3.

IE TRIAL PROCESS

trial procedure is conducted in the fo lowing stages;

The 1st court process; Plea-taking p oceedings: Plea of guilty and plea of not guilty is governed by S 207 & 2(3 Criminal Procedure Code.

. The conduct of trial; trial in Magistrates' courts: Prosecut ion, Defence, Acquittal and Presentenc proceedings are governed by S 202 - 218 Criminal Procedure Code

. Trial in High Court: State's Case, Defence, Acquittal and Presentence proceedings governed by S 274- 329 Criminal Procedure Code.

JENCE OF TRIAL

taking is the first court process in a criminal trial. The conduct of plea- ; is as follows;

The charge (s) is read to the accused person (s) in a language he understands by the Court clerk. The accused person replies to the charge. The court records the reply as clearly as state d by the accused person.

If he pleads guilty to the charge (the plea must be unequivocal), the court prosecutor reads out the facts (a summary of the evidence compiled in the police file with relevant exhibits produced) of the case to the accused person.

The accused person will plead to these facts. If he pleads guilty to the facts, the court will convict him on his own plea of guilt.

The prosecutor will address the court on the accused person's past record; if he is a first offender or a habitual offender.

The accused person will give mitigation; any matter that the court :onsider before sentencing.

The court will write and pronounce the sentence in court to the accused)erson. The court will inform the accused person of the right to appeal.

If the accused person pleads not guilty to the charge and/or fact
will write and give bail/bond terms to the accused per
ce is bailable and there are no objections to bail), the h
the case, the mention date (every 14 days if the accused
remand and 1 month if out on bail) and the court where th
e conducted.

THE HEARING

1. The case is called out, the accused person (s) names and case numl the court clerk.
2. The court prosecutor informs the court, the number of witnesses f case and defense counsels introduce themselves.
3. Any preliminary issues and applications are made and dealt with at this stage.
4. Sequence of calling witnesses; the prosecution will call the com and his witnesses heard first.
5. The witnesses will remain outside the court and go in the court of them testifies.
6. Every witness will give evidence on oath or affirmation (section 15 and section 15 & 17 of Oaths and Statutory Declarations Act)
7. Each witness is called by the prosecutor to proceed with examination in chief. The purpose of the examination is to o testimony in support of the version of facts in issue or relevant t issue for which party calling the witness contends.
8. The witness will be cross-examined by the accused person represented by defense counsel. The purpose of cross-examination elicit information concerning facts in issue or relevant to the issue a favorable to the party on whose behalf the cross -examinatic conducted, and secondly to cast doubt upon the accuracy of evidence in chief given against such party.

9. The court prosecutor may ask the witness questions after cross-examination. This is in re-examination; the questions are confined only to matters that arose in cross-examination. New matters can only be introduced with leave of the court.
10. After, the prosecution witnesses have testified, the prosecution will close the case.
11. The legal standard of proof in criminal cases is that the burden of proof is on the prosecution to prove the case beyond reasonable doubt. The prosecutor and defense counsel will make submissions (Closing Statements) to the court on whether a prima facie case is established by the prosecution or not.
12. The court will consider the arguments and submissions and find out if the prosecution has made out a prima facie case against the accused to require that the accused be put on his defense. If such a case is made out, the court will deliver a ruling that the matter will proceed to defense hearing.
13. If the prima facie case is not made out, the court will in its ruling dismiss the case and discharge the accused person under section 210 of the CPC. The determination will be in writing and reasons will be given for the dismissal and discharge.
14. During the defense hearing, the accused person will exercise the options of giving evidence as prescribed in section 211 CPC.
15. The accused person will inform the court on witnesses to be called to testify on his behalf. The witnesses are called and testify as those of the prosecution.
16. If the accused person gives a sworn statement and/or the witnesses testify on oath, the prosecution will make final submissions. If cross-examination did not take place, then the defense counsel will make final submissions.
17. The proceedings close and parties await the judgment of the court.

18. On the scheduled date, the judgment is read out to the accused person and the public. The court pronounces the conviction or acquittal under Section 215 CPC.
19. If the court convicts the accused person, the prosecution will read out the accused person's previous record. The record includes previous convictions; the nature, date, sentence imposed and the date of release from prison.
20. The accused person will comment by accepting or refusing. The accused person must know what is alleged against him and has the opportunity to deny it. If he refuses, then evidence is called to confirm the same. Fingerprints are taken afresh for examination with stored criminal cases data at the CID headquarters.
21. The accused person will mitigate; inform the court any/all issues the court should take into account during sentencing. The purpose of mitigation is to enable the accused person to show the court why it ought to impose one form of sentence instead of another. The court ought to establish the history, character, antecedents and all matters relevant to punishment before assessing sentence.
22. The court will write and read the sentence meted out to the accused person and the right of appeal within 14 days.

PREPARATION OF THE CASE FOR TRIAL

Preparation and presentation enhances performance. The main purpose of a trial preparation is to find out as much evidence as possible to maximize the client's chances of winning the case.

The Counsel needs to prepare for trial (witnesses and documents) and prepare himself /herself for trial

The preparation process includes;

- advising on evidence
- assembling the evidence
- conducting legal research

- analyzing facts and developing a strategy

NOTE: The first 2 are to prepare the CASE for trial and the other 2 are to prepare the advocate for trial.

ADVICE ON EVIDENCE

An advocate will get a brief from the client or relative. The advocate will visit and interview the client and obtain his version of the case and may give leads of possible witnesses and exhibits. The information will help the advocate determine the procedures of the court, the evidence, the issues in the trial, the legal principles which apply to the case including the defense case.

Sources are:

- The Constitution - spells out the inherent rights of the suspect throughout the trial,
- Criminal Procedure Code- outlines the procedure of conducting the case,
- Penal Code- sets out the offences and the prescribed penalties,
- Evidence Act- deals with admissibility of evidence,
- Relevant Case-law,
- Recent amendments of the law; Criminal Law Amendment Act of 2003 and the Sexual Offences Act of 2006,
- Regional and International instruments relevant to the case (persuasive if not domesticated),
- Case-law from the Commonwealth jurisdictions (persuasive to the court)

ASSEMBLING THE EVIDENCE

The High Court allowed the defence team (suspect, lawyer) to be provided with copies of the charge sheet, witness statements and documentary exhibits.
In the case of ;

JUMA & OTHERS VERSUS ATTORNEY GENERAL MISC APPLICATION 345/01

The High Court declared that in all criminal trials the defense is entitled to copies of witness statements for them to prepare their defense as provided for in section 77 of the Constitution.

One must compile the evidence available:

- Direct evidence- that which is perceived from all senses(witness statements)
- Indirect evidence/ Circumstantial evidence unlike the eye witness testimony there will be a bullet recovered from the

ɛceased which matched to the to suspect's gun, or suspect's ŋgerprints on the subject weapon

redibility evidence- evidence that serves to establish that the irect or indirect evidence is credible and reliable; production of statement or record the witness gave contrary evidence to what he said in court on the same issue. An eye witness testifies a there is evidence to show that he was not at the scene or if he was he could not see clearly due to the prevailing circumstances e.g. his eyesight or the light

- Expert Evidence- evidence given by one who by virtue of academic qualifications, experience and research is able to testify in the area of expertise on the issue at hand in court.

  Note; The court requires proof of alleged facts and the parties have to persuade the court to rule in favour of one party or another. The process of persuasion requires a difficult case made simple and straightforward.

CONDUCTING LEGAL RESEARCH

It is a technique employed by lawyers to identify the legal principles applying to a proven or assumed set of facts. It is undertaken against the background of known or anticipated set of facts. Legal research and fact analysis go hand in hand. The law is the same for all cases but the facts differ from case to case.

In a criminal trial one looks at the charge sheet;

- Is the charge(s) proper in law and competent before the court?
- What are the ingredients of the alleged offence?
- What is the evidence by the prosecution witnesses to prove the ingredients of the offence?
- What are the current legal principles on the charge(s)

One should consider the sources of law, the current case-law on the matter from the library or on line.

FACT/ CASE ANALYSIS

The legal elements are laid down by law and discovered through legal research. The facts are arrived at through logical deductions from the evidence adduced by the prosecution witnesses and the exhibits produced.

The task is to find out whether the evidence is admissible, reliable, and sufficient. This is the process of case or fact analysis,

NOTE: /ocate should not be seen t) run a haphazard, disjointed, and confu[illegible] duction of apparently unc)nnected witnesses and items of evidenc[illegible] purpose of advocacy is to persuade

COURT PROCEEDINGS

EXAMINATION IN CHIEF:

Cases are won as a consequence of direct examination. This requires the ability to extract all the material evidence from the witness without asking leading questions.

The content of the evidence has to be relevant, in its content, material its substance and admissible in its form.

To effectively conduct examination in chief, one has to do the following;

- Plan the case in chief
- Consider potential witnesses and exhibits
- Evaluate each witness individually (positive information)
- Identify factual weaknesses (gaps or damaging information)
- Tackle evidentiary problems (admissibility of evidence)
- Prepare to deal with credibility problems (will the witness be attacked; on bias, interest or untruthfulness)
- Decide which witness to call (no hard and fast rule but determine sequence based on retention, progression and impact)

There are direct examination presentation techniques;

These are;

- Maximize use of descriptive language and minimize Legal and technical language
- Make use of primacy and recency
- Use repetition and duration to emphasize important points
- Use reflective questioning to illustrate time, distance and intensity
- Start strong and end strong in the overall examination in chief.

CROSS EXAMINATION:

This type of questioning is adversarial in nature as the witness would not have been called to testify unless he/she had something to contribute against the interests of the party cross-examining. Treating the witness with courtesy is not inconsistent with skillful powerful and penetrative cross-examination.

- Admissible- is the evidence relevant, under certain legal exceptions; refer to section 99 of Criminal law Amendment No.5 of 2003
- Reliable- is there any bias, interest, opportunity to observe ability to recall, consistency, honesty
- Sufficient- has the burden of proof been discharged? What is the quality or quantity of evidence?

Admissibility is determined by the law; the reliability is by the court as a finding of fact and sufficiency too. It is the advocate and prosecutor to prove that the burden of proof is discharged by the prosecution or not

STRATEGIC PLANNING.

In a trial, the lawyer representing the client is engaged in a contest on behalf of the client. The trial is conducted with certain rules and procedures and both sides are determined to win. The lawyer then needs to develop a strategy and consider a persuasive theory to pursue in court in the client's favor.

In a criminal case the material facts are set out in the charge sheet; when the accused person pleads not guilty, then every material act must be proved to the required standard.

After the material facts are identified, their precise legal meaning and content still has to be determined. The element of killing in a murder case actually incorporates 3 ingredients; the *actus reus* (act), the causation and the dead body. One must also prove the intention *mens rea* so as to discharge the burden of proof.

