recognisance. On 8/7/1975 the trial started and the appellant did not indicate to the court that he intended to have an advocate till after the first prosecution witness had given

evidence. A State Attorney, who had travelled all the way from Dodoma, objected to the application as the Republic had already incurred expenses in calling witnesses from distant places. The appellant's application was refused and the hearing proceeded. On appeal the High Court said:

- *His application for adjournment of the case so that he could employ an advocate was clearly most unreasonable taking into account the fact that the Republic had already incurred a lot of expenses in calling witnesses from distant areas and the State Attorney had travelled all the way from Dodoma to prosecute the case.*
- *Courts always try to facilitate accused person in getting legal aid but in cases when an accused does not show any interest in employing an advocate as it was in this case, it would be wrong to adjourn a case when the prosecution has already incurred a lot of expenses in bringing the witnesses to the court.*
- *As there was no reason why the appellant should not have employed an advocate…the learned magistrate was in my view right in refusing the application for adjournment.*

In another case of **Hassan Mohamed Mkondo & Another V R [1991] TLR 148**, in trial before a subordinate court, the appellant was represented by an advocate who persistently defaulted appearing in court. The trial magistrate ordered the trial to proceed without the advocate's representation. On an application to quash the proceedings before the trial court the judge found that the trial court acted properly in proceeding with the trial in the absence of the advocate. The judge further said:

> *Under the provisions of section 310 CPA, an accused has a right to engage an advocate. But a right has to be reasonably exercised and must be considered along with other equally important rights. For example, a court of law cannot consider only the rights of an accused before it in complete oblivion of the rights of witnesses who appear before it after they have travelled from near and far.*

- In this case the accused were formally charged on 26/5/1988 but it was not until March 1991 when the applicant engaged an advocate some two and a half years later. It cannot be sensibly argued that the applicant had exercised his right with reasonableness.
- Regarding the rights of the witnesses some had travelled from Mwanza. There is also the right of the Republic that pays allowances to those witnesses.

> *"…The learned trial magistrate has been fully aware of all other rights beside that of the appellant. This is what I would choose to call, balanced justice rather than what I would also call one sided justice."* Per Korosso, J. at p.153

Furthermore, there are situations whereby the accused person may be in need of legal representation but cannot afford to hire an advocate. In such a case, the court may find an advocate to represent the accused. However, before such a move, two instances must exist that the accused is in need of legal representation at his trial:

i) Where an accused is charged with a serious offence, wherefore lengthy prison term is likely to follow upon a conviction,

ii) When the trial is likely to include complicated issues of law like, alibi, possession, burden of proof, consent, knowledge, confession, hearsay evidence, special circumstances or special reasons etc.

Whenever the two instances aforesaid present themselves the trial magistrate is enjoined to conduct an inquiry to determine the means of the accused person to see if he or she can afford to hire an advocate.

If the magistrate finds that the accused cannot afford to hire an advocate, he is enjoined to send his recommendations to the certifying authority. The certifying authority for proceedings before the High Court is the Chief Justice or the Judge of the High Court conducting such proceedings and in

case of a proceeding before a District Court or Resident Magistrate's Court, the certifying authority is the Chief Justice.

Under section 3 of the *Legal Aid (Criminal Proceedings) Act, No. 21 of 1969*, where in any proceedings it appears to the certifying authority that it is desirable, in the interest of justice that an accused should have legal aid in the preparation and conduct of his defence or appeal and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have a free legal aid.

The certifying authority cannot delegate its responsibility. The Chief Justice himself must make a personal decision. In the case of **Mohamed s/o Salim V R [1958] E.A 202**, at p.203 the court said:

> *"…That in such a case the 'certifying authority'…should give the matter anxious consideration before deciding to refuse a certificate for legal aid on the ground of sufficiency of means; that a reasonably liberal interpretation ought to be placed on the section and that in case of doubt the discretion should be exercised in the prisoner's favour. The certifying authority has to exercise its own independent judgment in the matter…instead of merely accepting the opinion expressed by the magistrate".*

The trial magistrate is duty bound to send recommendation to the certifying authority on its own motion, instead of waiting till the accused raise or apply for legal aid. Whenever the magistrate finds that the two instances for legal aid mentioned above exist, then he is supposed to send his recommendation to the certifying authority. In **Mohamed s/o Salim,** at p. 204 the court said:

> *"We would add that we consider that it is the duty of the trial judge or magistrate to ascertain that the question of provision of legal aid has been dully considered by the proper authority…in which the accused appears before him unrepresented"*

Where legal aid is unreasonably refused by the certifying authority or is not considered at all, the trial will be declared to be a nullity. In **Kalumbeta V R [1982] TLR 328**, at p.300-332, Samatta, J. said:

> *Legal representation for an accused is a right that is almost universally recognized. In some jurisdictions the right is a constitutional right. In Tanzania the right is provided for in section 109 of the CPC (S. 310 CPA). The right is so jealously guarded by the law that if an accused is deprived of it, through no fault of his own and through no fault of his advocate and he is in the end convicted, that conviction cannot be allowed to stand on appeal. It must be quashed."*

It is to be noted that in 1982 when this case was decided, the right to legal representation was only statutory right, but now it is constitutional right incorporated in the constitution vide Act No. 15/1984. (Article 13(6) (a).

In **Haruna Said V R [1991] TLR 124**, the court said the following:

- Legal representation is a constitutional right;
- The right to a fair hearing under Article 13(6)(a) of our Constitution carries with it the right to legal representation;
- Where legal aid is unreasonably refused by the certifying authority or where the trial magistrate has omitted to send the proceedings to the certifying authority for consideration of legal aid, the trial will be held to be a nullity.

Alternative Verdicts or Substituted Convictions

After hearing both parties i.e. the complainant and the accused person and their witnesses and evidence, the court may do the following;

- Convict the accused and pass sentence,

- Acquit the accused or dismiss the charge under section 38 of the PC& section 235 CPA.

Under normal circumstances, the court is supposed to convict the accused for the offence charged as provided under section 235 CPA. And the order of conviction has to be signed either by the magistrate making it or court clerk or other officer of the court—S.238 CPA.

However, in some cases, the facts as presented by the prosecution may not be sufficient to prove the offence charged, but may prove other offence, which is minor or cognate to the one charged. Where such a thing occurs, section 300 CPA will be applicable. In order to convict a person for the offence not charged the following conditions must exist;

- The offence substituted must be minor to the offence with which the accused was charged and tried,
- The circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence also,
- The major charge has given the accused notice of the circumstances going to constitute the minor offence by which the accused is to be convicted, that it must not appear that in substituting the minor offence, the accused was taken by surprise. =See the case of **Haruna Said V R P. 125.**

In the case of **Mwita Magore v Republic** 1983 [TLR] 173 The appellant was charged with robbery following an allegation that he assaulted one Joseph Nchagwa with a panga and made away with shs. 12,000/= and an ignition key found in the complainant's pockets. The learned trial magistrate found that the violence perpetrated upon the complainant was not for the purpose of stealing, and acquitted the appellant of robbery and convicted him of causing grievous harm c/s 225 of the Penal Code, Cap. 16. The question before the appeal was whether conviction of causing grievous harm could be substituted for robbery. The court held that:

(i) Conviction of causing grievous harm cannot be substituted for robbery for the simple reason that causing grievous harm is not a cognate minor offence to robbery;
(ii) a cognate minor offence is the one that forms part of a series of lesser offences which must be committed in order to complete the major one. Thus in order to commit robbery one must commit two minor offences, assault and stealing;
(iii) when a person is tried for robbery, assault and stealing are necessarily the subject of the trial and it shall not be unlawful to substitute conviction of either of them for robbery;
(iv) causing grievous harm is not a cognate minor offence to robbery and must be specifically charged, to substitute grievous harm for robbery is bad in law.

Where the court is of the view that it is necessary to convict the accused for the offence not charged, it is duty bound to formulate in its own mind the charge upon which if it were originally and dully framed, it would have then been prepared to convict.

In **R V Kenneth Kizito [1992] TLR 269**, the accused was charged and convicted of armed robbery. The court also found that the accused was guilty of assault causing actual bodily harm by invoking section 300(1) CPA was sentenced to 15 years imprisonment for the offence of robbery and 6 months for the offence of assault. On revision the High Court held that:

> *The offence of robbery for which the accused was convicted consisted in stealing money and the use of violence on the victim in furtherance of the theft. It was wrong for the trial magistrate to invoke the provisions of section 300(1) CPA.*

It is clear from this case that the offence of assault causing actual bodily harm could stand-alone only if the evidence was not sufficient to establish the offence of robbery as for example the offence of theft was not proved. But in the present case there was evidence to prove both the theft and the assault in furtherance of the theft, the combination of these two constitute the offence of robbery.

The offence of carrying a heavy maximum penalty should not be substituted for offences carrying a light maximum penalty. In addition to that, the decision to convict must be reached at, not only because there is abundance of evidence against the accused, but also the minor offence has been conclusively proved.

In the case of **Ali M.H. Mpanda V R [1963] E.A 294**, the appellant was charged with others with obstructing police officers in due execution of their duty c/s 243(b) PC. The magistrate acquitted him of the charge but convicted him of the minor offence of assault occasioning actual bodily harm c/s 241 PC. On appeal it was considered whether the magistrate had powers to substitute a conviction of a lesser offence and whether that offence must be cognate with the major offence charged. The court of appeal held that:

- *Section 181 CPC (section 300 CPA) can be applied only where the minor offence is arrived at by a process of subtraction from the major charge, and,*
- *Where circumstances embodied in the major charge constitute the minor offence also, and further,*
- *Where the major charge gave the accused notice of all circumstances going to constitute the minor offence of which the accused is to be convicted.*

In this case the court found that an essential constituent of minor offence of assault occasioning actual bodily harm is not essential constituent of the major offence of obstructing a police officer in the due execution of his duties.

Also the court found that the charge as drawn did not give the appellant notice of all that constituted the offence of which he was convicted, since it contained the allegation of assault; accordingly section 181 CPC was not applicable and the conviction under section 241 PC of assault occasioning actual bodily harm was set aside.

An accessory after the fact in a theft offence cannot be substituted for theft. The offence of accessory after the fact is minor to the offence of theft but not cognate to it. =See the case of **Andrea Nicodemo V R (1969) HCD No. 25.**

In the case of **Adija Juma V R (1970) HCD No. 37**, it was held that a more serious charge should not be substituted for a less serious charge and that unlawful possession of Moshi c/s 36 of Moshi (Manufacture and Distillation) Act, cannot be substituted for illegal sale or manufacture of intoxicating liquor, c/s 65 of the Intoxication Liquor Act.

Theft can be substituted for breaking in and committing an offence, but theft cannot be substituted for possession of property suspected of having been stolen, although the reverse can be done. Cattle theft cannot be substituted for possession of stock suspected of having been stolen.

The following are example of offences that can be substituted for minor or cognate offences;

1. Murder—s. 196 PC

(a) Manslaughter
(b) Infanticide/child destruction (s. 219PC)
(c) Killing unborn child
(d) Concealment of birth
(e) Attempt to procure miscarriage (s. 150-151 PC).

2. Attempted Murder—s.211 PC:

(a) Unlawful wounding
(b) Grievous harm
(c) Unlawful attempts to strike a person with a projectile, spear, sword, knife or any dangerous or offensive weapon.
(d) Exploding explosive substance
(e) Sending or delivering to a person explosive substance, noxious or dangerous thing

(f) Putting corrosive fluid, destructive or explosive matter in any place.
(g) Unlawful casting or throwing any such fluid (as ni (f)) or substance at or upon any person or application of them to any person

3. Manslaughter—s. 195

(a) Attempt to procure miscarriage whether or not the woman is with child (s.150PC)
(b) Reckless driving
(c) See also (1) and exclude (a)

4. Obtaining Goods by False Pretences—s.302 PC

(a) Cheating (and vice versa) s. 302 &s. 304. Ss. 304 &302 are interchangeable.

5. Stealing—s.258 PC

(a) Obtaining goods by false pretences—s. 302 PC
(b) Cheating—s.304PC
(c) Receiving and/or retaining stolen property—s.311PC
(d) Receiving property fraudulently obtained—s.311(2)PC
(e) Suspected of having or conveying stole property—s. 312 PC.

6. Burglary—s.294 PC

(a) Entering dwelling house with intent to commit a felony—s.295 PC
(b) Breaking into a building and committing a felony—s.296PC
(c) Breaking into a building with intent to commit a felony—s.297PC
(d) Being armed with intent to commit felony and related offences—s.298PC

7. Rape

(a) Attempted rape
(b) Indecent assault on females
(c) Insulting the modest of a woman
(d) Procuring defilement of a woman by threat or fraud or administering drugs
(e) Incest by males

8. Incest by males

(a) Defilement of girls under twelve years
(b) Attempted incest by males
(c) Defilement of idiots or imbeciles.

JUDGMENT

Introduction

The court after hearing both parties i.e. the prosecution and the accused person and their witnesses and evidence if satisfied that the evidence warrant conviction may convict the accused person. After convicting the accused person, the trial magistrate is required to write a judgment and read it to the accused person.

Mode of delivering a Judgment

According to section 311 CPA the judgment in every trial should be delivered/pronounced:

- In an open court,
- Immediately after the conclusion of the trial if it is not delivered immediately then notice should be given to the parties on the time and place of delivering the judgment.
- The magistrate may explain the substance of the judgment in lieu of reading it if there is no objection from the parities.
- At the time of delivering the judgment;
- If the accused is in custody the magistrate should cause him to be brought before the court.
- If he is not in custody he should be required to attend to hear the judgment; except where;

  a. His personal attendance has been dispensed with, during the trial,

  b. The sentence is one of fine only,

  c. He is acquitted.

- Where there is more than one accused person and on the day of delivering a judgment one or more of them do not attend, the magistrate may proceed to deliver the judgment.

Content of a Judgment

According to section 312 CPA, every judgment shall be:

i. In writing or may be reduced into writing under the personal direction or superintendence of the presiding magistrate,
ii. Shall be in the language of the court,
iii. Contain a clear and concise statement of the case,
iv. Include the point(s) for determination,
v. Include the decision of the case,
vi. Bear the signature of the presiding magistrate.

The provisions of section 312(1) CPA are mandatory. If the trial court fails to comply with these provisions will render the trial a nullity. In the case of **R V Suna (1971) HCD No.208**, the accused was charged with unlawful possession of uncut diamonds. The magistrate neither wrote the judgment nor did he register a conviction before imposing a sentence. The issue was whether these irregularities were fatal to the proceedings. The court held that:

> *Every judgment should state the facts of the case establishing each fact by reference to the particular evidence by which it is supported and it should give sufficient and plainly the reasons that justify the finding. Failure to write the judgment is clearly an incurable irregularity*.

In **Kagoye s/o Bundala V R [1959] E.A 900**, the judgment passed by the trial judge was like this:

The accused is charged with the murder of Maganga his son, on April 8, 1959, contrary to section 196 of the Penal Code. I have summarized the evidence in my charge to the assessors and there is no need to repeat it. They are both of the opinion that he is guilty and I fully agree. He is accordingly convicted.

The main ground on appeal was that the judge failed to deliver the judgment according to the provisions of section 171(1) CPC (s.312 (1) CPA). The court said:

> *The judgment did not comply with section 171(1) CPC, but since the conviction was not necessarily thereby invalidated, the court had to decide whether the record contained sufficient material for the determination of the appeal on its merits. The evidence on the record was not such as to enable the court to say that the trial judge had evaluated it and embodied his findings in a considered judgment, he would have inevitably found the appellant guilty of murder or would have acquitted the appellant, accordingly the court could not determine the appeal on its merits.*

In his judgment, the trial magistrate must make particular reference to the evidence, which he rely on his decision. In the case of **Jeremiah Shemweta V R [1985] TLR 228**, the trial magistrate merely made reference to the existence of some evidence in support of conviction without singling out any piece of evidence and evaluating them to show how such evidence supports the decision reached. On appeal:

> *By merely making plain reference to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial magistrate failed to comply with the requirements of section 171(1) CPC which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of facts thereon.*

Referring to section 171(1) CPC, Sisya, J. in the case of JEREMIAH said:

> *"It is not sufficient under the said section merely to make plain reference to the evidence adduced, for example, by merely saying that there is evidence showing this and there is evidence showing that, without even stating whether or not the said evidence is acceptable and / or accepted a true and/ or correct."*

Furthermore, the magistrate must show how the evidence he referred in his judgment is acceptable. Plain reference to the evidence is not enough. Section 312(1) CPA requires the magistrate to single out in his judgment the points for determination, evaluate the evidence and make findings of the facts thereon.

Failure to complete the judgment is the same as failure to write a judgment at all. In the case of **George Mhando V R [1983] TLR 118**, at the end of the trial, the magistrate wrote a summary of evidence but did not complete the judgment. He left a whole blank page, apparently intending to complete the judgment later on, and then he proceeds to sentence the appellant. It was held that:

> *Since section 171(1) CPC provides that a judgment must contain points for determination and reasons for the decision and that a conviction must be recorded, failure to comply with these provisions amounts to failure of justice. Failure to complete a judgment is the same as failure to write a judgment, because in both instances the points for determination and reasons for the decision are not known, it is failure of justice to pronounce a sentence without writing a judgment or without reading a conviction.*

Failure to date and sign a judgment as required by section 312(1) CPA is not a fatal mistake, "failure to date and sign a judgment is a mere irregularity which can be cured by the application of section 302 CPC (S.388 CPA) since the whole of the record of the proceedings is in the hand of the trial judge and there was no prejudice on the appellant."—See Willy John V R (1956) 23 E.A.C.A 509.

In the case of **Juma Mushi V R [1988] TLR 182**, the judgment of the district court was neither dated nor signed as required by section 312(1) CPA. The court said:

> *An omission of date and signature in a judgment can never occasion failure of justice. It is a mere irregularity which is curable under the provisions of section 388(1) CPA.*
>
> *Furthermore, in the above case, Kazimoto, J. said:*
>
> *"I do not see how a judgment delivered in the presence of the accused, though undated and unsigned can occasion in fact failure of justice to an accused person. It is an irregularity which does not go to the root of the content of a judgment and can never occasion a failure of justice."*

Where the magistrate convict an accused he must specify in his judgment the offence with which the accused is convicted and the punishment. —S.312 (2) CPA.

Where the magistrate acquits the accused he must specify in his judgment the offence with which the accused is acquitted and must direct the accused to be set as liberty. —S. 312 (3) CPA.

How to Write a Judgment

There is no hard and fast rule on writing a judgment so long as it contains the point(s) for determination, the decision and reasons for the decision.

It has been suggested that a good judgment should contain the following points:

- The brief statement of the offence and the allegations in the particulars of the charge.
- Name of the accused.
- Summary of the prosecution's case.
- Summary of the defence's case.
- It must point out the issues or points to be determined i.e. what is in issue and what is not disputed.

Example: in case of theft;

If the accused admits taking the property but denies stealing it, then that should be pointed out and the single question for determination would be whether the taking in the circumstances revealed by the evidence amount to stealing in law. If however the accused denies stealing and possession of the article, then;

a) Whether the accused was ever in possession of the article

b) Whether the possession in the circumstances amounted to theft or some other offence, which he could be convicted under the principle of substituted conviction, or no offence at all.

- Evaluation of evidence.
- Discrepancies pointed out.
- Corroborated accounts.
- Demeanour etc
- Magistrate should draw findings of facts and he should state why he finds some facts proved and others not proved.
- Relevant principles of law applying to the finding of facts so as to arrive at a decision.
- Burden of proof—prosecution to prove the case beyond reasonable doubt; the accused to raise doubt on the balance of probabilities.
- Make a decision and enter a verdict of guilty or acquittal as the case may be.

An accused person is entitled to a free copy of a judgment if he so requires and if he wishes it to be in his language, then this should be done immediately.

Any other party or an interested person who has been affected by the judgment may apply for a copy of the judgment. This may be done after payment of a prescribed fee, unless the court thinks otherwise—see section 313 CPA.

SENTENCES

Introduction

Sentence refers to the punishment that a court imposes after convicting an accused person. In all respect sentences is supposed to be in the form of punishment. Punishment can take different forms; it can be taken as;

- A form of actual physical punishment or psychological suffering to the accused.
- A form of deterrent to the accused person in particular and to society in general.
- A form of treatment to the accused. Conviction itself being a blow to the accused, a form of treatment can be taken to be a punishment.
- A form of measure to protect the interest of society.

Since there is no standard form of punishment it is the duty of the magistrate to impose a punishment, which fit the crime, committed by the accused. When the magistrate imposes a punishment, he must take into consideration the purpose of that punishment, i.e. what he intends to achieve from that sentence which he imposes.

Types of Sentences

The following are categories of sentences that the court may impose on an accused person;

i. Death sentence—S.25 (1) & S.26 of the Penal Code
ii. Imprisonment—S.25 (3) & S.28 of the Penal Code.
iii. Corporal punishment—S.25 (3) & S.28 of the Penal Code.
iv. Fine—S.25 (4) & 29(1) of the Penal Code.
v. Forfeiture—S.25 (5) & 30 of the Penal Code.
vi. Compensation, payment of –S.348 CPA.
vii. Probation –S.4 of the Probation of Offenders Act, Cap.17
viii. Absolute discharge—S.38 (1) of the Penal Code.
ix. Conditional discharge—S.38 (1) of the Penal Code.
x. Probation with bond—S.337 of the CPA.
xi. Costs—S.32 of the Penal Code.
xii. Reconciliation—S.163 of the CPA.
xiii. Restitution—S.357 of the CPA.
xiv. Police supervision—S.341 (1) of the CPA.
xv. Finding security to keep peace and be of good behaviour—S.33 of the Penal Code.

