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KENYA SCHOOL OF LAW-ADVOCATE TRAINING PROGRAMME
CRIMINAL LITIGATION-2009/2010 ACADEMIC YEAR
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LESSON 1: OBJECTIVES OF THE COURSE

At the end of the course, students are expected to:-

a) Understand and draft relevant pleadings and documents necessary for criminal litigation.
b) Understand various jurisdictions in criminal litigation;
c) Apply the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and other statutes relating to criminal litigation;
d) Understand the processes of criminal litigation generally;
e) Identify and apply different forms of procedures applicable to different forms of criminal litigation;
f) Equip students with case management skills to facilitate expeditious disposal of cases.

STATUTES AND TEXT

1. *The Constitution of Kenya;*
2. *The Criminal Procedure Code* [Cap. 75 of the Laws of Kenya].
3. *The Criminal Law (Amendment) Act 2003.*
4. *The Penal Code* [Cap. 63 of the Laws of Kenya].
5. *The Evidence Act* [Cap. 80 of the Laws of Kenya].
6. Dr. Lumumba, P.L.O.: *Criminal Procedure in Kenya* (Law Africa Publishing (K) Ltd., 2005)

What is the role of a Legal Practitioner in a Trial?

- The facts of a case exist in jumbled pieces: in the memories of witnesses, buried in documents and reflected in physical exhibits. ✓ make sense and conceptualize
- The legal practitioner must make sense of these pieces of facts by conceptualizing the theme of the case, determining what facts will form evidence in court, plan the presentation and effectively communicate the client's story.
- The Advocate and the Prosecutor are central figures to the trial; they each have to communicate their side of the story to the Court for determination.

Why Do We Need The Law?

- Law ensures that there is a just and stable society.
- Law contains what a society has agreed can be done (permissible acts) and what cannot be done (forbidden acts).
- Law binds the members of the community together in adherence to the recognized values and standards.

evidence – obtaining facts and the means of proving them

What Does Criminal Litigation Comprise?

- ✓ Criminal Law – Substantive Law on Crimes.
- ✓ Law Of Evidence – Obtaining facts and the means of proving them in court.
- ✓ Criminal Procedure – Process by which Criminal Law is enforced.
- ✓ Trial Advocacy – Skills involved in the litigation process.

Criminal Law Principles – Aims of Criminal Law

1. To forbid and prevent conduct that threatens substantial harm to individual or public interests;
2. To subject to public control persons whose conduct indicates that they are disposed to commit crimes;
3. To safeguard conduct without fault from condemnation as criminal;
4. To give fair warning of the nature of the conduct declared to be an offence; and
5. To differentiate on reasonable grounds between serious and minor offences.

Criminal Law Principles – Definition of a Crime

1. A public wrong - An act which generally has a particularly harmful effect on the public. Acts are made crimes by legislation and judicial decisions.
2. A moral wrong - The traditional Common Law attitude was that crimes were immoral acts that deserved punishment. Today, immoral acts are not all crimes.

Criminal proceedings - Due to the difficulty in defining the criminal quality of an act the definition is sought from criminal proceedings; is the act prohibited by criminal consequences?

Criminal Law Principles – Elements of A Crime

It is a principle of Criminal law that a person may not be convicted of a crime unless the prosecution proves beyond reasonable doubt:

- That he caused a certain event or state of affairs which is forbidden by Criminal law (*'actus reus'*)
- That he had a defined state of mind in relation to causing the event or the existence of the state of affairs. (*'mens rea'*)

Criminal Law Principles – Elements of a Crime

Exceptions to the rule of *'mens rea'*

- Strict Liability offences - Crimes which do not require intention, recklessness or negligence as to one or more elements in the *'actus reus'* are known as offences of strict liability or absolute prohibition.
- Vicarious Liability offences - These are offences whose liability is visited on the suspect for the acts of others e.g. principal and agent relationship.

Criminal Law Principles – Criminal Law General Defenses

- Infancy
- Mistake
- Insanity
- Intoxication
- Provocation
- Self defense
- Duress
- Coercion
- Necessity

Jurisdiction and hierarchy of Courts:

- Jurisdiction- the right to use power of an official body to make decisions on questions of law
- Hierarchy-system by which members of an organization are grouped and arranged according to higher and lower ranks.

Types of jurisdiction

- Geographical/ Territorial- the jurisdiction to hear and determine cases is defined by law based on designated areas.
- Pecuniary/ Monetary- the jurisdiction to hear and determine cases is defined by law based on designated financial value -levels.
- Original- the jurisdiction for a court to hear the case the first time
- Inherent-the jurisdiction for a specific court to hear the specific type of case only
- Appellate- the jurisdiction for a court to hear the case the second time (on appeal)

Types of jurisdiction

- 1st instance- the jurisdiction for a court to hear the case for the first time
- 2nd instance- the jurisdiction for a court to hear the case the second time (on appeal)
- Limited- jurisdiction is restricted to certain conditions
- Unlimited- jurisdiction without conditions

Types of proceedings

Criminal proceedings/case:

Begins with: Charge sheet/ Complaint

Parties: Accused person/ suspect----v----- Prosecutor/ State Counsel (High Court)

Judicial officer: Magistrate/ Judge (High Court)

Process: Plea taking, Prosecution case, Ruling, Defense case, Judgment

Civil Suit / Case

Begins with: Pleadings (plaint/ petition/OS)

Parties: Plaintiff/ Petitioner/Applicant (in person/ advocate) -----v---- Defendant/Respondent (in person/Advocate)

Judicial officer: Magistrate/ Judge (High Court)

Process: Close of pleadings, Interlocutory matters, Plaintiff's case, Defendant's case, Judgment

LESSON 2

COURT OF APPEAL

- Jurisdiction; Section 64 of the Constitution establishes Court of Appeal as the superior Court of record and has appellate jurisdiction in criminal and civil cases from the High Court. The jurisdiction of the Court of Appeal is contained in the Appellate Jurisdiction Act ;Section 3 (3)

- ✓ Location: housed in the High Court building but works on circuits in each province based on the calendar of court sittings.
- ✓ Establishment: 11 judges of the Court of Appeal including Chief Justice of Kenya.
- ✓ Process; 3 judges of the court of appeal usually sit to hear an appeal. The courts decisions are authoritative, binding and citable as precedent to the High Court and Magistrates Courts

HIGH COURT OF KENYA

Jurisdiction: Section 60 of the Constitution defines the High Court, a superior court of record, the jurisdiction consists of:

(a) Unlimited original jurisdiction in criminal and civil cases ✓
(b) Appellate jurisdiction in civil and criminal cases ✓
(c) Section 67(1) of the Constitution vests the High Court with the power to interpret the Constitution as the final arbiter. ✓
(d) Section 65 (2) Constitution general supervision of the Magistrates' courts. –
(e) Section 362 of the Criminal Procedure Code provide for revision of orders from the subordinate courts by the High court. –
(f) Section 4 of the Judicature Act provides admiralty jurisdiction in all matters arising on high seas, territorial waters, lake and other navigable waters in Kenya.
(g) Section 10 and 44 of the Constitution, confers powers to determine the validity of presidential and parliamentary elections to the High Court.

Location: In the High Court Building, Milimani Commercial Courts in Nairobi, Coast province: Mombasa and Malindi, Nyanza Province: Kisumu and Kisii, Western Province: Kakamega, Kitale and Bungoma, Rift Valley Province: Eldoret, Kericho and Nakuru, Central Province: Nyeri, Meru and Embu, Eastern Province: Machakos

Establishment: The Chief Justice and 45 judges of the High Court.

Divisions of the High Court:

- Criminal Division ✓
- Civil Division ✓
- Constitutional Division ✓
- Commercial and Tax Division ✓
- Family Division ✓
- Land and Environment Division. ✓

MAGISTRATES' (SUBORDINATE) COURTS

Jurisdiction: Sections 65 and 69 of the Constitution establish the Magistrates' Courts. The Magistrates Courts have limited original jurisdiction in both criminal and civil cases. The jurisdiction is outlined in the Magistrates Courts Act. Broadly the jurisdiction is based on rank, geographical and pecuniary considerations.

The Resident Magistrate's Court is subordinate to the High Court and is duly constituted when held by;

- Chief Magistrate ✓
- Senior Principal Magistrate ✓
- Principal Magistrate ✓
- Senior Resident Magistrate ✓
- Resident Magistrate ✓
- The Resident Magistrate's court shall have jurisdiction throughout Kenya.

Criminal Cases:

- Criminal jurisdiction is conferred by the Criminal Procedure Code or any other law.
- Criminal Cases: Senior Resident Magistrate-Chief Magistrate may adjudicate on felonies and may award the sentences prescribed in section 24 of the Penal Code.
- Resident Magistrates' may adjudicate on mainly misdemeanors.
- The Magistrates from the rank of Senior Resident Magistrate upwards have jurisdiction to determine capital offences.
- It should be noted that the district Magistrate level is being phased out.

Civil cases:

Section 5 (1) of the Magistrates' Courts Act prescribes Civil Jurisdiction as follows;

- Ksh. 100,000/= value of subject matter in RM's CT
- Ksh. 300,000/= value of subject matter in PM SPM's CT

- Ksh. 500,000/= value of subject matter in CM's CT

But there is enhanced jurisdiction invoked by the Chief Justice and is published in the Kenya Gazette for specific courts. The amounts are:

- Ksh. 3 million Chief Magistrate.
- Ksh. 2 million Senior Principal Magistrate.
- Ksh. 1 million, Principal Magistrate
- Ksh. 800,000/=. Senior Resident Magistrate
- Ksh. 500,000/= Resident Magistrate

Location: Country wide in major towns. The courts in Nairobi are divided into 2, the courts that deal with criminal cases, Nairobi, Makadara and Kibera Law Courts; and Milimani Commercial Courts that deal with civil and commercial disputes. The other Stations have both criminal and civil jurisdiction within the same court but on different days.

Establishment: 300 judicial officers.

In the Magistrates' Courts, there are certain special courts set out to enforce certain specific laws; these are:

- Traffic Court; determines cases based on offences under the Traffic Act
- Children's Court; determines welfare of the child in court proceedings under the Children's Act
- City /Municipal Court; enforces City bylaws under the Local Government Act
- Anti- Corruption Court; determine cases under the Anti-Corruption and Ethics Act.

INDUSTRIAL COURT-established under the trade disputes act. The judges hear civil cases involving employer/employee disputes.

COURTS- MARTIAL:

The courts- martial are established under section 65 (1) of the Constitution and operate under Armed Forces Act. They are referred to as tribunals but the judge/ advocate is the Trial Magistrate from the Magistrates' Courts appointed by the Chief Justice to adjudicate the matter. They hear criminal cases against members of the armed forces; army, navy and the air force.

KADHIS COURTS:

The courts are established under section 66 of the Constitution and the Kadhis' Court Act for determination of civil cases regarding personal status, marriage, divorce and inheritance issues under the Muslim law.

TRIBUNALS:

- The Rent Tribunal -Rent Restriction Act
- The Business Tribunal- Business Premises (Shops and Catering Establishments) Act
- The Co-operative Tribunal-Co-operatives Act
- The National Environment Tribunal-Environmental Management And Conservation Act
- The Public Procurement, Complaints, Appeals and Review board- Public Procurement and Disposal Act

SOURCES OF LAW

Judicature Act Cap 8 section 3 sets down the various laws operational in the various courts.

The Jurisdiction of the High Court, Court of Appeal and subordinate Courts shall be exercised in conformity with:

a. The Constitution
b. All other Written laws (subsidiary Legislation)
c. Acts of Parliament of the UK as shown in Part I and modified in Part 2
d. The substance of Common Law
e. Doctrines of Equity
f. Statutes of General Application in force in England on the 12th august, 1897
g. Procedure and practice observed in courts of justice in England at that date;
h. But the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.
i. African customary law in civil cases where parties are subject to tit and so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide cases according to substantial justice without undue regard to technicalities of procedure.

LESSON 3

ARREST

Working Definition-

- Physical apprehension
- Confining
- Restraining of the body of a person with a view to detention
- It is a forcible restraint on a person's liberty either on the basis of a warrant of arrest or power donated by law.
- Arrest is the beginning of imprisonment.
- Process Of Arrest

Police Officers (including administration officers) conduct arrests as part of maintaining law and order; to prevent crime and launch investigations of offences. The process of arrest is governed by the Constitution (Section 72), Criminal Procedure Code (section 21-42) and Police Act (Section 14 and 34)

Law Dictionary defines Arrest as it is to deprive of his liberty by legal authority.

Criminal Procedure Code

- ✓ Section 21- Police officer will touch/confine body of person, unless there is submission by word or action.
- ✓ If there is resistance or attempts to evade arrest all means necessary may be used.
- ✓ Greater force than is reasonable in the particular circumstances will not be justified
- ✓ Criminal Procedure Code
- ✓ Section 24 - the person arrested shall not be subjected to more restraint than is necessary to prevent his escape.
- ✓ Section 25 - when a person is arrested and cannot legally be admitted to bail or cannot furnish bail, the officer may search the suspect and place all recovered articles in safe custody.
- ✓ Section 27 – Women suspects are searched by women officers.

1) Arrest without a warrant by a Police Officer

- ✓ Section 29 A police officer can arrest without warrant if the persons are;
- ✓ suspected of committing cognizable offenses;
- ✓ felonies;
- ✓ breach of the peace;
- ✓ obstruction of police officers executing their duties;
- ✓ possession of suspected stolen property;
- ✓ deserter from the armed forces;
- ✓ possessors of implements of house breaking; and
- ✓ persons found in highways and streets in hours of darkness and suspects he is there for an illegal purpose
- ✓ A person reasonably suspected of an offence outside Kenya and is to be extradited – extradition
- ✓ Possession of any implement of housebreaking
- ✓ Released convict in breach of supervision order (repealed)
- ✓ Reasonably suspected to have a pending warrant of arrest.

2) Arrest by Magistrate Section 38 & 39 - Magistrates are conferred powers to arrest if offenses are committed in their presence and direct the arrest of persons whom they may issue warrants against.

3) Arrest by Private Person

Section 34 & 35 a private person may arrest any person on reasonable suspicion or commission of a cognizable offence

The owner of property that is damaged may arrest the suspect. A private person shall hand over the suspect to the police officer or police station without delay

Arrest with a warrant (S100-107 CPC)

- S102 - The warrant of arrest shall be under the hand of judge or magistrate issuing it. It must be in writing and signed, have the seal of the court, state the offense preferred and the names of the suspect, and the person (s) to execute it.
- S102 (3) - The warrant stays in force until it is executed or cancelled by the court.
- S103- court may direct security to be taken if the charge is not murder, treason or rape
- S104 - The warrant may be directed to one or generally to police offices to execute.
- S106 – The warrant shall indicate the names of the police officer to execute it, but if not possible another officer may execute it: Normally, warrants are sent to in charge of police station or units

CPC 100-107

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure established by law.
ARREST → DETENTION – ARRAIGNMENT IN COURT.

- Warrants are issued to suspects in private prosecutions or those who have jumped police/court bail/bond or where new charges are preferred.
- They are issued to witnesses who refuse to come to court to testify after summonses are issued (S146-147 CPC). – failure to attend.
- Warrants are issued to sureties who do not comply with court orders

Conditions of Arrest

- ✓ Reasonable force is used when a person resists arrest.
- ✓ It is necessary to inform the person the reason for arrest
- ✓ While in detention, the suspect is entitled to legal representation upon request and visitation by relatives.
- ✓ International Standards of Arrest
- ✓ Universal Declaration on Human Rights 1948, Article 3 prescribes guarantee to personal liberty.
- ✓ International Convention on Civil and Political Rights (ICCCPR) 1966,
- ✓ Article 9 provides; "no-one shall be deprived of his liberty except on such grounds and in accordance with such procedure established by law."

NATIONAL LAWS ON ARREST

Constitution of Kenya Section 72 (1) states; ": No person shall be Deprived of his personal liberty save as may be authorized by law....."

Section 72 (2) states; *A person who is arrested or detained shall informed as soon as reasonably practicable, in a language he understands, of the reasons for arrest.*

Section 72(3) states; a person who is arrested or detained..... shall be brought to court as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest, or within 14 days of his arrest upon reasonable suspicion of having committed an offence punishable by death, the burden of proving that the person was arrested and brought to court as soon as is reasonably practicable shall be on the person alleging that the provisions of this subsection have been complied with."

Criminal Procedure Code Section 36 states; *"When a person has been taken to custody without a warrant for an offence [other than those offences punishable by death], if it does not appear practicable to bring that person before the appropriate subordinate court within 24 hours, Unless the offence appears to be of a serious nature, [the person may be released] on executing bond, otherwise he shall be brought to court as soon as practicable."*

Pre-arraignment detention: Case-law

The jurisprudence emerging from the High Court and Court of Appeal is contradictory as to when and how the question of the legality of the intervening period between arrests, detention up to arraignment is determined. The courts are unanimous that if the suspect has not been brought to court within the lawful period, the prosecution must account for the delay to the satisfaction of the Court. If the reasons are not satisfactory, or no explanation is advanced, then the suspect is discharged and proceedings declared a nullity.