The police and prosecutor work together, to produce evidence to support the charge. The Investigating officer gathers the evidence in form of witness statements and exhibits.

One must develop a theory of a case which is coherent, comprehensive and credible and takes account of all the evidence and provides a persuasive answer to the question or issue in court.

- Comprehensive-it includes every known fact, including disputed facts
- Coherent-provides a consistent and orderly story which is held together by logic and evidence
- Convincing- it is persuasive and credible
- Legally sufficient- to obtain judgment in your client's favour.

The aim of cross examination is to

- Elicit favourable evidence on your side
- Test or discredit the evidence in chief
- Destroy and undermine the credibility of the witness
- Put your version of the case to the witness for comment
- Parade your case

Cross examination on merits is to test the reliability of the evidence. The merits include accuracy, consistency and veracity of the testimony. Cross examination to credit is to attack or cast doubt on the credibility of witness in the dock.

Remember that you do not attack the credibility of a witness unless you have details of the act you intend to refer to. The credibility of the witness may be attacked on the following grounds;

- Witness may contradict evidence
- Witness may show bias, prejudice or interest adverse to the defence side
- Witness is untruthful, has incidents of dishonesty.

It is noted however, people perceive events differently, they have different views of what is important, and have varying skills in communicating what they have witnessed. The result is that there are often discrepancies in the evidence.

Unrelated to any attempt to mislead; all witnesses to the same incident cannot give identical evidence; there will be small differences and as long as they are not material discrepancies, the witness cannot be said to be dishonest perhaps honestly mistaken.

There are many risks involved in cross examination, the witness may give damaging answers; the witness may withstand cross-examination so well that the evidence gains credibility or you find that simply have no material to cross-examine the witness credibility of the witness.

If you attack the character of an opposition witness or cross examine them on their previous convictions your own client's character and previous convictions may be explored by the other side.

While you will be allowed to repeat questions, even those raised in evidence in chief the court will stop you if you go too far.

Oppressive, insulting, abusive language in cross examination will not be allowed. Insisting that a witness answer a question 'Yes' or 'No' only, when he

1. d defense should relate to the matters in issue in the said
2. d may call witnesses to tender an alibi or any exculpatory e
3. He also produce documents to prove his case

At the close of the defense, the advocate may make further submissions and the prosecutor where the accused gave sworn evidence. The court will thereafter give a judgment.

Production of Documents (Exhibits)

1. Exhibits are things that tend to prove or disprove a fact. There are various types of exhibits,
   - real exhibits
   - documentary exhibits
   - demonstrative exhibits; plans, photos, models
   - inspection *in loco*

2. An exhibit introduced in court should be identified, named and then marked. Each exhibit is recorded in the court's list of exhibit form, the prosecution and defense list of exhibits.

3. The prosecution exhibits are marked sequentially by numbers and by alphabets, it is important the marking of exhibits is consistent and identical to all parties, especially where the documents are bulky and numerous. Similarly, the defence exhibits will be marked sequentially but clearly marked defence exhibit.

4. Documents referred to by the prosecution are marked serially as MFI- 1 (Marked for identification 1). Thereafter, the maker of the document, or the addressee of the letter or the investigation officer produces it an exhibit.

5. When the defence counsel introduces a document, it is marked DMFI-1 (Defence Marked for Identification 1). So that the relevant defence witness will produce it as defence exhibit.

6. A document is not produced as exhibit during cross examination.

7. Every document that is introduced during proceedings is marked for identification and then given to the witness for reference. It must be named and the date indicated for the court to record.

has some thing to add is oppressive. He has taken oath to say the whole truth and nothing but the truth. So the simple 'Yes' or 'No' is not the whole truth.

You have a duty to cross examine the witness on disputed facts. The idea is to give your client an opportunity to explain or answer the version given. The grave risk of not cross examining an opposing witness is that the court will accept the evidence as it is not disputed. Three techniques of cross examination are confrontation, probing, insinuation or undermining.

- **Confrontation** - this is when one has evidence to demonstrate that the testimony of the witness is incorrect or untrue.
- **Probing** - is where one enquires into the details of the evidence given by the witness to test its truth or cast doubt on it, in an attempt to expose weakness.
- **Insinuation** - is whereby the facts are put in a different light and a different spin is introduced to ensure that there're very slight differences between the evidence of the witness and your client's version.
- **Undermining** - all the three above methods are ways of undermining the evidence given by the witness.

Cross examination is part of the process of persuasion. It is counter productive to adopt a hard line when cross examining victims of crime or children.

Do not engage in unrewarding cross examination. You do not cross examine bullet holes out of a corpse, or entries out of books or finger prints off a dressing table. Just bank the good answers.

Closing arguments or submissions

At the close of the prosecution case both the prosecutor and the defence lawyer will make oral submissions (closing arguments) on whether the prosecution has made out a *prima facie* case to warrant the suspect being place on his defence.

1. It is preferable that submissions are made in points of law with reference to the evidence on record and not to repeat all the evidence again
2. Every principle of law referred to should be backed by case law.
3. The submissions should be brief, concise and clear.

The defense

If the court decides that from the evidence on record the accused is implicated as having committed the said offense the court delivers a ruling. Under Section 211 CPC the accused person chooses the mode of giving his defense.

8. All exhibits produced by the prosecution and the defense are marked serially; using numerals and alphabets.

9. If the documents are bulky documents, they are not marked in bulk, instead, they are arranged, relevant parts highlighted and identified to the court and then serially marked.

10. Before documents are produced and admitted as evidence, once marked, the prosecution will find out if there is any objection to the documents marked for identification being produced as exhibit. If so, the objections will be addressed, the court will give a ruling; if the documents are to be produced then the court will allow production. On the other hand, the court may disallow production of documents and they will not be produced.

11. Exhibits that are marked for identification but not produced do not form part of evidence that is relied on in the court's judgment.

Production of Physical Exhibits

1. Physical exhibits refer to specific items; gadgets or weapons used in commission of the crime, recovered stolen property, objects at the scene of crime that are relevant to the case at hand.
2. All exhibits are identified, properly named, (as in the charge sheet) and listed in court file, prosecution list and defence list.
3. The evidence adduced in relation to exhibits should inform the court, the custody chain, where the item (s) was recovered, belonged or from whom, the labeling and storage, retrieval and production during trial. There should be no shroud of mystery as to the custody process of exhibits.
4. Exhibits recovered from crime scene, during arrest, from conduct of search, suspect's or witness's lead, an inventory is made out, listing the goods recovered. Ideally, the 2 persons at the recovery spot should sign and 2 police officers. The inventory is produced with the exhibits in court as evidence.
5. If the exhibits are perishables, or goods in transit, or for sale, they are seen, identified and or counted in court's presence on earliest date. If ownership and release of goods is not contested, they are released to the owner. During subsequent hearing, the court will rely on sample from the bulk that was released or photos taken of the bulk before it was released.
6. Exhibits in form of motor vehicles, must be seen by the court, outside court precincts, the motor vehicle is identified by physical inspection of colour, make, engine and chassis numbers on the vehicle and the logbook and copy of records from KRA/ Motor Vehicles Section.

Witnesses

The Evidence Act Cap 80, deals with the production and effect of evidence. Evidence is adduced by witnesses.
Chapter 5 of Evidence Act deals with;

- Competency of witnesses- section 125-127
- Compellability and privileges of witnesses- section 128-143
- Examination of witnesses- section 144-146
- Questioning of witnesses- 147-166
- Refreshing of memory and production of documents by witnesses-section 167-173

Types of witnesses

The witnesses adduce evidence in court to enable the court to make an informed decision at the close of proceedings.
There are different types of witnesses based on the type of evidence they give and/or how they give it in court.

Formal witness:

The witness informs the court structures, processes and procedures of an institution or organization where the offence in issue was committed.

The formal witness could explain to court the procedures of a company paying VAT tax in KRA and give details of the documents filled in, process of payment, receipt of monies, banking and issuance of receipt of payment. The witness will not give incriminating evidence on how the money was stolen in KRA or by whom. The purpose of a formal witness is to help the court familiarize with the processes and operations of a given area that is relevant to the case at hand.

Expert witness:

Expert witnesses are used to explain subjects outside the court's normal experience and to express opinions on the inferences to be drawn from facts.
Experts give expert opinion based on;

- -his own independent investigations and observations
- -based on documents or other exhibits submitted to him for the purpose of providing an expert opinion on some issue or question or other.

The expert must introduce himself, state qualifications, experience, and training so that the expert's ability to assist the court on the issue before it is clearly established. The expert is to give expert opinion that generally helps in

decid ues in the case but not to dec e the ultimate issue- deciding the case.

Expert o nion evidence is allowed in mat ers of common knowledge, human attitude: and behavior, credibility of witnesses and construction of documents, statutes.

The court is not bound to accept expert's opinion, the court may reject it even if there is no opposition to it.

Hostile witness

A hostile witness is one who is unwilling to tell the truth for the benefit of the party who has called him/her. Additionally, a witness is hostile if his testimony legitimately surprises the side that called him to testify in court.
Whether a witness is hostile, depends on;

- Demeanor of the witness
- Relationship between the witness and the parties or other witnesses in the case
- General circumstances of the case
- Prior inconsistent statement made by the witness
- Display of hostile *animus* towards the side calling the witness.

The application is made to court to declare the witness hostile. If the court grants the application the witness is questioned by the prosecutor on the inconsistency and lack of credibility (as done in cross-examination) when the witness demonstrates the hostility, the prosecutor shows the witness is untruthful and or biased. The witness's evidence is not relied on.

Refractory witness

A refractory witness is one who volunteers to testify as a witness, is interviewed and record a statement with the police officer investigating the case. On the hearing date, the witness refuses to testify to the surprise and dismay of the court.

Section 152 of criminal procedure code prescribes the definition of the refractory witness and the penalty awarded.

The refractory witness is one who refuses to be sworn, or refuses to answer questions or testify, or refuses to give document in court or sign deposition. In each of these instances, if the witness gives no reasonable explanation, the court will adjourn the matter for 8 days while the witness is committed to prison.

Mrs. Rito's File

Child witness

The Children's Act, 2002 makes special provisions pertaining to children in the Criminal justice system.

Section 2 of the Act defines a child as "any human being under the age of eighteen years"

And a child of tender years is defined as "a child under the age of 10 years."
A child witness will testify after the court conducts the *voire dire* to determine

- whether the child understands nature of the oath
- Whether child possessed of sufficient intelligence to justify reception of the evidence.

If the court finds from the *voire dire*, the child understands the nature of oath, then under section 19 of Oaths and Statutory Declarations Act (Cap 15) the child will take the oath and give evidence.