Principles of Punishment

The task of sentencing is a very difficult and delicate one though it is discretionary. However, the magistrate is enjoined to exercise this discretion judiciously. The task of sentencing is difficult because each case has its own facts, no two cases are alike. Thus a magistrate has to pass a particular sentence in a particular case. Furthermore, it is delicate because the magistrate must make sure that he passes a fair and just sentence. Thus in assessing a sentence, the magistrate is supposed to take into consideration particular circumstances of each case.

In assessing a type of punishment the magistrate has to consider the following;

- The gravity of the offence.
- Prevalence of the offence.
- The interest of the society.
- The record of the accused.
- The penal section under which the accused is charged.

No magistrate is allowed to impose a sentence whose severity does not fit the crime, simply because he thinks that others might be deterred. In **Ally and Another V R (1972) HCD No.115**, the accused were convicted on their own plea of guilty of selling beer after hours c/ss.12 & 65 of the ***Intoxicating Liquors Act, 1968***. **[CAP. 77 R.E. 2002]** The accused who were both first offenders were sentenced to a fine of Tshs. 500/- each or one-month imprisonment in default. The

court ordered the trading licence to be withdrawn and the two bottles of beer to be confiscated. On appeal this sentence was considered to be severe because;

a) *The accused were first offenders.*

b) The offence did not involve any opprobrium or any moral turpitude a factor to be taken into account by a court when considering sending a person to jail.

c) The magistrate completely failed to inquire into the accused's means to pay the fine.

d) The magistrate did not give the accused an opportunity to speak against either the forfeiture of the trading licence or the confiscation of their property.

Where the penal section provides imprisonment and fine, normally, the courts are advised to impose a fine and in default imprisonment. In **Salum Shabani V R [1985] TLR 71**, the court said that, where the legislature has given an option of a fine or imprisonment, the court, when imposing a sentence, must ascertain that a sentence of fine should first be imposed and in default of payment of such fine, then sentence of imprisonment can be given.

The court is required to make inquiry as to the ability of the accused to pay fine. **In R V Samson (1971) HCD No. 224,** the court said:

In assessing an appropriate and adequate sentence of payment of a fine is first and foremost for the court to investigate the accused's means or ability to pay the fine.

The purpose of conducting investigation is to make sure that the accused will be able to pay the fine. If the court impose a fine, which is impossible for the accused to pay, will defeat the right given to the accused by the law to escape the stigma of having been in prison.

It is not necessary that when two or more persons are jointly charged and convicted of the same offence should be given the same punishment. However, courts should take care not to discriminate between two accused persons when all the circumstances of the case and the facts are the same. This is especially where the offenders are all first offenders.

Purpose of Sentence

The purpose of criminal justice is to punish the offenders who are found guilty. Salmond on Jurisprudence stated the main purpose of punishment;

" The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) deterrent (2) preventive (3) reformative (4) retributive. Of these the first is the essential and all—important one, the others being merely accessory".

Deterrent

This is the act of scaring potential wrong doers by making the convict as an example. Also a punishment is deterrent in the sense that when the accused is sent into jail, he is deterred from committing other offences for the term in which he is kept in jail.

Preventive

A sentence is said to be preventive because a person who is imprisoned is disabled from committing more offences by the act of being under custody either permanently or on a fixed period of time set by the court. During this period of jail term, the public is put at rest.

Reformative

A sentence is intended to reform any convict in a sense that the institutions such as prisons and approved schools are expected to change the character of the convict by educating and disciplining them. Punishment also helps the accused to turn his life. He will realize that if he do wrong again he will be punished, thus he is one who is going to pay for his wrongs.

Retributive

It is a gratification of our instinct for revenge for wrong deeds e.g., a tooth for a tooth, an eye for an eye, to make the evil doer an example and a warning to all that are like minded to him.

In awarding punishment, the court must always take into consideration the interest of the public. This was stated in the case of **Kenneth Bali V R 35 Cr. App. (R) 164,** at pp.165—166;

> *"In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is public enforced, not only with object of punishing the crime, but also in the hope of preventing it. A proper sentence passed in public serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that if the offender is caught and brought to justice the punishment will be negligible. Such sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living."*

Factors to be considered on Awarding Sentence

Normally, the court having determined the case and decide that the accused is guilty, must determine what sentence, fits the offence and the accused. When passing sentence, the magistrate is reminded to take all other circumstances surrounding the commission of the offence. These circumstances will influence the mind of the magistrate as to the severity or the leniency of the sentence. Likewise accused person must be heard in mitigation i.e. he has some reasons particular to himself that would like the magistrate to consider when passing sentence. By doing so, the magistrate will be able to dispose a fair and just sentence.

Factors that the magistrate may consider when passing sentence include:

- Is the accused first offender? If yes, then a lenient sentence may be imposed.
- Does he have any previous conviction records? If yes, the sentence is likely to be severe.
- Will the sentence, in the appropriate case, deter him from committing crime?
- Why did the accused commit the crime? (Motive)
- Will it be reformatory to the accused?

Now let us consider some of the specific factors:

Intention/mens rea of the accused

Generally the law requires that before any person can be convicted of an offence, intention to commit such offence must be proved. However, some statutory offences do not require intention as a pre-requisite before conviction. But the courts still require intention even in those statutory offences. Where it is not clearly stated, mens rea should be proved.

If the accused had formed an intention to commit an offence and had fully executed his intention, the magistrate will impose a severe punishment; on the other hand if the accused had no intention but given some factors was tempted and indeed yielded to such temptation, then he is entitled to some leniency. In the case of **Rashid Ramadhani V R (1968) HCD No.323**, the accused presented a cheque for Tshs. 420/= at the National Bank of Commerce at Iringa branch. The words on the cheque clearly stated the amount, but the numbers appeared to be Tshs. 4210/=. The accused replied to the question by the clerk stating that this was the amount to be paid, and was given this amount. He was convicted and sentenced to two years imprisonment and ordered to pay compensation as the magistrate mistakenly thought the offence fell under the ***Minimum Sentence Act***. It was held that:

> *"The accused did not plan to rob the bank, but instead was subjected to a sudden temptation and he yielded. There was gross carelessness on the part of the employee of the bank which created the situation."*

A sentence of two years imprisonment was considered to be too severe.

Provocation

Another factor that the court may consider is where the accused raises the defence of provocation. This defence is only allowed in murder cases whereas in other offences it is a matter for mitigation. When the accused person alleges provocation and given all the circumstances of the case, the court accepts this provocation, the accused is entitled to some leniency. Where the court imposes a severe sentence, the court on appeal will reduce the sentence. Read the case of **Manyanga V R (1970) HCD No. 284.**

Prevalence of the Offence

Frequency of the offence is another factor for consideration when assessing sentence. Where there is evidence that a particular offence is prevalent in the area, the court may impose a severe sentence, but if the offence is not prevalent, a lenient sentence may be imposed. In **Mbaruku Ndima V R (1967) HCD No. 212**, when imposing a sentence that was heavy in respect of the offence committed, the magistrate stated that crimes of this nature were common in the area. When the case went for appeal, the judge approved the sentence, saying that this was a proper factor to consider in assessing sentence. He further said;

> *"Normally if the prosecutor alleges such a state of affairs it is well that he makes the allegation in court before the accused and the latter be given an opportunity to contradict or comment upon it"*

However, prevalence of the offence should not be taken automatically to impose a severe or lenient sentence. Other factors should also be considered. In **R V George (1963) R& N 921**, the court said:

> *"An exemplary sentence is not more than an especially sentence imposed as a special deterrent to prevent recurrences of crimes which are becoming extremely prevalent. It is, of course, proper to impose exemplary sentence in special cases, but sentences should not be unduly severe simply because the offence is prevalent. The 'moral blameworthiness' of the accused in each individual case is the most important element to take into account in assessing sentence…the prevalence of an offence and the difficult of its detection are objective elements which may be taken into account, but which are not generally as important as the subjective elements peculiar to the offender and the peculiar offence for which he is being tried, as opposed to the general run of the offences."*

Read also **Nguruwe V R [1981] TLR 66**

Previous Conviction

The court here will look at whether the offender has ever committed the same offence earlier or not. However since previous conviction can be relevant factor in assessing sentence, but still the main determining factor in assessing sentence is the intrinsic offence, which has been committed. If the accused has a previous conviction, the court will impose a severe sentence, if no, then some leniency will be given and the sentence will be lighter. It is to be remembered that the purpose of punishment is to reform the accused person. When it is believed that the accused did not benefit from the previous sentence, which aimed at reforming him, a severe sentence will be imposed upon him. In **Mwizalubi Matisho V R (1970) HCD No. 296**, the accused admitted to five previous convictions all of which were for dishonesty. In sentencing the accused the magistrate said that the accused had not benefited from the previous prison sentences, which were meant to reform him because they were short. He imposed a longer sentence.

It is to be noted that before any court can consider previous convictions in assessing sentence, the accused person must be given an opportunity to acknowledge or deny them.

The Role of the Accused in Committing the Offence

It may happen that in some cases the accused may commit an offence for reasons outside his control. In such a case, the court will impose a light sentence. In **R V Albert Mwendenuka (1969) HCD No. 48**, the accused was a driver of the motor vehicle and was sentenced to pay Tshs. 70/= for the offence of driving a motor vehicle with defects. Biron, J. said:

> *"As is abundantly clear from the proceedings, the accused was a driver employed by the Tukuyu Agencies. He could, therefore…hardly be held responsible for the state of disrepair of the vehicle owned by his employers. The responsibility for maintaining a vehicle in good order and road worthy condition is that of the owner, although a driver may sometimes share such responsibility if, for example, he fails to report the defects to his employer, though he certainly cannot be held responsible for the state of the vehicle, and should he refuse to drive it, he may well suffer the loss of job."*

The sentence was reduced to pay a fine of Tshs. 20/=

Reformation

In some cases, sentence may take the form of treatment with the intention of reforming the accused person. This fact of reforming the accused should not be taken for granted as the sole purpose of punishment. In some cases the court will have to take into consideration the need to deter the accused from committing the offence. In the case of **Mwizalubi Matisho V.R. (1970) HCD No. 296**, after the accused had admitted to five previous convictions, the magistrate sentenced him to three years in prison and to be under police supervision for 12 months. On appeal to the High Court, the judge said:

> *"I fully agree with the learned resident magistrate that the appellant is unlikely to be reformed by prison sentence however stiff. However, reformation is not the sole object of punishment. The courts have the duty to protect the public from wicked people like the accused and with respect I echo the learned magistrate's direction that the accused needs to be removed from circulation for a long time. In the circumstances, the sentence although severe is well merited. I see no justification in interfering with it."*

In his book Jurisprudence, 11th edition at page 117, Salmond pointed out the following:

> *"The most sanguine advocate of the curative treatment of criminals must admit that there in the world men who are incurably bad, men who by some vice of nature are even in their youth beyond the reach of reformative influences, and with whom crime is not much a bad habit as an in eradicable instinct."*

In the case of **Sajile Salemu V R [1964] E.A 341**, the court said:

> *"When the court is imposing a severe sentence on a recidivist offender, it does not do so as an extra punishment, but it is because the offender is a confirmed criminal and a nuisance to the society, thus a long jail sentence will serve for the interests and protection of the public."*

Good Record and Status of Accused

Any punishment to be imposed by the court has to serve some purpose. For example, there is no need to send an old man, say 80 years to prison. Likewise, it will not be useful to send a youthful offender to prison. Also, it will be not proper to send an ill person to prison. However, this factor should be taken together with others already discussed above and others to be discussed bellow. This will depend on the seriousness of the offence and the possibility of it being repeated. Mere old age should not attract leniency.

Where a person is holding a higher status of trust, and has breached that status of trust, he should severely be punished. In the case of **Lawrence Amuli V R (1970) HCD No. 72**, the appellant was charged with theft by public servant c/ss 270 & 265 of the Penal Code. He was sentence to 9 months imprisonment for having stolen Tshs 210/= due to an employee of the National Housing Corporation, where he himself was a building inspector. When the case came for appeal the judge thought it worthwhile to consider the sentence and consequently made the following observation:

> *"The appellant had acted in a most irregular manner by failing to pay the wages of another person engaged in building work. It was a gross breach of trust seriously embarrassing the corporation."*

The sentence of 9 months was enhanced to 15 months imprisonment. But it is important to note that before enhancement of the sentence, the appellant was called upon to show cause why the sentence should not be enhanced.

Mistake of Law

Where the accused person pleads mistake of law, the court may consider some leniency. However, it is important to note that mistake of law is not a defence, but only as a matter for mitigation. For example, where the accused is an illiterate who could not fully appreciate the legal implication of his act, the magistrate would not be mistaken if he took the issue of illiteracy as a mitigating factor. Read the case of **Joseph Hawksworth & Another V R (1970) HCD No. 271**.

Loss of Job and Having Dependants

The court will have some leniency to a person after conviction loses his job, and also have a number of dependants. However, I hasten to say that these factors should not overwhelm the sentencing magistrate, other factors should be taken into consideration also. In **R V Oswald Bruno Kanga (1970) HCD No. 153**, the accused was a senior police officer and was convicted of two counts;

- Unlawful possession of government trophy and was sentenced to a fine of Tshs. 500/= or six months imprisonment in default,
- Hunting game animal without licence and was sentenced to a fine of 1,000/= or six months imprisonment in default.

The state appealed against the inadequacy of the sentence and also that the magistrate should have taken into account the acccused's senior and responsible position and the gravity and popularity of the offence.

The court held that:

> *The sentence seems inadequate if considered separately from the material and social loses that the accused suffered on his conviction. He is now in financial ruin with no prospect of re-employment by the government or parastatal organisation. He has lost all his pension privilege and the stigma of conviction would hang on him for a long time. Therefore the accused had been punished enough for his offence.*

Time Spent in Custody

When assessing a sentence, time spent by the accused in custody before conviction is one of the factors that will be taken into consideration when assessing a sentence. Where the accused has spent a long time in custody prior to his being sentenced, he is entitled to some leniency. In the case of **R V Joha Mdachi (1967) HCD No. 355,** the accused pleaded guilty to manslaughter. At the time she was convicted, she had been in custody for over a year. For this reason especially and for others in general, a sentence of one-day imprisonment was imposed.

Intoxication

Another defence that an accused person may raise is intoxication, and this defence is only available in murder cases. In other criminal cases, intoxication as a factor for consideration is not settled. Some judges take it into consideration while others do not. In the case of **Lucas V R (1970) HCD No. 298**, the judge expressed doubt whether intoxication is a mitigating factor. In the case of **R V Semberit Magnus Kassembere (1967) HCD No. 95,** the judge said that it is open to argument whether or not intoxication is a mitigating factor. In this case the judge found that the accused was drunk, (intoxicated) when he committed the offence. He however said that where intention is a necessary ingredient of offence intoxication could never be a defence.

However, where the offence committed is prevalent in the area, the fact that the accused was drunk can be rejected as a mitigating factor.

First Offenders

Generally the law requires that first offenders should as much as possible be kept out of prison. The emphasis should be on the reformative aspect of punishment. However, where the offence committed is serious one, and an exemplary punishment is required then a severe punishment will be imposed. Also where the offence is widespread in the area then a severe punishment will be imposed as a shock deterrent.

The Accused's Attitude to the Commission of the Crime and Punishment

In some cases you may find accused person showing some regrets for what they have done, and are ready to change and make up for their mistakes. In some cases the accused may show some remorse by offering to compensate the victim. Sometime the accused may show that he regrets his wrongs by pleading guilty. In such a case the accused is entitled to some leniency. Biron, J in the case of **F. Chilemba V R (1968) HCD No. 510**, said:

> *"It is generally, if not universally, recognized that an accused pleading guilty to an offence with which he is charged qualifies him for the exercise of mercy from the court. The reason is, I think, obvious, in that one of the main objects of punishment is the reformation of the offender. Contrition is the first step towards reformation, and a confession of a crime, as opposed to brazening it out, is an indication of contrition. Therefore in such a case, a court can and does impose a milder sentence than it would otherwise have done."*

In the case of **Lubaga Senga V R [1992] TLR 357**, the appellant was charged u/s 269(1) PC. He was condemned to five years imprisonment on his own plea of guilty. He appealed against the sentence contending that it was excessive.

The appellant was a first offender and in mitigation he showed deep sorrow for the offence apart from promising to refund the complainant the loss caused to him by the appellant's acts. On appeal;

> *The appellant was in the circumstances entitled to more lenient treatment than he was accorded. Appeal allowed and ordered as will result in his immediate release, unless he is otherwise legal held.*

In **Bernadeta Paul V R [1992] TLR 97**, the appellant was convicted on her own plea of guilty, of killing her eight days old boy. In sentencing the accused the High Court only considered two factors; 1) that she was first offender 2) she had been in custody for almost five years. The sentence imposed was four years imprisonment against which she appealed. It was argued on appeal in favour of the appellant that the fact that she readily pleaded guilt to the offence was not considered a mitigating factor. The court said:

> *Had the learned judge taken into account appellant's plea of guilty to the offence with which she was charged the judge would no doubt have found that the appellant was entitled to a much more lenient sentence than the sentence of four years imposed. The sentence of four years set aside and in substitution therefore the appellant is sentenced*

to such term of imprisonment as would result to her immediate release from custody; unless she is otherwise lawfully held in connection with another matter.

However it is important to note that every sentence must be proportionate to the offence committed and the circumstances surrounding its commission. This being so, it is always true that a severe punishment will be imposed to an accused who pleaded not guilty if convicted. By pleading not guilty, the accused is exercising his legal right of being heard. In the case of **R V Gaudenzio Kiwhele & Another 1 TLR (R) 81**, Wilson, Ag. C. J. Said:

"It occurred to me that the magistrate might have differentiated between the two accused because one pleaded guilty and the other did not. It is a moot point whether an accused person should be penalized for doing what the law allows him to do—have his case heard. If any discrimination is made between two accused on that ground it should be, I think by showing some leniency to the one who pleaded guilty, not being ultra—severe to the one who doesn't".

Cooperation of Accused with the Authorities

The cooperation of the accused with the authorities may;

- Simplify and reduce time to be spent in investigation.
- May lead into arresting of other offenders.
- Lead into recovery of stolen properties
- Lead into recovery of things used or intended to be used in committing other offences.

In the case of **Arthur James & Others V R (1913) Cr. App. R 200**, the court said:

"…. He deserve the term of seven years imposed, but the court reduces it to three, for he betrayed the thieves, it is expedient that they should be persuaded not to trust one another, that there should not be 'honour among thieves'. He is now rewarded for informing against his accomplices".

Sentencing Procedure and Choice of Punishment

Procedure on Sentencing

a) Mitigation

After convicting the accused and delivering the judgment, the magistrate is required to inquire into the background of the accused and the case. In doing so, he will ask the public prosecutor if the accused has any previous records. If the accused has no previous convictions i.e. is a first offender, the magistrate should ask him why sentence should not be passed upon him according to law. This process of asking the accused is called mitigation. In mitigation the accused is expected to say something that if taken into consideration by the court may justify some leniency.

However, in some cases the accused may not know what to say in mitigation. When such happen, the magistrate is supposed to ask the accused questions about himself. The practice of asking the accused is called ***allocutus.*** In the case of **R V Selemani Said & Another 1977 L.R.T N. 29**, Kisanga, J. said:

*"**Allocutus** is an important right of an accused person and magistrate should always ensure that the accused person is given opportunity to exercise it because he may have something to say which could influence the magistrate to exercise in his favour".*

Thus it is important that the accused person should be heard in mitigation and contradicts facts stated by the prosecution. In most cases, the accused in mitigation is expected to say the following;

- What drove him to commit the offence?
- His family commitments,
- How long he has been in custody,
- His poor health,
- His age, his education, his occupation etc

b) Proof of Previous Conviction

If the prosecution says that the accused has a previous conviction, then it has the duty to prove such previous conviction. The prosecution can do so by;

- Stating orally the offence,
- The sentences,
- The sentencing court.

However, the proper procedure is for the prosecution to produce a copy of these previous convictions.

The court will ask the accused person whether or not he admits the record of previous conviction as adduced by the prosecution. If the accused admits, then such record will be taken as true and correct.

Where the accused doesn't admit the record, the prosecution will have to prove the record by either oath or affirmation. In the case of **Gulam Hussein V R 13 E.A.C.A 167**, the court said at page 188:

> *"…. It is improper for a prosecutor after conviction and before sentence to make any statement to the court against the convict which—if challenged—he would be unable to prove legally admissible evidence…It seems to us that on a controversy as to the facts upon which sentence is to be based the same rule as to legal proof as the substantive trial of the offence must apply"*.

In another case of **Rashidi s/o Ally V R (1967) HCD No. 215** the judge said:

> *"When an accused person denies a conviction appearing on his record, it is necessary to call someone who was present at the conviction. Entries may be made in files in error, and since previous convictions affect the severity of sentence…. they must be strictly proved. Where they are not strictly proved they cannot be taken into account in sentencing."* Per George, C.J. Read also section 278 CPA.