Odhiambo Otel vs. Republic CA 54 1989

Wanyiri Kihoro vs. A.G CA 151 1988 – It was held, The Court should note the condition of the suspect as to whether he/she has injuries, complaints or requests made by him. The Court record of the Trial Court should be legible and clear to reflect all matters raised at the initial stage as it considers the period of detention.

CASE LAW

The land mark cases on pre arraignment detention are;

1. Albanus Mwasia Mutua Vs Republic CA 120 of 2004 -There was delay of 8months from the date of arrest to the date of arraignment in court, the prosecution offered no explanation given by prosecution. Section 72 (3) of the Constitution was upheld.

2. Gerald Macharia Githuku vs Republic CA 119 of 2004, The delay of 17 days between date of arrest and the arraignment date in court was not explained. The appeal was upheld. The court, however, made the finding that:

> *We have come to the conclusion, after a careful weighing of these two considerations in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court, 17 days after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the*

The prosecution must account for the delay to the satisfaction of the

constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.

3. Republic vs James Njuguna Nyaga Cr Case 40 of 2007, Counsel for the accused person raised a preliminary objection against the Attorney General. The suspect was arrested on 12/2/07 and kept in custody for 5 months. A habeas corpus Mis. Application 436 of 2007 was filed and the suspect was produced and charged with the offence of murder on 14/6/07. The suspect was held in custody illegally for 105 days after the mandatory 14 days. The preliminary objection was upheld by the High Court and the proceedings of the case were stopped. They were a nullity.

4. Anne Njogu & 5 others Vs Republic Misc Criminal Application 551 of 2007,

On 1/8/07 the Misc. application was filed, heard on 2/8/07. The applicants were arrested on 31/7/07 at 12 noon and were not brought to court until 2/8/07 when advocates blocked taking of pleas in the magistrate's ct pending the outcome of the High Court application. The applicants were not arraigned in court within the statutory 24 hours. The Misc. application was upheld and proceedings held to be a nullity.

I dare add that the said section is very clear and specific – that the applicants can only be kept in detention or cells for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants. ...upon determination that the constitutional rights of the applicants have been violated, any prosecution against them, or any of them, on the basis of the events for which attempted charges were being made this morning is null and void. And that is so and will remain so irrespective of the weight of the evidence that the police might have in support of their case. This is for the simple reason that such a prosecution would be based on an illegality and a null and void case.

5. Adan Keynan Wehliye Vs Republic, CC 223 of 2003 The applicant questioned the production of a nolle Prosequi and unlawful detention of 29 days. The High court ordered the matter was to proceed for hearing before the trial court and the unlawful detention issue canvassed in the Trial Court.

6. *Ben Amos Njau vs Republic CA 633 of 2007* The application was dismissed on the basis of the fact that the issue of the applicants arrest and detention had not been raised in the trial court.

7.David Karobia Kiiru vs Republic Misc App 863 of 2007 similarly the High Court directed that an application on the arrest and detention of a suspect is a matter of fact to be raised in the trial court so as to allow for an explanation before it is addressed in the High court.

8. Samuel Ndungu Kamau and another vs Republic CA 223 of 2006 The Court of Appeal now stated that the court exercised appellate jurisdiction. Therefore the question of arrest and detention be raised first in the trial court. *'This Court has only appellate jurisdiction with regard to criminal and civil jurisdiction. The provisions of section 72(3)(b) above are framed in a way which presupposes that a complaint with regard to violation would either be raised at the trial or in an application under Section 84 of the Constitution, where witnesses are normally called or affidavit evidence is presented to prove or rebut a factual proposition. When such a complaint is raised for the first time before this Court, it may not be possible to investigate the truth or falsity of the allegation. That being our view of the matter this ground fails, more so when it does not relate to the question whether or not the 2nd appellant alone or together with other persons not before us, committed the offence he stands convicted of'.*

9. The Court of Appeal delivered on 22nd February 2008 the case of Paul Mwangi Murunga vs Republic (UR) Criminal Appeal: No. 35 of 2006 and stated; "...Under S72 (3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raised a complaint. But if in the case the prosecution does not offer any explanation, then the court, as the ultimate enforcer of the provisions of the Constitution must raise the issue."

10. In *the* case of Dominic Mutie Mwalimu Vs Republic CA 217 of 2005, Court of Appeal stated, the issue of unlawful detention of 2 days beyond the mandatory 14 days was not raised in the trial court on 1st appeal. The prosecution was not given an opportunity to explain the delay. The ground of appeal had no merit.

In the case of Ndede Vs Republic [1991] KLR 567 the appellant had been arrested without a warrant on 29th September 1997and was held in detention *in communicado*, until 30th October 1997 when he was brought before a magistrate. The period of delay was just over thirty days and Ndede was not charged with an offence carrying the death penalty. He pleaded guilty before the magistrate and was sentenced to long prison terms. He appealed to the High Court against the conviction and sentence but the appeal against the conviction was struck out as being incompetent by virtue of Section 348 of the Criminal Procedure Code

which bars appeals from persons who have been convicted on their own pleas of guilt. The sentences were, however, reduced. Ndede next appealed to this court and the court, consisting of the late Mr Justice Gachuhi, J.A. the late Mr Justice Masime, J.A and Mr. Justice Omolo, Ag J.A (as he then was) held that Section 348 of the Criminal Procedure Code was not an absolute bar to appeals from persons convicted on their own admission and that as there was no explanation offered for the delay of some thirty days before Ndede was brought to court, the trial magistrate ought not to have accepted Ndede's plea of guilty. ~~Ndede's~~ Ndede's appeal was allowed and his conviction quashed. It did not matter that before convicting Ndede the Deputy Public Prosecutor had stated the facts in support of their charges that Ndede had admitted those facts and the facts and the facts themselves had disclosed the offences charged against him. The quashing of the convictions must have been on the basis that Ndede's constitutional right given to him by section 73(3)(b) of the Constitution had been violated and he was entitled to an acquittal.

Then there are the cases concerned with the violations of the fair-trial provisions under Section 77 of the Constitution. First, is the case of Kiyato Vs Republic (1982-88) KAR 418 where the appellant was tried and convicted of the offence of robbery with violence under Section 296(2) of the Penal Code and sentenced to death. His first appeal to the High Court was dismissed and on his appeal to this court, it was held that as Kiyato had not been provided with an interpreter contrary to section 77(2)(f) of the Constitution, his appeal would be allowed. The nature and strength of the evidence adduced by the prosecution in support of their charge did not really count in such a situation.

S.77
Fair trial

11. In the case of Republic Vs Samuel Mbogo Ndwiga & Another HCT 55 of 2001, the accused persons charged with murder, raised preliminary objection of arrest from 2000 and charged in 2007. The explanation was, there were committal proceedings (Now Repealed) nolle Prosequi entered on the murder charge, inquest conducted, ruling given and accused persons charged again.

The delay in arrest not unconstitutional Explained.

High Court Held, the mere fact of detention beyond the requisite period is not unconstitutional, there should be reasonable explanation for the court to determine if the accused persons were brought to court as soon as was reasonably practicable.

12. In the case Of David Waiganjo Wanaina Vs Republic CA 113of 2005, the Court of Appeal allowed the appeal. There was a delay of 9 months between arrest and arraignment. The court stated the long delay was not explained. The Accused person was set free.

S. 71 – expeditiously

When should the issue of unlawful detention be raised?

1. in Paul Njehia Vs Republic HCT 96 of 2005, the accused person was charged with murder. At the close of Prosecution case and ruling on a case to answer, the defense raised the issue of unlawful detention. High Court held: there are 2 competing interests; section 71 and 72 (3). The defense heard 11 witnesses for 2 years and did not raise the issue. The timing did not accord the prosecution the opportunity to explain the detention. The objection was dismissed and defence hearing proceeded.

2. In Republic vs Joseph Ndirangu Nungari and Another HC 42 of 2006 The accused persons charged with murder, at the close of the prosecution case, defense raised preliminary objection on unlawful detention.

The investigating officer filed an affidavit on the delay. The High Court stated preliminary objections maybe raised at any time but this is more in civil cases than criminal ones; as the express intention of the application is to stop criminal proceedings. Criminal trials are matters of public interest, and each case determined on its peculiar circumstances. The application / objection be raised at the earliest stage. The preliminary objection dismissed.

3. in Republic Vs Talib Abubakar & others Criminal Revision: No 1 of 2008, the

High Court dealt with the following issues;

- ✓ The Magistrates' courts should take pleas in spite of the unlawful detention issue, and afford, the prosecution an opportunity to explain the delay.
- ✓ Section 72(3) seems to outlaw unlawful detention but with an exception; an opportunity to explain is given.
- ✓ Whether, the detention is unlawful is a judicial question to be determined on legal principles after hearing parties
- ✓ Whereas the high court determines questions of interpretation of The Constitution, facts that affect the Constitutional decision are best determined in the Magistrates' court

Conclusion

- Pre arraignment detention must be in accordance with the Constitution.
- The issue may be raised as a preliminary objection at the earliest opportunity in the trial court.
- The trial court may also question the delay based on the C/Sheet
- The prosecution/police/state counsel has an opportunity in law to give an explanation.
- The court will determine on the basis of circumstances of the specific case, the outcome.

– The determination a judicial question to

- The application for unlawful arrest can be filed in the High Court under section 84(6) of the Constitution.

LESSON 4
IDENTIFICATION PARADES

DEFINITION

- The Concise Oxford Dictionary defines an identification parade as an assembly of persons from whom a suspect is to be identified. The Blacks Law Dictionary seeks to wholly define an identification parade It defines it as 'a police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime.'
- Identification parades are held to enable eye witnesses to identify the suspect, whom they allegedly saw. In this process, the eye witness ability to identify the suspect is tested with accuracy. Failure to hold such parades weakens the evidential value and all that remains will be dock identification, which is weak.
- From the above we can deduce that an identification parade is a process or forum organized by the police in which a suspect is lined up together with eight other persons who are of the same height, age, general appearance and the same class of life as the suspect and, a witness or witnesses are asked to identify whether or not the accused or the suspect is present in that line-up in a bid to ascertain if it is the suspect who committed the crime he/she is accused of.

INTRODUCTION

- Evidence of identity (visual identification of the suspect) is often an expression of an opinion that a person seen at one time (in Court) is the same person as was seen at some other time (during the commission of the crime). This evidence is admissible in a criminal trial, whether the identification took place during the crime or at an identification parade.
- The criminal process commences when a report/ complaint is lodged at the Police station or an arrest of a suspect (s) is made and he is detained at the Police Station.
- Once the report is made by the Complainant, the police officer records the information in the Occurrence Book (OB). Investigations are launched to determine whether an offence is disclosed, whether there is sufficient evidence and if the matter should be resolved in court.
- Often times, complaints that disclose sufficient evidence that offences were committed after investigations are conducted by the police are lodged in court for determination.
- Identification parades to establish the suspect (s) in the commission of the crimes is crucial and it is one of the most important processes in the conduct of investigations. If the police have arrested a suspect on the basis of other evidence and there are witnesses who indicate that they might be able to make an identification of the suspect, then an identification parade should be conducted for positive identification.
- Where a witness confirms that he witnessed the commission of the crime and witnessed a suspect committing the said crime and could identify him, then an identification parade is conducted by Police to verify the witness's claim and test its veracity.
- Evidence of identification of suspects may take different forms. Difficulties arise in respect of visual identification by witnesses.
- If the witness states that he recognized the suspect during the commission of the crime, the identification parade is not conducted. During trial, the court will evaluate the circumstances under which the crime occurred and determine if there was positive recognition of the suspect by the witness. Recognition maybe more reliable than identification of a stranger, but even where a witness purports to recognize close relatives and friends, mistakes are sometimes made.
- Where the offenders are identified close to the time and scene of the crime, identification parades are not useful. In terms of the timing it is unlikely that there is mistaken identity of the suspect as he is caught in the act.

VISUAL IDENTIFICATION

The visual identification of suspects by witnesses has for many years been recognized as problematic and potentially unreliable. It is easy for an honest witness to make a confident, but false, identification of a suspect.

There are many reasons why this may happen: among them are the following reasons/ possibilities:

1. Some people have difficulty distinguishing between different subjects of only moderately similar appearance;
2. Witnesses to crime are able to see the perpetrators fleetingly, often in stressful circumstances
3. Visual memory may fade with time and may become confused or distorted
4. There is evidence that 'unconscious transference' may occur; where a witness confuses a face he recognizes from the scene of the crime

5. Witnesses rarely remember more than portions of events and their recollection may change through self interest or suggestion
6. Witnesses are not always articulate and descriptive
7. Though understandable, but often misguided many witnesses are eager to help police by making positive identifications

DOCK IDENTIFICATION VS IDENTIFICATION PARADES

- There is a clear difference between dock identification and identification parades. In dock identification, a witness or witnesses point out the accused standing at the dock and identifies him/her as the culprit who committed the crime. It is imperative to note that the courts generally avoid convictions based on dock identifications because such evidence without corroboration is of a lesser value or worthless. This was clearly enunciated in the case of Gabriel Njoroge vs Republic where the court held that the dock identification of a suspect is generally worthless unless other evidence is adduced to corroborate it. Similar findings were illustrated in the case of Owen Kimotho Kiarie vs Republic
- The courts then sought to elucidate this position further and in the case of Amolo vs. Republic the court explained the rationale for the courts reluctance to accept a dock identification without other evidence as follows,
- 'The reason for the courts reluctance to accept a dock identification is part of the wider concept, or principle of law that is not permissible for a party to suggest answers to his own witnesses or, as it sometimes put, to lead his own witness.'
- Thus, it is generally believed the if an accused sits in the dock while the witness give evidence in a criminal case against him undue attention is drawn towards his. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of the crime even though he might not be sure of that fact.
- It is also believed that the accused presence in the dock might suggest to a witness that he is expected to identify him/her as the person who committed the offence. This was particularly discussed in the case of Mwiruri and 2 others vs Republic.
- It is important to note that in circumstances where the witness/ complainant personally know the witness, their evidence after dock identifications are admissible in court. However, great care must be taken concerning testimonies of single witnesses.
- The striking difference between dock identification evidence and identification parade evidence is that the latter carry a lot of weight and are more credible in their admissibility in a court of law. However, it cannot be said that all dock identifications is worthless. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.
- Therefore ID parades are conducted under set and specified rules to ensure correctness of the identification of the suspect.

CONDUCT OF IDENTIFICATION PARADES

The rules that govern the operation of ID parades are contained in the FORCE STANDING ORDERS of the Kenya Police. These orders are a guide to criminal investigations.
The same rules are cited in various decided cases on the conduct of ID parades and in the prescribed forms.
The necessity and value of holding identification parades in appropriate cases cannot be over -stressed. When the whereabouts of an accused person is known to the police, but there is doubt as to whether he is the correct person, the only way to ensure a fair and correct identification is by means of an identification parade.
Any person may refuse to appear in an identification parade, and if he takes this attitude, he cannot be compelled to take part in the parade. When the suspect is subsequently charged, evidence will be given of the refusal to take part in an identification parade. [By production of the ID parade form filled in by the ID parade officer on what the suspect exactly said with regard to participating in an ID parade]

Whenever an identification parade is held, the conducting officer will make use of and complete all relevant portions of Form P.156 "Report of an Identification Parade". The form will be filled in all the prescribed spaces and inform and allow the suspect to sign after the conduct of the ID parade, and if necessary will be used by the conducting officer to refresh his memory in court proceedings as provided for in S 167 (i) of the Evidence Act.

THE IDENTIFICATION PARADE WILL FOLLOW THE FOLLOWING GUIDELINES

- The suspect is informed of the reason for the parade and that he may have a solicitor or friend present
- The police officer in charge of the case, although he maybe present, will not conduct the parade;
- The witness (s) will not see the accused before the parade

- The accused person will be placed among at least 8 persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the suspect have any disfigurement, steps should be taken to ensure that it is not especially apparent.
- The accused person will be allowed to change his position he chooses and will be allowed to change his position after each identifying witness has left, if he so desires;
- Care will be exercised to ensure witnesses do not communicate with each other ;
- Every unauthorized person must be excluded
- If the witness desires to see the suspect/accused person walk, hear him speak, se him with his hat on or off, this should be done, but in the event the whole parade should be asked to do likewise
- The conducting officer will ensure that the witness indicates the person identified, without the possibility of error
- At the termination of the parade, the IP officer should ask the suspect if he is satisfied that the parade is being/ has been conducted in a fair manner and make a note in writing of his reply thereto;
- When explaining the procedure to a witness, the officer conducting the parade will tell the witness that he will see a group who may or may not include the person responsible. The witness should not be told to pick out somebody or be influenced in any way whatsoever:
- A careful note must be made after each witness leaves the parade, to record whether he identified the accused and in what circumstances
- A record should be made by the officer conducting the parade of any comment made by the accused during the parade, particularly comments made when the accused person is identified in the parade
- The parade must be conducted with scrupulous fairness, otherwise the value of identification (s) as evidence will be lessened or nullified
- Unless a police officer is accused/suspect, police officers will not be used to makeup the parade.
- Identification parades should be conducted with as much privacy as possible. They should not, unless unavoidable, be held in view of the public but in an enclosed compound or yard from where all spectators and unauthorized persons have been excluded.