Reference: FUAD DUMILA MOHAMMED VERSUS REPUBLIC CRIMINAL APPEAL 210 OF 2003

Section 76 (4) of the Children's Act, prescribes, In proceedings against or by a child for an offence on decency or morality and a witness under 18 years of age is called as a witness, the court may exclude all other persons save for members or officers of the court and the parties to the case and their advocates. The proceedings should be held in camera.

Section 124 of the Evidence Act prescribes; "Notwithstanding section19 of Oaths and Statutory Declarations Act....., the accused shall not be liable to convicted on such evidence unless it is corroborated by other material evidence...."

Criminal Law Miscellaneous Amendment No5 of 2003 qualified section 124 of the Evidence Act. It provides;
"Provided that where in a criminal case involving a sexual offence, the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth".

It is not mandatory in all cases for child's evidence to be corroborated.

Star/Ke[illegible] [illegible]rucial witness

The witn[illegible] ho gives direct evidence; evidence perceived by the 5 senses, sight, hear[illegible] smell, touch and taste. The witness may have been at the sc[illegible]e of the crime [illegible]d witnessed the commission of the crime, the person who no[illegible]d the loss or [illegible]amage of items and reported the matter and was involved in investigations. The witness could have valuable information that would give the investigators leads.

The witness is consistent and concise in his testimony in court, gives a vivid and detailed account of the events culminating to the commission of the offence. The witness withstands intense cross-examination by the defense, the testimony remains firm and intact and his credibility unshaken.

THE PROTOCOL AND ETTIQUETTE IN COURT.

The litigation process the advocate has 2 roles, serving the court being the embodiment of administration of justice as an officer of the court representing the client

A) Appearance- Dress should be sober, decent and smart (formal).

- well-groomed and on time
- well-prepared for trial

B) The attitude should be positive calm and firm but not rude and acrimonious.

1) In court Counsel ought to be courteous to colleagues, prosecutor, witnesses and the presiding judicial officer and the same courtesy must be reciprocated. (Examples)
2) The advocate should not deceive the court knowingly or reckless on the facts or the law (examples on attendance of clients in court, misrepresentation of facts of arrest and police detention, of the court's conduct previously etc, crosscheck facts and the court record)
3) Use civil language and not stereotypes
4) Present copies of notices, authorities to be relied on submissions with copies to colleagues and prosecutor and the court
5) Forum-shopping: it is appreciated that litigants prefer certain courts for certain reasons courtesy, efficiency, etc If one is in a court the litigant does not want or like unless a substantive application is made then Counsel should not show dislike openly proceed or try to adjourn.

6) Making of application on sensitive matters. Alert the trial court in advance in chambers with the prosecutor present (apprehension of suspect of the court, the suspect's or witness health condition or other difficulty that will affect trial)

7) Double- dating - the advocate is expected to fix cases that he/she can handle competently in a day. Consider the type of case the more serious the counsel should be present himself. If certificates of urgency applications are served to be heard on a hearing date inform the trial court of the development and cite the case.

8) A lawyer is on trial from the moment he/she steps in court. The court evaluates your credibility;

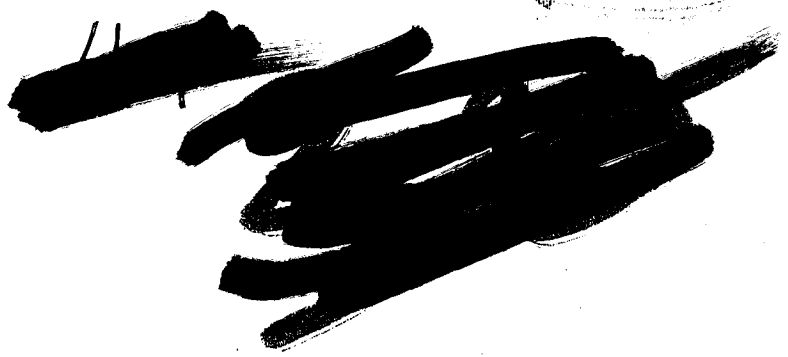
- Behavior
- Appearance
- Bearing
- Conduct

The court will observe your interactions with your client, opposing counsel, prosecutor, witnesses and the court.

The court will look for signs of confidence, authority, and professionalism, as well as subtle displays of doubt, misgiving, weakness and betrayal.

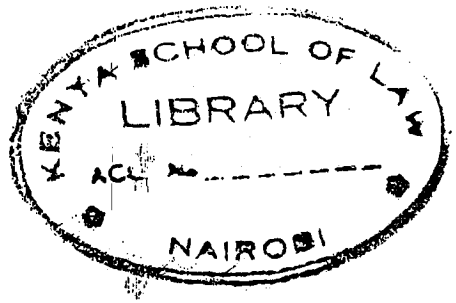
The lawyers' demeanor should include;

- Integrity; inspire trust which leads to success.
- Confidence; well organized and well prepared
- Consideration; courteous and respectful



SECTION TWO

THE TRIAL



2.01 The Trial Process

I. The Right to a Public Trial and its Limits

A. When the accused has pleaded not guilty, the prosecution must prove the charge beyond reasonable doubt.

B. Under S.77 (10) of the Constitution, the trial of the accused should be held in public unless the parties to the case agree otherwise. The CPC also requires a criminal Court to be held in open Court to which the public generally may have access, so far as it can conveniently be accommodated (S 77(1)).

C. Under both the Constitution and the CPC, the Court retains the power to exclude from the proceedings persons other than the parties to the case and their legal representatives if publicity would prejudice the interests of justice, morality, welfare of minors, the protection of the private lives of parties to the proceedings, or if such exclusion is in the interests of defence, public safety or public order (S 77(11) of the Constitution and the proviso to S. 77(1) CPC).

D. Notwithstanding the general rule that the trial should take place in public or in open Court, all prosecutions for rape, attempted rape, defilement of girls under sixteen years and incest must be held in private and no person is allowed to publish or cause to be published by whatever means any particulars calculated to lead to the identification of the victim or their picture. A contravention of this requirement is an offence punishable on conviction by a fine of Kshs 100,000 if the offender is an individual and Kshs 500,000.00 if it is a body corporate (S 77 (2) CPC as amended by the Criminal Law (Amendment) Act 2003, No 5 of 2003).

II. The Complainant

A. If on the day and at the time set for the trial the accused person appears but the complainant does not, the Court is

entitled to acquit the accused, unless it deems it fit to adjourn the hearing to some other time (S.202 CPC). Hence the Court has a discretion which must be exercised judicially.

B. In *R v Mwaura & 4 Others* [1979] KLR 209, it was held that the term complainant under this section includes the prosecutor and that the provision is not intended to cover a situation where a prosecutor does come to Court but says the trial cannot proceed because some witnesses have not turned up. In *Ruhi v R* [1985] 373, it was also held that under S 208 (1) of the CPC, the term "complainant" includes both the prosecutor as well as the person so described in the particulars of the charge.

C. The term "complainant" is now defined by the CPC to mean "a person who lodges a complaint with the police or any other lawful authority" (S 2 CPC as amended by the Criminal Law (Amendment) Act 2003, No 5 of 2003).

III. Sequence of Calling Witnesses

A. Where the complainant and the accused appear, the Court is supposed to hear the case (S 208(1)). The complainant and his or her witnesses, if any, are heard first.

B. At the commencement of the trial it is advisable to request both the prosecution and defence witnesses who are yet to testify to stay out of the Court whilst a witness is testifying. The Court cannot however reject the evidence of a witness merely because he or she was in Court when other witnesses were testifying. The evidence of such witness should be taken and the fact of his or her presence in Court only goes to the weight to be attached to such evidence (*Waithaka & Another v R* [1972] EA 184).

IV. Oaths

A. Every witness has to give evidence upon oath or affirmation. (S.151 CPC and SS 15 and 17 of the Oaths and Statutory Declarations Act).

B. A witness who submits to the oath has to be sworn on a Holy Book such as the Bible, the Koran, etc. The oath takes the following form:

> *"I,...do swear that the evidence I shall give in this Court, touching the matter in issue shall be the truth, the whole truth and nothing but the truth. So help me God".*

C. Where an oath has been duly administered and taken, the fact that the person to whom it was administered had as at the time of taking the oath no religious belief shall not affect the validity of the oath.

V. Affirmations

A. Where a witness objects to being sworn either on the basis of lack of religious belief or that the taking of an oath is contrary to his or her religious belief, such witness should be allowed to make a solemn affirmation instead of taking an oath.

B. The legal effect of the affirmation is the same as an oath (S.15 Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya). In an affirmation, any words of imprecation or calling to witness are avoided (S.16 Oaths and Statutory Declarations Act). An affirmation takes the following form:

"I,... do solemnly, sincerely and truly declare and affirm that the evidence I shall give in this Court, touching the matters in question, shall be the truth; the whole truth and nothing but the truth."

VI. Mode of Recording Evidence.

A. S. 197 CPC requires the evidence of each witness to be taken down in writing or on a typewriter in the language of the Court by the Magistrate or in his or her presence and under his or her personal direction and supervision. The Magistrate is to sign such recorded evidence and it shall

form part of the record. The language of the Court in Kenya is English or Swahili (S. 198(4) CPC).

B. The evidence is to be recorded in narrative form though the Magistrate may record any particular evidence and the answer thereto (S. 197(1) (b)). The Court may also record remarks it deems material regarding the demeanour of the witness under examination (S.199). In *Byamungu s/o Rusiliba v R* (1951)18 EACA 233 and *Musau v R* [1980] KLR 54, it was held that an impression as to the demeanour of a witness ought not to be made without testing it against the whole evidence in question.

C. A witness has a right to have the recorded evidence read to him or her if he or she so requests.

D. If the evidence is tendered in a language which the accused person does not understand, it should be interpreted to a language that he or she understands. If the evidence is tendered in a language other than English and the accused person's advocate does not understand that language, it shall be interpreted to the advocate in English.

VII. Examination-in-Chief

A. The burden of proof is on the prosecution and so it opens the case by calling witnesses. Even in those instances where a statute casts the burden of proof on the accused person, the state must first lay some factual basis by calling witnesses before the burden of proof shifts to the accused person (*Prabulal v R* [1971] EA 52).

B. The prosecutor determines the order in which the prosecution witnesses are to appear before the Court (*Roy Richard Elirema & Another v R*, CA Criminal Appeal No.67 of 2002 (Mombasa) (unreported). Whilst there is no law requiring witnesses to be called in any particular order, it is desirable to have the complainant or a key witness give evidence first and lay the basis for the prosecution case.

matter within the discretion of the prosecutor and a Court should not interfere with that discretion unless it is shown that the prosecutor is influenced by some oblique motive. However, where a party fails to call a material witness without any apparent reason, the Court is entitled to presume that the evidence which that witness would have given would, if produced, be unfavourable to that party (*Mwangi v R* (1984) KLR 595 and *Nguku v R* [1985] KLR 412).