Jurisdiction of Subordinate Courts in Sentencing:

a) Sentence of Imprisonment

According to section 170(1) CPA a subordinate court may pass a sentence of imprisonment of a term not exceeding five years. This will apply to those offences that are authorized by law. In case of scheduled offences, if law authorizes such sentence, pass a sentence of imprisonment for a term not exceeding eight years in respect of such scheduled offence under the ***Minimum Sentence Act, 1972.***

This means that the magistrate is not allowed to pass a sentence, which is more than the maximum prescribed by the statute. In ordinary offence the maximum is eight years. Refer to the Sexual Offences Special Provision Act, No.4/98.

b) Fines

Section 170(1) (b) CPA gives powers to subordinate courts to impose a fine not exceeding twenty thousand shillings.

c) Corporal Punishment

Section 170(1) (c) CPA provides that the limitations are provided under the ***Corporal Punishment Act, Cap.17*** R.E. 2002 The maximum sentence allowed in twenty-four strokes—s.8 (2) of the Act.

d) Confirmation of Sentences

According to section 170(2) CPA, the following sentences:

- A sentence of imprisonment for scheduled offence, which exceed the minimum term of imprisonment prescribed by the MSA;

- For any other offence which exceed twelve months;
- A corporal punishment, which exceed twelve strokes;
- A sentence of fine or for payment of money (not under the MSA), which exceed six thousand shillings;

Will only be carries out after a judge has confirmed them. Thus the record of the case should be transmitted to the High Court. But if a sentence is passed by a Senior Resident Magistrate of any rank or grade this condition will not apply.

On the other hand if there is any provision of any other written law which authorize the subordinate court to pass a sentence in excess of the sentences provides u/s 170(1) CPA. Read section 67 of the **Wildlife Conservation Act, Cap. 283.**

Concurrent and Consecutive Sentences

When the accused is charged and convicted on several offences, which arose out of the same transaction, the sentence will be ordered to run concurrently and not consecutively. Whereas where the offences arose out of different transactions, which took place in different days, it is inappropriate to order the sentences to run concurrently no matter how close they may be.

The sentence is said to run concurrently, when after being convicted, the sentence will be served together and not to be served one after the other. Example the accused is convicted of the following offences: Burglary and is sentenced to four years imprisonment, stealing two years imprisonment and rape thirty years imprisonment. The magistrate will order the sentence to run concurrently, which means, the accused will serve the substantive sentence of thirty years and not a total of thirty-six years. But if the order for the sentences to run consecutively, the accused will have to serve thirty-six years; that is one sentence after the other. In the case of **R V Kasongo s/o Luhogwa 2 TLR (R) 47**, the accused was charged with housebreaking and stealing. He was convicted and sentenced to one year imprisonment for each offence and the sentences were ordered to run consecutively. The court said:

> *"It is a well established principle that offences committed in the same transaction should carry concurrent sentences and before any departure is made from this principle the trial magistrate must be satisfied that there are very exceptional circumstances warrant that course being taken".*

In **Musa s/o Bakari V R (1968) HCD No.239**, the court said:

> *"It was universal practice, in the absence of good reason to the contrary, to order the sentence for related offences of house breaking and stealing to run concurrently, or where the charged counts, attracting conviction, arose out of a single transaction, or are part and parcel of a single plan of campaign concurrent sentence will be awarded".*

In the case of **Elias Joakim V R [1992] TLR 220**, the appellant was convicted on two counts of housebreaking and sentenced to two years imprisonment and stealing and sentenced to five years imprisonment without the magistrate ordering the same to run either concurrently or consecutively. In mitigation it also transpired that the appellant was also serving another sentence. On appeal:

> *It is judicial practice that where there is an indictment consisting of several or many counts, that have attracted convictions, the sentence imposed and assigned to each count shall be ordered to run concurrently, if such related offences arose out of a single transaction, or are a part and parcel of a single plan.*

According to section 168 CPA and section 36 PC the court may order sentences of imprisonment to run concurrently even where the accused was convicted on separate trials the conditions for this practice to apply are;

- The accused must have been sentenced on a first conviction,
- The first sentence should not be death or corporal punishment.

In the case of **Chilemba V R [1969] E.A 470**, the appellant was charged and convicted of the offence of theft by public servant and sentenced to nine months imprisonment, he was sentenced on 20/4/63. Some three months later he was convicted on four counts of theft by public servant and sentenced to two years imprisonment and twenty-four strokes of corporal punishment. It appears that the offences in the two trials were committed at about the same time and in the course of the same transaction, but apparently the offences in the second trials were uncovered later. In both cases the appellant had pleaded guilty. The appeal was on the ground that the sentences in the two trials ought to have been ordered to run concurrently in that had they been charged in a single charge, the sentences would have been ordered to run concurrently in the circumstances. Biron J said:

> *"…It is clear from the learned magistrate's remarks, with which, with respect, I agree, that he was of the view that all the charges should have been brought together and if they had been so brought he would have imposed concurrent sentences of imprisonment on the convictions in respect of the charges. In the result, the appeal is allowed, and it is ordered that the sentences imposed in this case, which have been ordered to run concurrently with each other, are to run concurrently with that of Lindi criminal case No, 20, 1968".*

We see from this case that for the sentences to run concurrently:

- The offences must have been committed in the course of the same transaction.
- The accused must have been tried in two different trials.
- Had the offences been tried together, the sentences would have been ordered to run concurrently.

It is to be noted that where the court imposes a sentence of corporal punishment, such sentence in no circumstances be ordered to run concurrently. In the case of **R V Paul Msilu (1968) HCD No. 64**, the accused was convicted of five counts of stealing government property, and sentenced to ten strokes of corporal punishment on each count, sentence to run concurrently. When the question of sentence came before the High Court, it was held that there was no authority to do that.

Likewise, it is inappropriate to order sentences of fines to run concurrently, they should always be ordered to run consecutively.

NB: It has been suggested that when imposing a sentence, the magistrate should record the reasons for imposing that sentence. This will enable the court on appeal to know why that sentence was imposed, thus can easily make up its mind whether or not to interfere with that sentence.

ORDERS

Upon passing sentence, competent court may also make orders. The distinction between sentence and order is very difficulty, they are commonly used simultaneously. Normally sentence and order go together. Example a person may be sentenced to serve imprisonment term and at the same time ordered to pay compensation to the victim. The act of paying the compensation is an order, while that of serving imprisonment term is punishment imposed by the court against the evil act done by the accused. The following under are some of the orders that a magistrate may make when passing sentence.

Discharge

Where the court unless expressly provided by the law, like the ***Minimum Sentence Act, Cap. 90 R.E. 2002*** convicts an accused person, may discharge him. The court may do so when it is of the opinion that confinement or supervision will not be appropriate. There are two types of discharge;

a) Absolute Discharge

After convicting the accused, if the magistrate or judge;

- Forms the opinion that punishment will not serve any useful purpose or,
- The conviction is itself a sufficient blow to the accused person or,
- The accused is convicted only on technical grounds while the substance of the offence charged is negligible;

May discharge the accused absolutely without further ado. The phrase "without further ado" means that the conviction of this kind is only for the purposes of proceedings. The conviction of this kind will not be taken to be previous conviction in subsequent proceedings.

- Section 38(1) PC, gives the court power to discharge a person absolutely when it finds that a custodial sentence or fine or probation will not meet the justice. This order will not be made when a person is convicted of murder or is convicted for a scheduled offence under the MSA, 1972.

According to section 4(1), 3rd Sch. of the MCA, the order of discharge may be made in respect of any offence and by any court in Tanzania.

In the case of **R V Kisiwani Sisal Estate (1970) HCD No. 162**, the respondent company was convicted on its own plea of guilty of five counts of failing to pay contribution to the National Provident Fund c/ss.15 (2)(d) of the ***National Provident Fund Act, Cap.563*** as amended by Act No. 5 of 1968. During the trial, it was contended that the company had experienced some difficulties due to drought and also the company's punctuality in making payments, all these led the court to the decision that but for failure of rains would have been well.

From the given facts, the court decided that an absolute discharge was appropriate.

The Republic appealed on the ground that the learned magistrate was not entitled to employ section 38 PC as a matter of law. It was said that section 38(1) of the NPF Act provided only three alternatives; fine imprisonment or combination of both. On appeal the High Court said:

> *"It has never been doubted that the general provisions of the Penal Code (or Criminal Procedure Code) control all trials of a criminal nature unless there is express provisions to the contrary. There is nothing in section 38 of the Act, which would suggest that the general provision of section 38 PC should be excluded. Therefore on face value at least I see no reason why the learned magistrate could not have applied section 38 of the Code…The Act, no doubt, seeks to build up the National Provident Fund and its terms are stringent and in one case almost a type of taxation. But it surely cannot be said that the Act was intended as an oppressive measure even in the event of overwhelming hardship".*

The first ground of appeal was therefore rejected.

The second ground was that even if the magistrate was empowered to use his discretion, he should not have exercised it in the circumstances of the case. It was not disputed that:

- There had been serious drought and that apart from having difficult time with the sisal, had also lost entirely on the cash crops, which was the main diversification of its main business.
- Also as pointed above, the company was always punctual in paying its dues to the Fund.

But due to drought, it had failed to pay its dues for four months, and it was not suggested that the officers of the company used the company's funds extravagantly or improperly, the only faulty levied on them is that they did not inform the Compliance Officer of the difficulties. The judge said:

> *"I cannot see that the company was deliberately defaulting or would have defaulted if it had not been for genuine hardship…It may be that the magistrate could have secured the funds by granting a conditional discharge covering the period during which instalment would be ordered to be paid. But he trusted the company because he noted that it had already began making regular payments. If that is so, and nothing has been suggested on appeal that the company has failed to pay any of the instalment ordered as to the arrears it seems hardly likely that the Fund will lose any revenue."*

On these grounds, the learned judge saw no reason to interfere with the magistrate's decision and order.

- Another type of discharge is where after hearing the whole of the prosecution case the court finds that the accused has no case to answer. According to section 230 CPA discharge of this nature is a bar to any subsequent proceedings, hence the accused can plea autrefois acquit.
- In addition to that where the accused person has been called upon to defend himself and before judgment the prosecution applies to withdraw the charge, the accused is acquitted. The acquittal of this nature amount to an absolute discharge and hence a bar to any subsequent proceedings—S. 98 (b) CPA.

b) Conditional Discharge

According to section 38(1) PC, the court may discharge an accused person on conditions that he commits no offence for the time to be fixed by the court. Before releasing the accused on conditional discharge the magistrate must look at the nature of the offence and the character of the accused.

The court is required by section 38(3) PC to tell the accused the consequences of breaking the conditions of his discharge i.e. he will be liable to be sentenced for the original offence. Read also section 38A (1) PC.

The conditions that the court may impose are:

- The person so discharged may be prohibited from associating with certain persons or visiting undesirable places,
- If the offence was committed when the accused was under the influence of drink then the court may order him to abstain himself from intoxicating liquor,
- The court may impose a condition that will secure that the offender led an honest and industrial life,
- The condition may require the accused or his surety to appear in chambers before the judge of the court at such interval as may be specified by the court in the order of discharge—s.326 CPA.

In the case of **R V Alli s/o Said (1967) HCD No. 364**, the accused was convicted of obtaining credit by false pretences. The incident was petty, involving Tshs.1/15 in bus fare. He was sentenced

to one month's imprisonment, with a recommendation for extra-mural labour. While exercising its power of inspection, the High Court noted:

> *"Short imprisonment term has little deterrent value. It introduces the accused to an economically insecure environment in which he may make the acquaintance of more experienced criminals. The brief confinement does not effectively chasten the offender, nor does it afford unskilled person the opportunity for training that may be useful in the future. In this case then, the recommendation for extra-mural was good one however a fine or discharge would have been most appropriate.*

This decision was upheld in the case of **R V Mabula Masota Charles (1968) HCD No. 238**, where the accused a first offender was convicted of travelling on a railroad without a valid ticket that would have cost Tshs.7/10. He was sentenced to one month's imprisonment. The High Court remarked that, in this case, a conditional discharge order accompanied by an order to pay the fare to the Railways would have met the justice of the case.

When fixing the time within which the accused should not commit any offence, normally, courts have discretion. Thus the trial magistrate will determine the length of conditional discharge. It is to be noted that the length of conditional discharge is not limited by the maximum prison term assigned to the offence. In the case of **R V Mwukwa (1972) HCD No. 32**, the magistrate ordered a period of conditional discharge, which was longer than the maximum prison term for the offence. On appeal the judge said that the trial magistrate was entitled to do so.

The maximum prison term is relevant only where the accused is called upon to be sentenced for failing to observe the conditions of his release. It is only then that the court is ought to ensure that it does not impose a term in excess of the maximum prison term, which is provided for the offence for which the accused is being sentenced.

When a person is discharged whether absolute or on condition the court may order him to pay compensation or costs to the accused in accordance with the provisions of section 248 CPA. In the case of **DPP V Eston Selemani [1994] TLR 9**, among other charges the respondent was charged with causing grievous harm and was convicted and sentenced to a conditional discharge and also ordered to pay Tshs.15,000/= as compensation to the person grievously harmed. The respondent was ordered to be remanded in custody until he pays the compensation money.

The DPP appealed to the High Court against the sentence, praying for a custodial sentence and enhancement of the compensation. It was said:

> *Where the respondent fails to pay compensation ordered the next step would be to order distress, and only in default of distress is an accused person liable to imprisonment, the order for remand in custody until compensation is paid was irregular.*

Probation

i) Definition

According to section 2 of the ***Probation of Offenders Act, Cap.247***, the following terms are defined;

- Probation—is an order made under the provisions of the Act placing a person under the supervision of a probation officer.
- Probation officer—is a probation officer appointed under the provisions of section 15 of the Act.
- Probationer—means a person placed under probation by a probation order.

ii) Types of Probation

a) Probation with bond

Probation order with bond is provided under section 337(1) CPA. According to this section this order will be made if,

- The offence for which the accused is convicted is not punishable by death,
- The accused has no previous conviction.

In addition to the above requirements the court will consider the following,

- The age of the accused, his character, his health and mental condition.
- The gravity of the offence.
- The circumstances surrounding the commission of the offence.

If the court is satisfied that the accused has no previous conviction and the offence is of trivial nature, instead of sentencing him to any other punishment, it may release him on entering into a bond with or without sureties.

The period of probation should not exceed three years and in such period the court may direct him to appear and receive sentence if called upon and at the same time to keep peace and be of good behaviour.

The High Court when exercising its powers of revision may also make probation order—S.337 (2) CPA.

b) Probation Simpliciter

Probation orders issued under the Probation of Offenders Act, Cap.247 need not be accompanied by a bond. According to section 3 of the Act, the court has powers to make probation orders under the following circumstances;

- If the offence for which the accused is convicted is not scheduled under **the *Minimum Sentence Act,***
- The court has to take regard into the character of the accused, his age, his health condition, his home surroundings etc,
- The court is also supposed to look at the nature and circumstances under which the offence was committed.

The court is supposed to consider the following before making such order:

- The court must make sure that it explains to the accused the effect of the order and consequences of failure to observe the conditions of the order. The accused must then agree to comply with the conditions of the order. If he doesn't agree, then the magistrate will not make such order—S.3 (1) (2) of the Act.

- The probation order must, according to section 4(1) of the Act be for a period not less than one year and not exceeding three years.

iii) Conditions of Probation Order

Normally probation order is accompanied by several conditions;

- Probationer must submit himself to the supervision of the probation officer named in the order,
- The accused may be required to be of good behaviour,
- The accused must give details of his residence during the probation period,
- The probationer may be required to abstain from frequenting certain places or associating with certain undesirable persons.

iv) Consequences of Failure to Observe the Conditions

Consequences of failure to observe the conditions are provided under section 7 of the Act. These are:

- Where the court is satisfied that the probationer has failed to comply with the conditions, it may impose a fine not more than Tshs.200/= and may order the probation to remain in force.

- The court may pass any sentence if the probationer had just been convicted.

v) When does Probation Order Cease?

- The probation order will cease to have effect after the expiration of the probation order,
- When the probationer is sentenced to imprisonment for the offence, in respect of which the probation order was made,
- When the order is discharged by the court on the application of the probationer or the probation officer.

When a person is issued with a probation order, this order should not be combined with any form of punitive sentence. In the case of **R V Patrice Matata (1967) HCD No. 413**, the magistrate imposed a corporal punishment in addition to probation order. The High Court said:

> *"The purpose of probation is to release the prisoner without punishment where the court regards it expedient to do so taking into account the circumstances of the case and character of the accused. It is improper to impose a sentence in addition to an order of probation."*

The probation order was set aside because the order for strokes had already been executed.

Probation orders under the Probation of Offenders Act, Cap. 247 should only be made in areas where there are probation officers. According to section 340 CPA the provisions relating to probation under the CPA i.e. sections 337 338 & 339 will not apply in Tanzania Mainland where the Probation of Offenders Act Cap. 247 apply.

Costs and Compensation

i) Costs

Costs are expenses incurred by a party to an action. Costs are provided by section 32 PC. However it is to be noted that the provisions of section 32 PC are applicable subject to the limitations imposed by section 145 CPA. Costs have to be quantified by the court, thus a party to an action may not recoup all the costs incurred because the court may hold that they were not reasonably incurred and disallow them.

According to section 345(1) CPA the magistrate or judge may order a person convicted of an offence before him to pay to the public prosecutor or private prosecutor reasonable costs incurred by such public or private prosecutor.

An order to pay costs may be in addition to any other penalty imposed by the court provided that costs should not exceed Tshs 4,000/= in case of the High Court and Tshs 2,000/= in case of a subordinate court.

According to section 344(2) CPA, where the prosecution of an accused person was originally instituted on a summons or warrant issued by a court on application of a private prosecutor the court may order such private prosecutor to pay to the accused person such costs as shall be deemed fit by the court. However such costs should not exceed Tshs. 2,000/= in case of the High Court and tshs.1,000/= in case of a subordinate court. The court may order such costs only where the accused is acquitted or discharged by the court.

Before awarding costs to the accused the court must hear the private prosecutor, and if he shows to the court that he had reasonable grounds for making complaint then the court may not order such costs.

For the purpose of this part, public prosecutor and private prosecutor are defined under section 345(4) CPA.

ii) Compensation

A person convicted of an offence not punishable by death may be ordered to pay compensation to any person injured by his offence.

Compensation according to section 348(1) CPA may be awarded under the following circumstances:

- The victim must have suffered material loss or personal injury as a result of the offence committed by the accused.
- The loss or injury is recoverable by that person (victim) in civil suit.

It is to be noted that section 348(1) CPA gives power to court to order the accused to pay compensation to the bona fide purchaser of any property in relation to which the offence was committed. The compensation will be in respect of the loss of such property, if it is restored to the possession of the person entitled thereto. The compensation will be also ordered only where the accused is convicted of any offence under Chapters XXVI &XXXI of the PC.

In the case of **Selemani Misuri V R 1973 L.R.T N. 5**, the court gave three conditions before the court can order compensation, these are;

- *The person entitled to compensation must have suffered material loss or personal injury.*
- *Compensation would be recoverable in civil suit.*
- *Such compensation is to be such, as the court deem fair and reasonable.*

It is important that before the court can order compensation it must assess the extent of loss or damage. Where loss or damage is alleged it must be proved before the court. In **R V Kaserikali Bin Isabosi (1921—1952) 1 TLR (R) 100**, the accused was convicted of arson and sentenced to two years imprisonment. The magistrate ordered the accused to pay compensation but there was no evidence as to the extent of the damage. The court said:

> *"I do not think that the order for compensation can be upheld. The magistrate's motive in making it is obviously to compensate Nyaringo binti Mahende for the loss of her house and property but according to the record there was no evidence as to the extent of the fire, the property destroyed by it, the value of the property that was apparently burnt. Proof of these matters is required unless the accused admits them before an order of compensation can be made."* Per Mahon, J.

In case of domestic offences it is inappropriate to order a large amount of compensation from one spouse to another. This is because if the marriage is still subsisting it will result in difficulty and aggravate the differences between the spouses.

In the case of **Moshua s/o Mduna V R (1968) HCD No. 227**, the appellant was convicted of assault and of causing actual bodily harm to a woman.

The Court of Appeal remarked that, a man convicted of striking a woman should pay compensation even though there is no permanent injury, since striking a woman is not a manly act.

However, it is to be noted that compensation will not be awarded where one assaults another and during that assault damage to the property worn or in the possession of the complainant occurs. Read **Leo s/o Pigangoma (1967) HCD No. 131.**

According to the provision of section 347 CPA, if the accused person is acquitted, the court will order the complainant to pay to the accused a reasonable amount of compensation for the trouble and expenses such person may have incurred. The compensation is in respect of trouble and expenses and not from acts that result in a charge being brought. In addition to compensation, the complainant will also be ordered to pay costs. The court may order such compensation after satisfying itself upon evidence that the charge was frivolous or vexatious.

Compensation in cases of sexual offences is provided by the provision of section 348A CPA. The compensation will be:

- The victim must have suffered injuries.
- The compensation must have been recovered in a civil suit.

The court will fix the amount of compensation.

The sum of the compensation must be specified and where are more than one accused persons, each one must be allocated his share. In the case of **Leshaion s/o Ncosha V R (1968) HCD No. 62**, the two accused persons were convicted of cattle theft and sentenced in accordance with the provisions of the MSA. In addition to the imprisonment and corporal punishment it was ordered that 'after their term of imprisonment, they will have to pay the complainant his cattle' on appeal:

> *"The trial court should have assessed the value of the missing cattle. The court should have also determined the share which each to the accused was allocated in the proceeds of the theft. Appropriate orders for compensation should then have been made against each accused for the value of his share of the proceeds."*

From the above case we see that the fair and proper order to be made is to order compensation to be paid jointly and severally by the accused persons, but only to the extent of their respective responsibility.