Note:
If a witness desires to keep his identity secret, and circumstances are such that the officer in charge of the case deems such a course advisable for reasons of security, victimization etc, arrangements will be made for the witness to view the parade from a concealed vantage point(from a window or from a room or from behind the screen) If the witness identifies for 2 people from the parade, they will be removed from the parade and brought before the witness who will confirm identification in the normal way, by clearly indicating that he/she is the person concerned.

These rules (in the Force Standing Orders) were first stated in the case of R vs MWANGO S/O MANAA 1936 3 E.A.C.A 29 Facts
The case is based on statements made by the deceased on his identification of the accused before his death. The court held there was sufficient evidence for the court to convict but made 2 observations on the conduct of identification parades; namely In the first place the so- called ID parade took place at the hospital where only 3 men were actually paraded. There were 2 plain clothed askaris it is not clear whether they were part of the parade or not.
One of the askaris testified that the ID parade officer asked the deceased; "amongst these 3 men who assaulted you"
The court held the ID parade was unsatisfactory and cited the ID parade guidelines then referred to as Kenya Police Order No 15/26

This position was approved in SIMON MUSOKE vs REPUBLIC 1958 E.A.715 CA Facts
A motor vehicle was stolen and shortly thereafter, the appellant drove it to a funeral where friends who had earlier seen him on a bicycle saw him in the car and he had a helmet. After a spate of thefts, the vehicle was found outside a bar and stolen items were recovered.
During the ID parade one of the witnesses identified the appellant; her evidence was rejected by the court as she was not asked how she was able to identify the appellant.
"The court held [that] it is not within established practice to question a witness who has made identification at a parade as to his reason for doing so. A comment voluntarily made by the witness is often received in evidence as part of the act of identification." The court set out the ID parade guidelines as in *Mwango* supra.

Reference to the ID parade guidelines was made in the case of SSENTALE VS UGANDA CA 56 of 1968; *Facts*:

On 2nd September, 1967 at 11.30 pm the appellant (accused) attacked the Complainant with violence and removed and ran off with her sweater. He was charged and convicted of robbery with violence under the Penal Code. The appeal was based on 2 grounds;

- ✓ There was no proper identification parade
- ✓ The court did not direct itself properly on the issue of the burden of proof relating to the alibi raised by the accused.

In relation to the ID parade, the Complainant testified that she went to the police station and in the police office found 6 men standing in a row with the appellant seated in front of them. She picked the assailant as the suspect.

The appellant testified that on the day of the robbery he was not in the area until the 4th September, 1967. He alleged that he had ejected the lady friend of the Policeman who arrested him from the room she rented from due to non payment of rent.

Court held

The identification parade was held in a manner contrary to the rule approved by the Court of Appeal in *R vs Mwanga s/o Munaa 1936, 3EACA,29* "*In that case the Court of Appeal approved of the method of identification which was set out in Kenya Police Order No. 56/26 and approved then by the then Chief Justice Of Kenya. The rules are headed Instruction for Identification Parades...* "The content of the said rules are as stated above.

KENYAN JURISPRUDENCE ON IDENTIFICATION PARADES

- Most of identification parades in Kenya have not been conducted with scrupulous fairness as is required by the Police Force Standing Orders. The police as custodians of identification parades have flouted most if not every rule in their own standing orders if the cases on identification parades are anything to go by. This has generally occasioned bias on accused persons and to a great extent occasioned the accused persons miscarriages of justice. The worst form of punishment is punishment that an individual does not deserve. Mistaken identity causes the worst form of injustice and it is with this in mind that identification parades should be carried out with the utmost care and fairness;
- Kenyan jurisprudence on identification parades has proved that in most circumstances, the rights of the accused have been wantonly trampled on with reckless abandon when the said identification parades are conducted. The question that begs to be answered is: Can justice be achieved when one's rights are grossly violated?
- It should be noted that identification parades were formed on the basis of protecting the accused. In the Kenyan scenario this is a far cry from that basis as most identification parades instead tend to injure the accused person more than protect him.
- For purposes of proper grasping of the foregoing argument we shall discuss a few selected Kenyan cases and as far as possible highlight the injustices. The cases have been discussed in the rules above and we shall therefore give a summary.
- The order to be flouted is the order that states that the identifying witness should not be asked to "pick out the person" he believes committed the offence. This intimates that the accused was present in the group. It is however relieving to note that the court quashed the evidence that was obtained from the flawed parade.

In this particular case a certain witness who attended the identification parade stated that he had been told to "identify the people who robbed him." The tragedy of the case is that the trial magistrate and the High court Judge in their wisdom or lack of it thereof found the parade to have been properly conducted. This Court however held that: "*In an identification parade, it is dangerous to suggest to an identifying witness that the person to be identified is believed to be present in the parade. The value of the parade as evidence in this case was considerably depreciated by that fact.*"

Joseph Kariuki vs Republic, Criminal Appeal No. 74 of 1985

Four persons were lined up with twelve (12) other persons in an identification parade. The court held that: "*Under Police Force (standing) Orders, while conducting identification parades, one accused should be lined up against at least eight (8) other non-accused persons. It was an infringement of the orders and a flaw in the proceedings to line up the four accused persons with 12 other persons in an identification parade and this rendered the parade an unreliable source of identification.*"

Njihia vs Republic, Criminal Appeal No. 13 of 1986

There where three (3) suspects who were mixed with eleven (11) others for an identification parade. The court held that: "Mathematically that is too low a ratio (something like one to nearly five) to exclude the chance of random guesswork."

The courts have always emphasized the evidential value of a well conducted parade. At page 424 of the above case, the court made the following pertinent observations: "*It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person*

present looking after the interest of the suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon a clear evidence of identification apart from parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult if not impossible, for the witness to dissociate himself from the identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.'

Kamau and 2 Others vs Republic, Criminal Appeal No. 337 of 1987

The facts of this case are that the suspects were identified in three identification parades. Each suspect was called to take his place in a parade involving eight (8) members. However in all the parades conducted the same members lined up in the same order. The court held: *"The 2nd and 3rd identification parades were not conducted properly. The two identifying witnesses only had to observe that the parades were identical to the previous ones except for the absence of the previously identified person and the presence of another person in his place who the witnesses must have considered to be another suspect. Once a witness knows who the suspect is, an identification parade is valueless."*

Omar vs Republic, Criminal Appeal No. 133 of 1986

The accused in this case was identified by two witnesses; the witnesses had seen him prior to the parade. The court held: *"Though the parade had been properly conducted, the appellant's success in proving that he had been seen by the witnesses prior to the parade meant that the parade was useless."*

Can it be clearer that overlooking such discrepancies is in itself highly prejudicial to the accused?

David Mwita Wanja and 2 Others vs Republic, Criminal Appeal No. 117 of 2005

In this case, the same eight (8) persons where used for three (3) identification parades and as such the identifying witness could easily tell by elimination that the appellants were the only new faces in the parades. The parade was rendered worthless by the court since it was extremely prejudicial to the appellants.

These are just but a few selected cases to prove that most identification parades conducted by the police in Kenya have been extremely prejudicial and in some cases, the courts have tried to cure these prejudices by invoking other legal provisions in cases where the rights of an accused have been violated though evidence heavily points to the guilt of the accused.

It is for these reasons that major reforms should be undertaken to improve the fairness of these identification parades as will be proposed hereafter.

PROBATIVE VALUE OF IDENTIFICATION PARADE EVIDENCE IN COURT

1. In England, the Criminal Law Revision Committee asserted "that cases of mistaken identification constituted by far the greatest cause of actual or possible wrong convictions". Much has been done since then to reduce the dangers posed by such errors and to ensure courts are aware of them.
2. Other jurisdictions, for example, UK, under the Police and Criminal Evidence Act (PACE) prescribes various forms of visual identification. They include group identification, video –film identification and confrontation. The parade is the first choice, and should be held if the suspect disputes identification.
3. Group identification is acceptable especially where the suspect is uncooperative
4. Video- film may also be resorted to because of the suspect's refusal to co-operate with a parade or group identification. In contrast, confrontation may not take place unless none of the other procedures are practicable.

What effect or probative value does Visual identification/Identification parade evidence have in a criminal trial? Once the identification parade is conducted, and the suspect is arraigned in court, the evidence on identification of the suspect produced in court is;

- The testimony of the ID parade officer who conducted the ID parade
- The production of the ID parade form as exhibit in court
- The evidence of arresting and or investigating officer of the case (depending on the circumstances of the arrest of the suspect)
- The court will evaluate credibility (demeanor) of the witnesses, the veracity of the evidence (as tested by cross-examination from the defense) in conjunction with all other evidence adduced in relation to the case to conclusively determine:
    - The accused person was positively identified (no mistaken identity)
    - The accused person committed the offence charged with.
- To do this, the court relies on the often cited case of the case of R vs Turnbull 1977 QB 224

- The Court of Appeal laid down important rules for guidance of trial courts faced with contested identification evidence and to cross check the pre trial identification procedures are conducted as fairly as possible to avert the possibility of mistaken identity.
- **If there is no identification evidence the Turnbull guidelines will not apply.** A witness who has had a proper sight of the culprit's face and who may be able to make an identification of the suspect, should be invited to attend an identification parade if the police have a suspect available.
- Where the identity of the suspect is known, the witness may participate in an identification parade.

In the *Turnbull* case;

Facts

Turnbull was convicted of conspiracy to burgle and sentence d to 3 years imprisonment. The appeal raised problems relating to visual identification as he claimed there was mistaken identity. The witness who identified him was alleged to have a fleeting glance. The witnesses described the suspect, bystander and the vehicle the suspects left in. Shortly thereafter, a police officer on duty passed by and recognized Turnbull. The court found the evidence of recognition sufficient and dismissed the appeal. The court went on to state as follows;

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defense alleges to be mistaken, [the court] should warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification (s).

The court should emphasize on the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.

Secondly, [the court] should examine closely the circumstances in which the identification by each witness came to be made.

- How long did the witness have the accused under observation?
- At what distance?
- In what light?
- Was the observation impeded in any way?
- Had the witness seen the suspect before?
- How often?
- If occasionally, had he any special reason for remembering the accused?
- How long elapsed between the original observation and the subsequent identification to the police?
- Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? [first report]

All these go to the quality of the identification evidence. If the quality is good and remains good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

When in the judgment of [the court], the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance on a longer observation made in difficult conditions, the situation is very different"

The English decision is persuasive and has been considered in the local cases

LIVINGSTONE KIHUGO MWANGI VS REPUBLIC C.A.554 OF 2004

The appellant complained that identification of PW1 at night in difficult conditions, as the source of light was doubtful. The second issue was that the identification parade was conducted contrary to the Forces Standing Orders.

The court held: "*the circumstances for identification at the scene of crime was clearly unfavorable. It is trite that identification by a single identifying witness in the circumstances such as those in our present case has to be treated with great caution- especially where the circumstances are not conducive to positive identification*"

The evidence of PW1 shows that he could not identify all the suspects at the scene. He did not give a description of the appellant or any of the robbers when he reported to the police shortly thereafter"

The identification parade was not conducted in accordance with the Police force standing orders. Although an identification parade was conducted, PW6 testified that the Complainant actually met the accused some days before the identification parade was conducted.

DAVID MWITA WANJA AND 2 OTHERS VS REPUBLIC CA 117 OF 2005

The appellants contested identification by 3 witnesses at the scene of the crime and the conduct of the identification parade by the 3 witnesses and alleged mistaken identity.
The Court held" *We have on our part, taken into consideration that this offence was committed at 8 a.m. in broad daylight. We also considered that the appellants approached the Complainant and even exchanged words. In those circumstances we are of the view that the circumstances of identification were good and conducive for identification by the complainant.....We are aware that the evidence of a single identification witness needs to be tested with greatest care; we have done so in this case..... We are also of the view that the complainant's ability to identify all 3 appellants in an identification parade held 2 months after the incident lends credence and assurance to the positive identification....."*

3. MILLER WANJALA MUCHACHA VS REPUBLIC C.A. 2008 KLR
The appellant was convicted of robbery with violence c/s 296 (2) Penal Code.
The appellant contested the Identification parade on 2 grounds; The witnesses had seen him before the identification parade; The ID parade was not in compliance with Force STANDING ORDERS
The Court held,
"We have anxiously considered the issue of Identification.....some witnesses who identified the appellant had seen him in an office before the parade. This made the identification doubtful. We note the numbers were below eight (8) as required of the Forces Standing Orders Paragraph 6 (iv) (d

PROPOSED REFORMS
As earlier mentioned, most identification parades conducted in Kenya has occasioned more harm than protection to the rights of accused persons. It is in light of this that we propose the following reforms that we believe if undertaken will totally change the conduct of identification parades so as to ensure justice is not only done but also seen to be done.

A) The total abolition of the order in the police standing order that requires an identifying witness to touch the shoulder of an accused once he/she has identified him.
This provision is not only stressful for the witness but also aides in exposing the witness to potentially dangerous people who may threaten them. This then creates stressful conditions for the witnesses and may scare the witnesses from identifying the accused for fear of victimization. Reference is again made to the South African case of "The Station Strangler" where the young boy who was a witness never pointed to anyone in the parade probably because of fear and confusion.
In some extreme cases where the nature of the crime leaves the witnesses with a lot of emotional trauma, for instance rape cases, the mere sight of the accused conjures up bad memories and having to touch the accused can be excruciatingly traumatizing for the witness.
A preferable solution is to number the parade members with visible numbers and ask the witnesses to say the number rather than touch the accused.

B) Adoption of the "Sequential System" of Parades.
This is another reform proposal where the parade is carried out in a more sequential manner rather than the lining up of people and asking the accused to identify the accused.
The parade members are presented to the witness individually in a randomized sequence. The witness needs to decide for each person shown, if he/she is the culprit or not. In this way, it is envisaged that the witness will be forced to make an absolute choice about each person seen rather than comparing the people on parade to each other.
Indeed this method has been thoroughly tested and shown to be highly robust and superior to the traditional simultaneous parades. On this issue Annegret Rust writes that: "*Studies have found that the correct identification rate is about the same for sequential and simultaneous parades but that the false identification rate is very significantly lower in the case of sequential parades.*"
With the foregoing in mind, it will be wise to adopt the sequential system of parade as it will ensure the results are free from errors and the cases of "mistaken identity" will be a thing of the past, hopefully."

C) The use of Photographs in place of Corporal Parades.
The time to do away with corporeal parades is now as the country swims into the sophisticated age. This method of using photographs in a well prepared manner enables the witness to be confident and relaxed when identifying the accused persons.
This method offers a variety of advantages. First and foremost is that they protect the identifying witness from coming face to face with the accused/suspected person(s). This removes the aspects of tension and fear among the identifying witness. We once again have to take recourse to the South African case of the Station Strangler where the boy failed to identify the accused probably due to fear. Had it been identifying the accused from photographs. I honestly believe the boy would have identified the accused.

Use of photographs is also more convenient and effective. They are set up faster and the hustle of ensuring that foils are present is greatly reduced.

D) The VIPER (Video Identification Parade Electronic Recording) System
This is another process similar to the use of photographs only that a database system of pictures is used in collaboration with other hi-tech IT equipment. This system is already in use in England and especially the Thames Valley Police are already using it.
In this system however, a suspect's description is entered into the system and then a gallery of images from the database similar to him are displayed. The suspect can then choose which of these images they want to appear with them in which order. A video of the images is then shown to potential witnesses in controlled conditions to see if they recognize the suspect.
Mr. Dave Hill an identification officer has noted the improvements VIPER has brought and in relation to this he commented on an article posted in the internet at
www.thamesvalley.police.uk/news_info/diversity/id-parade.htm as follows, 'A real-life Identification parade can take weeks to arrange and cause the witnesses some distress. This new system saves all that."
Conversely, the level of ICT technology in Kenya may be a limiting factor in employing this method in the country's government institutions since most of them have not been fully computerized.

LESSON 5

PREPARATIONS OF CASE FILES

- Police File
- Advocates File
- Court File

The Police File Sub files

SUB-FILE
'A'
INITIAL REPORT

SUBFILE "A" INITIAL REPORT
The complainant/victim/witness will make a report to the Police station. The report is recorded in the Occurrence Book (OB) the complaint is referred to an officer for investigations. This first report forms the initial report in the police file.
The Police File Sub files

SUB-FILE
'B'
SKETCH PLAN
LIST OF DOCUMENTARY EXHIBITS

SUBFILE "B" SKETCH PLAN /DOCUMENTARY EVIDENCE
In the process of investigations exhibits are collected or produced. The documentary exhibits are official and personal documents and include expert evidence.
The documents vary from case to case. For example, in road traffic cases, sketch plans, road views, and (notice of intended prosecution) NIPs' are recovered.
In murder, robbery or burglary cases, the documents recovered include photographs of the crime scene, recovered stolen items, weapons or dead victims
The Police File Sub files

SUB-FILE
'C'
EXPERTS REPORT

SUB-FILE 'C' EXPERTS REPORT (Expert opinions & Exhibit memo)
In the course of investigations a number of tests and examinations are done. The Investigation Officer will fill the Exhibit Memo form and take the exhibit in question for examination. The exhibit memo form and the expert's report are filed in this sub file. Experts' reports include, doctor's report, postmortem report, ballistic report, document examiner, government analyst report and explosive expert's reports. Each report is accompanied by the expert's statement.
The Police File Sub files

SUB-FILE
'D'
STATEMENTS OF PROSECUTION WITNESSES

SUBFILE "D" STATEMENTS OF PROSECUTION WITNESSES
The Investigation officer will interrogate all persons with information about the crime being investigated. The proposed witnesses will record statements at the Police station and they will be housed in this sub file.