D. The prosecutor starts by leading his witnesses in examination in chief. The object of examination in chief is "to obtain testimony in support of the version of the facts in issue or relevant to the issue for which the party calling the witness contends." (*Cross & Tapper on Evidence*, 8th Ed. 1995)

E. Leading questions, i.e. questions which obviously suggest the desired answer or assume the existence of disputed facts which the witness has been called to testify about are normally not allowed in examination in chief. Such questions are only allowed in the formal introductory part of the testimony.

VIII. Cross-examination

A. Once the witness has given evidence-in-chief he or she is cross-examined by the accused person or the advocate if one has been instructed. S.208 (3) CPC specifically requires the Court to ask an accused who is not represented by an advocate whether he or she wishes to put any questions to the witness and the Court is required to record the answer.

B. Leading questions are allowed in cross-examination.

C. The purpose of cross examination is "first to elicit information concerning the facts in issue or relevant to the issue and that is favourable to the party on whose behalf the cross-examination is conducted, and secondly to cast doubt upon the accuracy of the evidence in chief given against such

party (Cross & Tapper, op. cit.).

D. The right of the accused or his or her advocate to cross-examine witnesses called by the prosecution is guaranteed by the Constitution (S. 77(2) (e)). A denial of this right will vitiate any resultant conviction (*Ezekiel Nyaga & 3 Others v R*, CA Criminal Appeal No. 9 of 1985 (Nakuru) (unreported).

IX. Re-examination

A. After a witness has been cross-examined, the party calling that witness may put further questions to him or her. There are strict limits to the type of questions which may be put in re-examination. Leading questions may not be put.

B. Re-examination must be confined only to matters that arose in cross-examination. New matters can only be introduced with the leave of the Court.

X. Impartiality of the Court

A. Section 77(1) of the Constitution requires the Court trying a criminal offence to be independent and impartial.

B. Although our trial system is adversarial, the role of the Court is not restricted to that of a passive arbiter. Its primary duty is to ascertain the truth. To that end, it is entitled to put questions to the witnesses to clarify any point or resolve contradictions. Under S.150 of the CPC, the Court can, at any stage of the trial summon any person as a witness though not called by any of the parties, or recall and re-examine any witness already called if his or her evidence is essential to the just decision of the case. In such an eventuality, the Court is to allow the prosecutor and the accused to cross-examine the witness.

C. The limit of the power of the Court to call witnesses on its own motion was set out in *Murimi v R* [1967] EA 542. The Court held that the power vested in the Court to call

witnesses must be read in conjunction with the requirement of the law that the prosecution must prove its case beyond reasonable doubt. It concluded that the above provision was not designed and should not be used to empower the trial Court upon the close of the prosecution case, to call a witness in order to establish a case against the accused person, except where the evidence is of a purely formal nature.

D. Ultimately the Court retains residual discretion to control and regulate the conduct of the trial. It determines admissible or inadmissible, relevant or irrelevant evidence and the questions to be put in examination in chief, cross-examination and re-examination of witnesses. It has power to ensure that the right of cross-examination and re-examination does not degenerate into an occasion for irrelevancies and filibuster.

E. On the other hand, the Court must exercise that power sparingly, and as a last resort. It should not unduly interfere with the prosecution's or the defence's conduct of its case. Above all, the Court should not descend into the arena of the conflict so that the dust of the conflict clouds its eyes. At all times, the Court should strive and be seen to be "an independent and impartial Court established by law" as required by S. 77(1) of the Constitution.

XI. Non Appearance of the Parties after Adjournment

A. How the Court proceeds after failure of the accused to appear following an adjournment depends on whether it is trying a misdemeanour or a felony (S. 206 CPC).

B. If the offence charged is a misdemeanour and the accused person fails to appear at the time or place to which the hearing was adjourned, the Court may deal with the case in either of two ways. Firstly, it may proceed with the hearing as if the accused were present. If the accused is convicted and sentenced, the sentence commences from

the date of his or her apprehension. The Court however has power to set aside the conviction if it is satisfied that the failure to appear was due to a cause over which the accused had no control and there was a probable defence on merits. Secondly the Court may refrain from convicting the accused in his or her absence and issue a warrant for apprehension and production of the accused in Court.

C. If the offence charged is a felony and the accused person fails to appear at the time or place to which the hearing was adjourned, the Court has no choice but to issue a warrant for the apprehension and production of the accused in Court.

D. Where it is the complainant who fails to appear at the time or place to which the hearing was adjourned, the Court has discretion to dismiss the charge with or without costs. The discretion must be exercised judicially.

XII. Evidence of Children of Tender Years

A. Where a child of tender years is called as a witness, the Court must first conduct a *voir dire* examination before allowing the child to give evidence. The purpose of a *voir dire* examination is to find out whether the child understands the nature of an oath (S. 19(1) of the Oaths & Statutory Declarations Act and *Onserio v R* [1985] KLR 618).

B. Whether a child is of tender years is a matter of the good sense of the Court (*R v Campbell* [1956] 2 All ER 272). In *Kibangeny arap Kolil v R* [1959] EA 92, the Court of Appeal noted that there is no definition of a child of tender years in the Oaths and Statutory Declarations Act and held that in the absence of special circumstances, the term meant any child of the age, or apparent age of under 14 years. However, it must be noted that the Children's Act 2001 now defines a child of tender years as a child under the age of ten years (S 2).

C. If the child does not understand the nature of an oath, the Child's evidence may still be received, though not on oath, if in the Court's opinion the child possesses a sufficient

intelligence and understands the duty to tell the truth (S. 19(1) Oaths & Statutory Declarations Act). In *R v Kibiba* [1979] KLR 142 a child of the apparent age of 9 or 10 years was allowed to give unsworn evidence.

D. In determining whether a child of tender years understands the nature of an oath the Court should place on record the questions to the child and the answers thereto so that the appellate Court is able to decide whether the issue was rightly decided (*Peter Kiriga Kiune v R* CA Criminal Appeal No 77 of 1982, (unreported) and *Johnson Muiruri V R* [1983] KLR 445).

E. The questions should aim "to establish whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct. There are therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case, and second a realisation that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life" (*R v Lal Khan* (1981) 73 Cr App R 190).

F. In *Gabriel s/o Maholi v R* [1960] EA 159 the former Court of Appeal for East Africa observed that it is not sufficient to ascertain that a child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between truth and falsehood.

G. Examples of questions that may be put to the child in a *voire dire* examination include the name and age of the child, the child's school and class if any, whether the child attends the church or takes any religious instructions, the frequency of church attendance, the value of telling the truth, what the child would expect to happen if he or she did not tell the truth, etc.

H. In *Macharia v R* [1976] KLR 209, it was held that although a Magistrate should hold an examination of a child to see

whether he or she is competent to give evidence and whether he or she should be sworn or should make an affirmation before being allowed to give evidence, a finding on these points after the witness has given evidence is not necessarily a ground for quashing the conviction in the proceedings.

I. S.124 of the Evidence Act, Cap 80 Laws of Kenya requires that where the evidence of a child of tender years is admitted on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence implicating him.

J. In *Kibangeny arap Kolil v R* [1959] EA 92, it was held that no corroboration is required if the evidence of the child is sworn.

K. S. 124 of the Evidence Act as amended by the Criminal Law (Amendment) Act 2003, NO 5 of 2003, now allows the Court, in a trial involving a sexual offence where the only evidence is that of a child of tender years who is the victim of the offence, to receive the evidence of the child and to convict the accused person if it is satisfied that the child is telling the truth. The reasons for the Court's satisfaction must be recorded in the proceedings.

L. If any child, whose evidence is received as aforesaid, wilfully gives false evidence in circumstances where if the evidence was given on oath the child would have been guilty of perjury, the child is guilty of an offence.

XIII. Confessions

A. S. 25 of the Evidence Act defines a confession as comprising "words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts, an inference may reasonably be drawn that the person making it has committed an offence".

B. In *Anyangu v R* [1968)] EA 239, the former Court of Appeal

for East Africa held that a statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried.

C. The Evidence Act as amended by the Criminal Law (Amendment) Act 2003, No 5 of 2003 has radically changed the law relating to confessions. Henceforth a confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved against such person unless it is made in Court.

D. The making of confessions to police officers whilst the suspect is in custody is henceforth prohibited.

2.02 Close of the Prosecution Case

A. Once the prosecution has called all its witnesses, it closes its case. Where the prosecution closes its case prematurely, for example because of denial of an adjournment to call further witnesses, it is desirable to note that fact on the record.

B. S.210 of the CPC entitles both the prosecutor and the accused or his or her advocate to make such summing up, submissions or arguments as they wish to show whether or not the prosecution has made out its case sufficiently to require the accused to make a defence. In addressing the Court on whether a case has been made out against the accused, the defence is to start, followed by the prosecution.

C. In *Robert Fanali Akhuya v R* (CA Criminal Appeal No. 42 of 2002 (Kisumu) (unreported), the Court of Appeal interpreting SS.213 and 310 of the Criminal Procedure Code and S.77(2) of the Constitution held that submissions must be made orally in open Court and in the presence of the accused person. Written submissions constitute a fundamental irregularity.

D. If after considering the arguments and submissions the Court finds that the prosecution has not made out a case against

the accused to require that the accused to be put on his or her defence, the Court is to dismiss the case and acquit the accused forthwith. That determination is a judgement in law and hence it must be in writing and must state the points for decision and the reasons therefore (*R v Amirali* [1971] EA 116).

E. In *R v Wachira* [1975] EA 262, the circumstances under which the Court should find out that a sufficient case has not been made out to require the accused to make a defence were considered. It was held that "a Court is only entitled to acquit at (this) stage if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict".

F. The determination whether or not a case has been made out against the accused has to be made by the Court, whether or not the prosecution and the defence avail themselves the right to make submissions.

2.03 The *Prima Facie* Case

A. If the Court finds that a *prima facie* case has been made out against the accused person sufficiently to require him or her to make a defence, the stage is set for the hearing of the defence case.

B. What constitutes a *prima facie* case was considered in *Ramanlal Trambaklal Bhatt v R* [1957] EA 332). A *prima facie* case was defined therein as "one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

C. If the Court concludes that a prima facie case has been made out against the accused, it is not advisable to give reasons why it has so found (*Kibera Karimi v R* [1979] KLR 36 and *Festo Wandera Mukando v R* [1980] KLR 103). The

reason is that it may appear as if the Court has finally made up its mind even before hearing the defence.