Section 348(3) CPA provides that an order of compensation is subject to appeal. It further states that no order shall be executed until the time for appeal has expired. And where appeal has been lodged, the order of compensation will be suspended until the disposal of the appeal.

No order of compensation will be suspended so as to take effect upon the release of the accused. In the case of **Mukusi & Another V R (1972) HCD No. 121**, the judge said "it is foolish in the extreme as such suspension gives an opportunity to friends or relatives of the convicted person to dispose of the property".

Thus an order for compensation must take effect immediately after conviction.

Consequences of failure to pay compensation and cost, and also in default of distress, section 349 CPA provides that the defaulter will be liable to imprisonment for a term not exceeding six months, unless such compensation or costs is paid soon.

Disqualification

In some cases the person who is convicted of an offence may be disqualified from performing certain acts or duties. This is commonly in traffic offences under the Road Traffic Act, 1973. In this law the order of disqualification is provided under section 27. Here disqualification is in respect of the offences listed under this section only. Before an order for disqualification is made, an accused person must be heard—that is, he must be given an opportunity to show cause why an order of disqualification should not be made against him. In making order of disqualification the magistrate has discretion to impose a lesser period of disqualification than those prescribed under section 27 of the Road Traffic Act. However the magistrate is required to exercise this discretion judicially.

Suspended Sentence

Section 330(1) CPA provides that the court may suspend the sentence of imprisonment where:

- The offender has been sentenced to a fine only, or
- The offender has been sentenced to imprisonment in default of payment of the fine.

When the sentence is suspended:

- The offender will be released after executing a bond with or without sureties,
- The accused will be required to pay the fine within fifteen days from the time of executing a bond,
- If the offender after the time prescribed elapsed without paying the fine, the court may direct the sentence of imprisonment to be carried out immediately.

However, the court may extend the operation of the bond from time to time for a period of not more than fifteen days.

Police Supervision

The provisions of section 341(1) CPA, provides circumstances under which a person may be placed under police supervision:

- Where a person is convicted of any offence against sections 59 or 60 PC or sections 19, 20 & 21 of the Society Act, Cap. 337.
- Where the accused has been convicted of any offence punishable for a term of three years or upward or an offence under section 342 CPA.

Any person under police supervision may be required:

- To reside within the limits of any specified district,
- Whenever he wants to transfer his residence to another district he should obtain a written consent of the administrative officer or police officer in charge of such district,
- If he wants to leave the district where he resides, he should obtain a written consent from the administrative officer or police officer in charge of such district,
- He should inform from time to time the police officer and if no police officer then the administrative officer in charge of that district in which he resides of the house or place in which he resides,
- He should at anytime present himself to the administrative officer or police officer in charge of the district where he lives whenever called to do so—S.342 (1) CPA.

Consequences of failure to comply with the conditions are provided under section 343 CPA

- The offender will be liable to imprisonment for a term not exceeding six months,
- For a second time or any subsequent breach, he may be liable to imprisonment for a term not exceeding twelve months.

However, before sentenced to imprisonment, the offender must be heard, and must satisfy the court that he did his best to act in conformity with the requirement of the conditions.

Corporal Punishment

Court's power to award corporal punishment is provided by the ***Corporal Punishment Act, Cap.17***.

According to section 3 of the Act, no court is allowed to award corporal punishment to adult unless the offence for which he is convicted is provided in the schedule to the Act.

The magistrate is not allowed to award corporal punishment to the following:
- Males persons sentenced to death,
- Females
- Males of the age of over forty-five years.

According to section 6 of the Act, a juvenile (a person under the age of sixteen years) may be liable to corporal punishment in lieu of any other punishment. The condition is that the offence for which this juvenile is convicted is not;
- Punishable with death,
- Punishable under any law with imprisonment—S.8 (2) of the Act.
- The sentence of corporal punishment should not exceed twenty-four strokes for adults. And for juvenile should not exceed twelve strokes.
- No order for infliction of corporal punishment should be made in default of payment of fine.

Forfeiture

When the person is convicted of an offence and the court is satisfied that in his possession there is any property and at the time of arrest:

- He has been using such property for the purpose of committing an offence, or
- He has been using such property for facilitating the commission of an offence, or
- Was intended by him to be used for that purpose,

Order such property to be forfeited and confiscated—S.351 CPA.

For an order of forfeiture to have any validity it must be expressly and explicitly authorized by the statute that is being applied in respect of the offence charged—S.352 (3) CPA. In the case of **R V Ngulila Mwakanyemba (1968) HCD No. 314,** the court said;

> *"Every forfeiture order should specify the authority under which it is made and should contain sufficient reasons to show that the magistrate applied his mind judicially to the question whether or not the order should be made."*

It is important to note that some statutes make forfeiture mandatory while others make it discretionary. Example of the statutes which make forfeiture mandatory is the Wildlife Conservation Act, 1974, where in the case of **Ochora Ongira V R [1983] TLR 74** the court said that where the offence is committed under the provisions of the Wildlife Conservation Act 1974 forfeiture of the fire arm involved in the commission of the offence in mandatory.

Other statute, which provides for forfeiture is the Penal Code—s. 300, where a person is found in possession of dangerous or offensive weapons or instruments of house breaking or other offences under chapter XXXIX, and section 338 refers to documents used for committing forgery.

Before an order for forfeiture can be made, a party to be affected by such order—being the accused himself or another person—a third party, has to be heard. In the case of **R V Jafari Musa (1967) HCD No. 299,** the accused was convicted of hunting game animals without a license c/s 12 of the Fauna Conservation Ordinance, Cap.302 [Repealed] and unlawful possession of firearm c/s 13(1) of the Arms and Ammunition Act, Cap.223. The sentence included forfeiture of the firearm unlawful in the possession of the accused as provided by section 53(2B) of the Act.

On appeal it was included in the record of the case a sworn affidavit by the owner of the gun stating that he was out of town when the accused used the gun unlawfully and knew nothing about the event constituting the offence. It was held that:

> *"It seems evident that the owner of the gun in no way connived in the commission of the offence by accused and it would be unjust to penalize the owner for an offence committed by another without his consent."*

The High Court ordered that the gun be returned to the owner.

In **Michael R. Kabongo V R [1989] TLR 31**, the appellant was at the material time of the incident the holder of two firearms licenses for two rifles. On 2/3/80 the appellant left the two guns with someone who was not authorized to possess any firearm (Mr Sanga). The guns were found with the later person. Consequently, both the appellant and Mr Sanga were charged with the appropriate offence under the Firearm and Ammunition Act and sentenced. In terms of section 31(4) of Cap 223 upon conviction of the appellant, the firearm was liable to be forfeited or to have the licences to be suspended for a specified period. This was not ordered until the same court was moved by the DPP. The trial court proceeded to make the forfeiture order without notice to the prosecutor who was to represent the Republic, and the appellant whose guns were to be forfeited.

This appeal is based on the ground that such order was made seven years after sentence had been passed and without notice or hearing to the appellant, or any application to the order from the prosecution. The High Court held that:

> *"The procedure adopted by the trial magistrate was grossly irregular, in that by denying the parties opportunity to be heard, he offended one of the cornerstone of*

justice i.e. principles of natural justice. =No one should be condemned guilty or have his property confiscated without being given the opportunity to be heard.

- *Where the trial court inadvertently omits to make an order that order could be properly considered and made at a later stage after sentencing provided that all parties concerned have been given notice and an opportunity to be heard.*

According to section 351(4) CPA, where an order is made and an appeal lays such order shall not be executed until the period for presenting such appeal has passed or where the order is appealed until the disposal of such appeal. However, where the property involved is livestock or subject to speedy decay and natural decay, the order will be carried out immediately.

Restitution

If at the time of arrest, a person charged with any offence had in his possession any property, which was taken from him, the court may order that;

- The property or part thereof is restored to the person who appears to the court to be entitled thereof,
- If he is the person charged, then it be restored either to him or to such other person as he may direct,
- The property or part thereof be applied to the payment of any fine, costs or compensation directed to be paid by the person charged==this is subject of course to the property belonging to him (the person charged)—S.357 CPA.

If a person is charged and convicted of stealing and allied offences i.e. chapters XXVI to XXXI PC and if the property stolen is recovered, it should be restored to the owner or his representative. It is important to note here that the person must have been prosecuted to conviction.

Where good as defined by the ***Sale of Goods Act Cap. 214***, has been obtained by fraud or other means not amounting to stealing, the goods will not be restored to the owner merely because of the conviction of the offender.

Unless reasonable cause exist to suspect that the property has been stolen, restitution will not apply to any valuable security which has been paid in good faith by some person liable to the payment thereof, or being a negotiable instrument has been in good faith taken or received by transfer or delivery by some person for a just and valuable consideration.

If the offender has sold the stolen property to any person, and the person had no knowledge that the same was stole, and that at the time of apprehension the money was found in possession of the offender, the court may on the application of such purchaser, order that part of such money a sum not exceeding the amount of the proceeds of such sale be delivered to the said purchaser.

The order of restitution unless otherwise stated by the court before which conviction takes place be suspended:

- Until the time for appeal has elapsed, and
- Where the appeal has been lodged, until the determination of the appeal. If the conviction is quashed on appeal, the order will not take effect as to the property in question.

While pending the suspension of the operation of any such order, the High Court may make provision by rules of securing the safe custody of such property.

Any person aggrieved by an order may appeal to the High Court. And the High Court upon hearing such appeal;

- By order annul,
- Vary any order made on trial for restitution of any property to any person, even though the conviction is not quashed.

If the order is annulled, it will not take effect, if varied, it shall take effect as so varied.

In the case of **Abdul Alli Issa V R [1989] TLR 16**, the appellant was a witness in a criminal case. At the conclusion of the trial, the District Court ordered that 604 bales of second hand clothes

(mitumba) which were exhibits in the case be restored to Sadrudin Seleman, the other respondent, who was one of the accused person at the trial. The accused were discharged. The appellant was dissatisfied by the restoration order.

On appeal it was argued that the appeal was incompetent because, inter alia, the appellant had no right of appeal. The court considered under what circumstances a person who is not a party to the proceedings might appeal. The court held that:

- *A person cannot appeal against an order made under section 357 CPA relying on section 358(5) CPA because the subsection says, "any person aggrieved by an order made under this section" i.e. section 358 CPA.*
- *An order which can be appealed by "any person aggrieved" under section 358(5) CPA is made on a trial for restoration of the property.*
- *It is only a party to the restoration of the property proceedings who may appeal against an order of restoration and not any one else.*
- *Section 358 CPA, applies only to situation where an accused has been prosecuted to conviction. Since the accused was discharged section 358 CPA does not apply.*

Reconciliation

According to section 163 C.P.A reconciliation apply only in certain cases, like common assault or any other offence of personal or private nature. Reconciliation should be promoted and encouraged by the court; it should not be imposed on the parties. The court should encourage settlement of the disputes in an amicable way—either on terms of payment of compensation or other terms as to be approved by the court. In the case of **R V Muhidin Twalib [1989] TLR 8**, the accused was charged in the District Court with burglary and stealing. He denied the charge and after few adjournments, the prosecution informed the court that the accused was married to the complainant's daughter. The prosecutor requested that the matter be settled out of court. The trial magistrate purporting to act under section 163 CPA ordered that the case be settled out of court. The case was admitted for revision.

- Before applying section 163CPA the court has to consider whether the offence is one of common assault or of private nature.
- The offence of burglary and stealing is not one of common assault or of private nature and therefore does not fall within the powers of the court to promote reconciliation. Case remitted for trial

APPEALS AND REVISION

Is Appeal a Right or Privilege?

When we read provisions relating to appeals we find that they do not constitute appeal as a natural right. Thus the right to appeal must be given by the statute that is being applied. In some cases the statute may be silent on the question of appeal, in such case then the courts have inherent powers to hear an appeal, originating from the application for such statute. However, in some cases, the statute may oust the jurisdiction of the court in dealing with an appeal. When the right to appeal is given, it cannot be taken away provided that all the attending conditions and limitations are abided by.

According to section 359(1) CPA, any party to a case may appeal to the higher court if he is aggrieved by any finding, sentence or order made or passed by a subordinate court. The subordinate court is required by law when any finding, sentence or order is made or passed to inform any person or party who may be aggrieved, the limit of time to which if he wishes to appeal may do so. The court is also required to inform him the period required to giving notice of his intention to appeal and the period to lodge his petition of appeal.

Matters to be appealed to the High Court may be on the points of law as well as the points of facts.

However, when a subordinate court is excising the extended powers under section 173 CPA, no appeal to the High Court will be allowed.

No Right of Appeal to

- A person who plea guilty to a charge, cannot appeal against the conviction except as to the extent of or legality of the sentence imposed—S. 360 CPA. In the case of **Lawrence Mpinga V R [1983] TLR 166**, the court gave several circumstances under which a person may appeal on a conviction of an offence on his own plea of guilty. These are:
    - *That even taking into consideration the admitted facts, his plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty.*
    - *That he pleaded guilty as a result of mistake or misapprehension.*
    - *That the charges as laid at his door disclose no offence known to law.*
    - *That upon the admitted facts he could not in law have been convicted of the offence charged.*
- Any person convicted and sentenced to pay a fine not exceeding Tshs.1, 000/= only
- Any person sentenced to suffer corporal punishment only and is under sixteen years old
- Any person who has been sentenced to imprisonment in default of the payment of a fine, if no substantive sentence of imprisonment has been imposed.

However under section 360(2) CPA a person may appeal after obtaining the leave of the court.

Limitation of Appeal

When any person who has been aggrieved by any finding, or order or sentence made or passed by a subordinate court and intends to appeal, then under section 361 CPA, must do so in the following manner:

- If the appeal is against any finding, sentence or order, must give his intention to appeal within ten days form the date of the finding, sentence or order.
- If it is against corporal punishment, must give notice of intention to appeal within three days of the date of such sentence.
- Petition of appeal should be lodged within forty-five days from the date the finding, sentence or order was made or passed.

The provisions of this section i.e. section 361 CPA must be complied with, as was said in the case of **Jamal Manji & Company V R (1970) HCD No. 338**, that:

> *"The compliance required by section 314 is total. A partial compliance, as by giving the notice of appeal in time but lodging the petition out of time or vice versa, is not enough. A partial compliance creates, at most, an imperfect appeal which by section 314 cannot be entertained."*

A proviso to section 361 CPA provides that the High Court may admit an appeal out of time if the appellant show good cause why he did not appeal within the time.

One of the good causes that may prompt the High Court to give leave to appeal out of time is where the appeal involves important points of law. In **R V John Katua [1981] TLR 257**, the applicant was charged on two counts: stealing by public servant, in the alternative by occasioning loss to a specified authority.

The magistrate convicted him on first counts of stealing by public servant, and acquitted him on the second count. The applicant applied for leave to appeal to the High Court some three years after being convicted. He said that he had been trying to secure the service of council. On admitting the application, the court said:

- *The reason for the delay in appealing was not sufficient ground for granting the application because the applicant had not acted reasonably in the circumstances.*
- *"I decided to grant the application because on perusing the record I thought that points of law are involved"* per Kisanga, J.

Where the High Court refuses to grant leave to appeal out of time, such order is appelable to the Court of Appeal. In the case of **Melkizedeki Gabriel & Shabani Benyamini [1993] TLR 269**, the appellants were jointly convicted of robbery with violence by the district court. Their application to the High Court for leave to challenge both conviction and sentence out of time was dismissed for failure to show good cause. The appellants dissatisfied with that refusal and applied for leave to appeal against it. The judge, Mroso, J. rejected their application on the ground that they raised no point of law requiring consideration by the Court of Appeal.

The issues were: whether orders of the High Court appelable only with leave, whether by an order of the High Court refusing leave to appeal to that court appelable to the Court of Appeal on a point of law only. The Court of Appeal held:

- *There is no provision in the Appellate Jurisdiction Act, 1979 and the court of Appeal Rules which provides that in criminal cases a person aggrieved by an order of the High Court refusing leave to appeal out of time can go to the Court of Appeal on point of law only. An application for leave to appeal out of time will normally involve matters of facts.*
- *The learned judge erred in requiring the applicants to raise points of law as a condition for granting leave to appeal; he would have looked into the circumstances of the case as a whole.*
- *There is no law or rule that makes an order of the High Court in criminal cases refusing to extend time to appeal to that court appelable with leave. Even though the general practice has been that such orders are appelable with leave.*

Petition of Appeal

Section 362 CPA requires that all appeal should be made in the form of petition. Petition of appeal should be;

- In writing
- Presented by the appellant or his advocate

- Accompanied by a copy of judgment or order appealed against, unless otherwise directed by the High Court.
- Contain particulars of the matters of law or facts appealed against.

In **Riano Lena Laimer & Another V R [1960] E.A 960**, the court said that the provisions of section 315 CPC (362 CPA) are mandatory in that the grounds of appeal must by particularized. It is not sufficient to allege that a conviction was bad in law or conviction was against the weight of the evidence, the grounds of appeal must be particularized. Where there are several persons who have been jointly charged and convicted and wish to appeal, separate petitions of appeal must be filed by or no behalf of each applicant.

Notice as to the Venue of Hearing

If the appeal is not summarily dismissed, the High Court shall cause the notice of the time and place when and where the appeal shall be heard to the following:

- The appellant or his advocate,
- The Director of Public Prosecution.

The High Court is supposed to furnish the DPP with a copy of the proceedings and of the grounds of appeal.

Where it is stated in the petition of appeal that the appellant will not be present at the hearing of the appeal, and doesn't intend to engage an advocate, the court will not supply him with the copies of proceedings and grounds of appeal.

Powers of the High Court on Appeal

The High Court when sitting on an appeal has the following powers as stipulated under section 366 CPA.

- It has powers to hear both parties, i.e. the appellant or his advocate who will address the court to support the particulars set out in the petition of appeal. The public prosecutor may then address the court. And the court may allow the appellant or his advocate to reply the matters of law raised by the public prosecutor.
- The court may dismiss the appeal if it finds that there are no sufficient grounds to interfere with the decision of the lower court.
- Where the appeal is against conviction, the High Court may:
  - Reverse the finding or sentence and acquit the accused.
  - Discharge the accused u/s 38 PC
  - Order the accused to be re-tried by a competent court.
  - Direct the subordinate court to hold committal proceedings.
  - Alter the findings and maintaining the sentence.
  - Reduce or increase the sentence without altering the finding.
  - Alter the nature of the sentence with or without altering the finding.

Where the appeal is against the sentence it may

- Increase or reduce the sentence
- Alter the nature of the sentence.

Where the appeal is against any other order

- Alter or reverse such order.
- Make amendment or any consequential or incidental order that may appear just and proper.

NB: The High Court may order re-trial of the appellant/respondent if it is of the opinion that the acquittal/conviction was unwarranted in law or fact.

Where the large part of the sentence has been served it would be inappropriate, and unfair to order for a re-trial. Also where the value of the goods stolen is infinitesimal.

- The High Court has powers to take additional evidence when it is of the opinion that such evidence is necessary for a just decision of the appeal. When such additional evidence is taken the accused or his advocate must be present. In the case of **Francis s/o Mutungunya V R (1970) HCD No. 181**, Georges, C.J. (as he then was) said:

> *"At the first hearing of the appeal, I adjourned the matter so that further evidence could be adduced as to whether or not the money had in fact been deposited. In doing so I acted under section 322 of the Criminal Procedure Code (s.369 CPA)…I thought such additional evidence necessary because although it is possible, in my view, in the facts to support the inference drawn by the trial magistrate, it appeared to me to be undesirable to decide an important issue as to guilt or innocence on a serious charge on an inference when there could be available records which could help to establish the matter one way or another. Had the money been deposited then the appellant would be acquitted and absolutely cleared. If the money had not been deposited then his guilt would be established with certainty. To deprive oneself of the benefit of this evidence when there was power to hear it did not appear to be in the interest of justice. The authorities in East Africa have tended to narrow somewhat the wide powers conferred on courts by section 322. The law would appear to be that additional evidence would not be called for the purpose of "filing gap" in the case of the prosecution. More explicitly the Court of Appeal has held that where a scrutiny of the evidence is clear at the closure of the case for the prosecution no case has been made out against the accused person because there was a gap in the evidence then on appeal, the power to call additional evidence, to fill the gap. On the other hand, where all that was required was elucidated of some matter left vague in the case for prosecution, then the power conferred by section 322 can be used. The fact that the evidence was available and could have been in the court below would seem to be immaterial."*

In the case of **Sgt. Lawrence Mzava & Two Others V R [1980] TLR 25**, the appellant together with another accused were charged with two counts of stealing by public servant of forty pistols and fourteen rounds of ammunition and being in unlawful possession of offensive weapons. The trial magistrate held that appellants had no case to answer because of non-production of the book or register in which the numbers of the pistols had been recorded and as such ownership of the pistols was not established, also that the appellants were not found in possession of the pistols.

The first appellate court invoked the powers u/ss. 151&322(1) CPC recalling five prosecution witnesses to give further evidence and called three more witnesses in order to "perform the duties of the trial court, which the magistrate so miserably failed to perform". The judge held that the appellants had a case to answer in respect of both accounts.