'J'

-MINUTE-SHEET

SUBFILE "J" MINUTE SHEET

The sub-file contains correspondence between police personnel with regard to the case.

ADVOCATE'S FILE

- Instruction note: - It contains a note of the exact action required of the advocate, advocate's name, name and address of the person giving instructions and retainer.
- Client attendance form: - this form indicates name of client, date of attendance, length of time spent attending the client/representative and Purpose (s) of attendance.
- Court attendance form:- It contains date of attendance, length of attendance, file reference, name of client, case number and parties, name of advocate in attendance, counterpart in attendance, name of judicial officer, purpose of the court attendance, instructions for the said attendance, what transpired in court and further instructions as a consequence of the court attendance
- Charge sheet: - after taking the plea (not guilty), the advocate will be given a copy of the charge sheet.
- Bail/bond documents: - if the offence is bailable, then the advocate's file will have the necessary copies of documents necessary for the admittance of the client to bail. They are copies because the originals are deposited in court.
- Legal Opinion/Brief; It is also appropriate for the advocate to render a preliminary legal opinion to client on the strengths and weaknesses of the case. This may be important for out of court settlement.
- Witness statements and documentary exhibits: - on attending court, after taking plea, the advocate would ordinarily apply to court for copies of the statements and documentary exhibits to be relied on during trial.
- *GEORGE NGOTHE JUMA, PETER OKOTH ALINGO. AND SUSAN MUTHONI NYOIKE VS ATTORNEY GENERAL MISC APP 345 of 2001*
- Legal research: After, the lawyer has gathered evidence, legal research is conducted and a list of cases to be relied on during the trial is placed in the file
- Case concept/battle plan; - The advocates file will contain notes on the fact/case analysis of the evidence gathered and the legal principles that apply. The outcome will be the strategy which will be the case concept/battle plan for the trial process.
- Defence case; Copies of reports such as post mortem, ballistic report, finger print, expert report, handwriting expert and all other expert reports should be on the defence files.
- Defence witness statements- defence files must have defence witness statements. Lists of defence witnesses and exhibits should also be on the file. The advocate should have a list of authorities that he intends to rely on while submitting.

COURT FILE

The court file is not prepared in advance. It is opened once a new case is brought to court and the file is opened.

The (physical file) contains the following; (on top of the file)

- Court of arms
- Court names/ place
- Case number/ year
- Names of suspect(s)
- Name of the case/ the charge (s)

Inside the file 1st page, the Court Clerk will indicate

- The date
- Names and rank of judicial officer to conduct trial
- Names and rank of prosecutor.
- Names of Court Clerk

When the court proceedings start, the judicial officer will record the following;

- Names of counsel/advocate (s)
- Names of Interpreter (if present)
- Language used in the proceedings

Applications The first step, the judicial officer conducts and records Plea Taking Proceedings

- ✓ The charge(s) are read from the charge-sheet to the suspect in a language he/she understands
- ✓ The suspect(s) reply is recorded as clearly and directly as possible
- ✓ The Advocates Address-the suspect (s) have an opportunity to make applications to the court or the advocate if represented
- ✓ The Prosecutors Address-The prosecutor will reply to the applications made by the suspect or advocate and the same will be recorded in the court file

The witness's further statement on identification of the suspect will be in this file. The ID parade officer will also record the statement and attach the ID parade form and place it in this sub file.
The Police File Sub files

SUB-FILE
'E'
-CHARGE AND CAUTIONARY STATEMENTS OF ACCUSED PERSONS
-STATEMENT UNDER INQUIRY

SUBFILE "E" CHARGE AND CAUTIONARY STATEMENT, STATEMENT UNDER INQUIRY, STATEMENT OF THE ACCUSED (S)
The Investigation officer will interrogate the suspect on the alleged offence any statement made will be kept in this subfile.
NOTE: Criminal Law (Amendment) Act, 2003 section 99 repealed section 25 of the Evidence Act and inserted Section 25A 'Any confession or admission of fact shall not be proved unless made in court." Criminal Law (Amendment) Act, 2007 section 25A was amended to include statements made by the suspect at the police station in the presence of a representative and the statement be taken by an officer above the rank of Assistant Inspector or statement made in court.
The Police File Sub files

SUB-FILE
'F'
-INVESTIGATION DIARY

SUBFILE "F" INVESTIGATION DIARY
The Investigation officer conducting investigations will interview witnesses and suspects. He will visit the crime scene, hospitals, mortuary, offices, prisons, courts and residences.
The times, dates and places should be clearly indicated and recorded. The events must be accurate as they occurred and will be in this sub file
The Police File Sub files

SUB-FILE
'G'
-COPY OF CHARGE SHEETS AND RELATED DOCUMENTS

SUBFILE "G" COPY OF CHARGE SHEET AND RELATED DOCUMENTS
Upon completion of investigations, the Investigation officer will prepare the charges in a charge sheet and place in this file. During the trial, the charge sheet maybe amended or substituted and such copies will be kept in the sub file.
Section 214 CPC allows the prosecution to amend or substitute the charge sheet anytime before the close of the prosecution case.
The Police File Sub files.

SUB-FILE
'H'
-ACCUSED PREVIOUS RECORDS
-LIST OF EXHIBITS
-LIST OF WITNESSES

SUBFILE "H "ACCUSED'S
PREVIOUS RECORDS, LIST OF EXHIBITS LIST OF WITNESSES
The fingerprint form of the accused will be placed in this sub file.
The Accused person's record will also be in this file. The prisoner's personal effects will be listed in this sub file, documents, watch, wallet, shoes and money
Inventory of items recovered from accused or his home or place of arrest that relate to the case or are deemed to be stolen items will be in this file. List of the witnesses to testify
The Police File Sub files

SUB-FILE
'I'
-COVERING REPORT

SUBFILE " I" COVERING REPORT (I.O (one last to testify — He is the constant person that
This report is by the Officer in charge of investigations giving the chronology of events and conduct of investigations culminating to the decision to charge the suspect and arraign him in court with specific charges. The I/O in giving the findings will cross reference with relevant witness statement and exhibit
The Police File Sub files

SUB-FILE

- ✓ Courts orders- The applications made by the suspect or advocate and reply by prosecutor are recorded and the court makes and records orders on bond/bail, mentions and hearing dates and allocation of courts for the hearing of the case.
- ✓ Any preliminary applications and proceedings made after plea taking and before the hearing of the case will be recorded in the court file.
- ✓ On the hearing date the court will record the proceedings of all parties in the sequence they address the court.

The following are court documents found in the in the Court file;

1. Charge sheet
2. Remand Warrant
3. Bail/bond documents/ cash bail receipts
4. Particulars of surety documents
5. Release order of the Suspect
6. Court Exhibit list
7. Court list of witnesses list
8. Committal documents
9. Copies of warrants of arrest/ summons
10. High Court orders relating to the case

Hearing Proceedings

- Criminal proceedings commence when a suspect is arraigned in court and takes plea. The plea taking process is recorded
- Sections 197, 198 CPC prescribes the mode of taking down evidence. The evidence shall be taken down in writing in a narrative form and the magistrate shall sign that such recorded evidence forms part of the record.
- When the hearing starts the proceedings are recorded of all that is said by each witness, from the oath, examination in chief, cross examination and re-examination thereof and comments made during the proceedings.
- All pages of the proceedings are marked serially except the court rulings and judgment that are marked separately.
- During trial the exhibits are marked and produced but are kept separately from the court file, the documentary exhibits are kept in the registry, and the physical exhibits in the exhibits

COMPLAINT AND CHARGE (Sec 89)

Introduction

In most criminal cases, proceedings commences at this stage i.e. by way of indictment or charge. The formal document is usually referred to as charge in the subordinate courts whereas indictment refers to the form of charge in the High court. The CPC[1] refers to these as charge and information.

What is a charge?

A charge refers to a formal written accusation or complaint against a person (the accused) for an offence known in law. The offence must be provided for in law[2]. It is drawn by a magistrate or a police officer and signed as required by law. Since criminal cases are usually for and on behalf of the Republic, the state is the party to institute the case; namely through prosecutors or state counsels. Therefore the title reads as *republic v. accused*

What is the purpose of the formal charge (rules?)

The Golden Rule is that the charge sheet should inform the accused person in clear and unmistakable terms of the allegations against him in order for him to be able to prepare his defense. This rule is part of the wider requirement of affording an accused person a fair trial. Therefore in *Nashon Marenya V. Republic*[3] the court emphasized on the need for the charge to be clear and unequivocal as a way of avoiding confusion as to what the accused must meet. The court further was emphatic that such confusion cannot be said not to lead to a miscarriage of justice. In the words of Todd J; "*Charges and particulars should be clearly framed so that the accused persons know what they are charged with, and proper references should also be made otherwise confusion may arise, and if confusion arises, it cannot be said that failure of justice may not have been occasioned.*"

The law provides for the manner in which a charge is to be framed. It has three basic parts: commencement, statement of the offence and the particulars of the offence.

Complaint - An allegation that some person known or unknown has committed or is guilty of an offence.

[1] Criminal Procedure Code
[2] Section 77(8) of the constitution
[3] [illegible]

offence - Act, attempt or omission punishable by law

FRAMING OF CHARGE

The manner in which the charge is to be framed is set out in Section 137 of the CPC. The requirements are as follows;

- The statement of offence shall describe the offence shortly in ordinary language. The statement of the offence will include the law creating the offence.
- The particulars of the offence shall be set out in ordinary language. This includes where and when the offence is alleged to have occurred, the subject-matter of the charge and the identity of the accused person.
- Where the charge or information contains more than 1 count, the counts shall be numbered consecutively
- The provisions for statutory offences it shall not be necessary, in a count charging an offence constituted by an enactment, to negative any exception, exemption or qualification
- The description of property in a charge or information shall be in ordinary language and it is not necessary to name the person to whom the property belongs to but the one who was in possession of the item when the offence occurred.
- Where the property is owned by more than 1 person, it shall be sufficient to name one of them with the others or the joint entity.
- Property belonging to a public establishment is described as property of the Government.
- Description of the person whether the accused person, complainant or witness shall be by reference to the full names.
- Any place, time, thing shall be referred to in clear ordinary language.
- The statement of intent is vital and will be referred to, however, the specific intent towards a person shall not be referred to unless it is an essential ingredient of the offence.

Where the charge contains more than 1 count, the counts are to be numbered consecutively. Where the charge has an alternative charge, the same should be so described after the count.

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(i) Statement of the offence

Pursuant to section 137 of the CPC[4] and as part of the well-recognized principle of criminal law, **no person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof prescribed in a written law.** The statement of the offence must contain the offence charged together with the law creating that offence. In cases where the offence is defined in one section and the penalty prescribed in another it is imperative that the two sections be quoted in the charge.

(ii) Particulars of the offence

The particulars required are such as will provide reasonable information as to the nature of the offence charged. This includes where and when the offence is alleged to have been committed, the subject matter of the charge and the identity of the accused and the complainant[5]. In short it should be sufficient enough to disclose the offence.

In **Yozefu & Anor. V. Republic**[6] the court emphasized that the particulars must disclose the offence, and such statement is enough if it contains a precise statement of the incriminating factors as the prosecution seeks to prove at the hearing. As per Spry J A: ***"It is fundamental that every charge should allege all the essential constituents of an offence. In the present case...we think that the allegation that the pieces of skin came from an animal killed in contravention of the Act was an essential ingredient, and its omission makes the charge defective."*** The allegation that "the offence is completed once a person is in possession of a trophy was rejected by the court. From this case it is clear that one needs to understand the offence before one can draw up the charge.

PROBLEMS IN DRAWING CHARGE SHEETS

The following are grounds for defective charge sheets. They are;

1. **Wrong / Non-existent sections of Law** - A charge that contains non-existent sections or wrong sections of the law. The defect is not fatal as under section 382 of the CPC the defect does not cause failure of justice or prejudice to the accused person.
2. **Essential ingredients of offence** - The particulars of the offence should contain essential ingredients of the offence. Lack of particulars and wrong ingredients are fatal to the charge.
   FRANCIS KIMANI MUTHOKO AND ANOTHER VS REPUBLIC C.A 331 OF 2006
3. **Duplicity of charges**; Charging of the same offence in more than 1 count or joining 2 or more offences in the same count except where the law expressly allows the same.

1) Commencement Bio data
- Police case no.
- Date to court
- OB no. --
- First name & fathers name
- Nationality

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4. Criminal Procedure Code
5. Section 137,criminal procedure code
6. [1969] E.A 236

- Examples; Section 46 of the Traffic Act prescribes the offence of causing death by dangerous driving. To prove the charge, the prosecution must prove beyond reasonable doubt that the driving was dangerous due to high speed, recklessness or lack of control of the motor vehicle or lack of proper judgment at the time. Yet, the Traffic Act contains specific offences of reckless driving and leaving the motor vehicle on the road. But these cannot be part of the charge of causing death by dangerous driving. It would be duplex.
- In ***MWADALAFU VS R*** the charge of arson and attempted murder were combined in 2 counts. Yet the facts of the case, there were 2 people, one whose house was set on fire and he ran to the next house which the accused also set on fire. There should have been 4 counts, 2 of arson due to setting the 2 houses on fire, 1 count of attempted murder for A and another of attempted murder for B. The 2 Counts were duplex.
- Where the accused is charged with house breaking, theft and handling stolen property, the charge of handling should be in the alternative and not all bundled together as one charge.

4. **Descriptive provisions**: The main guide to drafting charges is to read the prescribed offences and ensure each charge contains essential ingredients and ensure that the statement of offence discloses an offence and the penalty.
   - There are provisions that are descriptive of the offence but do not constitute the statement of offence; theft is described in section 267 and 268 of the Penal Code. The general offence of stealing is disclosed in section 275 and the penalty thereof. The charge of theft is in section 275 and not the other descriptive provisions.
   - For the offence of robbery, section295 of the Penal Code describes the offence, but the essential ingredients are in the specific types of robbery, section 296 (1) or296 (2) of the Penal Code
   - The offence of obtaining by false pretences is described in section 312 but the essential ingredients are in section 313 Penal Code.
   - The charge of handling stolen goods c/s 322 (1) gives the essential ingredients of the offence, yet the penalty is in section 322 (2) of the Penal Code. The charge would include both 322 (1) and (2).
   - Similarly in murder cases sections 203 and 204 of the Penal Code are combined in the statement of the offence.

5. **Alternative Charges**; Usually in the course of investigations, the evidence will disclose various offences from the same set of facts and sometimes due to the time span and other intervening circumstances it is not clear cut what specific offence was committed. Therefore, the investigating officer will draft the main charge and another one that may be possibly proved by the same facts incase the first charge fails.
   Examples of these are;
   - The offences of theft, house-breaking, burglary and robbery, where recovery of stolen goods or suspected stolen goods are found on the suspect or with him/her at the time of arrest, depending on the specific circumstances of the case. the main charge is followed by the alternative charge of handling stolen goods. The alternative charge is lesser in gravity, seriousness and punishment than the main charge.
   - The offences of rape or defilement are usually accompanied by the alternative charge of indecent assault.
   - The offence of obtaining by false pretences c/s 313 of the Penal Code may be followed by an alternative count of stealing under section 275 of the Penal Code.
   - Where there are alternative counts, the trial court will make a finding on the main count and discharge/acquit the accused of the alternative charge or discharge /acquit of the main charge and decide on the alternative count, or acquit on both the main charge and alternative. What is not permissible in law is to convict on both the main charge and the alternative charge.
   - NOTE; where the alternative/ lesser charge is not included in the c/sheet the trial court may convict on the lesser charge if it proved by the facts and evidence adduced in court. Section 179 CPC;
   - States "when a person is charged with an offence and facts are proved which reduce it to a minor offence, [the accused] maybe convicted of the minor offence although he was not charged with it."

DUPLICITY OF CHARGES

Black's Law Dictionary *defines duplicity as charging of the same offence in more than one count of an indictment or the pleading of two or more distinct grounds of complaint or defense for the same issue.* It further states that in criminal procedure this takes the form of joining two or more offenses in the same count of an indictment.

It is a legal requirement that a charge should not suffer from duplicity. Duplicity occurs where the charge or count charges the accused of having committed two or more separate offences[7]; it is said to be duplex and barred for duplicity. Duplicity can be avoided where a statute creates offences in the alternative, **Section 86 of the Traffic Act provides for offences created in the alternative** e.g. causing death by driving a motor vehicle:

a) driving recklessly;
b) Driving at high speed.
c) Driving in a manner dangerous to the public.
d) Leaving the motor vehicle on the road in a manner dangerous to the public.