2.04 The Defence Case

A. Once the Court has found that the accused has a case to answer, the accused must present his or her defence. Under the Constitution, an accused person cannot be compelled to give evidence at his or her trial (S.77 (7)). S.211 of the CPC enjoins the Court to explain to the accused the substance of the charge and to inform the accused: -

i) his or her right to give evidence under oath from the witness box, in which case the accused will be cross-examined and may be asked questions by the Court; or

ii) his or her right to make an unsworn statement from the dock, in which case the accused is not liable to be cross-examined.

iii) By dint of S.77 (7) of the Constitution, the accused may also elect to keep quiet.

B. The Court has also to find out from the accused whether he or she will be calling witnesses or other evidence in defence.

C. If the accused person elects not to give any evidence, make an unsworn statement or call evidence, the prosecutor may sum up the prosecution case against the accused (S.306 (3), CPC).

D. Where the accused opts to give an unsworn statement, his or her statement should be recorded in full by the Court and should not be cut short. The accused must be freely allowed to make his or her defence (*Peter Kipkomoi Cheruiyot v R*, CA Criminal Appeal No. 131 of 1981, unreported).

E. No adverse inference - such as that the accused is guilty and that is why he or she is shielding from cross-examination - should be drawn by the Court (*Winston s/o Mbaza v R* [1961] EA 274). In *Johnson Muiruri v R* [1983]

"it is the statutory right of an accused person to choose to make an unsworn statement in his defence in Court. His decision to do so should not be made the subject of unfavourable comment, indeed not any kind of comment at all".

F. Further, the Court should not prompt the accused person to either add or subtract from an unsworn statement (*Augustine Chebon A Cheruiyot v R*, CA Criminal Appeal No. 16 of 1982 (unreported) and *Peter Kipkomoi Cheruiyot v R*, CA Criminal Appeal No. 131 of 1981 (unreported). In *Amber May v R* [1979] KLR 38, the Court of Appeal held that an unsworn statement is not evidence as the term is generally understood because it has no probative value. However the statement should be taken into consideration in relation to the whole of the evidence.

G. If the accused elects to give evidence or make an unsworn statement or to adduce evidence, the Court is to call upon the accused to enter defence. S. 160 of the CPC requires that where the only witness called by the defence is the person charged, he or she shall be called as a witness immediately after the close of the evidence for the prosecution. An accused person who elects to keep quiet still retains the option to call witnesses if he or she so wishes.

H. Where the accused elects to call other witnesses, such accused has to give his or her evidence first, followed by the witnesses (*R v Malakwen arap Mutei* (1949) 22-23 KLR 132 and *Andiazi & Another v R* [1967] EA 813). The defence is subject to the same rules as the prosecution in examination-in-chief, cross-examination and re-examination.

I. If the accused adduces evidence in his or her defence introducing new matters which the prosecution could not have reasonably foreseen, the Court may allow the prosecution to adduce evidence in rebuttal (S.309 CPC). The Court may recall a prosecution witness for further cross-

v R [1961] EA 320).

J. The Court should ensure fairness and as much as possible afford both the prosecution and the defence equal opportunities in calling their witnesses and conducting their respective cases. In particular the Court should not deny them reasonable opportunity to call their witnesses (*Washira v R* [1985] KLR 761

K. Just like the prosecution, where the defence closes its case prematurely, for example because of denial of an adjournment to call further witnesses, it is desirable to note that fact on the record.

2.05 Final Submissions

A. At the close of the case, both the prosecutor and the accused or his or her advocate have a right to address the Court and to present submissions on both the evidence and the law. Whether or not the prosecution has a right to make submissions depends on whether the accused has called witnesses. If the accused adduces any evidence, the prosecution has a right to make submissions (S. 310 CPC). If however, the only evidence adduced by the defence is that of the accused, the prosecution is not entitled to reply (S.161 CPC).

B. Where the Attorney General or the Solicitor General appears personally for the prosecution, they have a right of reply in all cases.

C. In *Robert Fanali Akhuya v R* CA Criminal Appeal No. 42 of 2002 (Kisumu) (unreported) the Court of Appeal in interpreting Sections 213 and 310 of the Criminal Procedure Code and Section 77(2) of the Constitution held that submissions must be made orally in open Court and in the presence of the accused person. The Court further held that accepting written submissions was a fundamental irregularity going to the root of the conviction.

2.06 Change of Magistrates

A. If a Magistrate after hearing and recording the whole or part of evidence in a trial ceases to exercise jurisdiction and is replaced by another who has jurisdiction, the succeeding Magistrate is empowered to deliver any undelivered judgement written and signed by the predecessor. If no judgement has been written and signed by the predecessor, the succeeding Magistrate may act on the evidence recorded by the predecessor or alternatively re-summon the witnesses and commence the trial *de novo* (S 200(1)). It is desirable that where the Court opts to act on the evidence of the predecessor, it should find out the accused person's preference and to inform the accused of his or her right to a *de novo* trial.

B. Where a Magistrate ceases to exercise jurisdiction after delivering judgement but before passing sentence and is replaced by another who has jurisdiction, the succeeding Magistrate is empowered to pass sentence or make any order as if he had delivered the judgement (S. 200(2) CPC).

C. If a succeeding Magistrate continues with a trial where part of the evidence was taken by his predecessor, the Magistrate must inform the accused person of his or her right to demand that any witness be re-summoned and reheard (S.200(3)). In *Njenga v R* [1984] KLR 605 the Court of Appeal set aside a conviction because the succeeding Magistrate who took over the trial after the evidence of the complainant had been taken had failed to inform the accused of his right to have that witness re-summoned and re-heard. See also *Kariuki v R* [1985] KLR 504 where a similar verdict was reached with the Court of Appeal emphasising that S 200(3) CPC imposes a duty on a succeeding Magistrate to inform the accused person of the right to demand recall and rehearing of witnesses.

D. If an accused person is convicted on the evidence not taken

empowered by S.200 (4) to set aside the conviction and order a retrial if it feels that the accused person was materially prejudiced.

E. In *Ndegwa v R* [1985] KLR 534, the Court of Appeal set out the following principles to guide the invocation of S 200 CPC:-

(i) The provisions of S 200 CPC ought to be used very sparingly and only in cases where the exigencies of the circumstances are not likely but will defeat the ends of justice if a succeeding Magistrate is not allowed to adopt or continue a criminal trial commenced by a predecessor.

(ii) The provisions of S 200 should not be invoked where the part-heard trial is a short one and could be conveniently started *de novo*.

(iii) S 200 CPC should not be invoked where witnesses are still available locally and passage of time is short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to the prejudice of the prosecution.

(iv) No rule of natural justice, statutory protection, and evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the administration of justice.

(v) The statutory and time honoured formula that the Magistrate making the judgement should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.

(vi) A Magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses.

I. Pronouncement

A. Judgement is to be pronounced either immediately after the termination of the trial or at some subsequent time. If the Court opts for the latter, it must give notice of the date and time to the parties and their advocates, if any (S. 168(1) CPC).

B. The judgement should be read in the presence of the accused, save where his or her personal attendance has been dispensed within during the trial and the sentence is a fine, or where the accused is acquitted. S.168 (3) however, provides that the absence of a party at the delivery of the judgement or failure to notify him or her of the date of delivery of judgement does not invalidate the judgement.

C. Like the trial, S.77 (10) of the Constitution requires that, except with the agreement of the parties, the judgement of the Court should be read in public. Similarly, S.168 (1) CPC requires the judgement to be pronounced or the substance thereof explained "in open Court". If either the prosecution or the defence so requests the whole judgement should be read out in open Court.

D. It must follow that in all cases which the law requires to be heard in private namely, rape, attempted rape, defilement of girls under fourteen years and incest, even the judgement should be read in private.

II. Contents of the Judgement

A. The judgement should include the name of the accused and the charge he or she is facing. The judgement ought to commence on a separate page from the rest of the proceedings and the pages should be numbered consecutively.

B. S.169 CPC requires the following of the judgement:-

Magistrate
(ii) It must be written in the language of the Court
(iii) It must contain the point or points for determination
(iv) It must contain the decision
(v) It must contain the reasons for the decision
(vi) It must be dated and signed by the Magistrate in open Court at the time it is pronounced.

C. The judgement should not contain two dates, namely the date of writing and the date of delivery. It should contain only the date of delivery being the date from which the right of appeal (if any) starts to run. Where one Magistrate writes a judgement and it is read by another, the Magistrate who wrote the judgement should sign but not date the judgement. The Magistrate who reads the judgement should date and sign the same at the time it is pronounced.

D. In *Mugema v R* [1967] EA 676, the judgement was undated and unsigned. At the end of the judgement, it was indicated that the accused persons were found guilty and convicted, but it did not show whether they were sentenced. It was not clear whether the judgement was delivered in the presence of the accused persons and how they were sentenced. On appeal it was held that these omissions constituted grave irregularities that could not be cured under S. 346 CPC and that the trial was a nullity.

E. Where the law requires a particular offence to be tried by a Magistrate with a specified jurisdiction, the Magistrate who reads the judgement should be a Magistrate of the same jurisdiction as the one who tried the offence and wrote the judgement. Hence for example, a capital robbery judgement ought to be read by a Magistrate with jurisdiction to try that offence.

F. In arriving at its judgement, the Court should analyse and weigh all the prosecution and defence evidence in its totality. The prosecution and the defence cases should not be looked at in isolation, but as a whole. Similarly, the Court should not evaluate the case of the prosecution in isolation

... doubt on it (*Okethi Okale & Others v R* [1965] EA 555, *Geoffrey Nguku v R* (1982-88) 1 KAR 818 and Joseph Najramba Karura v R (1982-88)1 KAR 1165).

G. In *Nyanamba v R* [1983] KLR 601 the trial Magistrate, after outlining the evidence of the prosecution witnesses stated that he believed their evidence but gave no reason for believing it apart from saying that they had no reason for lying. After considering and deciding on the prosecution evidence, the Magistrate rejected the defence as false, again without giving any reasons. The conviction was quashed and the sentence set aside by the Court of Appeal because the judgement did not comply with S 169(1) CPC which requires every judgement to contain the point or points for determination, the decision thereon and the reasons for the decision. The Court also held that the evidence should have been considered as a whole. However in *Confiance v R* (1960) EA 567 it was held that failure to set out the point or points for determination and the reasons for the decision are not alone sufficient grounds for allowing an appeal

H. The judgement should also contain a summary of the evidence adduced both by the prosecution and the defence. Findings are to be made after considering the entire evidence on record. It is improper to consider the evidence of the prosecution in isolation from that of the defence or vice versa. However weak the defence of the accused appears, it must be considered by the Magistrate.