On the appeal to the Court of Appeal of Tanzania the main argument by appellants was that the judge was wrong in recalling and calling new witnesses to fill the gaps in the prosecution case. The Court of Appeal said that:

- *Since there was ineptness on the part of the trial magistrate and incompetence on the part of the prosecution, the appellate court was justified in invoking the provisions of section 151 CPC (S.195 CPA) and section 322(1) CPC (S.369 CPA).*
- *The additional evidence required was available as was apparent from the record, and such evidence was not for filing gaps in the prosecution case or for making a new case against the accused but was for the just decision of the case.*

Summary Dismissal of Appeal

The High Court may after perusing the records forwarded to it summarily reject the appeal by an order certifying that upon perusing the record, the court is satisfied that the appeal has been lodged without any sufficient ground of complaints. Thus;

- If it is an appeal against the sentence, that is excessive and that the High Court on perusing the record finds that there are no materials, which would lead to reduce the sentence, the High Court will reject such appeal summarily.
- If it is an appeal against conviction and the High Court upon perusing the record finds that the evidence in the lower court leaves no doubts that the accused is guilty or the appeal is frivolous, the High Court will reject the appeal summarily.
- If the appeal is against conviction and sentence, the High Court will reject the appeal summarily if it finds that the evidence in the lower court warrants conviction and that the appeal is frivolous, and that no material in the record to enable it to reduce the sentence—S.364 CPA.

Suspension of Sentence Pending Appeals

The procedure to be followed when a person has been sentenced to imprisonment and his appeal admitted is provided u/s 368 CPA.

- The High Court or subordinate court, which convicted the accused, may order that person to be released on bail with or without sureties pending the hearing of his appeal.
- If the person is not released on bail, he will be treated as a remand prisoner and his sentence will be suspended until the appeal is disposed off.
- If the appeal is disposed of, and the original sentence is restored or another one entered for it, the time he was on bail or when his sentence was suspended will be excluded in computing the term of imprisonment to which he is finally entered.

Appellate Court Properly Constituted

- Appeals from the subordinate courts according to section 370 CPA are to be heard by one judge of the High Court. However, in particular case the Chief Justice may direct that the case be heard by more than one judges of the High Court.
- The direction of the Chief Justice is to be given before the hearing of the appeal or at any time before the judgment is delivered.
- When on hearing the appeal the court is equally divide in opinion the appeal shall be dismissed.

Abatement of Appeals

The appeal from a subordinate court will finally abate on the death of the appellant, except if it is an appeal against a sentence of fine—S.371 CPA.

Appeals by the Director of Public Prosecutions

Right of Appeal by the DPP

The DPP may appeal by the powers conferred under section 378(1) CPA, appeals to the High Court against any finding, order or sentence made or passed by a subordinate court. However, when the subordinate court is exercising extended jurisdiction or powers under section 173 CPA, the appeal will lie to the Court of Appeal.

The appeal by the DPP to the High Court may be on points of law or facts.

In public prosecutions it is the DPP who has the right to appeal. The victim/ complainant have no right to appeal to the High Court. This was stated in the case of **Fanuel Msengi V Peter Mtumba [1992] TLR 109**, whereby the respondent was acquitted by the District Court of the offence of cattle theft. The appellant aggrieved by decision of the District Court appealed to the High Court. The High Court said that:

This was not a private prosecution rather a public prosecution conducted by the DPP; as such the complainant has no right of appeal under section 378(1) CPA.

Where the criminal case originate from the Primary Court under section 20(1)(a) MCA, 1984, the complainant or DPP may appeal to the District Court and to the High Court against the acquittal in public prosecutions.

The same decision was reached in the case of **Sylvery Mkangaa V Raphael Albertho [1992] TLR 110**, where the court said that by virtue of section 378(1) CPA, in public prosecutions only the DPP could appeal against an acquittal from cases originating in the District Court.

According to section 43 MCA, appeals from the District Court to the High Court have to be done in accordance with the procedure stipulated in the CPA. Hence the complainant is not personally allowed to appeal in public prosecutions. What he can do is to ask the DPP to appeal in his behalf.

The position is different in respect of criminal cases originating from the Primary Court. According to section 20(1) (a) MCA, the complainant or the DPP may appeal to the District Court and to the High Court against an acquittal in a public prosecution.

Limitation of Appeal by the DPP

For appeals by the DPP to be entertained by the High Court the DPP must have given his notice of intention to appeal to the subordinate court within thirty days since the decision of the court was made. The decision may be an acquittal, finding or sentence.

The DPP is required to lodge his petition of appeal within forty-five days from the date of the court's decision. However in computing the forty five days, the days spent in obtaining the copy of the judgment or order or the record of proceedings in the case will be excluded—S.379 CPA.

The High Court on good cause may admit the appeals by the DPP out of time—S.379 (b) (ii) CPA.

In **DPP V A. M. Swai [1989] TLR 37**, the DPP applied supported with an affidavit to appeal out of time against a decision of the District Court. Beside the appeal having been lodged out of time, no notice of intention to appeal was given to the DC. The DPP contended that the prosecutor in the DC gave an informal notice to the trial magistrate however did not record it. The DPP further contended that the informal notice was followed up with a letter asking for copies of proceedings and judgment for appeal purposes. In rejecting the application the HC said:

- *A letter applying for copies of proceedings and judgment for appeal purposes is different from a notice of intention to appeal as envisaged by the law. The letter applying for proceedings and judgment for appeal presuppose that a notice has already been given.*
- *As no notice of intention to appeal was given, the application for leave to appeal out of time cannot be envisaged.*

Petition of Appeal

Every appeal by the DPP shall be in the form of petition and in writing, it must be accompanied by a copy of the judgment appealed against. The petition must contain the particulars on the matters of law or facts—S.380 CPA.

Notice of Venue of Hearing

The HC after the petition has been lodged, cause a notice to be given to the respondent or his advocate of the time and place where the appeal will be heard.

The notice will be accompanied by a copy of the petition of appeal and a copy of the judgment or order appealed against.

If the notice cannot be served on the accused may be due to the fact that he can not be found through the address obtained, u/ss 228 & 275 CPA, the notice will be published in the newspaper

three times so that it can be brought to his attention. If after such service still the respondent has not appeared the court will proceed to hear the appeal in the absence of the respondent—S.381 (1) & (2) CPA.

Right to be heard

Section 382 CPA provides that both parties have the right to be heard during an appeal. Firstly, the DPP will address the court in support of the particulars set out in the petition of appeal. Secondly, the respondent or his advocate will then address the court. Thirdly, the DPP if he wishes may reply upon the matters of law or facts raised by the respondent or his advocate.

The court if finds that no sufficient grounds to interfere the finding, order or sentence may dismiss the appeal.

Powers of the High Court on Appeal

The HC has the following powers when dealing with an appeal as provided under section 382 CPA:

If it is an appeal from acquittal the HC may

- Reverse the finding,
- Convict the respondent. When making those findings the HC may proceed to sentence the respondent or remit the case to the trial court for sentencing.
- Order the respondent to be tried by competent court.
- Direct the subordinate court to hold committal proceedings.

If it is an appeal against the sentence, the HC may

- Increase or reduce the sentence.
- Alter the nature of the sentence.

If is an appeal against any order, the HC may

- Alter or reverse such order.
- Make any consequential or incidental order.

Non-attendance of Parties

- If on the date and place set for hearing an appeal the DPP doesn't appear the court may dismiss the appeal. However, under section 383(3) CPA if the DPP shows good cause for his absence the HC may re-admit the appeal.

- Where the DPP appears but the respondent or his advocate doesn't appear the court may proceed to hear the appeal *ex-parte* or may adjourn the hearing to another date. However, the HC must be sure that the respondent or his advocate has dully served with the notice of appeal before ordering the appeal to go *ex-parte.*

Taking Further Evidence

According to section 384 CPA:

- When the HC is of the opinion that further evidence is necessary for just decision of the appeal, it may either take such evidence itself or order the subordinate court to take that evidence.
- Evidence taken by the subordinate court must be certified by such court and transmit it to the HC.
- When additional evidence is taken the respondent or his advocate must be present. The evidence taken in the presence of the respondent or his advocate will deem to have been taken at the trial before a subordinate court.

Abatement of Appeal

All appeals under section 378 CPA will abate on the death of the respondent.

Police Action Where Appeal is intended

Police officers may appeal to the HC against the decision of the subordinate court on the points of law or facts.

However, police officers in their capacities as public prosecutors are not allowed to appeal direct to the HC without the prior consent of the DPP. When the public prosecutor considers that he has to appeal against the decision of the subordinate court he shall report to the OCD immediately. In addition to report he shall furnish the OCD with the following:

- A copy of the court proceedings or order or judgment.
- The case file or minor offence docket.
- A report giving reasons for the application and quoting any case law known to him applicable in support of the application.

The OCD will immediately refer these documents to the State Attorney or DPP via the DCI with a request for advice.

Revision

Powers of the High Court on Revision

The power of the HC to call the records from the subordinate court and examine them is provided u/s 372 CPA. The purposes of calling the records from the subordinate courts are:

- To satisfy itself that the finding, order or sentence of such subordinate court is legal, correct and proper.
- Whether or not the proceedings were conducted according to law. The aim of giving powers superior courts is to confer upon them jurisdiction. Thus when exercising revision the courts will be able to correct miscarriage of justice that may arise from;
  - Misunderstanding of the law.
  - Neglect of proper precaution.
  - Injustices arising out of malice or spite on the part of those administering the law.

Powers of the HC u/s 373 CPA are the same as those exercised by the HC when hearing an appeal. Refer to sections 366, 368, &369 CPA.

Also the HC on revision may enhance the sentence.

No order may be made to the prejudice of the accused person unless he has been given an opportunity to be heard either personally or by an advocate.

An order reversing the finding of the magistrate made under section 219 CPA (regarding insanity of an accused) will not be deemed to be made to the prejudice of an accused person—S.373 CPA.

Number of the Judges on Revision

Generally, all proceedings in the HC when exercising its reversionary jurisdiction may be heard by one judge. When the court is composed of more than one judge and they are equally divided, the decision of the subordinate court must be upheld—s.375 CPA.

Discretion of the High Court as to Hearing parties

According to section 374 CPA, parties are not allowed to appear before the court, thus the HC when exercising reversionary jurisdiction will not hear the parties either personally or by hearing an advocate.

However, if the HC thinks that it is necessary for justice to be met to hear the parties, it may do so either by hearing the party personally or by an advocate.

Since the powers of revision are discretionary, they should not be invoked unless there has been miscarriage of justice. It should not be used to choke the magistrates' lawful use of his discretion. Such power should be used where:

- The magistrate had no jurisdiction to deal with the matter.
- The lower court had excluded from the record some vital evidence.

In the case of **Ladha V R (1972) HCD No. 88**, it was an appeal to the CA from an order of revision made by a judge of the HC u/s 327 CPC (S.372 CPA). The appellant had been convicted by senior magistrates' court on his own plea of offences u/s 7(1) (b) of the Exchange Control Act Cap. 294. The appellant with another person were both fined Tshs. 2,000/=. The HC acting on a complaint from the Governor of the BoT enhanced the sentence. The appellant was sentenced to imprisonment for six months and his fine increased to Tshs. 6,000/=. He was represented by a counsel at the review of the sentence. On appeal it was argued that the HC was wrong in revising the matter u/s 327 CPC as the RM's court had not made any error in sentencing the accused.

It was further argued that the learned judge failed to comply with the principle of natural justice in the exercise of his powers in that these proceedings were on the face of the record instituted on a complaint by the Governor of the BoT and the fact that this complaint was made by the Governor of the BoT would also have influenced the decision of the learned judge. It was held:

- *That the HC is justified in interfering with a sentence on the ground the sentence was completely inadequate having regard to the seriousness of the offence.*
- *That the HC had jurisdiction to act u/s 327 CPC on the facts of the case and, in the words of the section "to satisfy itself as to correctness. Legality or propriety of the sentence"*
- *That the HC acting as it did in increasing the sentence was acting legally within its jurisdiction and the question as to quantum or nature of the sentence is a matter coming within the meaning of "severity of sentence"*
- *There was absolutely no jurisdiction to even suggest that the learned judge who heard and made the revision order was in any was affected by the question as to who made the complaint.*

NB: However, it was held that it would have been better if the Governor of BoT had made his complaint to the DPP although the fact that the Governor of BoT made it direct did not vitiate the proceedings.

PROCEDURE WHERE THE ACCUSED IS OF UNSOUND MIND

Prosecutor to Give Evidence before Inquiry by Court as to Insanity of accused

If the court is made by reason to believe that the accused person is incapable of making his defence for the reason that he is of unsound mind, may call the prosecutor to give or adduce evidence in support of the charge. The court may call the prosecution to do so before inquiring into the unsoundness of the mind of the accused person. Also the court will not consider whether the accused person had pleaded to the charge or not—S.216 (1) CPA.

In the case of **R V Dani s/o Timoth (1968) HCD No. 467**, the accused was charged with assault causing actual bodily harm. After his plea was taken and before the trial commenced, the trial magistrate ordered that the accused be medically examined and on the basis of the medical report found him to be of unsound mind and ordered him to be detained as a criminal lunatic. The court said:

> *"Section 164(1) CPC (S.216 (1) CPA), as amended by Act of 1966 No.35, provides that if the court has reason to believe that the accused is of unsound mind it shall call upon the prosecution to adduce evidence in support of the charge before inquiring into the issue whether the accused is fit to stand trial. The inquiry as to accused's unsoundness of mind shall proceed only if the court finds that a case has been made out against the accused."*

The magistrate's order was set aside and the case returned to the trial court for the taking of the prosecution's evidence.

The court may decide to dismiss the charge and acquit the accused if at the closure of the prosecution case it finds that no case has been made against the accused. Upon dismissal of the charge and acquittal of the accused, the court may decide to deal with him under the Mental Disease Act, Cap.98—S.216 (2) CPA.

When the court finds that a case has been made against the accused person after the closure of the prosecution evidence, the court should:

- Inquiry into the fact of unsoundness of mind and at the mean time,
- Order the person to be detained for the purpose of medical examination or,
- Grant bail on sufficient security as to his own safety and that of the public and on condition that he submits to such an examination—S.216 (3) CPA.

Upon considering medical report and other evidence the court is of the opinion that the accused is of unsound mind and is incapable of making a defence, it shall order that the accused be detained in safe custody and transmit a copy of the order to the minister. The minister upon considering the report, may by order directed to the court, direct the accused to be detained as a criminal lunatic in a mental hospital or any other suitable place of custody—S.216 (4)—(7) CPA.

In the case **R V Elieza Sangu (1968) HCD No. 187**, the accused was charged with failing to comply with the condition of a removal order. After the closure of the prosecution case, the prosecutor stated that the accused was a recluse, and the trial magistrate noted in the record that appeared to be of unsound mind. On the basis of the accused's conduct it was ordered that he be detained in safe custody, and a copy of the order was sent to the minister. No medical examination was carried out.

On revision the judge stated that pursuant to the provisions of section 164(3) (4) & (5) CPC, a medical report is a condition precedent to an order of detainment and that the order was ultra-vires. The HC ordered that the accused be medically examined as to his mental condition and that case be returned to the trial court for a proper trial.

In **R V Matenyamusi s/o Nzagula (1968) HCD No. 420**, the accused was charged with unlawful wounding. The trial court found that the accused was of unsound mind after hearing the evidence of the district medical officer. He therefore postponed the proceedings, ordered that the accused be

detained and subsequently referred the matter to the minister. It is clear that the magistrate did not apply the proper procedure. On revision the judge repeated what has been said above and added;

> *"Under the procedure, the magistrate must determine whether a case has been made out against the accused to be detained in a mental hospital for observation. If the record of the medical hospital states that the accused is incapable of making his defence, the case can be postponed and the accused detained and the matter referred to the minister in charge of legal affairs."*

So we see that before the magistrate can send the order to the minister, he must rule on the issue of unsoundness of the accused's mind.

Where the medical report certify that the accused is of sound mind and hence capable of making his defence, then proceedings will resume as provided by section 218 CPA—s. 216 (8) CPA.

Procedure Where the Accused if Certified as Capable of Making Defence

Where the person detained pursuant to warrant issued u/s 218 CPA is found by a medical officer to be of sound mind i.e. he has recovered his soundness of mind thus is capable of making his defence, then the medical officer will forward to the DPP a certificate stating that the accused is fit for unconditional discharge from detention save for the charge against him—s. 217 (1) CPA.

The DPP upon receipt of a report will inform the court which issued the warrant, whether the Republic intends to proceed with the proceedings against the accused or not—s. 217 (2) CPA.

Where the DPP intends to proceed, the court will order the removal of the person from where he is detained and cause him to be brought before it—s. 217 (3) CPA.

In cases where the DPP doesn't intends to continue with the proceedings against the accused;

- The court shall make an order of discharge where the certificate states that the accused is fit for unconditional discharge.
- The court may decide to deal with the accused u/s 8 of the Mental Disease Act. However, before that the court will proceed to discharge the accused person first—s. 217 (4) CPA.

However, discharge under subsection (4) of section 217 CPA will not operate as a bar to any subsequent proceedings against the accused person on account of the same facts—s. 217 (5) CPA.

Resumption of a Trial

When the DPP informs the court that the Republic intends to continue with the proceedings against the accused person, the court shall require the accused to appear or being brought before it. The court will proceed to hear the case *de novo* or on its discretion treat the case as partly heard, hence may proceed to hear further evidence in the case—s. 218 (1)(2) CPA.

If after resumption of proceedings, still the court is of the opinion that the accused is of unsound mind, thus cannot make his defence, the court will according to section 218 CPA record the finding and proceed to make a fresh order u/s 216(6) CPA—s. 218 (3) CPA.

Defence of Insanity at Trial

Where the person is charged with an offence being it the act or omission and intends to raise the defence of insanity at the trial, he must raise the defence at the time when he is called upon to plead —s. 219 (1) CPA.

If on the evidence on record the court finds that the accused at the time of committing the offence or making the omission was of unsound mind, the court will make a special finding that the accused committed the offence charged but due to insanity, he is not guilty of the offence—s. 218 (2) CPA.

When the court makes a special finding, it shall

- If the accused was charged with an offence involving physical violence or damage to property, and save for insanity on conviction be liable to sentence of death or imprisonment for a term not less than seven years, the court shall submit the record (or certified copy) of the proceedings to the minister, and meanwhile order the person to be kept in custody as a criminal lunatic.

- In any other case, the court may proceed to deal with such person u/s 8 of the Mental Disease Act:
  - Discharge him or otherwise deal with him subject to such conditions as, he remain under supervision in any place by any person.
  - Other condition for ensuring the safety and welfare of the said person and also the public—s. 219 (3) CPA.

The minister upon receipt of the report may order such person to be detained as a criminal lunatic in a mental hospital, prison or other suitable place of custody—s. 219 (4) CPA.

The superintendent of the mental hospital or prison or place where any criminal lunatic is detained is required to make a report to the minister as to the condition, history and circumstances of any such lunatic after the expiration of three years from the period the minister's order and thereafter every two years from the date of the last report—s. 219 (5) CPA.

Any other person authorized by the minister may report to the minister no the condition, history or circumstances of such criminal lunatic and the minister may after considering the report order that the criminal lunatic be discharged or otherwise dealt with;

- Any such person is under supervision in any place.
- Under supervision of any person.
- Any other condition that will ensure the safety of and welfare of the said criminal lunatic and the public—s. 219 (6) CPA.

Court's Power to Inquire into Insanity

If during the trial it appears to the court that any person charged with an offence being the act or the omission that at the time of commission or omission he was insane so as not to be responsible, the court may order such person to be detained in a mental hospital for medical examination and in the mean time the court will adjourn the proceedings.

The medical officer in charge of a mental hospital is required within forty two days from the date the person was detained to submit a written report to the court ordered the detention, stating on the mental condition of the accused, stating whether at the time of committing the offence was sane or insane so as not to be responsible for his action.

Such report by the medical officer in charge of the mental hospital may be admitted as evidence unless if it is proved that it was not signed by the medical officer who purports to have signed it.

If on the evidence on record, the court finds that in fact the accused was insane at the time of the commission of the offence the court shall make a special finding in accordance with section 219 CPA shall apply—s. 220 CPA.

In **Mheluke V R (1970) HCD No. 386**, the accused was convicted of murder and sentenced to death by the HC. Before the commencement of his trial he had been remanded by the HC at the request of the State Attorney for medical observation at the Isanga Institute u/s 168 CPC (s. 220 CPA). At his trial, nothing was said of his mental condition until at the end of the case for the defence, when at the request of the defence attorney, the psychiatrist's report was put in. It stated, *inter alia*, that the appellant had no clear recollection of the events at the time of the alleged crime and concluded;

"I am of the opinion that the accused has suffered from catatonic excitement. This is a schizophrenic reaction in which the patient become acutely disturbed with destructive behaviour…I

am also of the opinion that it is mostly likely that he committed the alleged crime while in this state of unsound mind."

On appeal the attorney for Republic submitted that the report of the psychiatrist was not admissible in evidence and that if it were included there was no evidence on which a finding of insanity could be based. The attorney argued that section 168 CPC (220 CPA) applies where "it appears to the court during the trial" and that this restricted the scope of the section to those cases where in the course of the proceedings, the judge, from what has taken place before him suspects insanity. He argued that here the issue did not arise in the course of the trial and was not raised by the judge but by the State Attorney. The CA said:

> *"We have no doubt that the matter arose during the trial because the appellant had been arraigned and had pleaded to the charge. We think also that the words 'it appears to the court' apply equally whether the question is drawn to the attention of the court or is raised by the court on its own motion. We think, therefore, that the psychiatrist's report was properly admitted."*

THE HABEAS CORPUS

Habeas corpus is a writ directed to a person who detains another person in custody. This writ demands such person to produce or have the body of that person brought before the court. The aim of habeas corpus is to protect the liberty of an individual who is detained unlawful or arbitrary by the executive or any other person without trial.