All these are stated in the alternative so that you cannot be charged of two or more but only one of the alternative.
A count charging the accused of causing death by driving the motor vehicle recklessly and at high speed is duplex. The charges should be expressed in the alternative:

Mwamdalafu v R[8] The appellant was charged with the alternative counts of the offence of arson and attempted murder. The particulars of the charge of arson alleged that the appellant had set on fire two houses, one belonging to A and the other belonging to B. The houses stood more than 100 yards apart.
He was charged with one count of murder and one count of arson. The particulars stated that he attempted to cause the death of A and his wife by setting on fire 2 house one A's and the other B's. Evidence showed that the appellant had attempted murder on 2 occasions. The first, he burnt A's house and when A took refuge in B's house, he burnt B's house as well. The question was whether there was duplicity.

It was found that yes there was duplicity, with respect to the arson charge as there were two offences arising from two acts of arson. Secondly, there was also duplicity with respect to the attempted murder hence there ought to have been two charges off attempted murder. Thirdly, the attempted murder counts should be framed in the alternative. There ought to be four counts and not two but the second attempted murder count should be in the alternative.
In **Saina v R**[9], The appellant was charged on a single count with the offence of housebreaking, theft and handling stolen property. He was convicted but on appeal the High Court found the charge barred for duplicity. It was found that one count charged 3 separate offences i.e. shop breaking contrary to section 306(a) of the penal code, handling stolen goods contrary to section 322 of the penal code. It was forth held that each offence should be set out in a different count. The charge of handling stolen property is in the alternative.

In **Bhatt v R**[10], The appellant was charged with being in possession of obscene material, contrary to section 181(a) of the penal code. It was alleged that the appellant for the purpose of or by way of trade for the purpose of distribution or public exhibition had in his possession 37 photographs of an obscene nature which could tend to corrupt the morals of any person etc. **Section 181**[11] talks of alternative purposes.
It was held that (on appeal) the particular motive why the appellant had the photos should have been averred to the purposes. It was wrong for the charge to refer to many purposes. The averment of several purposes made the charge barred for duplicity. Each of the several particulars set out in the charge constituted a separate offence. Charging the accused in this manner prejudices his defense.
In **Koti v R** [12], the appellant was charged and convicted of wrongfully attempting to interfere with or influence witnesses in a judicial proceeding either before or after they had given evidence contrary to section 212 (1) of the penal code. On appeal, it was held that the charge was duplex, i.e. it charged with two offences; interfering with the witness before and after. They should state if it was before or after. If it was before and after there should been two counts. Duplicity is allowed in certain circumstances. There are exceptions to the general rule that count should not charge an accused with more than one offence.

Exceptions to the General Rule

1. **Where the form of preferring a charge is allowed by statute.** The second schedule of the CPC authorizes charging of 2 offences in one count in respect of:
    a. The offence created under section 330 of the Penal ode in respect of false accounting;
    b. Second schedule authorizes offences creates under the section 304 and section 379 i.e. burglary and stealing. Form 9, in the second schedule.

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7. Archbold JF: Pleadings, Evidence and Practise in criminal cases, London, Sweet and Maxwell (5th ed), 1962 at page 53
8. [1966] EA 459
9. [1974] EA 83
10. (1960)
11. Criminal procedure code
12. (1962) EA 439

In **Pope V R** [13] the accused was charged with fraudulent accounting false accounting contrary to section 330(a) of the penal code. In the particulars it was alleged that he falsified or was privy to the falsifying of a document .He was convicted. On appeal he argued that the charge was bad for duplicity because it charged two offences in one count. The court of appeal held that the charge was not duplex for it only charged one offence and was in the form authorized by the second schedule to the criminal procedure code.

2. **Where the separate offences are charged conjunctively using the word 'and' as opposed to 'or' if the matter relates to one act.** In Gichinga v R the appellant was charged with driving a car recklessly. In the particulars, it was stated that he drove in a reckless manner and at a speed which was dangerous to the public having regard to all the circumstances of the case contrary to section 86 of the Traffic Act.[14] The Act employs 'or' rather than 'and'. The magistrate acquitted the accused because of duplicity as it alleges the commission of two offences. On revision by the high court, it was held that the charge was not duplex and it had been expressed conjunctively and it referred to one incident or act i.e. appellants manner of driving at the relevant time. If it had been expressed using the disjunctive OR. In a. reckless manner or at a high speed it would have been duplex.

Effects of Duplicity

The law is not clear. There are two opposing views:

1. **One view holds that duplicity is an incurable defect which can be cured by amending the charge hence if found to be duplex, the accused should be discharged.** This was seen in **Cherere Gukuli v R** [15]and followed in **Saina v R**[16]. Those who subscribe to this position hold that a count which charges for two counts is barred for duplicity and a conviction based on it can not stand. In **Kasyoka V R**[17], the charge sheet read that the accused had dishonestly "received or retained" a cheques knowing or having reason to believe it to have been stolen. The appellant had been convicted of among other offences handling stolen property contrary to section 322(2) of the Penal code[18]. The state argued that the fact that a charge was defective was not necessarily fatal to a conviction or charge the real test being whether the accused was able to understand the charge. **Held** the appellant was convicted on a duplex charge and no one can state for sure which of the two offences was committed.

2. **The other view holds that the true test should be whether injustice or prejudice has been occasioned on the accused by the duplicity so that where the accused suffers no prejudice; conviction of duplicity should stand.** This school relies on section 382 CPC which provides for finding of a sentence or order issued by a court should not be reversed or altered on appeal or revision on account of error, omission or irregularity in the charge unless the error, omission or irregularity has occasioned a failure of justice. This school of thought was followed in:

Kababi v R[19]. The appellant was charged in a single count with causing the death of three persons by dangerous diving. He was convicted. He appealed, challenged the decision of the court that it was based on a barred charge. It was held that the failure to charge or to file three separate counts did not occasion injustice though there was duplicity. The conviction was upheld.

Koti v R[20]: Appellate court found the charge was duplex but declined to interfere because it did not occasion any injustice. It was held that the test in deciding whether a failure of justice had occurred was whether the accused had been prejudiced in his trial.

Mwandalafu v R[21] : the appellate court found that the arson charge was duplex but that it did not occasion any injustice. The court relied on section 382 of the Tanzania Criminal Procedure Code.

Mwangi v R[22] In this case, the appellant had been found in possession of a firearm stolen thirteen months earlier when he was in prison. He had been convicted on a single charge of being in possession of the revolver and the ammunition without a firearms certificate and of receiving the revolver knowing it to have been stolen. The appellate court found that the charge was duplex but that it had occasioned no injustice. **Bennet J** opined that the firearm and the ammunition could be charged in one count.

CAPITAL CHARGES

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13. (1960) EA 132
14. Cap 404 Laws of Kenya
15. (1955) 22 EACA 478
16. [1974] EA 83
17. (2003)KLR 406
18. Cap 63 Laws of Kenya
19. (1980) KLR 95
20. (1962) EA 439
21. [1966] EA 459
22. [1974] EA 83

A capital charge is a formal written accusation of an offence drawn by a magistrate or by a police officer and signed as required by law for the purpose of use in preliminary proceedings or in a proper trial. It lays against all persons who actually commit, who procure or assist in the commission of any crime or who knowingly harbor a felon.[23]Accordingly a capital charge refers to a formal written accusation drawn against a person who if found guilty will be liable to face the death sentence.

Framing of capital charges

The Criminal Procedure Code at *Sec.135 (1)* makes provision for the joinder of counts. It provides that: *"Any offences whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or similar character."*

Despite the above provision, in framing a capital charge the general rule of practice is that no other count should be joined to a count which carries a death penalty in the event of conviction except where the additional count is based on precisely the same facts as the more serious charge. In line with this, the Court of appeal has long held that it is undesirable to charge an accused person on more than one charge of murder.[24]That rule has been followed in subsequent cases. Furthermore, the same court has also laid down that a charge of murder ought not be laid with a count of another offence.[25]

In the case of **Yowana Sebuzikira**[26] The Court of Appeal upheld its ruling that there should be no departure from the established rule of practice that no other count should be joined to a count of murder or manslaughter, except where the additional count is based on precisely the same facts as the more serious charge.

With regard to robbery with violence, the case of **Wanjala & another v. R** applies. In that case the appellants were charged with two charges of capital robbery which was a departure from the general rule but the Court of Appeal was of the view that no prejudice could have been caused to the appellants as the robberies formed part of the same transaction and the evidence in support of one charge was relevant to the other.

In the case of treason, whether the same rule applies is a matter of conjecture. In practice, however, the treason charges brought in Kenya have not contravened this rule. It is noteworthy, however, that in a treason charge, apart from alleging the particulars of the offence, the prosecution must also state the overt acts in the information. For instance, in the case of **R v. Raila Amolo Odinga & two others** the treason charge was drafted as follows:

CHARGE SHEET

Count 1

Statement of Offence

Treason contrary to Section 40(1) (a) (iii) and (b) of the Penal Code

Particulars of Offence

1. RAILA AMOLO ODINGA AND 2. OTIENO MAK-ONYANGO.
   On diverse days between THE 15TH DAY OF July 1982 and 1st day of August 1982, in Kenya, being persons owing allegiance to the Republic of Kenya, jointly compassed, imagined, invented, devised or intended to overthrow by unlawful means, the government and expressed, uttered or declared such compassings, imaginations, devices or intentions by the following overt acts or deeds:
   OVERT ACTS- RAILA AMOLO ODINGA AND OTIENO MAK-ONYANGO
   1. RAILA AMOLO ODINGA: In mid-July, 1982 at Nairobi loaned Senior Private Hezekiah Ochuka his Peugeot 504 Registration Number KVZ 642 to assist him in making preparation to overthrow the government.
   2.RAILA AMOLO ODINGA: On or about 18th day of July, 1982 visited the house of Senior private Hezekiah Ochuka at Umoja estate in Nairobi and discussed plans to overthrow the government with Senior Private Hezekiah Ochuka and others
   3.OTIENO MAK-ONYANGO: On or about 20th day of July, 1982 inspected the house of Albert Vincent Otieno at Ngong Road in Nairobi with a view to obtain the use of the house as Command Headquarters for a group planning to overthrow the government.

The requirement that overt acts be stated in the information is intended to avoid uncertainty in such a serious and sensitive charge so as to enable the accused to prepare his defense. Further, it has been submitted that the reason for the requirement that no other count should be joined to a capital count is that

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[23]. Dr. P.L.O. Lumumba(2005)A Handbook on Criminal Procedure in Kenya, LawAfrica Publishing (K) Ltd,Nairobi,48
[24]. Mongolia v. R [1934] 1 EACA 152
[25]. Valezi Kashiza v. R [1954] 21 EACA 389
[26]. [1965]EA 685

such a charge is so serious and complicated that the defence ought not to be embarrassed by the necessity of dealing at the same time with other matters, whether of equal or of minor gravity.[27]

In cases where an offence is created by one section of the law and the punishment is provided for in another section, it is the practice to specify in the count both the punishment and the section creating the offence. This is the practice in murder cases. In **Pitalis Oval Mambia v. R,**[28] the appellant was charged with murder which was expressed in the following terms:

Statement of offence

MURDER- contrary to Section 204 as read with 203 of the Penal Code.

PITALIS OLAL MAMBIA: On the 19th day of June,1984 at Wang'aya sub-location, South West Kano Location in Kisumu District of the Nyanza Province, Kenya, Murdered Morris Babu....

The rule that it is better to specify in the count the punishment section rather than the definition section has a long history.[29]

ALTERNATIVE CHARGES

This is a charge preferred against the accused person instead of the former charge(offence).This is justified in circumstances where the factors attending the offence in question are not very clearly focused with the consequence that it is not easy to discern which offence was actually committed. The rule relating to duplicity prohibits a situation whereby two substantive offences are charged under the same count and ordinarily even in cases where one charge has several counts to it, it is a mandatory requirement of the law that the counts should be set out separately and the two should be numbered consecutively.[30]

A good example is where a person is thought to have stolen property contrary to section 275 of the penal code yet the prosecution is not certain that the accused actually stole .In this scenario, the alternative of handling suspected stolen property contrary to section 322 of the penal code may be preferred against the accused.

In **Bennault Oinamo V R (KLR HCK)** the appellant was charged with unlawfully obtaining credit by false pretences and on appeal it came to light that the offence with which he was charged with could not amount to a false pretense in law but there was evidence that might have supported obtaining credit by means of fraud other than by false pretenses.

The High court ruled that in those circumstances the prosecution should have laid two separate charges namely, one by obtaining credit by false pretenses and two by obtaining credit by fraud other than by false pretenses.

It is also proper to charge in one count the offence of incitement to violence with an alternative charge of creating disturbance in a manner likely to cause a breach of peace .However the trial court is not in law permitted to make a finding on the alternative charge when a finding has been made in the main charge (this was held in the case of **Wainana V R**[31])

In **Kigen Arap Chemoiwa V R**[32], the court determined that if the prosecution is in doubt as to whether the accused has completed an offence, it is desirable to charge him with an attempt of the completed offence because it is always open to the trial court to convict on an attempt upon a charge of the completed offence. Alternative charges may be waived if the offence preferred arose from one transaction

In **R V Chow (1965) 1QB 598**, an English court considered that where a statute creates two rather than three offences that is (recklessly or dangerously driving) held that "even if there are separate offences, it is impossible to charge them conjunctively if the matter relates to one single incident. From the foregoing, it is clear that alternative charges are a means to the end of achieving justice, without the mischief of duplicity.

CONSPIRACY

Definition of Conspiracy given in the case of Crofter **Hand Woven Harris Tweed Co Ltd V Veitch,** Viscount L.C said: ***"Conspiracy when regarded as a crime is an agreement of two or more persons to effect any unlawful purpose . . . and the crime is complete if there is such agreement."***

There can also be conspiracy to do a lawful purpose by unlawful means. Conspiracy is an inchoate offence. **Inchoate; meaning just begun or undeveloped.** Inchoate offences permit intervention at an earlier stage before any harm has been done but where the accused begins to manifest his criminal intention overtly.

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[27] Alkaeli v. R

[28] Criminal Appeal No.206 of 1987, C.A, Kisumu

[29] Cosma s/o Nyadago v. R [1955] 22 EACA,450 (C.A)

[30] Lumumba PLO, A handbook in criminal procedure in Kenya (Law Africa, Nairobi 2005) pg.62.

[31] (1973) E.A 182 (ILCK).

[32] (1962) E.A 684 (SCK).

For the actus reus, parties must have at least reached a decision to carry out the unlawful object. However reaching an agreement /decision is essentially a mental operation, though manifested by some acts of some kind. What has agreed to be done and not what in fact has been done. Section 393 of the Penal Code [33] states: "***Any person who conspires with another to commit any felony or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable if no other punishment is provided to imprisonment for seven years, or if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years then to that lesser punishment.***"

Common Elements

- Agreement: There must be an agreement between two or more persons to effect the particular prohibited purpose. The agreement could be express or implied. In the case of **R v Karia,** [34] it was held that the existence of an agreement may be inferred from the facts.
- The offence of conspiracy is complete as soon as the parties agree to effect the unlawful purpose. Conspiracy will continue to subsist as long as they agree. It will only terminate on its completion by performance or by abandonment or frustration.
- One can join the existing conspiracy (i.e. become party to it and it is not necessary for all the parties to a conspiracy to be in contact with each other. What is necessary is that all parties to a conspiracy have a common purpose communicated to at least one other party to the conspiracy.
- There must be at least two parties to the agreement but the other need not be identified. If all the other conspirators are acquitted, the one remaining conspirator must also be acquitted.
  In the case of **Mawji v R,**[35] the Privy Council held that the English rule that a husband and a wife could not commit conspiracy applied to all valid marriages, including polygamous marriages. In conspiracy both husband and wife are regarded as one person.

Under Section 394 of the Penal Code, "***Any person who conspires with another to commit a misdemeanor, or to do any act in any part of the world which if done in Kenya would be a misdemeanor and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanor'.***

Section 395 deals with other conspiracies. It states: **"Any person who conspires with another to effect any of the purposes following, that is to say-**

a) **To prevent or defeat the execution or enforcement of any written law; or**
b) **To cause injury to the person or reputation of any person or to depreciate the value of any property of any person; or**
c) **To prevent or obstruct the free and lawful disposition of any property by the owner thereof for its fair value; or**
d) **To injure any person in his trade or profession; or**
e) **To prevent or obstruct by means of any act or acts which if done by an individual person would constitute an offence on his part, the free and lawful exercise by any person of his trade, profession or occupation ;or**
f) **To effect any unlawful purpose; or**
g) **To affect any lawful purpose by any unlawful means is guilty of a misdemeanor.**

An example of a criminal conspiracy to make lawful protests by unlawful means was seen in the case of **R v Zulu**[36]. In this case the accused was charged with conspiring to injure the Ndola Municipal Council in its trade contrary to the Zambian Penal Code, by urging people to boycott its beer. The court held that it did not matter that the ultimate object of the accused was to make a lawful protest, if they did this by employing unlawful means, i.e. boycotting to cause financial injury to the Council.

Under Section 317 of the Penal Code, Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold or to defraud the public or any other person whether a particular person or not, or to extort any property from any person is guilty of a misdemeanor and is liable for imprisonment for three years.