I. The findings made by the Court must be based upon the evidence adduced and not upon speculation or theories unproved by evidence (*Okethi Okale & Others v R* [1965] EA 555). In *Aluta v R* [1985] KLR 543 the Court of Appeal emphasised that in criminal cases, conviction can only be based on the weight of the actual evidence adduced and that it is dangerous and inadvisable for a trial Court to put forward a theory not canvassed in evidence or in the speeches of counsel

that in a joint trial involving more than one accused person, the evidence against each accused must be considered separately and the case against each accused must be such as to prove the guilt of that particular accused beyond reasonable doubt. The Court further emphasised that it was a misdirection to deal separately with one part of the evidence and omit to relate it to the whole.

K. Where the accused is convicted, the judgement should specify the offence and the section of the law under which the accused is convicted and the punishment to which he is sentenced. (S.169 (2) CPC and *Nyanamba v R* [1983] KLR 599). Where the accused is acquitted, the judgement should state the offence of which he or she is acquitted and should direct that the accused be set at liberty (S. 169(3) unless otherwise lawfully held. The Attorney General has a right of appeal against acquittal of an accused person on a matter of law (S. 348A CPC).

L. Failure to comply with the requirements of S.169 CPC is an irregularity. It entitles the appellate Court to examine the facts of the case with a view to determining whether the irregularity has occasioned a failure of justice. Once the appellate Court finds the irregularity to have occasioned a failure of justice, the decision will be reversed or altered (S.382 CPC).Where from the record the appellate Court cannot determine the appeal on merit, or cannot tell whether the trial Court properly directed itself on the evidence, the appellate Court will order a re-trial.

M. In *Diego v R* [1985] KLR 621, the High Court decried unsavoury and derogatory language in the judgement. It held that sarcastic and denigratory remarks in relation to the defence case or defence witnesses (or in that case the prosecution and prosecution witnesses) have no place in a judgement and that a dispassionate approach and clear findings of fact are more indicative of judicial approach and do not lay the Magistrate open to a charge of possible bias.

N. Upon convicting the accused person the Court must inform

the accused person of his right of appeal. Under S 348 CPC the appeal must ordinarily be entered within 14 days of the date of the order or sentence appealed against.

O. Under S 170 CPC the accused is entitled without delay, to a copy of the judgement or if he so desires where practicable, a translation thereof in his own language. As amended by the Criminal Law (Amendment) Act No 5 of 2003, the accused is no longer entitled to the judgement free of charge. S 392 CPC also entitles a person affected by a judgement or order passed by the Court, on application and payment, to a copy of the judgement, order, deposition or other part of the record, unless for special reasons the Court decides to give them free of charge.

2.08 Conviction for offences other than those Charged

A. Where evidence tendered does not disclose the offence charged, but instead proves commission of a lesser offence of the same genus, the Court is empowered to convict the accused person for the proved lesser offence (S. 179 CPC). Thus for example, where the accused is charged with an offence consisting of several particulars, a combination of some only which constitute a complete minor offence and that combination is proved whilst the remaining particulars are not proved, the Court may convict of the minor offence even though it was not charged.

B. Hence the accused charged with rape contrary to S140 PC may be convicted of indecent assault contrary to S 144(1) PC, even though not so charged. Similarly, where the accused is charged with an offence and the facts are proved which reduce it to a minor offence, the Court may convict of the minor offence although the accused was not charged with it. Hence the accused charged with robbery with violence contrary to S 296 (2) of the PC may be convicted of simple robbery under S 296(1) PC even though not so charged.

Mugambi v R [1980] KLR 73, it was held that the substituted offence must be both minor and cognate of the offence charged.

D. An accused charged with committing an offence may be convicted of having attempted to commit the offence even though he or she was not charged with the attempt (S 180 CPC).

E. SS 181-191 CPC give other instances where a conviction may be entered for a lesser offence even though the lesser offence was not charged. These include:-

(i) A mother charged with the murder of her child of less than 12 months may be convicted of infanticide.

(ii) A person charged with murder or manslaughter of a child or infanticide or attempt to procure an abortion may be convicted of killing an unborn child.

(iii) A person charged with killing an unborn child may be convicted of attempt to procure an abortion.

(iv) A person charged with murder of an infant or infanticide or killing an unborn child may be convicted of attempt to conceal the birth.

(v) A person charged with manslaughter arising from driving a motor vehicle may be convicted of causing death by dangerous driving under S. 46 of the Traffic Act, Cap 403 Laws of Kenya.

(vi) A person charged with administration of or consenting to the administration of unlawful oaths to bind commission of particular offences may be convicted of committing those particular offences.

(vii) A person charged with rape may be convicted of indecent assault, defilement, procuring defilement by threats or fraud or administering drugs or incest.

(viii) A person charged with incest may be convicted of defilement or defilement of idiots or imbeciles.

(ix) A person charged with stealing may be convicted

of handling stolen goods or conveying stolen property or obtaining by false pretences.

(x) A person charged with obtaining by false pretences may be convicted of stealing.

2.09 Mitigation and Victim Impact Statements

I. Mitigation Statements

A. SS. 216 and 329 CPC empower the Court which has convicted an accused person, before sentencing him or her or making any other order to receive such evidence as it thinks fit, in order to determine the appropriate sentence or order to be made. This provision does not make it mandatory for a Court to receive such information *(R v Nasanairi Nsubuga* (1950) 17 EACA 130). However, it is desirable to do so. Similarly, S. 323 CPC requires that an accused person who has been convicted or who has pleaded guilty shall be asked whether he or she has anything to say why sentence should not be passed upon him or her. Omission to put this question cannot invalidate the proceedings.

B. Under S. 324 CPC, an accused person whether he has pleaded guilty or otherwise, may apply to arrest judgement at any time before sentencing if the information, after due amendment, does not disclose an offence which the Court has power to try. Should the Court decide in favour of the accused, he or she is to be discharged.

C. The procedure followed by the Court in assessing sentence is as follows:-

(i) After convicting the accused the Court will first call upon the prosecution to give a factual statement on the accused and in particular whether the accused has any previous convictions, and if so, the nature, date, sentence imposed, and the date when accused was last released from prison. The

prosecution should not allege or imply that the accused has committed offences for which he or she has not been convicted. Similarly, prejudicial statements meant only to influence the Court to award severe sentences should not be allowed (*Karanja v R* [1985] KLR 348 and *Ruhi v R* [1985] KLR 373). Indeed, where the prosecution knows anything in favour of the accused, it should bring it to the attention of the Court. This information does not have to be given on oath.

(ii) The accused should then be given an opportunity to deny or qualify the information presented by the prosecutor and to state further facts in mitigation. When something alleged by the prosecution is denied or disputed, the Court should make a finding on its truth by following the normal procedure of a trial.

The prosecution must produce evidence on oath, which should be subjected to cross-examination. Further evidence to contradict the prosecution may be presented. In *Thathi v R* [1983] KLR 354 the High Court emphasised that previous convictions must be read to the accused who must be asked whether he or she accepts them. The accused must know what is alleged against him or her and have the opportunity to deny it. If the prosecution wishes to continue to rely on the previous conviction, evidence must be called to confirm them.

(iii) Where the prosecution alleges previous conviction, the Court should specifically ask the accused whether he or she admits or denies them and this should be noted in the record. Where the accused denies previous conviction, the conviction must be proved in any of the methods set out in S. 142 CPC. In addition to proof of the conviction, the accused has to be identified as the same person who was so convicted. This is usually done by

fingerprints. Where the identification is made by way of a certificate comparing fingerprints, it is *prima facie* evidence of the facts set out therein if it is produced by the person who took the fingerprints of the accused.

(iv) A previous conviction outside Kenya may be proved by a certificate of a police officer in the country of conviction, together with a copy of the sentence or order and the fingerprints or photographs thereof of the person convicted, and evidence that the fingerprints are those of the accused.

(v) The facts relied upon by the accused in mitigation may be questioned by the prosecution, in which case evidence must be heard and a finding made as to the disputed facts. In the absence of evidence to the contrary, the Court ought not to ignore mitigating circumstances put forward by the accused.

D. The purpose of mitigation is to enable the accused person to show why the Court should be lenient to him or her or why it ought to impose one form of sentence instead of another. The Court ought to establish the history, character, antecedents and all matters relevant to punishment before assessing sentence.

E. Although mitigating factors may require an accused to be treated leniently, they do not entitle or guarantee the accused that he or she will in fact be so treated. Courts are free to ignore mitigating circumstances when the gravity of the offence or the need for deterrence is so compelling as to outweigh the individual circumstances of the accused.

F. The Court should explain to the accused person of his or her right to make a mitigation statement, even where the accused has been convicted of an offence punishable by death. This is not an exercise in futility even though in such cases the law does not allow the Court to award a sentence

other than death. Under S.27 of the Constitution, the President, in exercise of the prerogative of mercy has power to grant a convicted person a pardon, respite of execution of the punishment indefinitely or for a specified period, substitute a less severe form of punishment for that imposed, and remit the whole or part of the sentence. Furthermore, where a person is sentenced to death section 29 of the Constitution requires the president to cause a written report of the case from the trial Court, together with such other information derived from the record of the case or elsewhere to be considered by the Advisory Committee on the Prerogative of Mercy, which shall advise the president accordingly. The mitigation statement being part of the record may be very important in the consideration of whether or not to exercise the prerogative of mercy.

G. It is important for the Court to give the reasons for the sentence, punishment or order that it makes. The prosecution, the accused, the victim and the public in general are entitled to know why the Court awarded a specific punishment.

II. Victim Impact Statements

A. Victim impact statements were introduced for the first time by the Criminal Law (Amendment) Act, No 5 of 2003 to enable the Court to receive, upon convicting an offender and before sentencing, information on the impact of the offence on the victim and his or her family (S. 329(C) CPC).

B. The victim impact statement is receivable only in trials where the offence has resulted in death or actual physical bodily harm to any person (S 329B) and where it is given in accordance with the law (S. 329 E (3).

C. The Court is allowed to receive such statement if it considers appropriate. S. 329(d) expressly states that the victim impact statement is not mandatory and in any event it shall not be received or considered if the victim objects. In addition, in determining punishment for the offence, the Court is not obliged to consider a victim impact statement given by a

family victim unless it considers it appropriate to do so (S.329(C) (3)(b)). However the absence of a victim impact statement does not lead to any inference that the offence had little or no impact on the victim (S. 329D (3)).

D. The CPC creates various categories of victims whose statements may be received and considered (S 329(A)). These are:
   (i) Primary victim, meaning a person against whom the offence was committed or a person who witnessed the actual or threatened violence, death or infliction of physical bodily harm and as a result thereof suffered personal harm as a direct result of the offence,
   (ii) family victim meaning where a primary victim has died as a direct result of an offence, a member of the primary victim's immediate family, whether or not he or she has suffered personal harm as a result of the offence ,
   (iii) member of the primary victim's immediate family meaning the victim's spouse or defector spouse, parent, step-parent, guardian, child, step-child, brother, sister, step-brother or step sister.