The habeas corpus owes its origin in England law. The writ first appeared in history in the thirty third year of the reign of Edward I. This writ has since then been used by the courts of law as a check against the imprisonment/detention of persons without legal cause. Habeas corpus found its way into Tanzania during the colonial period through the reception clause in the Tanganyika Order in Council of 1920. In 1930, the Habeas Corpus Rules were made to facilitate proper determination of cases.

The jurisdiction to issue the writ of Habeas Corpus is conferred on the HC, under section 390 CPA whereby the HC may order:

- A person within the local limits of Tanzania Mainland be brought up before the HC and dealt with according to law.
- A person illegal or improperly detained whether in public or private custody are set at liberty.
- A prisoner detained in jail be brought up before the court and examined as a witness.
- A person detained in jail be brought before a court martial or commission.
- A person changed from one custody to another for trial.
- A defendant who has been detained as a result of a judgment execution process be brought upon a return of *cepi-corpus* i.e. the executor of a warrant of attachment declaring that he has the defendant in custody should bring the defendant to court to be dealt with in accordance with the law.

Procedures for the directions in the nature of habeas corpus are provided by the Habeas Corpus Rules of 1930 G.N.150. The rules provide that:

- There must be an application to the judge in chambers.
- The application should be made ex-parte supported by an affidavit in triplicate. *Ex-parte means those applications granted at the request and for the benefit of one party, without notice to or contention by any adversely interested party in the application. Example OCD, RCO, RPC, etc.*
- The summons should be issued to the person in whose custody the detainee is to appear and show cause why the detainee should not be set free.
- The person in whose custody the detainee is to file his reply by way of an affidavit in duplicate within the shortest possible time.
- The detainee may be admitted to bail pending the hearing.

The order of speech is as follows:

- The detainee or his advocate/representative begins to argue for his release.
- The detainer then replies to the detainee's prayers.
- The detainee or his representative may reply to the reply by the detainer if he wishes.
- Then comes the order of the court that could grant or refuse to the habeas corpus application.

You should note that the writ of habeas corpus is purely intended to ensure the protection and well being of the person detained in custody.

You may further note that the language of section 390 CPA places no limit on the class of persons who can move the HC with relation to the detainee. As you can see the section is widely worded and confers jurisdiction on the HC to issue the writ whenever it thinks fits. It can be moved by the prisoner, his relatives or may act on its own initiatives as long as it acquires knowledge that a person who might be a subject of habeas corpus proceedings is in custody.

Another thing to note is that where the detention of a person is illegal at a certain time but before the writ of habeas corpus is granted his detention becomes lawful by virtue of lawful order, the HC cannot direct his release under the Habeas Corpus Rules merely because at some prior stage there was no valid ground for his detention. However, a detention that is unlawful entitles the detainee to sue for damages for unlawful confinement for the period he was detained unlawful.

COMMITTAL PROCEEDINGS

The HC is empowered to try any offence under the Penal Code, and where the offence is shown in the fifth column of Part A of the 1st schedule to the CPA, to be triable by a subordinate court, by a subordinate court.

If no provision is made in Part A of the 1st sch. to the CPA, such offence is triable and shall always be deemed to have been triable by the HC as well as the subordinate court—s.164 CPA.

It is important to note that in all criminal cases the HC will not entertain them unless they have been investigated by a subordinate court and the accused person have been committed to the HC for trial by a subordinate court—s.178 CPA.

Power to Commit for Trial

Powers to commit any person for trial to the HC may be exercised by any magistrate, save where he is precluded from doing so by the terms of his employment.

If any person is brought to a subordinate court charged with an offence triable only by the HC such subordinate court is required to hold committal proceedings.

The DPP may also advice the court that a person brought to it be committed to the HC for trial.

Furthermore, where in the course of trial in a subordinate court, the magistrate is of the opinion that the case is one, which ought to be tried by the HC he shall stop the proceedings and commit the accused person to the HC for trial—sections 242,243, & 244 CPA.

Preparation for Committal

Where the person is arrested or upon the completion of the investigations and the arrest in respect of the commission of an offence triable by the HC, then such person as soon as practicable be brought to a competent court together with a charge to be dealt with according to law.

When a person is brought before a competent court for committal purpose, the magistrate has to read or cause to be read the charge to him. He will then explain the charge(s) set out in the charge sheet. The accused will not be allowed to plead or make any reply to the charge.

After reading the charge and explaining it, the magistrate will address the accused in the following words:

> *"This is not your trial. If so decided, you will be tried later in the HC, and the evidence against you will then be adduced. You will then be able to make your defence and call witnesses on your behalf".*

The subordinate court may commit the accused person to remand prison or release him on bail. After an investigation has been completed, the investigating officer (police officer or any public officer in charge of the investigation of the case) shall cause the statements of persons intended to be called as witnesses be typed in quintuplicate (five copies). The statements and the police case file will be sent to the DPP or any other public officer designated by him in that behalf.

The DPP or that other public officer will examine the police case file and the statements of the intended witnesses. If he finds that the evidence is not sufficient to warrant prosecution, he shall enter nolle Presque. This is where the accused has already been charged. However, if he believes that further investigation is needed, and such investigation will change the position, then he shall order further investigations.

The DPP or that other public officer upon examining the police case file and the statements of the intended witnesses finds that the evidence warrants putting the suspect on trial; he will draw up or cause to be drawn up information and sign it. He will send such information together with three copies of the statements of each intended witnesses and any document containing the substance of the evidence to the HC.

The Registrar of the HC will deliver a copy of the information to the court having charge of the case i.e. where the accused was first presented.

Committal for Trial

Section 246 CPA provides that upon receipt of a copy of information the subordinate court shall summon the accused person from remand and if not yet arrested order his arrest and commit him for trial.

The subordinate court shall read or cause to be read and explain to the accused person:
- The information brought against him.
- The statements of the witnesses.
- The substance of the evidence of the witnesses who the DPP intends to call at the trial.

After reading and explaining the information, the court will address the accused person in the following words:

> *"You have now heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defence, which you are at liberty to do so, or say anything you may wish to say relevant to the charge against you. Anything you say will be taken down and may be used in evidence at your trial."*

The statement of the accused will be recorded in full by the court, and shall be at liberty to explain or add anything contained in the statement. However, before the accused makes any statement, it shall be made clear that he has nothing to hope from any promise of favour or nothing to fear from any threat, which may be made or induced to make any confession or admission of his guilt. Further, it must be explained to him that whatever he says may be given in evidence or his trial.

If the accused makes any statement, the magistrate and the accused will sign the statement. The magistrate will attest such statement and certify that such statement was taken in his presence and hearing and contains accurately the whole statement made by the accused person. The accused shall sign or attest the statement by his mark such record. If the accused refuses the court shall add a note of his refusal and the record may be used as if the accused had signed or attested it.

After completing the above procedure, the court will make the list of all prosecution witnesses whom the DPP intends to call. The court will also ask the accused person if he intends to call witnesses at the trial. If he wishes to give their names and address so that they may be summoned.

In the case of **Hamis Meure V R [1993] TLR 213**, the appellant was convicted of murder and sentenced to death. The statement written by the justice of peace was not read at the committal proceedings. The justice of peace was called as a prosecution witness without the appellant or his advocate being given reasonable notice.

The CA held that the learned trial judge erred in law in allowing evidence of the justice of peace to be given at the trial when his statement had not been read at the committal proceedings and no notice had been given to the appellant or his advocate, and therefore the extra-judicial statement was wrongly admitted.

Section 289(2) CPA makes it mandatory for not only the name and address of the witness to be supplied, but also the substance of the evidence, which he intends to give.

The issues in this case were:
- Whether the statement of witness or substance of evidence not read at the committal proceedings could the witness testify for prosecution at the trial? —Read section 289(1) CPA.
- Whether notice to the accused or his advocate of the intention to call the witness necessary? — Read section 289(2) CPA.

Copy of the Committal Proceedings to be given to the Accused

An accused person who has been committed for trial to the HC according to section 249 CPA is entitled to a copy of the record of the committal proceedings free of charge.

Record of the committal proceedings supplied to the accused person must contain the following:

- The charge or charges
- Copies of the statements of the witnesses
- Copies of the documents produced during the committal proceedings
- Copy of the record of the proceedings before the court.

Preservation of Testimony in Certain Cases

When it appears that any person intended to be called as a witness may not appear to give evidence at the trial either due to;

- Dangerous illness or hurt and may/is not likely to recover or for any other reason but is able/ready and wiling to give material evidence, the magistrate may take his statement in writing.
- The statement of such person will be taken on oath or affirmation.
- The magistrate must subscribe his name and certify that it contains accurately the whole of the statement made by such person.
- The magistrate must certify his reason for taking the statement, state the date and place it was taken—s. 252 CPA.

Whenever the magistrate intends to take the statement of witness who will not attend the trial he must notify the accused and if in custody he must be brought to a place where the statement is to be taken—s. 253 CPA.

When the statement is taken in the presence of the accused, he or his advocate may cross-examine the deponent and the answers of the deponent will form part of the statement if the accused is committed for trial, the statement will be transmitted to the Registrar of the HC and a copy to the DPP—s. 254 CPA.

The statement take and dully certified by the magistrate will without further proof be admissible in any trial, either, before the HC or subordinate court in which the accused person is charged if:

- The witness is dead.
- His attendance cannot be procured without an amount of delay, expenses or inconvenience.
- The accused had full opportunity of cross-examining the deponent—s. 255 CPA.

Proceedings After Committal for Trial

The committing magistrate is duty bound after the committal proceedings to transmit to the HC authenticated and duly signed record of the committal proceedings, also he shall transmit copies of the charge(s) and proceedings to the DPP—s. 256 CPA.

The Registrar of the HC or his deputy after receiving the record of committal proceedings shall endorse and annex to every information and deliver to the officer of the court or police officer for service thereof a notice of trial which will specify the particular sessions of the HC at which the accused is to be tried. Copy of the information and notice of trial shall be served to the accused—s. 257 CPA.

If the accused person had been admitted to bail and cannot be readily found, the service officer will leave such copy with one of his house hold for him at his dwelling house or with someone of his trial. If neither is found, shall affix the said copy and notice to the outer principal door of the dwelling house or any of his bail—s. 258 CPA.

The notice issued by the Registrar of the HC or his deputy shall be in the following form:

A.B

Take notice that you will be tried in the information whereof this a true copy at the session of the High Court to be held at…. on the …day of …20.

Every information shall be in the name and signed by the DPP (subject however to section 92 CPA). Every information shall bear the date of the day when it was signed and may commence in the following form;

> **"In the High Court of Tanzania, the day of…. 20…. at the session Holden at…. on ….the day of ….20…the court is informed by the Directory of Public Prosecutions on behalf of the United Republic that A.B is charged with the following offence(s)…**sections 262 &261 CPA.

Before the commencement of the hearing the Registrar of the HC will have to issue summons to all witnesses whose statements were taken and produced during the committal proceedings. The Registrar will issue also summons to all witnesses whose names and addresses were given to the committing magistrate by the accused—s. 263 CPA.

PROCEDURE IN RELATION TO ECONOMIC CRIMES

Investigation of Economic Crimes

Application of the Criminal Procedure Act, Cap. 20

The investigation of economic crimes is to be conducted in accordance with the provisions of the **Criminal Procedure Act, Cap. 20** except where it is provided otherwise by any other written law or any part under the **Economic and Organized Crime Control Act, Cap. 200.**

Where the EOCCA expressly provides for a specific act to be done in the process of investigation of the criminal offence, that act should be done only to the extent it derogates from the provisions of the CPA.

Where during trial it appears that further evidence ought to be taken in order to reach a just decision the court on its own instance or that of the prosecutor may order the investigation to be carried out and a report to be furnished to the court.

The period of adjournment for further investigation may be taken into consideration if the sentence to be imposed is custodial. This will help the court to determine the length of the custodial sentence to be imposed—s. 20 EOCCA.

Who May Investigate into Economic Crimes?

Investigation of all economic crimes reported to the police is to be conducted by police officers. The DPP in consultation with the DCI and the order published in the GAZZETE may appoint any public official or category of public officials to conduct the investigation of economic crimes.

Where the investigation of economic crimes is carried out by public officials, then for the purpose of EOCCA, such public officials shall be deemed to be police officers—s. 21 EOCCA.

Search for and Seizure of Property.

Any police officer who has reasonable ground for suspecting that in any building, vessel, carriage, box, receptacle or place, there is;

- Anything with respect of which any economic offence has been committed.
- Anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of any economic offence.
- Anything upon which there are reasonable grounds to believes that it is intended to be used for the purpose of committing any offence, may search himself or issue a written authority to any other police officer to conduct the search.

When search is made, the police officer concerned shall as soon as practicable report to the District Magistrate under whose jurisdiction the search was conducted, stating the grounds of search or issuing authority for the search and the result of the search.

Anything seized during search shall as soon as practicable be evaluated to ascertain its value. The police officer must issue an official receipt evidencing such seizure and the value of the property. In addition, the signature of the police officer, of the owner of the premises searched and that of at least one person who witnessed the search.

At any stage of the investigation, the thing seized may be restored to the owner if it appears that it is not related to any economic offence or to any offence for which any person is to be charged.

Where any premises or part of such premises is put under police custody, then at least two padlock or locks shall be fixed to the external doors of such premises. The keys for one lock or padlock shall be kept by the owner or occupier of the premises—s. 22 EOCCA.

Disposal and Forfeiture of Property.

Where it appears to the IGP or a person authorized by him in writing or to the court, before the institution or determination of the proceedings that any property seized or put in evidence in the proceedings before the court is subject to speedy decay or for any other reasons it is necessary that it be sooner disposed off, the IGP or the court may cause or order that property be destroyed or disposed off. However, property destroyed or disposed off in this manner shall not be sold by public auction.

Where a person is convicted of an economic offence and the court is satisfied that any property which was in his possession or under his control at the time of his apprehension;

- Was used for the purpose of committing or facilitating the commission of the offence.
- Was intended by him to be used for that purpose.
- Was otherwise involved in the commission of the offence.
- Was so used or involved in the commission of the offence with the knowledge or consent of its owner, the court shall make and order either to be destroyed, disposed or dealt with in any other manner the court may specify.

Where a person is acquitted with an economic offence, and the court is satisfied that the property, which was in his possession, was used for the purpose of;

- Committing the offence.
- Facilitating the commission of the offence.
- Was otherwise involved in the commission of the offence, the court may order to be destroyed, disposed or dealt with in any other manner.

When the court makes orders in regard to the property involved in the commission of an economic offence, the property may be kept or sold, and the sum of the proceeds of its sale shall be paid and form part of the consolidated fund—s. 23 EOCCA.

Disappearance of the Suspect.

Where the IGP is satisfied that;

- Any person under arrest.
- Any person liable to be investigated, searched or arrested.
- Who is in bail during trial or pending appeal for an economic offence, has absconded to any place outside the United Republic of Tanzania or within the United Republic, concealed himself so that he may not be searched, arrested or investigated the IGP may cause investigative measures to be taken in relation to the premises and the property previously in the possession, occupation or under the control of the suspect but abandoned by reason of his abscondence.

After the completion of the investigation measures ordered by the IGP, if the commission of an economic offence is revealed for which the suspect would have been prosecuted save for his abscondence, the IGP shall issue a public notice of not less than twenty one clear days by publication in the GAZZETE that he intends to submit the property before the court or other goods involved.

On expiration of a public notice issued by the IGP he shall prepare and lodge with the court a certificate stating;

- The name of the absconding suspect.
- The address of the deserted residence or the premises involved.
- The details of the property abandoned involved or in respect of which an economic offence is alleged to have been committed.
- A sketch of the evidence envisaged to be relied upon by the prosecution were the suspect to be found and charged before the court.

Upon receipt of the certificate, the court may proceed to make order either of disposal or any order of dealing in respect of the property or part of the property or goods left by the absconded suspect, after considering representation given and if it is satisfied that the evidence envisaged to be relied

upon to be revealed would have been sufficient to disclose a criminal offence connected with the absconded suspect.

Where the absconded suspect returns to the United Republic or reveals his where about, he may be arrested and charged with an economic offence with which he would have been charged had he not previously absconded.

No action or demand or claim may be instituted in the court in respect of the property or goods forfeited or disposed of by an order of the court, whether or not the absconded suspect re-appears in the United Republic or not, notwithstanding any written law for the time being in force in the United Republic—s. 34 EOCCA.

The Decision to Prosecute

The DPP to be Informed of the Occurrence of the Economic Crimes.

For the purpose of this topic, the term "Director of Public Prosecution" also includes any public officials or officials specified by the DPP by notice published in the GAZZETE to whom he has delegated any of his functions.

When a police officer in charge of a criminal investigations in ÙŸ6zregion or any person in charged of a Government Department or any other public authority empowered by the written law of the occurrence of an economic offence either in the region or any other area within which he or his department has jurisdiction, shall communicate with the DPP immediately.

For a successful completion of investigations the DPP is required to give direction and advice or the matter, as he may deem appropriate or proper in the circumstances—s. 25 EOCCA.

Trial to Commence with the Consent of the DPP.

According to EOCCA, in all economic offences, no trial will be commenced without the consent of the DPP. The consent of the DPP has to be given prior to the commencement of the trial as was stated in the case of **Paulo Matheo V R [1995] TLR 144**, in which the trial of the appellant started as an ordinary trial but upon reaching half-way the character of the offence changed to economic crimes. In compliance with section 26 of the EOCCA, the DPP gave his consent to prosecute, the trial continued and the appellant was convicted. The first appellate court validated the proceedings of the trial court. The CA held that;

- *The consent of the DPP must be given before any trial involving an economic offence commence, the DPP cannot consent retrospectively.*
- *In this case the consent of the DPP was not given in accordance with the law.*

The DPP is required to establish and maintain a system whereby the process of seeking and obtaining his consent may be expedient. The DPP is further required to publish in the GAZZETE a notice specifying economic offences for which the consent for prosecution will be sought and obtained personally from the DPP and those for which the consent will be exercised by such officer(s) subordinate to him.

The DPP will exercise his powers under the EOCCA in relation to prosecution of economic offences as those conferred on him in respect of public and private prosecution by the CPA—s. 26 EOCCA.

Who may Conduct Prosecution of Economic Crimes.

The prosecution of economic offences will be conducted by prosecuting officer, and these are:
- All law officers.
- All state attorneys of every rank.
- All police officer of or above the rank of ASP.

The DPP by notice published in the GAZETEE may appoint the following to conduct prosecution:

- Any legally qualified person or category of legal qualified persons employed in the public service.
- Any other person or category of persons—s. 27 EOCCA.

Preliminary Procedure Before Trial

Procedure under the CPA applies to economic crimes court except where differently provided—s. 28 EOCCA.

Accused to be Brought Before the District Court with a Charge.

After a person is arrested or upon the completion of investigation he shall as soon as practicable be brought before the DC within whose local limits of jurisdiction the arrest was made and in any case not more than forty-eight hours after the arrest together with a charge.

After a person is brought before a DC after an arrest in relation to economic offence, the magistrate shall read and explain the charge to him but will not be required to plead or make any reply to the charge.

When bail is not petitioned for or not granted the magistrate shall explain to the accused person his right if he wishes to petition for bail and the power to hear bail applications and grant bail shall;

- Between the arrest and the committal is vested in the DC or RM'C. If the value of the property is less than ten million shillings.
- After committal is vested in the HC.
- After the trial has commenced in the COURT is vested in the COURT.
- In all cases if the value of the property is ten million shillings or more at any stage before the commencement of the trial in the COURT is vested in the HC.

In the case of **Fidelis Tindwa V R [1985] TLR 130**, the applicant appeared before the DC charged with cattle theft, an offence scheduled as an economic crime. He applied for bail to the HC. The application was made u/s 35(1) of the EOCCA, but the HC was not sitting as an economic crime court (ECC). The court held that:

- *Application for bail u/s 35 EOCCA are entertained by the HC when sitting as an ECC and after the accused person has been arraigned on the court properly constituted.*
- *The application in this case ought to have been filed u/s 29(1) EOCCA, all the same the error committed here did not cause an embarrassment to the prosecution.*

The statement of witnesses to be typed out in quintuplicate conveniently compiled and sent along with the police case file to the DPP or any other public official designated by him in that behalf.

After studying the police case file and the statements of the intended witnesses, the DPP or that other public official is of the opinion that the evidence warrant prosecution, he shall draw or cause to be drawn up an information, sign it and submit it together with three copies of the statements of the witnesses to the Registrar of the HC—s. 29 EOCCA.

Committal for Trial by the Economic Crimes Court.

The DC upon receipt of the information and the notice of trial shall summon the accused from the prison and if not yet arrested order his arrest and deliver to him a copy of the information and notice of trial and commit him for trial by the COURT.

The Registrar of the HC will be responsible to summon all witnesses for the prosecution and for defence—s. 30 EOCCA

Procedure Before the Economic Crimes Court.

Where the accused person admits the truth of the information or any economic offence in the information, his admission shall be recorded as nearly as possible in his own words. If there is any amendment or correction by the accused it should also be recorded.