In the case of **Scott V Metropolitan Police Commissioner,**[37] D agreed with the employees of cinema owners that in return for payment, they would abstract films without the consent of the employers or owners of the copyright, so that D could make copies and distribute them for profit. The Court held that D was guilty of conspiracy to defraud. The House of Lords said:

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[33] Cap 63, Under Chapter XLI Section
[34] R v Karia 16 E.A.C.A 116
[35] Mawji v R
[36] R v Zulu [1961]R.&N.645(N.R)
[37] [1975] AC 819[1974]3 All ER 1032

" an agreement by two or more by dishonesty to deprive a person of something which ... or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his suffices to constitute the offence of conspiracy to defraud"

The general rule of practice is that it undesirable to charges offences of conspiracy where specific offences are available. This position is mainly for two reasons; first is because conspiracy has matured into a known specific offence hence preferable to charge the offence disclosed by the evidence[38].; secondly, in a charge of conspiracy, there has to be at least two accused persons. It has held to be improper to join other offences to a charge of conspiracy especially where the conspiracy charge covers the substantive offences.[39]

JOINDER OF CHARGES/COUNTS

The legislative cushion upon which several counts may be joined Sec. 135(1) of the CPC

This provision was judiciary interpreted in the case of **Ralph V Dalip Singh** [40] the appellant had been charged jointly with another with the theft of property belonging to the Kenya Uganda Railway and convicted of conveying stolen property. In the second count the appellant was charged alone and convicted of bribing a police officer in order to procure the release .It was adduced in evidence that the bribe had been given very shortly after the arrest of the two men. On appeal, it was argued on behalf of the appellant that there had been misjoinder of offences because theft and bribery were not offences of a similar character. It was held that although the two offences were different in character, they were founded on the same facts as the evidence clearly demonstrated that the bribe was offered within a very short time after the appellants were had been arrested..

This demonstrates that it is not necessary that the offences are of the same character and nature as a condition precedent to their inclusion in one charge under different counts. The above is true notwithstanding **sec.135(1) which provides** ***"any offenses ,whether felonies or misdemeanors may be charged together in the same charge or information if the offences charged are founded on the same facts ,or form part of a series of offences of the same or similar character"***

In **Kamwana s/o Mutia V R**[41], the question which arose was whether the trial would be a nullity where there was a joinder of counts for dissimilar offences in one charge sheet. The appellant appealed against conviction and sentence on three counts involving "theft", "breaking and entering premises", and "possession of bhang." The fourth charge was not treated as an issue at the trial but when the appellant had been convicted on the other three counts, he asked that this offence be taken into consideration whereupon the magistrate purported to convict him of this offence and composed for it a separate sentence.

On appeal, the supreme court of Kenya held that the count charging the appellant with possession of bhang shouldn't have been included in the same charge sheet with the other three dissimilar counts ,but since no injustice resulted from the improper joinder, the trial of the other three should not be treated as a nullity

So long as the anomaly of misjoinder does not occasion an injustice courts are ready to disregard the impropriety of technicalities and deal with substantial justice. This position prevails even in English courts .In R v M (1938)[42] the appellant was convicted upon an indictment which charged four offences. 2 of rape of a young girl on 2 occasions, a third of stealing from the girl's father and a fourth of indecent assault on a married woman. He appealed on the ground that the two charges of rape and indecent assault should not have been tried together. However, the court only ruled as to the desirability of the two dissimilar offences being tried and charged separately and upheld the conviction noting that the impropriety did not occasion a miscarriage of justice to the accused.

JOINDER OF PERSONS

Section 136 of the Criminal procedure Code spells out the circumstances under which persons may be joined as co-accused persons. Persons who join in the commission of an offence may in law be jointly indicted for it or each of them may be indicted separately.[43]

In **Nathan V R** [44] the appellant who was a travel agency proprietor was charged together with a public officer on a number of counts. He was convicted on one count of wrongfully and corruptly giving money to a public officer. The officer was convicted in the same trial for receiving the said bribe. On appeal, it was held by the East African court of appeal that there had been no such misjoinder as the concatenation of events was uninterrupted and therefore the offences constituted the same transaction.

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[38] Procedures in Criminal Law in Kenya by Momanyi Bwononga
[39] Uganda V Milenge & Anor (1970) E.A 269 (CA)
[40] 1943 1 EACA 121
[41] (1952) EA 471
[42]. 2 ALL ER 516
[43]. Criminal Procedure in Kenya by PLO Lumumba at page 64
[44]. [1965] EA 777

In **Yakobo Uma and another V R**[45] , the two appellants were charged and tried jointly for the offence of "doing an act intended to cause grievous harm" Only the first appellant was charged on the second account. The allegations in the particulars showed that the incident involving the first appellant occurred on a different date and place and with a different weapon from the one said to involve the second appellant. The complainant was however the same in each count. On appeal, Sir Udo Udoma CJ ruled that the charge as laid down was bad in law for misjoinder.

AMENDMENT OF CHARGES

Sec 214(1) of the C.P.C Provides where at any stage of a trial before the close of the prosecution case, it appears to the court that the charge is defective either in form or substance, the court may order for its amendment to bring it in line with required style. Once the charge has been amended, an accused person should be called upon to plead to the amended charge. However, a simple variance between the charge and the evidence adduced (for Example with respect to the time for which the alleged offence was committed) is immaterial and the charge need not be amended, especially if it is proved that the proceedings were instituted within the time (if any) limited by law for the institution thereof..

Sec 275 (1)[46] provides for the amendment of information, every objection to information for a formal defect on the face thereof shall be taken immediately after the information has been read over to the accused. When information is amended a note of the order for the amendment shall be endorsed on the information and the information shall be treated for all purposes of the proceedings as having been filed in the amended form as provided in Sec 275(3)[47].

Where such an amendment is made, the accused shall be required to plead afresh to the charges. **The court is thus required to inform the accused of his right to plead to the new charges and also to recall any of the witnesses who have already given evidence for the prosecution for purposes of cross examination in light of the amended charges**. The purpose of this is to give the accused an opportunity to prepare his defense in the light of the amended charge.

The position at Kenyan law is that the courts can amend the charge in the course of a trial but this should be done at the earliest opportunity before the close of the prosecution case.[48]

However some East African cases suggest that an amendment can be done even after the close of the prosecution case. In **Maulidi Abdalla Change V R**[49] a charge was amended at the close of the defence case with the result that a new charge with a heavier penalty was introduced. Sir Ralph Windham stated *inter alia* that a charge can be substituted even after the close of the defence case, but the substituted charge can only be allowed if it will not occasion injustice to the accused person.

In **Benjamin Sauzier VS R**[50], the appellant appealed against his conviction of attempted arson. The appeal was dismissed but the appellate court commented on the aspect of amending the charge even after the prosecution case .In this case, at the end of the prosecution, the evidence had disclosed attempted arson only. The trial judge then upheld a submission of no case to answer, but having regard to the provisions of the C.P.C ordered that the charge be amended to attempted arson and took the appellants plea on the amended charge.

The court held inter alia that it is not necessary to amend a charge of committing a full offence in order to convict an accused person of an attempt. However, in amending a charge, the court is not entitled to make a new case other than the one put forward by the prosecution.

CAN A CHARGE BE AMENDED AFTER CLOSURE OF THE DEFENCE CASE?

1. THE CONSTITUTION OF KENYA.

Section 77(1) *"If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing....."*

2. THE CRIMINAL PROCEDURE CODE, CAP 75 OF THE LAWS OF KENYA.

Section 214 –This section governs amendment of a charge before the close of the case for the prosecution and provides that the court may order for the alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge.

The CPC does not expressly state whether a charge can be amended after closure of the defence case. However, the CPC treats charges and information as one and the same. [See Sections 134 -137] Indeed, Section 137 requires charges and information to be framed in the same way. It logically follows, therefore, that Section 275 (2) of the CPC can apply to charges. It reads; "**Where, before a trial upon information**

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[45]. [1963] EA 542
[46]. Criminal procedure code
[47]. Criminal procedure code
[48] Section 214 CPC
[49] (1964) E.A122.
[50] (1962) EA 50

or at any stage of the trial, it appears to the court that the information is defective, the court shall make an order for the amendment of the information as the court thinks it necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and any amendments shall be made upon such terms as to the court shall seem just."

That is what happened in Modakaa vs. Republic [2000] KLR 411. In this case, the Appellant was charged in the High Court with three counts of murder. In each count, the Appellant was not named in the particulars of the charge although on the heading of the information, his name appeared in full as Fanuel Hewasis Madokaa. The better practice in framing a charge is to set out the name of the accused in full in the particulars of the charge. The prosecution applied to substitute the charge sheet on the ground that there was an error in the way the old charge sheet was drawn. This was allowed. On appeal against conviction the Court of Appeal upheld the Trial Court's decision to allow amendment of the charge and stated that amendment of a charge will take place upon an order of the court only where there is a defect in the charge. The court further drew attention to Section 275 (2) of the CPC. Clearly, the court did not find it difficult to use the terms "charge" and "information" interchangeably.

3. CASE LAW

It has to be noted that amending a charge after the closure of the defence case is rare and consequently case law on the same is rare. However, the landmark case is:

MAULIDI ABDULLAH CHENGO VS REPUBLIC [1964] EA 122.

FACTS

The Appellant was charged with stealing by servant i.e. that he stole his employer's clothes from the latter's house, in which he was a house servant. The prosecution evidence, which the Magistrate accepted, was ample to support a conviction. The employer gave evidence that he had locked the house and had returned to find the door broken. The evidence was thus also sufficient to support a conviction of housebreaking and theft.

A week after the defence had closed its case, the Magistrate amended the charge to housebreaking and stealing noting that "It is not too late for me to amend the charge.....and this can be done without injustice to the accused." The Appellant was informed that he had a right to recall any or all of the witnesses. The new charge carried a more severe penalty than the original charge. The Appellant was then convicted of the new charge. He appealed.

ISSUE

Under what circumstances can the court amend a charge after the closure of the defence case?

APPLICABLE RULES OF LAW

1. To be capable of amendment, the original charge should be defective.
2. The amendment should not occasion injustice to the accused.

HOLDING

1. The original charge was not defective merely because the evidence adduced would also support another charge for a different offence.
2. The substitution at such a late stage of the charge of housebreaking and theft could not be said to have been made "without injustice" to the Appellant.

THE COURTS ORDER

Appeal allowed. Convictions of housebreaking and theft quashed and sentences set aside. Conviction of stealing by servant substituted.

COMMENTS

In this case, it was never in doubt as to whether the court could amend the charge after the close of the case for the defence. Indeed the question was: "In what circumstances could the amendment of a charge after the closure of the defence case occur?

It is clear from the ruling that to be capable of amendment, the original charge should be defective, the amendment should not occasion injustice to the accused, and where those two conditions have been satisfied, the accused must be allowed to recall any or all of the witnesses.

In the earlier case of Rex vs. Pople and Others [1951] 1 KB 58, the Accused persons were indicted on counts of obtaining certain amounts of money by false pretences from a building society. At the close of the prosecution objection was taken that there was no evidence to support those charges. The prosecution applied for leave to amend those counts by altering in each count the sum of money to "a valuable security, to wit, a cheque for" the same amount. The trial judge granted the application. The Defendants appealed on the ground, inter alia, that the Judge had no discretion under the Indictments Act, 1915, s.5 subsection 1, to allow that amendment. HELD; Appeal dismissed. Section 5 (1) of the indictments Act was clear that " where, before trial or at any stage of a trial it appears to the court that the indictment is defective,

PLEAS

INTRODUCTION

The plea is the commencement of the trial process in criminal proceedings. Once the charge sheet is drawn with the relevant charges, it is presented in a court of law and the suspect(s) are also present for plea taking.

This is an important stage of the proceedings as it is at this forum that the parties to the criminal proceedings state what the subject-matter of the case is or will be in open court. ✓

It is also important that the suspect(s) understand the charges leveled against them before they can decide on the next option to take.

PLEATAKING PROCESS

The plea-taking process is clearly laid down in Section 207 of the Criminal Procedure Code which states as follows;

1. The substance of the charge(s) shall be read to the accused person [in a language he understands and include the ingredients of the offence], he shall be asked whether he admits or denies the truth of the charge.
2. If the accused person admits the charge(s) [unequivocally] the admission shall be recorded as nearly as possible in the words used by him.
3. The Court shall be informed by the [prosecution] or the court may require the complainant to outline the facts upon which the charge was founded. The prosecution will state the facts upon which the offence is based. The accused person is given an opportunity to admit/dispute/ explain or add any facts. If the accused person denies the facts, a plea of not guilty is entered on the court record.
4. If the accused person admits the facts that gave rise to the charge[unequivocally], then the court will convict the accused person on the charges admitted.
5. On the basis of the plea, the court will be addressed on the accused person's record by the prosecution
6. The accused person will mitigate
7. Then the court will pass sentence
8. If the accused person does not admit the charge [a plea of not guilty shall be entered in the Court record] and shall proceed to hear the case
9. If the accused person refuses to plead, the court shall order plea of not guilty entered for him.

The procedure of dealing with a plea of guilty is set out in.

ADAN VS REPUBLIC (1973) EA 445
KARIUKI VS REPUBLIC (1984) KLR 809

In compliance with the prescribed procedure in section 207 of the Criminal Procedure Code

TAKING THE PLEA

The Plea taking process contains 4 elements;

- Appearance or arraignment in court by the suspect(s)
- Formal statement (Charge sheet)
- The substance of the charges read to the accused persons
- Response of the charges by the accused persons are made

The court is required to state the substance of the charge to the accused person.

The reading of the charge:

The trial commences with the reading of the charge. The accused person has a constitutional right under section 77 of the Constitution; to be informed in a language he/she understands the substance of the charge.

Where he does not understand the language of the court, he is entitled without payment to an interpreter. The charge contains specific offences known in law and the necessary particulars and

information as to the nature of the offence charged. No person can be convicted of a criminal offence unless the offence is defined and penalty prescribed by written law (Section 77 (8))

Under the Constitution, the prosecution of criminal cases is vested in the Attorney General. Section 26 of the Constitution is instructive; the Attorney General has the power to institute proceedings, takeover ongoing proceedings, withdraw proceedings. Section 85 (1) empowers the Attorney General by notice in the Kenya Gazette to appoint public prosecutors. Therefore the prosecution of cases is by duly appointed prosecutors.

PROCESS

It is a fatal blunder not to explain to the accused person all the ingredients of the charge.

CHARO VS REPUBLIC 1982 KLR 308

Police officers searched the appellant's home and found a television set that had been stolen. He did not have a receipt or permit for it. He was charged with being in possession of suspected stolen property c/s 323 of the Penal Code.

When plea was taken, he pleaded guilty to the charge and was convicted and sentenced to 1 year and 6 months imprisonment. On appeal, his advocate submitted that the facts did not support the charge as the appellant was not given a chance to defend himself as to how he came to be in possession of the TV as required in section 323 of the Penal Code.

The facts must support the charge and all ingredients of the charge read and understood by the accused. The appeal was successful.

WAINAINA VS REPUBLIC C.A. 1986

The appellant was convicted on 7 counts of causing death by dangerous driving c/s 46 of the Traffic Act and 1 count of failing to comply with Road Service License. To the 7 counts, he pleaded to each of them as follows;

"It is true I caused death by dangerous driving"

""It is true. I admit all the facts narrated by the prosecution."

On appeal, the appellant's advocate told the court, that the 8 charges did not amount to pleas of guilty as the ingredients of the charges; " in a manner dangerous to the public " is complex to appreciate and the appellant did not admit the essential ingredient of fault on his part. Secondly, dangerous driving is capable of diverse interpretations.

The respondent stated that there was no appeal against sentence, the facts outlined at the trial were accepted by the appellant, and viewed objectively, disclosed an element of dangerous driving. The appellant understood the charges and pleaded guilty unequivocally.

Court held;

- There was evidence that the charges were read out and the ingredients explained and then interpreted to the appellant and he must have understood the charges before he replied to them.
- There was no evidence that he disputed the facts or sought to assert other facts. Appeal dismissed.

Where the advocate represents the accused person, the accused person must personally plead to the charge; his lawyer cannot plead for him, on his behalf.

PLEA OF GUILTY

When the accused person (s) plead guilty, the Court must record the admission as nearly as possible in the words used by him/her

KARIUKI VS REPUBLIC (1984) KLR 809

The Accused person was charged with 4 others with importing goods contrary to the Customs and Excise Act. The charges were read to all accused persons. After, the prosecutor narrated the facts, the court record stated as follows;
"Accused 1 story is correct
Accused 2 do
Accused 3 do
Accused 4 do
Court - plea of guilty entered"

The court record did not contain the Accused person's answer to the charges. It was not clear from the record which counts the appellant pleaded to. The irregularities and omissions in the trial did not afford the appellant a satisfactory trial. The appeal was allowed.
Where the accused person is charged with more than 1 count, the court should record a plea on each count separately. The aim is to ensure that the plea is unequivocal.