E. In the case of a primary victim, a victim impact statement is defined as a statement containing particulars of any personal harm suffered by the victim as a direct result of the offence whilst in the case of a family victim, it is a statement containing the impact of the primary victim's death on the members of his or her immediate family (S 329A).

F. Where a primary victim has died as a result of the offence, the Court is allowed to receive a victim impact statement from a family victim and the Court may comment on it. To be receivable by the Court, the statement must be filed by or on behalf of the victim or the prosecutor.

G. The victim impact statement must be in writing and where a primary victim is incapable of providing one or objecting thereto, a member of the immediate family or other

2.10 Sentencing

I. Types of Sentences

A. S. 24 of the Penal Code and other laws set out the various forms of punishments that may be imposed by Courts in Kenya. These are: -
   (i) death
   (ii) imprisonment
   (iii) Suspended sentences
   (iv) fine
   (v) forfeiture
   (vi) payment of compensation
   (vii) security to keep peace and be of good behaviour
   (viii) absolute and conditional discharges
   (ix) probation
   (x) community service orders

II. The Death Sentence

A. This is the prescribed punishment for treason, murder, robbery with violence and attempted robbery with violence.

B. This sentence is not to be passed upon a convict if he or she was less than 18 years old at the time of commission of the offence (S.25 PC). Such a convict is to be detained during the President's pleasure.

C. Where an accused person is convicted of several counts of capital offences, the Court must pass the death sentence on each count (*Okwaro Wanjala v R* [1978] KLR 114 and *Shah v R* [1985] KLR 674). Similarly, where the accused is convicted of a capital offence as well as other non-capital offences, the Court must sentence the convict for each of the counts for which he or she has been convicted (*Turon v R* [1967] EA 789).

D. The Court of Appeal has held that subordinate Courts have no power to impose a sentence other than the death sentence on a convict where the evidence proves commission of the offence of robbery with violence. If such a convict appeals, the appellate Court will substitute the punishment imposed on the convict with the death sentence (*Joseph Boit Kemei & Another v R*, CA Criminal Appeal No. 7 of 1995 (Nakuru) (unreported).

E. Where an accused facing a charge punishable by death in a subordinate Court wishes to plead guilty or to change plea from one of not guilty to guilty, the Court is duty bound to explain to him or her the consequences of a plea of guilty. It is only if the accused insists on pleading guilty after the consequences are explained to him or her and the Court is satisfied that the accused fully appreciates the consequences and nevertheless truly wishes to plead guilty that the plea of guilty should be entered (*David Mundia Onkoba v R* CA Criminal Appeal No 14 of 1990 (unreported) and *Emongonyang'a v R* CA Criminal Appeal No. 69 of 1990 (unreported).

III. Imprisonment

A. Imprisonment may be for life or any shorter period. This is the prescribed punishment for such offences as rape manslaughter, arson, etc. Under S.26 (2) PC, where the prescribed punishment is imprisonment for life or any other period, the Court has discretion to pass a sentence of imprisonment for a shorter period. In determining the appropriate sentence, the Court exercises its discretion depending on the circumstances of the case (*Griffin v R* [1981] KLR 121).

B. S. 26(1) PC empowers the Court in addition to a sentence of imprisonment to sentence a convict, in appropriate cases to hard labour.

C. As a general principle, imprisonment should not be imposed on a first offender except where the offence is particularly grave, aggravated or widespread in an area so that

imprisonment acts as a shock deterrent. Where there are no aggravating circumstances, the emphasis in sentencing first offenders ought to be on reformation.

D. Whenever a convict is liable to be imprisoned the Court has the option of imposing a fine either in addition to or instead of a prison sentence (S.26 (3) PC). This is the case even if the section defining the offence does not refer to a fine as a form of punishment. However, this option is not available where the law prescribes a minimum sentence of imprisonment.

E. The sentence imposed by the trial Court begins on the date on which it is pronounced and although in considering what term of imprisonment to impose Courts usually take into account the period an accused has spent in remand, the Court of Appeal in *Muoki v R* [1985] KLR 323 held that they are not bound to do so. However, the Court of Appeal approved the practice.

F. Where the accused is convicted of two or more offences and sentenced to two or more terms of imprisonment, the Court should state whether the sentences are to run concurrently or consecutively (*Owiti v R* [1984] KLR 733). This is because S 14(1) of the CPC provides that in such cases the sentences are to commence the one after the expiration of the other, unless the Court directs that sentences shall run concurrently.

G. The general rule is that concurrent sentences rather than consecutive sentences should be awarded for offences committed in the same transaction *(R v Sawedi Mukasa s/o Abdulla Aligwansa* (1946) 13 EACA 97, *Ondiek v R* [1981] KLR 430) and *Ng'ang'a v R* [1981] KLR 531). In *Odero v R* [1984] KLR 621 the High Court held that if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, the offences constituted by the series of acts are committed in the course of the same transaction and deserve concurrent rather than consecutive sentences.

H. Upon sentencing the accused to imprisonment the Magistrate must issue a warrant ordering that the sentence shall be carried out in any prison in Kenya. The warrant is full authority to the officer in charge of the prison to carry out the sentence (S. 333(1) CPC).

I. Under the Prisons Act, Cap 90 Laws of Kenya, a prisoner is entitled to remission of up to one third of the sentence of imprisonment (S.46). The prisoner may however lose any accrued remission for offences against prison discipline.

J. S.72 (2) of the Prisons Act constitutes the resident Magistrate in any district in which a prison is situate an *ex officio* visiting justice of that prison. By virtue thereof, the Magistrate is entitled to visit the prison in respect of which he or she is a visiting justice "at any time" (S.72 (3)). The Act further empowers the Magistrate in that respect to inspect the wards, cells, yards, punishment cells and other apartments and divisions of the prison, to inspect and test the quality and quantity of the prisoner's food, to hear the complaint, if any, of any prisoner, to ascertain whether the Prisons Act, the rules made thereunder and the prison standing orders are being complied with and to draw the attention of the officer in charge to any irregularities noted (S.72 (4)).

K. The Prisons Act also empowers the visiting justices to a prison to constitute a Board of Visiting Justices and appoint a chairperson. At the end of each year or at any other convenient time, they may render a report to the Minister on the state of the prison to which they are visiting judges (S.72 (5)).

IV. Suspended Sentences

A. Section 15(1) CPC empowers a Court which has passed a sentence of imprisonment for any offence for a term not exceeding two years to suspend the sentence for a specified period, unless during that period the offender commits another offence punishable by imprisonment or fine.

period, the suspended sentence takes effect and the sentence for the subsequent offence is to run consecutively to the suspended sentence.

V. Fines

A. The amount of fine may be set by the law. Where it is not so set the amount of fine is unlimited but shall not be excessive (S.28 (1) (a) PC).

B. It is a first principle in inflicting fines that the capacity of the accused to pay should be considered. Hence before sentence of fine (other than trivial amount) is passed, the Magistrate should enquire into the means of the convicted person to pay a fine (*Karanja v R* [1985] KLR 348 and *R v Benjamin Ogweno Kayier* [1978] KLR 158). In other words, where the Court has decided to impose a fine, it should ensure that there is a reasonable correlation between the fine and the ability of the convict to pay. If the idea behind a fine is to keep the convict out of prison because he or she would serve a useful purpose, there is no need to impose a fine, which the accused cannot pay and in consequence end up in prison.

C. Where the offence is punishable with a fine or a term of imprisonment, it is in the discretion of the Court to impose a fine or imprisonment (S. 28(1) (b) PC).

D. When a fine is imposed, S. 28(1) (c) PC empowers the Court to direct that in default of payment of the fine, the convict will be imprisoned for a specified period. (*Karanja v R* [1985] KLR 348). A sentence of imprisonment in default of fine cannot be made concurrent with any other sentence of imprisonment (*R v Ofunya* [1970] EA 78). Imprisonment consequent upon non-payment of a fine terminates immediately the fine is paid.

E. Under S. 28(2) PC, the period of imprisonment in default of payment of a fine, where no other law specifies otherwise, is the period which in the Court's opinion will satisfy the

justice of the case. However it should not exceed the following scale.

Amount (Kshs)	*Maximum Period*
Up to 500/-	14 days
Exceeding 500/- to 2,500/-	1 month
Exceeding 2,500/- to 15,000/-	3 months
Exceeding 15,000/- to 50,000/-	6 months
Exceeding 50,000/-	12 months

F. The Court is also empowered to issue warrants for distress and sale of a convict's moveable and immovable property to satisfy a fine. Attachment and sale is not allowed if the convict has served imprisonment in default, unless for special reasons to be recorded in writing (S.28 (2) PC).

G. A fine cannot be denied merely because of the convict's earning capacity; otherwise all well paid convicts irrespective of the nature of the offence would be imprisoned without the option of a fine (*Mita v R* [1969] EA 598). The real test is whether, given all the circumstances of the case, justice would be better met by a fine rather than imprisonment.

VI. Forfeiture

A. The purpose of a forfeiture order is either to deprive the convict of the benefit of crime or to take from his or her possession things, which could aid in committing other offences. There is no general power for a Court to order forfeiture unless it is expressly provided for (*Munyo Muu v R* [1957] EA 891. A Court imposing forfeiture should specify the provision under which it is made.

B. Under some statutes like the Customs and Excise Act and the Wildlife Conservation and Management Act, forfeiture is a mandatory penalty while in others it is optional and at the discretion of the Court. In *Wakitata v R* [1977] KLR 168 the appellant was convicted of being in unlawful possession of game trophies under the Wildlife Conservation and Management Act. Upon conviction, the trial Court made an

improper because the trophies were automatically forfeited following conviction under the Act. (See also *Saleh v R* [1975] EA 251).

C. S. 389A CPC provides the procedure to be followed where forfeiture is discretionary. In such cases, the Court is to issue a notice to the person believed to be the owner of the goods to be forfeited to appear at a specified place and time and show cause why the goods should not be forfeited. If the owner is not known, the notice is to be advertised in a newspaper or other manner as the Court thinks fit. Where cause is not shown, the goods may be forfeited. If the Court finds that the goods belong to an innocent party who did not know that they were being put to a criminal purpose, it shall not forfeit the same.

VII. Payment of Compensation

A. Under S.31 PC the Court may order a convict to pay compensation to any person injured by his offence, either in addition to or in substitution of any other punishment.

B. Before the enactment of the Criminal Law (Amendment) Act, No 5 2003 compensation was to be ordered where the injuries suffered by the complainant were minor. If the injuries were grievous, the complainant was supposed to file recovery proceedings in a civil Court (*Terrah Mukindia v R* [1966] EA 425). In *Ahmed Mohammed v R* [1959] EA 1087) it was held that a heavy fine should not be imposed merely to create a compensation fund.