After the accused had pleaded guilty to the information, the court shall call the prosecution to give brief particulars of the actual facts and other particulars constituting the offence, and then ask the accused whether or not he agrees with the facts and particulars and if he would like to make any alterations.

After the particulars of the offence(s) have been settled, the court will convict him and proceed to pass sentence.

Where the accused doesn't admit the truth of the information the court shall enter a plea of not guilty and proceed to the preliminary hearing. The court will hear the evidence from the prosecution side and if desired of the accused and his witnesses. If during the preliminary hearing the accused person admits the truth of the information or of any economic offence on it, the court will proceed in accordance with the above procedure—s.32 & 33 EOCCA.

Provisions Relating to Bail

The court may, before the accused person is convicted, either on its own motion, or upon an application by the accused admit him to bail. The DPP may object to the granting of bail pending trial if he is of the opinion that the safety or interest of the Republic will be prejudiced.

Bail Restrictions

The court will not admit any person to bail if:

- The accused has previously been sentenced to imprisonment for a term exceeding three years.
- The accused that had previously been granted bail by the court had failed to comply with the conditions of the bail or absconded.
- The accused is charged with economic offence, which he committed while out on bail, by a court of law.
- The court considers that the accused is to be kept in custody for his own protection or safety.

Bail Conditions

Mandatory conditions

- The accused will be required by the court to execute a bond by paying a sum of money relating to the monetary value and the gravity of the offence concerned.
- The accused person also will be required to report to the court on a specified date, time and place.
- The accused person shall surrender his passport and any other travelling documents to the police.
- The movement of the accused person will be restricted to the area of town, village or area of his residence.

Discretionary conditions

- The court may require the accused person to report at specified intervals to a police station or other authority in his area of residence.
- To abstain from visiting a particular locality or premises or association with other certain specified persons.
- Any other conditions which the court may deem fit—s. 35 EOCCA.

Procedure during Trial

For expedient disposal of the case

- The court is required after the conclusion of the preliminary hearing to take all necessary measures to ensure early and just determination of cases brought to it.
- The DPP may file a certificate in any proceeding before the court stating that the case is of immense general public importance. And the court shall assign the case for hearing preliminary hearing or trial as soon as practicable conduct its hearing and determination.

- Where at any stage of the proceedings the court finds that the accused has no case to answer shall dismiss the charge and acquit the accused—s. 38 & 39 EOCCA.

- Where the court finds that the prosecution has established a case sufficient to require the accused to enter his defence, it shall inform so the accused and require him to make his defence.

Where the court is satisfied that the evidence by the prosecution;

- Is not sufficient to find conviction on the offence charged but it establish a cognate offence,
- If the evidence establish other economic offence in addition to that charged,

shall inform so the accused. The court will require him to defend himself against the offence established by the prosecution cognate or other economic offences and the one charged.

The accused person will be subjected to cross-examination despite the fact that he elects to give evidence without taking oath or being affirmed.

The court as well as the prosecution may draw an adverse inference and also comment on the accused's failure that without apparent excuse elects not to give evidence or call witnesses—s. 40 EOCCA.

If he did not raise the defence of alibi during the preliminary hearing, he shall at any stage of the proceedings, but before the closure of the prosecution case, furnish the prosecution with the particulars of the alibi he intends to rely upon as a defence. If he raises the defence of alibi after the case for defence has opened, the court may on its discretion accord no weight of any kind to the defence—s. 41 EOCCA.

Judgments and Sentence

After hearing all the evidence, the court shall proceed to pass judgment and either convict or acquit the accused accordingly.

Every judgment shall contain the following;

- The points for determination.
- The decision of the case/point(s).
- The reasons for the decision.
- Be dated and signed by the majority members who are in agreement to the decision reached.

Where any member is dissenting, (holding a different view) he shall state in open court and the judge shall record his reasons for dissenting and be read out as part of the judgment—s. 42 EOCCA.

Where the court finds that the accused person is not guilty of the economic offence, but is guilty to another economic offence cognate to the one charged, the court may convict him with other offence though not charged with it.

Where in addition to the economic offence charged, the court finds that the accused is also guilty of any other economic offence(s) for which he would be charged and also the offence(s). However the court must have earlier informed the accused, at the closure of the prosecution case—s. 43 EOCCA.

The court where it convicts an accused person may make any order in respect of the property of that person.

Where the property of the person who has been convicted of an economic offence, is not proved to be involved in the commission of an economic offence, shall not be forfeited.

When an accused person is acquitted, then his property, which was involved in the charged, or the value of that property, shall be restored to him.

TRIAL PROCEDURE FOR CHILDREN AND YOUNG PERSONS

Interpretation

Child—means a person under the age of eighteen years.

Special Provisions as to Procedure

a) Juvenile Courts.

(i) Establishment of Juvenile Court

The Juvenile Court is established by the Chief Justice by notice to be published in the Gazette designating any premises used by Primary Court to be a Juvenile Court. This court is established in order to hear and determine matters relating to children. This court is presided over by the Resident Magistrate. s. 97 LC

(ii) Jurisdiction of Juvenile Court

The Juvenile Court has the following powers:

(a) To hear and determine criminal charges against a child,

(b) To hear and determine applications relating to child care, maintenance and protection,

(c) To exercise other powers conferred to it by any other law. s. 98 LC

(iii) Procedure in Juvenile Court

Procedures to be used when conducting proceedings in the juvenile court are made by the Chief Justice, however, in any case shall be subject to the following conditions:

(a) The juvenile court to sit as often as possible,

(b) Proceedings in the juvenile court to be conducted in camera,

(c) Proceedings to as far as possible to be informal, and to be made by enquiry without exposing a child to adversarial procedures,

(d) The social welfare officer to be present,

(e) The parent, guardians or a next of kin has the right to be present,

(f) A child has the right to have a next of kin and a representation by an advocate,

(g) The right of appeal has to be explained to the child,

(h) The child has the right of to give an account and express opinion.

Apart from members and officers of the juvenile court, the following persons may only attend any sitting of the court with the discretion of the court;

(a) Parties to the case before the court, advocates, witnesses and other persons directly concerned or involved in the case.

(b) Any other person whom the court may authorize to be present. s. 99 LC

b) Provisions Relating to Bail

When a person under the age of sixteen years is arrested whether with or without warrant and cannot be brought forthwith before the court, the OCS shall release such person on recognizance being entered into by him or his parent or guardian or other responsible person with or without surety except under the following circumstances:

- The charge is one of homicides or any offence punishable with imprisonment for a term exceeding seven years.
- It is necessary in the interest of such person to remove him from the association of any undesirable person.
- The officer has reasons to believe that the release of such person will defeat the end of justice. s. 101 LC

It is the duty of the police officer to make sure that when a child or young person is put in custody does not associate with an adult charged with an offence other than a relative. s. 102 LC

Juvenile courts have power to dispose any case brought before it other than homicide. s. 103 LC

When a child or young person has been remanded or committed for trial before the HC and is not released on bail or permitted to go at large, the court instead of committing him to prison may order him to be handed over to the care of some fit person or institution named in the order. Such child or young person shall remain in the custody of such person or institution during the period named in the order or until he is further dealt with according to law and shall be deemed to be in legal custody during such period. s. 104 LC

Procedure on Trial

When hearing a charge against a child, the juvenile court is supposed to sit in a different building or room that is normally used by such court for ordinary proceedings, unless such child is charged jointly with an adult.

During the trial if it happens that the person charged or to whom the proceedings relate is a child, the court has to stop the proceedings and commit the child to the juvenile court.

Furthermore, the court is to proceed to hear or determine the case in accordance with Criminal Procedure Act or Magistrates Court Act if it appears that the person charged or to whom the proceedings relate is an adult. s. 100 LC

The juvenile court is required to read and explain the substance of the charge to the child or young person in a simple language. The child or young person will be asked after the substance of the charged has been explained to him what he has to say in explanation thereof and whether he has any cause to show why he should not be convicted. ss. 105 and 106

Where the statement is made by the child or young person amount to a plea of guilty, the court may convict him. Where the child or young person does not admit the offence or the court does not accept the accused's statement as a plea of guilty, the court shall hear the evidence of the witnesses for the prosecution. ss. 107 and 108

The court will cross-examine the witnesses for the prosecution for the purpose of establishing the truth or otherwise of the facts alleged or to test the credibility of the witnesses. s. 109

If after the conclusion of the prosecution case, the court is satisfied that the facts properly before it establish a prima facie case against the defence the court shall inform so the defence and require it to defend itself. s. 110

Where the child admits the offence and the court accept his plea or after hearing the witness the court is satisfied that the offence is proved shall convict him. In order to deal with the case in the best interests of the child or young person, the court will:

- Obtain information as to his character.
- Obtain information about his home life.
- Obtain information about his occupation and health.
- The court will then put to him any question arising out of such information.

The court may remand the child or young person or release him on bail for the purpose of obtaining information or special medical examination or observation. s. 111 LC

The court has discretion to require the attendance of a parent, guardian, relative or social welfare officer when a child is charged with any offence. s. 112

When a person is brought before the court, whether or not charged with an offence and not for the purpose of giving evidence and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person and make a finding thereon.

In determining the age of that person, the court shall take such evidence at the hearing which may include medical evidence, or DNA test as is necessary to provide proof of birth whether of documentary nature or otherwise as appears to such court to be of worthy of belief.

A certificate stating the age of a child shall, shall unless the court orders otherwise be received by the court without proof of signature provided that it was signed by a medical practitioner registered or licences under the provisions of the law governing medical practice in Tanzania.

The age found by the court to be the age of that person before it, shall be deemed to be the age of that person and an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court.

Medical evidence and collection of blood samples for DNA purposes shall be conducted in the presence of a social welfare officer. s. 113 LC

Where it appears to the court that any person brought before it is of the age of beyond eighteen years that person shall not be deemed to be a child. In a situation where the court fails to establish the age of the person before it, the age stated by the parent, guardian, relative or social welfare officer it deemed to be the correct age of that person. s. 114 LC

Punishment of Juvenile Offenders

The court upon convicting a child with any other offence other than homicide, may make an order discharging him conditionally on his entering into a recognizance with or without sureties, to be of good behaviour for a period not exceeding three years, as may specify in the order and if a child has demonstrated good behaviour, shall be deemed to have served the sentence.

The recognisance may include a condition that a child be under the supervision of a parent, guardian, relative or social welfare officer for a period specified in the order, however, the person named in the order has to be wiling to undertake the supervision of such child. The person undertaking such supervision may at any time be relieved of such duties, or in case of death of such person so named in the order, another person may be substituted by the court. s. 116 LC

If the court is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, it may issue a summons to the child or young person or his/her sureties requiring him/them to appear for conviction or sentence.

The court before which a person is bound by his recognizance to appear for sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith deal with him as for the original offence. s. 117 LC

Where a child or young person is convicted of any offence for the commission of which a fine, compensation or costs may be imposed, the court may order that the fine, compensation or costs awarded be paid by the parent or guardian.

However, if the court is satisfied that the parent or the guardian cannot be found or that he has not condoned to the commission of the offence by neglecting to exercise due care of the child or young person the court will not order him to pay the fine, compensation or costs.

An order to pay the fine, compensation or costs may be made against a parent or guardian who having been required to attend, has failed to do so, but no such order shall be made without giving the parent or guardian an opportunity of being heard.

In the case of **XY (MINOR) V R [1983] TLR 101**, a young person was charged and convicted of the offence of defilement of a girl under the age of fourteen years. He was sentenced to suffer eight strokes of the cane and ordered to pay Tshs. 2, 000/= as compensation to the complainant. On appeal the property of the compensation order against a young person himself was considered. The court said:

> *Where there is an order for compensation involving a young person, the order can be made against the parent or guardian of the young person.*

Any sum imposed or ordered to be paid by a parent or guardian may be recovered from him by distress or imprisonment of the parent or guardian as if the order has been made on the conviction of the parent or guardian of the offence with which the child or young person was charged.

A parent or guardian may appeal against the order to pay fine, compensation or costs. s. 118 LC
The law concerning to children provides that no child should be sentenced to imprisonment. **Republic v Fidelis John** 1988 TLR 165 the accused was convicted on his own plea of guilty for escaping from lawful custody and was sentenced to six months imprisonment and six strokes of the cane. He was below the age of 16 years. On revision the court held that:

> *No young person below the age of 16 years should be sentenced to imprisonment if there are other methods of dealing with him;*
> *The trial court had no legal justification to sentence the accused to imprisonment.*

Where a child or young person is convicted of an offence punishable with imprisonment, the court may either:

- Discharge the child without making any order.
- Order the child to be repatriated at the expenses of the Government to his home, or district.
- Order the child to be handed over to the care of a fit person or institution if such person or institution is wiling to take care of such child. s. 119 LC

When a child or young person is convicted with an offence punishable in the case of an adult, with imprisonment the court may order that he be committed to custody of an approved school.

However, the manager of the approved school should be consulted to make sure that he has a vacancy, which may be filed by the person to whom it is proposed to make the order. s. 120 LC

NB:

Where it is established that the child was instigated by a person who has some authority over him, the court should not, given the circumstances give a severe punishment. In the case of **Ngindi s/o Paulo v. R** (1969) HCD No. 153 The appellant was convicted together with his father, both on their own pleas of robbery c/s 286, Penal Code, and whilst his father was sentenced to imprisonment for three years, and to the statutory twenty four strokes corporal punishment, the appellant was sentenced to imprisonment for two years, and on the magistrate finding him to be a juvenile. In sentencing the two men the magistrate stated: - "This is an aggravated form of robbery on the highway, the complainant having been severely injured. It is quite apparent that the 1st accused – the father of the 2nd accused – was the domineering in the crime, and the 2nd accused must have unfortunately participated at the 1st accused's instigations. Some leniency is therefore called for as far as the 2nd accused is concerned. Heavy and deterrent sentence is called for as far as the 1st accused is concerned. On appeal the judge said that: *"The learned magistrate having found, and, I may add with respect, very properly, that the appellant was instigated to participate in the offence by his father, whom the magistrate to participate in the offence by his father, whom the magistrate describes as domineering, it is difficult to comprehend why the magistrate saw fit to impose a sentence of imprisonment for two years on the appellant, who he himself found to be a juvenile. As the learned magistrate will note, a juvenile is expressly exempted from the provisions of the Minimum Sentences Act. He therefore had an unfettered discretion in respect of sentence. In all the circumstances, the sentence imposed cannot be regarded as other than manifestly excessive, and is accordingly reduced to such term as will result in the immediate discharge of the appellant."*

Grounds for Care Orders

A child is in need of care and protection if:

(a) is an orphan or is abandoned by his relatives;

(b) has been neglected or ill-treated by the person who has the care and custody of the child or by his guardian or parents;

(c) has a parent or guardian who does not exercise proper guardianship;

(d) is a destitute;

(e) is under the care of a parent or guardian who, by reason of criminal or drunken habits, is unfit to have the care of the child;

(f) is wandering and has no home or settled place of abode;

(g) is begging or receiving alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, or is found in any street, premises or place for the purpose of begging or receiving alms;

(h) accompanies any person when that person is begging or receiving alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise;

(i) is under a care of a destitute parent,

(j) frequents the company of any reputed criminal or prostitute;

(k) is residing in a house or the part of a house used by any prostitute for the purpose of prostitution, or is otherwise living in circumstances calculated to cause, encourage or favour the seduction or prostitution of, or affect the morality of the child;

(1) is a person in relation to whom an offence has been committed or attempted under the Anti Trafficking of Persons Act;

(m) is found acting in a manner from which it is reasonable to suspect that he is, or has been, soliciting or importuning for immoral purposes

(n) is below the age of criminal responsibility and is involved in an offence other than a minor criminal matter;

(o) is otherwise exposed to moral or physical danger;

(p) is under a care of a person with disability and such disability hinders such person from exercising proper care or guardianship; or

(q) in any other environment as the Commissioner may determine. S. 16 LC

Appeals and Revisions

Any appeal against any order or sentence made or passed under the Act shall be entered within fourteen days from the date of order or sentence appealed against. However, for good cause the HC may admit an appeal out of time.

Where no appeal has been preferred against an approval school order made by the DC within the time allowed (i.e. fourteen days) a copy of the order together with the proceedings shall be sent forthwith to the HC.

The HC may in the exercise of its revisional jurisdiction make such order thereon as it may deem proper—s. 130 LC.

INQUEST PROCEEDINGS

Definition

i) Inquest: Means any inquiry held by a coroner under the Inquest Act into the death of any person.

ii) Coroner: Means any person empowered or appointed under section 5 of the Inquest Act, Cap. 24 to hold inquest.

iii) Local Authority: Means a City Council, Municipal Council, a Town Council or District Development Council.

iv) Principal Judge: Means a judge of the HC known as "JAJI KIONGOZI" in kiswahili, appointed under section 109 of the Constitution of the United Republic of Tanzania.

Coroner's Court

Establishment of Coroner's Court

Coroner's courts are established by the Minister under section 3(1) of the Inquest Act, after consulting the Principal Judge. The order of establishing the court should be published in the GAZETEE. The minister may establish coroner's courts within the local jurisdiction of every local authority. He may establish one or more coroner's court in one local authority or establish one coroner's court in respect of more than one local authority.

Where no coroner's court is established in the area, then the inquest will be conducted by Regional or District Magistrate.

An inquest is properly constituted court presided over by a coroner who is helped by coroner officers e.g. police officers and other officers of the court. Although no one is accused before the coroner his duty is to inquire and ascertain the cause and manner of death of a person who has been killed or who had died suddenly in prison or has died in the official custody or under suspicious circumstances. Therefore the principal duty of the coroner is to inquire into matters concerning the cause and manner of death of any person who dies suddenly in prison.

In Tanzania the Principal Judges of the two parts of the United Republic are the Principal Judges.

Functions of Coroner's Courts

According to section 4 IA, the coroner's court has the duty to inquiry into the death of any person who:

- There is reasonable cause to suspect that such person has died either a violent death or unnatural death.
- Has died a sudden death of which the cause is unknown.
- Dies while in official custody, or in consequence of the execution of a sentence passed on him.
- Dies or is found dead in such a place and in such circumstances as to require inquest in pursuance of the provisions of any written law.

Powers and Duties of Coroners

When to hold inquest—s. 6 IA

The coroner is required by the Act to hold an inquest upon being informed and satisfied that there is a body of a deceased person lying within his jurisdiction, and that there is reasonable cause to suspect that the circumstances of the death of that person makes the holding of an inquest necessary or desirable.

The appropriate authority may require the coroner to hold an inquest on the body of the deceased if the death of that person and circumstances of such death is unknown to the coroner.

Power to dispense with inquest—s. 7 IA

Where it appears to the coroner, either from the report of the medical practitioner or from other evidence that the death is due to natural causes and the body shows no appearance of death being attributed to or negligent act either on the part of the deceased or by any other person he may dispense with the holding of inquest except in case specified in section 15 IA.

Postponement and Adjournment of Inquests—s. 8 IA

The coroner is required to postpone the inquest proceedings where the proceedings has already began or is about to began if he is informed that some person has or is about to be brought before a court on a criminal charge in connection with the death of the deceased.

Power to order Exhumation—s. 9 IA

The coroner has power to order exhumation of the body of any person who died in circumstances which requires the holding of an inquest on the body but;

- Has been buried without being viewed.
- Where the inquest although held was quashed or re-opened.
- Or without the inquest having been held.

The coroner may order exhumation of the body notwithstanding:

- Any written law in force.
- Any custom for the time being in force.

Then he will proceed to hold an inquest on that body. After the exhumation of the body will direct its reinterment. The expenses of exhumation and reinterment will be paid for from the funds of the United Republic.

The order of exhumation will be made in form **A** as provided in the schedule to this Act.

Where the coroner is of the opinion that exhumation will be injurious to public health or it will not assist in the determination of the circumstances or cause of death, he will not order such exhumation.

Power to Direct Post-Mortem Examination—s. 10 IA

The coroner has power to order Government medical practitioner or where there is none any other medical practitioner to make examination of the body and report on it.

The coroner will not order post-mortem examination if he is of the opinion that;

- The exhumation cannot be made within time to be of any value because;
  - The body of the deceased cannot be brought to the medical practitioner for examination.
  - Given the place where the body is, it is impossible for the medical practitioner to examine it.
  - It is not possible to bring the body where the medical practitioner could make examination.
- It will be in the public interest given the distance for which the medical practitioner will have to travel, and also the time to be taken by the medical practitioner to where the body is for the purpose of examination.

The order of post-mortem will be in form **B**.

Medical Practitioner to Make Examination and Report—s. 11 IA

Upon receipt of the order, the medical practitioner is supposed to make the examination of the body immediately. His examination shall be done with the view of:

- Determining the cause of death.
- Ascertaining the circumstances connected with it.

The report of the medical practitioner shall be in form **C**. and shall state the following:

- The cause of death.
- Shall be signed by the medical practitioner.

This form if properly filed, it will be a prima facie evidence of the facts stated in it. However, where the coroner thinks that it is necessary, he may call the medical practitioner to appear in court.

Holding of Inquests

Notice of Death—s. 12 IA

Where any body is found, or a person dies in circumstances, which require the holding of an inquest, any person who find such body or becomes aware of the death, is required to inform the coroner, or police or any appropriate authority.

The consequences of failure to inform the coroner, police or appropriate authority of the death as required, shall be guilty of an offence and shall be liable to a fine not exceeding five hundred shillings.