OMBENA VS REPUBLIC 1981 KLR 450
The appellants were convicted of selling goods over the maximum price and failing to display a price list c/s Price Control Act (CAP504).
They pleaded to 6 counts yet 1 plea was recorded.
They were convicted without the court hearing and recording the facts of the case.
The Court held;
- It is good practice to record a plea for each count separately
- Whether the plea is unequivocal or not depends on circumstances of the case
- Prosecutor in stating that 'facts are as per charge sheets' was an error.
- The statements of facts must be explained to the accused, it enables him to understand the charges against him.

Where 2 or more persons are charged jointly, their pleas should not be recorded as a joint plea.

BAYA VS REPUBLIC (1984) KLR 657
One of the 2 accused persons charged jointly, in a charge of manslaughter replied to the charge when read at the time of plea;
"we killed him, but that was not intentional". The 2nd accused was not asked to plead. Both were convicted and sentenced. The Court of Appeal held that an accused person can't plead on behalf of the other.
Once the accused person pleads guilty to the charge, the prosecutor is required to state the facts upon which the charge is based on. The accused person should be given a chance to admit, dispute, explain or add any relevant facts. If the accused person denies the facts, a plea of not guilty is entered on the court record.

An accused person convicted on his own plea of guilt has no right of appeal against conviction but only sentence as prescribed in section 348 CPC.

In order for a plea of guilty to be valid it must be a plea that was entered voluntarily.

THIONGO VS REPUBLIC 1987 KLR 728
The appellant was convicted on his own plea of guilt to a charge of neglecting to prevent a felony c/s 392 of the Penal Code.
On appeal, the respondent raised a preliminary objection to section 348 CPC which prohibits an appeal against a conviction on a plea of guilty. The appellant made an application to call additional evidence to be taken.
The Court held;

- Where a plea of guilty is induced by threats to the appellant, then it will be invalid and would not operate as a bar to an appeal against a conviction as stated in section 348 of the CPC.
- The court will not order a review where it is clear the trial court followed the correct procedure in accepting the voluntary plea of guilt.

Where the charge is read to the accused person for the offence (s) charged and he pleads guilty to them, the facts read out by the prosecution must be facts related to the specific charges only.

NDABI VS REPUBLIC 1987 304.
The appellant was convicted on his own plea of guilty for distribution of seditious publication ad imprisoned for 7 years. The prosecutor read out facts that included the fact that he was a member of an unlawful society and taking and administering unlawful oaths.
Court held;

- Section 72 (1)of the Constitution and section 207 CPC indicate the trial court can only convict for the offence charged and the facts should relate to that charge only.

When the charges are read to the accused person and he pleads guilty, the prosecution should read out the facts of the charge and produce exhibits where necessary or relevant.

JOSEPH NATWAT and 10 OTHERS VS REPUBLIC KLR 2004
The appellants pleaded guilty to a charge of being in possession of traditional liquor contrary to the Traditional Liquor Act. The "facts were as per charge sheet"
Court held;

- The prosecutor did not read the facts and every ingredient of the charge had not been explained to the accused persons.
- The plea was not sufficient to amount to a plea of guilt
- The plea did not support the conviction.

The plea must be taken at the commencement of criminal proceedings. If the plea is not taken the proceedings are a nullity.

DAVID IRUNGU MURAGE VS REPUBLIC KLR2006
The appellants were charged with robbery with violence c/s 296 (2) of the Penal Code and were convicted and sentenced to death. On appeal, the Court record did not contain or reflect Plea taking. The record showed the 2 appellants went to court the first day and were given hearing dates to the trial.
Court held;

- Section 207 CPC was not complied with.
- Appeal allowed.

PLEA OF GUILTY IN THE ABSENCE OF ACCUSED PERSON

Section 77 of the Constitution requires that the trial should take place in the presence of the accused person. However there is a proviso that if the accused person conducts himself in such a way to render continuation of the trial of the trial in his or her presence impossible, such an accused person maybe removed from court and the trial and the trial may proceed in his absence. The CPC allows attendance of court by the suspect maybe waived with the Court's leave for petty offences where the sentence will not exceed 3 months imprisonment and a fine.

PLEA OF NOT GUILTY

The court is to enter a plea of not guilty where;

- The accused person does not admit the charge
- The accused person does not admit the facts
- The accused person refuses to plead

Where the accused person 'stands mute of malice', the court will enter a plea of not guilty.
Where the accused person is silent, the court may adjourn plea taking proceedings and ask for a medical report on whether, the accused person is fit plead.
If an objection is taken to the charge before plea, the court ought to deal with the preliminary objection first before plea taking. If the objection is dismissed, then the plea taking proceeds, if the objection is upheld, depending on the issue the court will determine the fate of the proceedings.

PLEA TAKING IN THE HIGH COURT

The plea taking procedure is similar to the Magistrates courts only that the information is the one read to the suspect.
The proceedings are guided by section 274-283 of the CPC.
Originally, the accused persons were arraigned in the High Court after the Magistrate had gone through the committal bundle and prepared the charge which was not read to the accused person. The whole bundle would form the court file of proceedings in High Court. If the evidence on record was insufficient, the accused was discharged under section 233 of CPC.

The committal bundles requirement was repealed by the Criminal Miscellaneous Amendment of 2003. The High Court original jurisdiction is in murder and treason cases. When asked to plead, the accused person may, or may fail to adopt any of the various approaches in answer to the charges;

1. Plead guilty
2. Plead not guilty
3. Say nothing; depending on the circumstances; if the accused person is disabled; cannot hear or speak, but he is fit to plead, the court will avail a sign language interpreter; if he is of unsound mind, then he is not fit to plead; based on the medical record, may postpone proceedings, have him/her kept in safe custody and the matter referred for the order of the President.
4. Assert the court lacks jurisdiction over the matter.
5. Demurrer; give a legal opinion, that is; admit the facts but say they do not amount to an offence known to law.
6. Plead Autrefois convict
7. Plead Autrefois acquit
8. Plead (having previously been) pardon [ed]

Demurrer

It is an objection to the form and substance of the charge. It is a legal objection, that though facts are true, no offence is disclosed.
This is a preserve of the Commonwealth practice. In Kenya, preliminary objections are raised before plea is taken, the prosecution replies and the court makes a ruling on the legality of the charge.

Jurisdiction

The jurisdiction of the Court can be questioned in the following areas;

- Geographical jurisdiction- a criminal matter can be heard in any court in the country. Matters are taken to specific courts for administrative purposes.
- Time Limit- There is no limitation to instituting criminal trials.
- Diplomatic immunity- diplomats are exempted from prosecution as they are protected under the Privileges and Immunities Act.
- Section 12 of the Penal Code exempts those who are insane from trial.
- Children under 8 years are not criminally liable and those under 12 years not criminally responsible.

- Judges and Magistrates exempted from prosecution by virtue of section 15 Of the Penal Code.
- Presidential immunity

CHANGE OF PLEA

An accused person, who has pleaded guilty to a charge, may change the plea to one of not guilty before he/she is sentenced.

KAMUNDI V REPUBLIC 1973 E.A. 540

Held the court had discretion to allow change of plea before sentence.

The accused person is also allowed to change plea from not guilty to guilty on a lesser offence.

For a long time, it was held that once an accused person entered a plea of guilty, the plea could not be changed because the court becomes *functus officio.*

AMENDMENT AND SUBSTITUTION OF CHARGES

If the charge is changed, amended or substituted, the accused person must be called upon to plead to the altered charge.

MACHARIA Vs REPUBLIC 1975 E.A. 193

An advocate was charged with an offence in court. The charge was amended and was not read to the accused person to take plea on the amended charge. It was argued that there was no prejudice, as the accused person was an advocate.

Court held:

In law, the status of the accused person is irrelevant; the fact that the accused person was an advocate did not absolve the court from its duty to inform the accused person of the right to answer to the substituted charge and to cross examine the witnesses who had testified.

When the charge is changed, amended or substituted, the court should allow, the accused person if he/she wishes to recall and reexamine witnesses. The requirement must be complied with and recorded. *YONGO V REPUBLIC* 1983 KLR 320

Similarly, the prosecution has a right to re-examine the witnesses.

DISPOSAL OF PERISHABLE EXHIBITS AFTER PLEA

Where the charge relates to perishable goods, it is inappropriate for the court to order disposal of the goods before they are exhibited in court.

KECHEL v REPUBLIC 1985 KLR 513

The accused persons were charged under the Price Control Act. After pleading not guilty, the court ordered for the sale of goods. Later after trial they were convicted. On appeal, the court held the evidence on identity of the goods was not taken, the conviction was quashed.

the court shall make such order for the amendment of the indictment.....unless, having regard to the merits of the case, the required amendments cannot be made without injustice....."
So then yes, a charge can be amended after closure of the defence case. It is only after conviction that the charges cannot be amended because the judge would then be *functus officio*.

QUASHING OF INFORMATION

It was the rule of common law that if an indictment or inquisition was bad on the face of it, or there was any such insufficiency either in the caption or in the body of an indictment as would make erroneous any judgment whatsoever given or any part thereof , the court may in its discretion quash the indictment[51]. For instance a number of persons may not be indicted jointly for an offence which must be several. In R v tucker[52] ,an indictment against six people for unlawfully exercising a trade that was quashed because it was a distinct offence in each case and could not be made the subject of joint prosecution.
In R V Phillips[53] judgment was arrested on an indictment of six persons (to which four pleaded and were convicted) on the ground that the offence was in its nature several and could not be indicted together for it.

It has however been stated in R v The chairman of London Sessions ex parte Downes[54] that a court is not entitled to quash an indictment because an examination of the dispositions has led it to the conclusion that the prosecution would not succeed on the account. In Kenya section 276 of the criminal procedure code provides for quashing of information. It is provided that if information does not state , and cannot by amendment authorized by section 275 be made to state an offence of which the accused has had notice , it shall be quashed either on a motion made before the accused pleads or a motion made in arrest of judgment
In the event that section 276 is invoked, a written statement of every such motion shall be delivered to the registrar or other officer of the court by or on behalf of the accused and shall be entered upon the record. If an information does not state and cannot even after amendment be made to state an offence for which the accused has had notice, it shall be quashed either on a motion, made before the accused, pleads or on a motion in arrest of judgment (276(1)) CPC. The motion shall be written and delivered to the registrar or other officer of the court (section 276(2) CPC

CONCLUSION

From the foregoing, it is clear that the person framing a charge must be conversant with the issue. Example is when a person enters a house with the intent to commit a felony contrary to section 304 of the Penal Code. If the entering was daytime, then the offence will be housebreaking if on the other hand the felon is alleged to have been committed at night, the proper offence to charge will be that of burglary[55].
It is in the spirit of The Constitution to ensure justice for all. It therefore follows that:

- The criminal trials must be dealt with expeditiously.
- If the charge as framed does not clearly state the offence as charged, no adequate opportunity can be said to have been offered to the accused to prepare his defense.
- Failure to make the offence well known to the accused leads to contravention of the constitution and consequently miscarriage of justice.
- If a defect of a charge is of such magnitude as to occasion failure of justice, it is unconstitutional and not even a plea of guilty to it can stand.

BAIL AND BOND

INTRODUCTION

The law guards against interference with the liberty of an individual. Bail protects a person's liberty during the pre-trial and trial stages. The law on bail is based on the Constitution, Criminal Procedure Code and rules derived from Court Practice.
Section 29 of the CPC allows a police officer to arrest without a warrant a person whom he has reasonable suspicion is about to commit a felony or has committed it. The interpretation of reasonable suspicion is very wide as illustrated by *M'Mbui vs Dyer* 1967 E.A. 315 the case suggests that even where the suspicion is incorrect it does not matter except that the circumstances were reasonable.
Section 72 3(b) and 72(5) of the Constitution curtail unlawful detention. The issue of bail/bond involves a delicate balance between 2 competing values; the welfare of the society sought to be protected and fairness to the accused persons.
Bail means an agreement between the accused person and the court that he /she will deposit a certain amount of money fixed by the court (Cash Bail) to guarantee his attendance until the determination

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51. See Arch bold JF: evidence, pleadings and criminal practice, London, sweet and Maxwell, (5th edition) 1962 at 88.
52. 4 Burr 2046
53. 2 str 921
54. 1954 1 QB 1
55. Section 304(2) of the Penal Code(Cap 63)

of the matter. Bail is a right rather than a privilege unless the court is convinced that to grant it will defeat the ends of justice as a failure of the accused to appear before the court to stand his trial or that by granting it the accused person would tamper with the investigations or with exhibits which are to be tendered before the court at the time of the trial. In the case of Patel v. R [1971], H.C.D. No. 391 Biron, J. indicated that a man whilst waiting trial is as of right entitled to bail, as there is presumption of innocence until the contrary is proved.

Bond means an official document/agreement between a 3rd party (surety) on behalf of the accused person; and the court that he/she will pay/ forfeit the agreed sum in the bond to the court or surrender the security if the accused persons absconds and does not stand trial. The surety will deposit sufficient security (Bond) as determined by the court and if the accused person absconds, the same shall be surrendered to court.

Surety is the person who takes responsibility for the attendance of the accused person until the determination of the trial.

Under **section 123 CPC**, when a person, other than a person accused of murder, treason, robbery with violence attempted robbery with violence or any drug related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

- The officer or court may, instead of taking bail from the person, release the accused person on his executing a bond without sureties for his appearance.
- The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
- The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

Under **section 124**, before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.

Under **section 125**, as soon as the bond has been executed, the person for whose appearance it has been executed shall be released, and when he is in prison the court admitting him to bail shall issue an order of release to the officer in charge of the prison and the officer on receipt of the order shall release him. The following are the main principles guiding courts on the granting of bail pending trial:

PROCEEDINGS

At the close of the plea-taking proceedings, where the accused person pleads not guilty to the charges, the court will impose an amount of money to be paid to directly in court (cashier's office) to secure the release of the accused person(s) awaiting trial. The amount is called **Cash bail.**

In other instances, taking into account the circumstances of the case, the court may impose sum of money to be guaranteed by surety (sureties) who will deposit in court security (securities) so as to secure the release of the accused person(s). This is called **bond or recognizance.**

Bail/ bond may be granted in the following circumstances;

- ✓ If it is in line with section 72 of the Constitution and section123 of the Criminal Procedure Code
- ✓ If the trial will not occur within reasonable time;
- ✓ If the accused person's release will not be prejudicial to the trial;
- ✓ If the accused person is not likely to abscond
- ✓ If the accused person will not interfere with the witnesses or investigations
- ✓ If the health or welfare of accused person is at serious risk.

Types of Bail/ bond

- Cash bail
- Bond/ recognizance
- Free bond
- Police bond
- Bond pending appeal
- Bond to keep peace and good behavior
- Anticipatory bail- in anticipation of arrest

PROCESS OF BAIL/ BOND

1. **Section 72 (5) of the Constitution and section 123 of the CPC**
   The above sections prescribe the accused person's right to bail unless charged with a capital offence (murder, treason, robbery with violence or attempted robbery with violence).

The accused person may directly or through his advocate apply for bail/ bond at any stage of the proceedings.

2. The court will consider the application for bail and taking into account the circumstances of the case, may or may not grant bail or grant conditional bail.
3. **The Constitution requires bail be reasonable and the CPC states that bond be set with due regard to the circumstances of the case** and not be excessive. Excessive bail amounts to denial of bail.
4. Bond/ bail applications are also made to vary the bond/bail terms in light of new developments or circumstances. These may entail;
   (a) The social-economic status of the accused person
   (b) The accused person's deterioration in health
   (c) The change, amendment or substitution of charges
   (d) Any other relevant issue arising.
5. The court gives bail as a matter of course as it is a constitutional right unless any objections are raised. When the prosecution opposes bond/bail there must be cogent reasons and facts to show reasonable cause for belief that the accused person is a flight risk or may interfere with the course of justice.
6. The court has power to impose conditions to ensure the accused person does not abscond by providing surety, deposit of passport and /or reporting to the police station consecutively in addition to the bail/ bond terms.
7. Section 123 (3) gives the High Court power to grant, vary or reduce bail imposed by courts.
8. Where the court considers denial of bail/bond, it will look into the following issues;

GROUNDS FOR DENIAL OF BAIL

The primary consideration before grant of bail is whether the accused person will turn up for trial. If the court is satisfied the accused will abscond, then bail is denied.

Some factors indicate likelihood of the accused person to abscond;

- The accused has been arrested before and tried to abscond
- The gravity of the charge and likely sentence upon conviction
- The capacity and opportunity of the accused to abscond, sanctuary or assets abroad
- The interest and status of accused person
- Whether the accused has a fixed abode and job

Other considerations are;

- Whether the accused will commit offences pending trial
- Whether the accused will interfere with witnesses and evidence
- Whether the accused has previous incidents of absconding.
- Where bail/bond is denied, earliest hearing dates are given and the hearing expedited.

9. **However, in court proceedings, there are different types of bail and they are granted in different courts at different stages; namely;**
   Plea taking process/ pretrial bail
   Bail pending appeal on plea of guilty
   Renewed bail application
   Bail/bond pending appeal
   Bail /bond to keep the peace
   Anticipatory bail/ bail pending arrest

BAIL PENDING ARREST

There is no jurisdiction to grant bail before or pending arrest in the Magistrates court.