C. The Criminal Law (Amendment) Act, No 5 2003 now empowers a Court to order compensation for civil liability proved against the accused in the course of the criminal trial. Under S.175 (2) a Court which convicts an accused and finds on the facts that he or she has by virtue of the offence a civil liability to the complainant or another party may order the convicted person to pay to the injured party such sum of money as it considers could justly be recovered as damages in civil proceedings brought by the injured party.

the Court making the same.

D. The Court is not to make such an order for compensation where it considers such an order prejudicial to the convicted person by reason of the complexity of evidentiary matters affecting quantum of damages, insufficiency of evidence relating to damages or quantum, rules on limitation of actions or any other circumstances.

E. Where an order for compensation is made under S 175 of the CPC, it cannot take effect before the expiry of the prescribed period for appeal and where an appeal has been preferred before confirmation of the order upon determination of the appeal.

F. Where an order for compensation has taken effect, the amount therein is recoverable as a judgement debt in civil proceedings and an award of compensation is a defence in any subsequent proceedings instituted in respect of that liability.

VIII. Security for Good Behaviour

A. Under S.33 of the PC a person convicted of an offence other than an offence punishable by death may, in addition or in substitution of any other fine, be ordered to enter into his or her own recognizance, with or without sureties, to keep peace and be of good behaviour for a period to be fixed by the Court. Such a person may be imprisoned pending his or entering into recognizance.

B. Where the convict fails to observe any of the conditions of the recognizance, the Court, which convicted is empowered to issue a warrant of arrest and may remand the convict in custody until the case is heard or may admit him or her to bail. The Court may thereafter hear the case and pass sentence.

A. Where the Court is of the view, having regard to all the circumstances of the case including the nature of the offence and the character of the offender that it is inexpedient to inflict punishment and further that an order of probation would not be suitable, the Court may discharge the convict absolutely or upon the condition that he or she shall not commit any offence in a period not exceeding 12 months from the date of the order.

B. The Court has to explain to the offender in a language he or she understands that if he or she commits any other offence within the specified period, the offender would be liable to be sentenced for the original offence. The Court may order an offender who has been discharged to pay all or any part of the costs incidental to the prosecution and compensation.

X. Probation

A. The primary aim of probation is the reform and rehabilitation of the offender. Probation is provided for under the Probation of Offenders Act, Cap 64 Laws of Kenya. S. 4 thereof empowers a Court, where it is of the opinion that it is expedient to release an offender on probation, it may convict and make an order for probation.

B. Before an offender is sentenced to probation, it must be shown that he or she is remorseful and repentant and is willing to learn and reform (*Elijah Munee Ndundu & Another v R* [1978] KLR 163).

C. A probation officer's report has to be availed to the Court before sentencing. This report should state the personal particulars of the offender such as the age, character, health, mental condition, family background, antecedents etc. The offender may be required to enter recognizance with or without sureties and must comply with all the terms of the probation order.

cancelled. Before cancellation, the offender has to be brought before the Court, which should put to him or her in the very clearest possible way the breach alleged. The offender should be asked whether he or she admits the breach. The grounds upon which it is alleged that the terms of the probation order have been breached must be put to the offender. If the order has been broken by the commission of another offence, the offender should be told the Court at which he or she appeared, the offence charged and the adjudication of the Court.

E. If the matters put to the offender are admitted, the Court shall proceed to deal with him or her.

F. If the offender denies those matters, they must be proved and the offender must be asked if he or she wises to give evidence or make a statutory statement and call witnesses. After all the evidence has been taken, the Court must pronounce whether it finds the breach proved (*Mulwa Munyalo v R* [1978] 14.

XI. Community Service Orders

A. The Community Service Orders Act (CSOA) has introduced a new type of sentence laying more emphasis on restorative form of justice that takes into account in a more direct way the interests of the accused, the society and the victim. It de-emphasises imprisonment for certain categories of offenders and emphasises service to the community.

B. Community service under the CSOA comprises unpaid public work within a community, for the benefit of that community, for a period not exceeding the term of imprisonment for which the Court would have sentenced the offender. Public work is defined in S.3 (2) (b) of the Act as: -

(a) construction or maintenance of public roads or roads of access;

(c) environment conservation and enhancement works;
(d) project for water conservation, management or distribution and supply;
(e) maintenance works in public schools, hospitals and other public social service amenities;
(f) work of any nature in a foster home or orphanage;
(g) rendering specialist or professional services in the community;

C. S.3 of the CSOA provides that where any person is convicted of an offence punishable with:
(a) imprisonment for a term not exceeding three years with or without the option of a fine, or
(b) imprisonment for a term exceeding three years but for which the Court determines a term of imprisonment for three years or less, with or without the option of a fine to be appropriate, the Court may make a community service order requiring the offender to perform community service.

D. Any person sentenced to 3 years imprisonment or less is eligible for community service where the Court considers the person a non-serious offender. On inquiry if the person is found to meet the laid down criteria, as a general rule he or she should be considered for community service.

E. Before imposing community service, a proper inquiry into the offender must be made and recorded. The background information on the offender may be obtained from the police, the prosecutor, community service officers, legal practitioners, etc. The factors which the Court should take into account in determining whether or not to impose community service include:-
(a) whether the offender has a fixed place of abode
(b) whether the offender is a family person,
(c) whether and where the offender is employed, his or her working hours and the nature of the offender's

skills

(d) whether the offender is a first offender

(e) whether the offender is a youthful offender

(f) distance to the nearest community service institution from the offender's home

(g) the status of the offender and the nature of work available

(h) age and health of the offender

F. In appropriate cases, the Court can combine community service order with another order. Thus for example, the Court may order community service as well as compensation, community service and counselling for a specified period etc. The Court may also impose community service on condition of good behaviour, restitution or compensation.

G. Some offences, by their very nature are not suitable for community service. Among these are murder, rape, defilement, robbery with violence, robbery, theft of cars, stock theft, corruption involving public officers, serious frauds drug trafficking in large quantities and other offence warranting lengthy jail terms.

H. Before imposing community service the Court should ascertain whether the offender is willing to perform community service and carefully explain to him or her the aims and objectives of community service, the obligations of the offender under the order, the consequences of failure to comply with the order and what community service entails. A community service order should not be made in respect of an offender who refuses to perform community service.

I. Before an offender is sentenced to perform community service, community service institutions should be willing to accept him or her. Community service orders should be sent to the concerned institution before the offender so that the institution can arrange appropriate work and supervision.

J. Under section 6 the Court has power, for good cause to amend or revoke a community service order. The offender, prosecutor, community service officer and head of the community service institution are entitled to be heard before revocation or amendment. Grounds upon which an amendment or revocation may be made include difficulties and inconveniences in complying with the order, deliberate breach of the order by the offender, etc.

K. Where an offender breaches the order by failing to perform the service as directed, summons may be issued to him or her to appear in Court where an inquiry must be held into the default. If there is no good reason for the default, the Court may revoke the order and order the offender to pay a fine or undergo imprisonment or deal with him in any other fit manner. If there was good cause for the default, the Court may order the offender to go back to the institution and complete community service.

L. Community service officers and the Court are required to keep track of all community service orders issued by the Court to ensure that there has been compliance with the orders. Completion form prepared by the institution must be returned to the Court and thereafter forwarded to the National Co-ordinator

M. The Magistrate is supposed to regularly visit community service institutions to ascertain the effectiveness of the scheme.

XII. Principles of Sentencing

A. The general rule is that a maximum sentence should not be imposed on a first offender. It is wrong to depart from that rule even if on the evidence, the accused person might have been convicted of a graver offence (*Otieno v R* [1983] KLR 295 and *Arrisol v R* [1957] EA 447).

A. Where the law prescribes maximum sentences the Court should ensure that the sentence imposed is not above the

maximum (*Kasongo v R* [1985] KLR 465). Similarly, the Court should not impose sentences below the minimum where the law so prescribes *(Rotich v R* [1983] KLR 541). A prescribed mandatory sentence cannot be challenged as harsh or excessive as the Court has no discretion in the matter *Johnson Muiruri v R* [1983] KLR 445.

B. In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. *(Makanga v R,* Criminal Appeal No. 972 of 1983 (unreported). The Court may also consider the value of the subject matter of the charge (*Mathai v R* [1983] KLR 422) and whether there has been restitution of property by the accused (*Hezekiah Mwaura Kibe v R* [1976] KLR 118)

C. For each count on which an accused is convicted, there must be a separate sentence. Omnibus sentences are illegal (*Mohammed Warsama HT Musa Aboker bah Majole v R* [1956] EACA 576) and *Kiarie v R* [1980] KLR 52.

D. If the subordinate Court convicts an accused of an offence punishable by that Court or the High Court and after obtaining information on his or her character and antecedents it considers that greater punishment should be meted than it has power to inflict, it may commit the accused in custody to the High Court for sentencing (*Katungo Mbuki v R* [1962] EA 682).

E. In passing sentence the Court should not take into account matters that are prejudicial and irrelevant to the case calculated only to influence the severity of the sentence. If the Court does so, the error is one of law entitling the accused to appeal on a matter of law.

F. Where two or more people have been convicted of the same

offence, it is wrong in principle to impose different sentences except for good reasons which should be noted on the record (*Marando v R* [1980] KLR 114 and *Sammy Omwega Ondari & 17 Others v R*, CA Criminal Appeal No 89 of 1985 (unreported).

G. Where the Court convicts and sentences an accused person under the age of 18 years to a prison term, the Court must forward the file to the High Court for confirmation of the sentence.

H. The sentence imposed by the trial Court starts to run on the date on which it is pronounced, unless it is stayed, postponed or suspended (S. 333(2) CPC and *Muoki v R* [1985] KLR 323).

XIII. Costs

A. Under S. 171 CPC the Court has power to order a person it has convicted of an offence to pay to the prosecutor such reasonable costs as the Court shall deem fit, in addition to any other penalty imposed. The amount awarded as costs must be specified in the conviction or order.

B. An appeal lies as of right to the High Court against the order awarding costs and the High Court is empowered to award such costs of the appeal as it deems reasonable (S.172).

C. The awarded costs are recoverable by levy of distress and sale under warrant of the movable and immovable property of the convict or in default the convict is liable to imprisonment in accordance with the scale set out in S 28 PC, unless the costs are paid. The maximum period of imprisonment in such instances is three months (S.174 (2)).

D. Under S 175 (1) CPC a Court which convicts an accused and imposes a fine or a sentence of which a fine forms a part is empowered when passing judgement to order the whole or any part of the fine recovered to be applied in defraying expenses properly incurred in the prosecution of the offence.