Preliminary Examination of the Body—s. 13 IA

Where a dead body is brought to a hospital the medical practitioner will make a preliminary external examination of the body and report in writing to a coroner who may if he considers necessary order a post-mortem examination.

Inquest into Sudden or Violent Death—s. 14 IA

- Whenever any person;
  - Dies suddenly
  - Dies by accident or violent
  - Dies under suspicious circumstances

The coroner may hold an inquest into the cause of and circumstances connected with the death of that person, with or without a view of the body and determine the cause of death.

- The coroner may hold inquest with the aid of assessors where the witnesses attend in person at an inquest.
- The holding of inquest will be done notwithstanding that the cause of death did not arise within the United Republic.
- The coroner is required to forward to the DPP all the papers, documents, and other evidence relating to the death, which he considered, where he finds that an inquest is not necessary.

Executions and Deaths in Prison—s. 15 IA

- The coroner is required by law to hold an inquest in respect of any person executed in pursuance of a judgment of a competent court. The inquest is supposed to:
  - Be held within twenty-four hours after the execution.
  - Inquire and ascertain the identity of the body.
  - Ascertain the cause of death.
  - Ascertain whether the judgment of death was duly executed on the offender.
- Whenever any person dies while he is in official custody a coroner shall as soon as practicable hold an inquest into the cause of the death with the aid of not less than three assessors.

Inquest where body destroyed or irrecoverable—s. 16 IA

Where fire or other natural agent destroys the body or the body is lying in a place from which it can't be recovered and the coroner reasonably believes that the circumstances necessitate the holding of an inquest, but an ordinary inquest can't be held, then he may hold an inquest touching on the death.

Coroner May Call Statement Recorded by Police Officer—s. 17 IA

- The coroner may order any police officer having charge of the investigation of any death to produce to him statement of any person having knowledge of the circumstances and cause of death and identity of the deceased. The coroner will make such order where the death occurred in such circumstances that an inquest is required or ought to be held.

  Where such order is made, the coroner may postpone the holding of an inquest in order to obtain and peruse the statements.

- The coroner is required to return the statements to the police officer before holding the inquest. When returning the statements the coroner may inform the police officer the name of the person whose statement should be taken or whose attendance at the inquest may be required.

Power of DPP to order inquest—s. 18 IA

The DPP may order an inquest to be held when he is of the opinion that it will be for the public interest, the coroner so required by the DPP shall hold an inquest into the cause and circumstances connected with the death of any person.

Procedure at Inquest

The inquisition

- The proceedings and evidence at the inquest shall be directed to ascertain the following;
  1) Who the deceased was.
  2) How, when, and where the deceased came by his death.
  3) Whether the circumstances of the death disclose any offence.
  4) The particulars concerning the death, which required in pursuance of any written law for the time being in force.

- The coroner is required to adjourn the inquest to enable a person whose statement required in the inquest was not taken or he was supposed to appear but was not summoned at the inquest. The adjournment period will be such as to enable the statement of such person to be taken or summoned.

- After the completion of the evidence, the coroner shall give his findings and certify it by an inquisition in writing in form **D** showing such matters as specified in (1)—(4) above.

- Where the inquest concerns the death of a person executed in pursuance of a death warrant the verdict and inquisition shall include a finding as to whether the death was instantaneous and the person executed was the person named in the warrant.

- The verdict of the coroner shall not be worded in such a way as to appear to determine any question of civil liability.

- In his verdict the coroner may make his recommendation designated to prevent the recurrence of fatalities similar to the one in respect of which the inquest was held.

Viewing of the Body—s. 20 IA

- The coroner has to view the body at or before the first sitting of an inquest or shall satisfy himself that;
  - The body has been viewed by a police officer.
  - By a medical practitioner.
  - By any other trustworthy person.

Where the body has already viewed it is not necessary for it to be viewed a second time upon a resumed or continued inquest or subsequent inquest.

- After the body has been viewed or examined as the case may be, the coroner may issue an order authorizing the burial of the body.

- If the body has been buried and has not been viewed the coroner may issue an order of exhumation of the body for the purpose of view.

Summoning of Witnesses—s. 21 IA

- During inquest, the evidence shall be adduced by reading of statement made by persons interviewed by police officers or other public officers and the persons who made those statements shall not appear in person at the inquest.
- However, at the request of an interested part or at the coroner's motion, any person may be required to appear in person at any inquest to give evidence. The coroner will have and may exercise all the powers conferred upon a subordinate court by the CPA with regard to summoning and compelling the attendance of witnesses.
- The coroner shall sign any summons or warrant of arrest issued in his writing where any witness is summoned to give evidence or to produce any document.
- In case where the inquest concerns the death of a person executed in pursuance of judgment, the medical practitioner who was at the execution is an essential witness at the inquest.

Rules of Evidence at the Inquest—s. 22 IA

At the inquest the coroner is not bound by rules of evidence. No witness is allowed to object to answer any question simply because it will incriminate him, and also nothing this witness says at the inquest may be used against him in any subsequent trial.

Examination of Witnesses—s. 23 IA

- Any person at the inquest is allowed to examine the witness either in person or by an advocate, provided that such person is an interested person in the inquest.
- The coroner may disallow any question put to the witness if he is of the opinion that the question is irrelevant or is improper.
- If the death of the deceased is due to injury received in the course of employment or by industrial disease, the following are interested persons;
  - The employer of the deceased.
  - Any person authorized by the minister responsible for labour matters at the time being.
  - A person appointed by workers' union.
- The witness will be examined by the coroner first and then by the person assisting the coroner—if he is assisted by any person.

Recording of Evidence—s. 24 IA

- The coroner should take the evidence in the following manner:
  - He shall record the name and designation of the officer reading the statements made by the persons who witnessed the death or who viewed the body of the deceased.
  - He shall also record the name and address of the persons whose statements are read at the inquest.
- Where the witnesses attend, then their statement shall be taken down either by the coroner himself or cause the statement to be taken down in his presence. The witness and the coroner shall sign the statement.

Statement made by Police Officers—s. 25 IA

The coroner is required to admit as evidence statements made to police officers by the person who has knowledge of the death. The admission of the statements will not be bound by the rules of evidence regarding the admission of evidence. However, before the coroner can admit such statement must satisfy himself that:

- The death was not caused by injury received in the course of employment or by an industrial disease or no criminal charge has been brought before a criminal court in connection with the death of the deceased.
- There is no reason to bring a charge against any person in a criminal court in connection with the death.

The statement admitted by the coroner as evidence in the inquest may if he is of the opinion that it is in the interest of justice hold inquest in private, but must record his reasons for doing so.

Disposal of Inquest Proceedings—s. 28 IA

- Where the inquest has not commenced or has commenced, the coroner shall not commence or continue an inquest if he is informed that a person has been brought before a court in relation to the death of the deceased.
- If at the closure of the criminal proceedings the coroner is of the opinion that no public benefit is likely to result from commencing or resuming an inquest he shall certify his opinion and transmit the deposition to the DPP.
- Where the coroner is of the opinion that sufficient grounds are disclosed for making a charge against any person in connection with the death he must record a verdict:
  - He must comply with the provisions of section 19 IA.
  - Has to make recommendation as to the offence disclosed and without naming any person as being responsible for the offence, discharge the witness if any, and any other person connected with the inquest in question and cause the record of the inquest to be sent to the DPP.

Return of the Inquisitions—s. 29 IA

The coroner is supposed soon after the conclusion of the inquest in circumstances other than those in section 28 IA to transmit to the Registrar of the HC the following:

- All the depositions and statements admitted by him at the inquest.
- All documents produced in evidence.
- All forms duly filled up and signed by him.

Powers of the High Court—s. 30 IA

Where on the application of the DPP and the HC is satisfied that it is necessary to do so, it may;

- Order any inquest to be reopened in order to take further evidence.
- Order the inquest to be reopened so that evidence taken in any judicial proceedings to be included in the evidence taken during the inquest, provided that this other evidence is relevant to any issue determinable at that inquest.
- The court may quash any finding and substituting for it some other finding, which is relevant, given the evidence recorded at the inquest.
- The court may quash any inquest without making any orders.

Offences

- It is an offence to refuse to inform the coroner, police officer or any other government officer of a death of unnatural or suspicious circumstances. If any person is convicted, he will be liable on conviction to a fine not exceeding five hundred shillings—s.12 (2) IA.
- Another offence is burying or cremating a body, which the coroner has prohibited for the purpose of inquest. If convicted to a fine not exceeding five hundred shillings—s.30 IA.

- Obstructing a medical practitioner, police officer or any other person in the execution of any duty imposed on him by the Inquest Act. If convicted to a fine not exceeding five hundred shillings—s.33 IA.

EXTRADITION PROCEEDINGS

What is Extradition?

Extradition is a bilateral reciprocal arrangement between sovereign states, by which each agrees to return to the territory of the other person found in its territory who has violated the law of both countries. Furthermore, it is a process by which a person under legal machinery is sent back to face his trial. In other words it is a method by which a person who has committed a crime and fled the country may be arrested and sent back for trial to the country in which he committed the crime.

Interpretation

- **Extradition Crime**

Means a crime, which, if committed within the jurisdiction of Tanzania would be one of the crimes described in the Schedule to the Extradition Act Cap. 368.

- **Fugitive Criminal**

Means any person accused or convicted of an extradition crime committed within the jurisdiction of any other country who is in or is suspected of being in Tanzania and a reference to a fugitive criminal of a country is a reference to a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that country.

- **Minister**

Means the minister for the time being responsible for legal affairs.

- **Magistrate**

Except in subsection 2 of section 22 of the Extradition Act, means a Resident Magistrate.

- **Warrant**

In the case of any other country includes any judicial document authorizing the arrest of a person accused or convicted of a crime.

Extraditable Offences

Normally extradition is confined to serious offences/crimes, which must also be crimes under the law of both states concerned within the reciprocal arrangement. This concept is known as the doctrine of double criminality, in the sense that the particular act done or omitted to be done must amount to an offence in the requesting state and the requested state. The purpose is to ensure that extradition takes place only when a fugitive is accused of an act, which amounts to a criminal offence under the laws of both states. It is to ensure that a fugitive is not surrendered by a requested state for a conduct, which would not be a crime in the requested state. This means that the return of a fugitive offender will either be precluded by law or be subject to refusal by the competent authority if the facts which the request for his return is grounded do not constitute an offence under the law of the country in which is founded.

Under the Schedule to the EA the following are extradition offences:

- Criminal homicides and similar offences, like murder, attempt and conspiracy to murder, manslaughter.
- Injury to person not amounting to homicides, like, wounding or inflicting grievous bodily harm, assault occasioning actual bodily harm etc.
- Abduction, rape and similar offences, like rape, unlawful carnal knowledge, indecent assault, etc.
- Narcotics and dangerous drugs, and offences related to narcotics, offences related to traffic in dangerous drugs.

- Damage to property like malicious damage to property.
- Falsification of currency and similar offences like, counterfeiting and uttering money and uttering counterfeit or altered money.
- Misappropriation, fraud and similar offences, like theft, fraudulent conversion, burglary etc.
- Forgery and similar offences like forgery, counterfeiting and uttering what is forged or counterfeit or altered.
- Piracy and similar offences, like piracy by the law of nations, sinking or destroying a vessel at sea or an aircraft in the air etc.
- Slave dealing—slave trade Act, 1873 or otherwise in connection with the slave trade committed on the high seas or on land or partly on the high sea and partly on land.

Surrender of Fugitive Criminal Present in Tanzania

The surrender of fugitive criminals present in Tanzania will be entertained only where that country had an agreement with Tanzania. Where the country had an agreement with Tanzania then any fugitive criminal of that country who is in Tanzania will be arrested, detained and surrendered.

The fugitive will be surrendered whether or not there is court of concurrent jurisdiction over the crime in Tanzania and whether the offence was committed before or after the commencement of the Extradition Act—s. 3 & 4 EA.

Requisition for surrender will be made to the minister by the diplomatic representative or consular of the country seeking surrender. The minister may upon receiving that request signify to the magistrate to issue a warrant for the arrest and detention of the fugitive criminal.

Where the minister is of the opinion that the offence for which the surrender is sought is of a political character, he may refuse such a request and may at any time order the release of the fugitive criminal accused or convicted from the custody—s. 5 EA.

Warrant of Arrest of Fugitive Criminals

The magistrate will issue a warrant of arrest for fugitive criminal present or suspected of being in Tanzania under the following circumstances:

- After hearing the evidence.
- On receipt of an information or complaint.

If the magistrate issue a warrant without the order of the minister shall;

- Forthwith send a report of the fact of the issue.
- The evidence and information or complaint or certified copies thereof to the minister. The minister may cancel the warrant and order the discharge of the fugitive criminal detained on that warrant.

Where the fugitive criminal is arrested on warrant without an order of the minister, the magistrate will have to discharge him, unless given circumstances of the case, he receives an order from the minister that a requisition has been made.

The warrant issued by the magistrate may be executed in any part of Tanzania as if had originally been issued or subsequently endorsed by a magistrate having jurisdiction in the place where it is executed—S.6 EA.

Fugitive Criminals to be brought before a Magistrate

When a fugitive criminal hearing is brought to the magistrate, the magistrate on hearing the case will have the same powers as nearly as preliminary inquiry.

When the foreign warrant authorizing the arrest of the fugitive criminal accused of an offence is charged, and the magistrate is satisfied from the evidence that the offence justify the committal of the prisoner for trial if the offence were committed in Tanzania shall commit him to prison.

Where the evidence produced that he had been convicted of an extradition crime justify conviction in Tanzania, the magistrate shall commit him to prison.

When a fugitive criminal is sent to prison he shall await the warrant of the minister for his surrender—s. 8 EA.

Execution of Foreign Warrants of Arrest

This part deals with the aspect of backing of warrants issued in Tanzania as for their execution in any contiguous country.

Where a warrant is issued by a country having an agreement with Tanzania for the arrest of a person accused by a country of an offence punishable by law in that country and is or is suspected of being or on his way to Tanzania the magistrate may endorse it, if he is satisfied that the warrant was issued by a person having lawful authority to issue it.

An endorsement signed by the magistrate shall authorize all or any person named in the warrant, and every police officer to execute the warrant. An endorsement will be sufficient authority to arrest the person named in the warrant and bring him before the magistrate within the jurisdiction of the endorsing magistrate—s.12 EA.

The magistrate is empowered to issue a provisional warrant pending arrest warrant from a requesting country. However, a person arrested under the provisional warrant shall not be surrendered unless and until the original warrant is issued. That is to say, no order may be made for his return to the country in which the original warrant is sought unless the original warrant is produced and endorsed accordingly. If not he shall be discharged unless the original warrant is produced and endorsed within such time as the magistrate thinks reasonable in the circumstances.

Where a warrant of arrest is issued by a requesting country or a provisional warrant, and a person is brought before the magistrate, the magistrate if satisfied may orders the prisoner to be returned to the country in which the original warrant was issued. However, before ordering return, the magistrate must make sure that:

- The warrant is duly authenticated and was issued by a person having lawful authority to issue it.
- The evidence on oath shows that the prisoner is the person named or described in the warrant.

Prisoner arrested on the strength of a foreign warrant is to be returned to the country originating the warrant within one month after the date of the order of his return. If the prisoner is not conveyed out of Tanzania within one month, the magistrate may order the prisoner to be discharged out of custody—s. 15 EA.

Restriction of Surrender on Return

The law does not permit surrender or return of any fugitive criminal under the following circumstances:

- Where the offence for which surrender is required or the offence specified in the warrant is of a political character. Furthermore, the requisition for surrender has in fact been made with a view to try or punish him for an offence of a political character.
- Where the fugitive criminal is accused of the offence triable by a court in Tanzania or is undergoing sentence in Tanzania until the expiration of the sentence or had been discharged by an acquittal.

- Until the expiration of fifteen days from the date of his being committed to prison to wait his surrender—s. 16 EA.

In case the Offence is of a Political Character

Where it is alleged that the offence in respect of which the surrender or return of the person is required is one of a political character or is made with a view to try or punish such person of an offence of a political character, the magistrate will hear the evidence tendered on such issue. Thereafter, the magistrate shall refer such evidence together with the copy of the record of the evidence to the minister.

The minister may certify that he is satisfied or that he is not satisfied that the offence is one of a political character or that it is made with a view to try or punish the person concerned an offence of a political character.

Extradition from Foreign Countries

Before an application is made for the extradition of a criminal who has fled to a foreign country, the following points must be considered:

- Whether there is extradition treaty with the foreign country concerned.
- Whether the offence committed is one included in the treaty.
- Whether the criminal is a subject of the foreign country concerned, as these treaties sometimes provide that a country need not surrender its own subjects.
- Whether the prosecutor i.e. Republic will pay the expenses of extradition.
- An application for extradition should be made to the minister for justice and should contain the facts of the case, including particulars of the whereabouts of the criminal. ***It should be accompanied by the following documents:***
- The warrant of arrest (or certified copy) stating the offence in the terms of the treaty.
- Deposition or information of witnesses taken on oath giving the evidence against the accused.
- A description of the accused embodied in a sworn information, with if possible his photograph and finger prints.
- A statutory declaration verifying the signature of the magistrate who has taken the information or depositions and issued the warrant.

The Arrest of Offender who has Fled From Tanzania to a Foreign Country, which the Extradition Applies

The arrest of an offender who has fled will be sought in accordance with the following procedure:

- An OCS who has reasons to believe that a person who has committed an offence in Tanzania has fled to any country to which the EA applies shall report to the RPC who will nominate either the OCS or some other officer to do the following;
  - He shall lay a complaint u/s 128 CPA and swear information before the RM charging the accused with an offence and obtain a warrant of arrest thereon in the ordinary manner as if the accused were in Tanzania. All such warrant should contain a full description of the person wanted and an endorsement showing whether bail is to be accepted, and if so, the amount thereof.
  - He shall ensure that the warrant is sealed with the seal of the subordinate court and signed by the RM issuing it.
  - Signal the CID headquarters giving the following information;
    - Full names and aliases of the fugitive offender.
    - Offence set out in the warrant.

- Address in another country where the fugitive offender is residing (this must be as complete as possible).

- He must forward the warrant together with the case file to the DCI for onward transmission to the AG who will advice whether or not the case is a proper one to be dealt with under the EA.

- The DCI on receipt of the signal shall immediately consult the AG and decide whether immediately to request the other country's police force to apply for provisional warrant of the arrest or to await the arrival of the police case file.
- Should the AG decide that the case is a proper one for authentification of the warrant he will forward the warrant to the minister of justice for authentification.
- As soon as the warrant has been authentificated, it will be returned to the DCI who will either;
  - Forward it to the country in which the accused is under arrest on a provisional warrant and inform the OCS or other officer who originated the warrant, by signal, that the warrant has been sent and that he should send identifying witness and escort to the police station where the fugitive offender is in remand.
  - Return it to the originating station pending information from the police of the other country in which the fugitive offender is, or is believed to be residing that he has been arrested.
- The police of the country to which the accused fled may then produce the warrant to a magistrate duly appointed for the purpose of their extradition law who may endorse it for execution within his jurisdiction.
- The offender on arrest, or if already on remand, will be produced before the magistrate. The person identifying the prisoner will give evidence on oath that the prisoner is the person named in the warrant and the magistrate should then order the prisoner to be returned back to Tanzania. The escort may then proceed with the prisoner back to Tanzania and on arrival will immediately produce him before the OCS or other nominated officer who will at once take him before the magistrate who issued the original warrant and inform the CID headquarters—PGO 221, Paras.28—33.

Procedure where the Fugitive Offender has fled From Tanzania to another Country, which is a Commonwealth Member

The OCS will do the following:

- If satisfied that a fugitive has committed an extradition offence in his station area he shall;
  - Lay a complaint u/s 128 CPA before a magistrate and inform him that in view of section 7 EA preliminary inquiries is required.
  - Call witnesses who know the facts of the case before a magistrate who will record their deposition in precisely the same manner as if he were holding a PI with a view to committal, except that the accused is not present. The evidence in these depositions must raise a strong and probable presumption that the accused committed the offence charged.
  - Give the magistrate a full description of the accused and also as much as his exact whereabouts in the country to which he has fled so as to facilitate his identification, location and arrest.
- If the magistrate is satisfied that an offence is disclosed against the accused, he will issue a warrant of arrest u/s 130 CPA and at the closure of the hearing he will forward the record to the Registrar of the HC.

- The magistrate will forward an authenticated copy of the record to the AG in accordance with section 256 CPA. The AG after examining the depositions will arrange for the original depositions and arrest warrant to be authenticated with the public seal of Tanzania.
- The OCS will at the same time submit a full report of the particulars of the case and police action taken to the RPC and to the DCI.
- If it is anticipated that the fugitive offender may abscond before that country is in possession of the authenticated warrant, application will be included in the report that the police in that country to which the fugitive has fled should be requested to apply for a provisional warrant of arrest pending the arrival of the authenticated warrant and other documents.
- After the warrant and other documents have been authenticated they will be forwarded for execution by the Tanzanian Government to the country, which the accused has fled. The OCS should then make sure that an identifying witness and escort is available at the shortest possible notice to proceed to the country if required.
- On the arrest of a fugitive offender in the country to which he has fled, the magistrate or a judge to whom he is taken, will commit him to prison to await his return, if he is satisfied that the fugitive offender has been properly identified and that the evidence against him raises a strong or possible presumption that the fugitive committed the extraditable offence(s) mentioned in the arrest warrant.