However, The High Court grants Bail / bond pending arrest by invoking section 60 of the Constitution. The court also validates the application under sections 72 and 84 of the Constitution. Anticipatory bail is a direction to release a person on bail, issued even before the person is arrested. A person can apply for anticipatory bail if he apprehends that there is a move to get him arrested on false or trump up charges, or due to enmity with someone, or he fears that a false case is likely to be built up against him.

In Devans Chilelo Mwangade Vs Attorney General [2006] High Court at Mombasa Misc Civ Appli 61 of 2006 The applicant sought to be granted bail as he feared arrest by the Kenya police for alleged sexual advances to two female pupils at Likoni Primary School. He claimed that the pupils had booked a malicious report at Likoni Police Station and an arrest warrant in his regard had been issued. J.K Sergon, in dismissing the bail application, lamented that no section to his knowledge of the CPC provided for anticipatory bail.

In Zakayo Kimutai Kimeto Vs Republic [2006] High Court at Eldoret Misc Crim Appli 12 of 2006, the applicant had relied on sections 72(1) and 84 (which provides for the enforcement of the protective provisions of the constitution) of the constitution and section 123 of the CPC to seek anticipatory bail. Jeanne Gacheche, in dismissing the application for lack of merit, stated that anticipatory bail is not catered for in the CPC.

In Samuel Muchiri W'Njuguna Vs Republic Misc Cr App 710 of 2002

The applicant brought the case under sections 70, 72, 76 and 84 (1) and (6) and 123 (8) of the Constitution for bail pending arrest.

He stated

- He was a spokesman for Tea Farmers.
- He had vied and was vying for Gatundu North Parliamentary seat.
- In June, 2000 he was kept in custody for 3 days arraigned and was in court in Cr Case Number 2826 of 2000. At the close of the prosecution case, he was discharged under s 210 CPC.
- He befriended a lady whose sons are connected to Police.
- He was attacked in July, 2002 at his home, by the sons of lady.
- In July, 2002, he was arrested from his Karen home and charged with arson. The charges were dismissed under section 202 CPC.
- He feared for his life as his late brother, the late Councilor Maina was murdered. He sought anticipatory bail to stop the police arresting him again and charging him the cases did not succeed in court.

Court Held;

While it is true that anticipatory bail is not specifically provided for by statute but it is envisaged by Section 84 (1) of the Constitution. The applicant's ordeal at the hands of Police is an instance where right of anticipatory bail accrues. The right to grant anticipatory bail is only by the High court under section 84(1) Constitution. In granting anticipatory bail, the High Court is exercising supervisory powers

In recent case of Amit Ashok Doshi Vs Republic Misc Crim App 45 of 2007 The applicants applied for anticipatory bail on the following grounds;

Doshi Iron Mongers Ltd paid all due taxes for 2003. April 2007 Kenya Revenue Authority officials and Police Officers raided the Company premises and carried away documents and computers and did not make an inventory. In May 2007, KRA demanded 124 million in tax arrears. The applicants lodged an objection under Income Tax Act. There is evidence that KRA officials made threats to the applicants to institute criminal proceedings. They received summons from Police under section22 of the Police Act Cap 84, to go and record statements on the charge of forgery. They are apprehensive of arrest and remand in custody.

Court Held;

The application has merit and remedy of anticipatory bail available in the court's jurisprudence.

PLEA TAKING PROCESS/ PRETRIAL BAIL

The steps and documents involved in obtaining bail/bond, processes and release of the accused person.

(a) Close of plea-taking process; If the accused person pleads not guilty to the charge, the court will impose bail or bond terms in form of the Court order.

(b) Court order will give the bail/bond terms, dates for hearing and the trial court.

(c) Cash bail is the amount the accused person through an advocate or relatives will pay into court to the cashier. The cashier on receipt of the amount will issue cash receipt. The copy of the cash receipt will be presented at the court cells or remand with the release order for the accused person to be released.

For example; Cash bail is Kshs. 10,000/=, the amount of Ksh: 10,000/=will be paid in cash Bond terms in the court order, it will consist of the amount of money as guarantee, and the number of sureties for specific amounts. For example; Bond is Kshs: 500,000/= with one surety or Bond is Kshs: 1,000,000/= with two Kenyan sureties of 500,000/= each.

PROCESSING BOND

Once the court gives bond, The Court Clerk takes the court file which contains the court order to the court registry. The advocate/ relatives of the accused person (s) will avail to court; securities; namely

- Title-deed with a recent search certificate from the Lands office and a current Valuation report from a registered valuer. The search will confirm ownership of the land, any mortgages, charges or encumbrance on the land. The valuation report will show current value of the land which must be of the surety sum or above. The 2 documents must have current fees' receipts from the official departments.
- Logbook of a car; with the Kenya Revenue Authority (KRA) copy of records document to establish ownership and a current receipt.

The vehicle must be physically seen by the court; (magistrate and/or prosecutor), parked within the court precincts. The details of the car should correspond to those in the logbook and are recorded in the court file. (Details include; color, make, engine type, chassis number, valid insurance and road license).

- There must be an assessment or valuation report from reputable assessors e.g. "A.A" to show the vehicle is valued at the surety sum or above.

The vehicle must be brought to the documents.

- Share Certificate (CDSC certificates) of shares owned and held by surety and document from the public company confirming the number of shares, value of shares, and undertaking not release/sell the shares if accepted by the court as security until determination of the case. The value must be of the surety sum or more.

- Fixed Deposits of the amount imposed by court or more.
  The proposed surety will present an official letter from a bank confirming the amount of deposit, date of depositing the money and the owner of the account. The bank will undertake in writing to hold the amount in a fixed deposit until the court issues an order of release of the money. The amount of money is the sum of money the court gave or more but not less.

- Pay slips of the proposed surety indicating the gross/net amount which must be the amount imposed by court.

- Co-operative (Sacco) deposits/ shares of the amount the court imposed as bond.

Relevant documents

1. The advocate/surety will present the security to the clerk in the court registry. He will scrutinize the same and may make enquiries. He fills in following documents;
   - Particulars of surety - names, employment, one general details (filled by each su
   - Particulars of Bail / bond - particulars of the propose security
   - Release order - To be filled with all particulars of the surety & accused person.

   Then he/she attaches the security documents and places them in the court file. The details of the proposed surety and the security are recorded in the prescribed forms. The file is taken to plea-taking court, trial court or duty court for examination of surety.

Examination of surety

The court will examine the surety on oath to ensure he/she a proper surety. The surety will present valid Identity card, Passport or driving license. This is a judicial function and examination proceedings will be recorded, in the court file.

The Court will examine the surety on oath; inform him/her of his obligation as surety and consequences of not ensuring the accused person attends court. The examination will determine the following; If the proposed surety is a ;

- Person of good character
- Age of majority
- Permanent address/residence
- Fixed abode or
- Meaningfully employed
- Easy and efficient method of contacting and tracing the accused person
- Proposed surety well known to the accused person
- Proposed surety able to met the financial obligation

⇒ The documents will be taken to the court where your case will be heard. (trial court)
⇒ Or to duty court who deals with cases which are urgent.

* If you cannot get the fixed abode the chief may be called.

During examination, the surety is informed of the consequences of default; the surety stands to suffer grave consequences if the accused person disappears or absconds before determination of the trial, the surety will pay the amount or forfeit the security pledged.

The surety is obligated to ensure that the accused person will attend court until the end of the matter. If for any reason, the accused person cannot appear in court, the surety should alert the court on the whereabouts or condition of the accused person.

A surety may ask the court to discharge him/her at any time during the proceedings. The court upon discharge of the surety, will suspend the bond terms until the accused person avails another suitable surety.

CONSEQUENCES/ FORFEITURE

If the accused person, in breach of bail/bond terms, fails to attend court as required, the court will issue warrant of arrest to the accused person and summons for the surety to appear in court and explain the whereabouts of the accused person.

If on bail, the amount deposited in court is forfeited to the State and a warrant of arrest is issued to the accused person.

If on bond, the accused person and/or surety will be arrested and summoned to court to show cause why the security should not be forfeited.

In Mulwa vs Republic, 1985 KLR329 the High Court held that the undertaking by a surety to secure the presence of the accused person in court is absolute and the liability to forfeiture or default is unqualified.

Section 131(1) of Criminal Procedure Code

in line with Nsubuga v Uganda,1968 EA 10,held that before forfeiture is effected, evidence on oath ought to be taken and not the mere statement by the prosecutor. The court will also consider what the accused person and surety have to say and then make an informed ruling.

Where cause is not shown or payment made, the court may issue warrant of attachment and sale of land of the surety under section 131(2) CPC.

If the penalty is unpaid and cannot be recovered by attachment, the court may order the surety to serve 6 months imprisonment as provided by section 131(4) CPC

The orders of the court under this section are subject to appeal to the High Court as prescribed in section 132 CPC.

CASELAW ON BAIL PENDING TRIAL

Mwaura vs Republic KLR 1986 600

The accused person was charged with murder c/s 204 of the Penal Code. He was in custody for 11 months awaiting committal bundles. He applied for bail.

Held; in the instant case the applicant is charged with a capital offence and there is great risk of him absconding is high and no special circumstances personal to him have been shown to the court.

Nganga vs Republic KLR 1985 450

The applicant was charged jointly with 4 other persons with conspiracy to commit a felony c/s 393 of the Penal Code. The 1st accused pleaded guilty, one of the other accused persons was granted bail. The prosecution objected to bail for the applicant. He applied for bail in the High Court. The advocate argued that the applicant's denial of bail was discriminatory and c/s 82 of the Constitution.

Court held;

The court in exercising its discretion to grant bail under section 123 (1) and (3) of the CPC will consider the following factors;

There should be substantial grounds for believing that;

- The accused person will fail to turn up for trial.
- The accused will commit other offences.
- That the accused person will obstruct justice.
- Where more than 1 person are jointly charged with the offence, the case for each accused person must be examined by its own facts and this applies to bail in which each accused person's case will be considered on its own facts, circumstances and merit.

Ngui Vs Republic1985 KLR 268

The applicant a woman of 54 years was charged with robbery with violence c/s 296 (2) Penal Code. After hearing of several witnesses the trial was adjourned to a later date. She applied for bail and was denied. She proceeded to the High Court and applied under section 84 of the Constitution that section 123 CPC was void as it was inconsistent with section 72 (5) of the Constitution. Court held;

- Section 72 (5) applied to one arrested and detained on reasonable suspicion, the applicant was already charged in court and therefore this section did not apply to her case.
- Section 72(5) of the Constitution expressly excludes bail granted where the offence carries a mandatory death penalty, as there is a great temptation in such cases to abscond.
- Where bail is not granted, lengthy adjournments should be avoided and trial should continue from day to day until completion.

Mazrui vs Republic 1985 KLR 279

The 3 applicants were University of Nairobi students who were charged with taking part in an unlawful assembly and failing to comply with a Police officer's instructions. Two bail applications were refused. They applied to High Court. Court held;

- The provisions of the Constitution and CPC do not provide that the right to bail pending trial is absolute.

- The right to liberty is a fundamental right and freedom as set out in section 70 of the Constitution. However, the right not absolute, but subject to respect for freedoms and rights of others and public interest.
- The word 'shall' in section 72(5) of the Constitution mandates that bail shall be granted where a person 'is not tried within reasonable time.'

Mutunga Vs Republic 1986 KLR 166

The applicant was charged with being in possession of seditious material. He applied and was denied bail pending trial by the trial court, on the grounds that investigations were not complete.

Court held;

The mere fact that he was found in possession of seditious publication did not mean that the investigations were complete. Further investigations were required on the origin, authorizing, printing, publication or circulation of the said documents.

Langat Vs Republic 1986 KLR 609

The applicant was charged with conspiracy to defraud the complainant Kshs 3,820,500 c/s 317 of the Penal Code. Bail was denied. The prosecution claimed he was on a holding charge and investigations were ongoing. Court held;

- Every person charged with a criminal offence is presumed innocent until proved guilty but it does not mean that he cannot be lawfully detained in custody if he is charged with a criminal offence.
- Taking into account all the circumstances of the case, the nature of the offence and the large sum of money involved, the court is inclined not to grant bail.

MARK KALIKU VS REPUBLIC C.A. 376 2000

The applicant who had a Dutch passport for Liberia and Dutch was charged with the offence of trafficking drugs c/s 4 (a) of Act No. 4 of 1994 (Narcotic Drug and Psychotropic Substances Control Act) The particulars are that he was in possession of heroin valued at Kshs.2.8 million. The trial court denied him bail as he had no fixed abode, in Kenya. He applied for bail in the High Court.

Court Held;

In Kenya, such offences are bailable

The main issue to be considered is whether the accused person will turn up for trial

There should be no discrimination in considering bail whether the accused is a foreigner or Kenyan citizen.

Bond granted Cash Bail 100,000/=

2 Kenyan sureties of kshs. 500,000/= each

The applicant to report to Anti-Narcotics Police Unit and CID HQ on every Tuesday and Friday until determination of the case

BONDS FOR PEACE AND GOOD BEHAVIOUR

The Magistrate's court on being informed on oath that a person is likely to commit a breach of peace or disturb public tranquility, or to commit a wrongful act to occasion a breach of the peace, the court may require the suspect to show cause why he should not execute bond for a period not exceeding 1 year.

Section 43 (1) & (2) CPC-When a magistrate's court is informed on oath that within the jurisdiction, person or persons orally or in writing disseminates or attempts to disseminate some seditious matters dangerous to peace and good order within Kenya or a matter concerning a judge which amounts to libel, the court may require the suspect to execute bond for good behavior for 1 year.

Section 44 of CPC-Where a court is informed on oath that a person is taking precautions to conceal his presence within the court's jurisdiction with a view to commit an offence, the magistrate may require the person to show cause why he should not execute bond with sureties for good behavior for such period not exceeding 1 year.

Section 45 CPC-Where the magistrate's court is informed on oath that the person is a habitual offender, robber, housebreaker or thief, a member of an unlawful society, one who aids and abets crime or is dangerous as to render being at large hazardous, the court will ask the suspect to show cause why he should not execute bond for good behavior, not exceeding 3 years and a restriction order to remain in the district for 3 years.Section 46 CPC.

BAIL PENDING APPEAL

Here again bail depends upon the grounds of the appeal, discretion of the court and the facts of the case. The principles governing the grant of bail pending appeal differ from those governing bail before conviction.

a) Whether leave to appeal has been granted
b) Whether there is a strong likelihood of success of the appeal, and

c) Where there is a risk that if bail is not granted, the sentence will have been served by the time the appeal is heard

Under section 356 of the CPC, the court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to that court.

If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.

Under section 357, after the entering of an appeal by a person entitled to appeal, the court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

In the case of *D.P.P. v. Daudi Pete*, CA, Criminal Appeal No. 28 of 1990, 2 LRC (Const) 53, it was held that what is paramount in issues relating to bail is for the courts of law to strike a balance between the interests of the individual and that of the society in which he lives.

SURETIES AND DISCHARGE OF SURETIES

Who is a surety?

In criminal law, a surety is a person who guarantees that an accused who was granted bail will appear for trial on his next scheduled court appearance. A surety may be required to deposit cash with the court which may be forfeited if the person in whose favor the guarantee is given does not appear as guaranteed.

DISCHARGE OF SURETIES

Under section 128, all or any of the sureties for the appearance and attendance of a person released on bail may at any time apply to a magistrate to discharge the bond either wholly or so far as it relates to the applicant or applicants. On an application being made, the magistrate shall issue his warrant the person so released be brought before him.

On the appearance of the person pursuant to the warrant issued so issued or on his voluntary surrender, the magistrate shall direct the bond to be discharged either wholly or so far as it relates to the applicant or applicants, and shall call upon the person to find other sufficient sureties, and if he fails to do so may commit him to prison.

Under section 129, death of surety before bond is forfeited discharges his estate from all liability in respect of the bond, but the party who gave the bond may be required to find a new surety.

RECOGNIZANCE

In criminal law, 'recognizance' means: '*An obligation of record that is entered into before a court or magistrate, containing a condition to perform a particular act, such as making a court appearance*'. A sum of money pledged to assure the performance of such an act. Under section 131, recognizance may be forfeited and penalty paid. The court may recover the penalty by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead.

Comment 'Scholars have raised the question with regard to the] law of bail, whether, the courts should have discretion in refusing to release on bail, and if so to what extent.'

Some of the alleged problems are;

- Socio-economic factors of the accused person are not brought to court and taken into account
- There is undue delay of hearing and determination of the case
- There is ignorance of accused person's rights on bail/bond
- Studies show those who unable to post bail and are in remand throughout the trial are likely to be convicted and serve sentence than those out on bond.
- On the issue of the likelihood of the accused person absconding, the State should bear the burden to search and get the accused person.

Reform Agenda on Bail/Bond

The Bar suggests the following changes;

- The law is amended to make it mandatory that the courts advise accused persons on right of bail
- The socio-economic status of accused person should be presented in court to be considered in granting bail.
- There must be a just system to show equality and consistency in granting bail
- A compensation system should be in place; if the accused person is remanded in custody throughout the trial period and is later acquitted, he should be compensated.
- There should be amendment of the law to reduce discretion of courts and police granting bail.