

Criminal Law

Introduction

It is important that in every academic work, there is definition or meaning of the term to be presented. In this subject then there is a need to provide for definition.

Meaning of Crime

- ❖ There are many definition of the term crime. The definitions defer from one to another depending on context in which the term is defined.
- ❖ According to Michael, J. and Mortimer, J., crime is a behaviour which is prohibited by the criminal code/law.
- ❖ Encyclopedia Britannica, vol. 6 defines crime to mean an act or omission forbidden by law under the pain of punishment.
- ❖ Smith, J C and Hogan, B in their book Criminal Law define crime as wrong which judges have held or parliament has from time to time laid down as sufficiently injurious to the public to warrant application of criminal procedure to deal with them.

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From all these definitions, it is not possible to know which act or omission is a crime and which one is not a crime. The decision as to which act or omission is a crime or not is determined by the state. This means the decision to make which act or omission is crime or not is done by the state

Characteristics of Crime

- ❑ Crime is a harm brought about by human conduct which the sovereign power (state) desires to prevent,
- ❑ Crime is prevented by the state through the use of prescribed punishment,
- ❑ Before the accused or criminal is punished there is a duly legal procedure to be followed.

Crime and Morality

- ❑ **Morality means principles or ethics and decency which society respect. They are principles which the society uses to determine which actions or omissions are useful and which actions and omissions are not useful in the society. Morality is created by the society from traditions and customs.**
- ❑ **Every society has its moralities. Some of the moralities are crimes while some of the moralities are not crime. So crime and moralities relates. This is why there is a time when morality and criminal law interact. This occurs when the state desires to impose its moral standards in the society which sometimes are equal to the moral standards of the community. However law and moral are different. For that there are many moralities which are not law and they are not enforceable by criminal law.**

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Case

Shaw vs. DPP (1962) AC 220

- ☐ In this case Shaw published a Ladies Directory. This directory was designed to assist prostitutes to get customers. He was charged for conspiracy to corrupt public morals. This offence was not among the offences at common law. However the court convicted Shaw in order to protect morality. One of the Lords Simonds said the following:-
- ☐ “There remains in courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard against attacks which may be more insidious because they are moral...”

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- ❑ This decision extended criminal law to morals. In the correct light of criminal law, this decision was wrong because law and morals are different and courts are required to decide cases using law not morals. So eleven years later-after this decision, the House of Lords reversed the decision in the case of Shaw. This was done in the case of *Knulier Ltd vs. DPP* (1973) AC 435
- ❑ In this case the House of Lords emphasized that the courts did not have residual power to extend criminal law, by creating newer offences and widening existing one, to enforce good morals.

Meaning of Criminal Law

- ❑ Criminal law is part of public law. It is the law which is connected with the state and individual. Criminal law is the law which is set by the state to discourage commission of crimes in the society (country). It is the law which prevents certain conduct or omission by assigning sanctions or punishment for every action or omission.
- ❑ Criminal law is a set of rules, laid down by the state in the interest of the ruling class and resulting from the conflict between the class of the rulers and the class of the ruled.

Sources of Criminal Law

❑ Source of criminal law means the materials from which principles of criminal law are derived. These are resources where criminal law is obtained. There are two groups of sources of law. These are municipal law and received laws. In generality, the following are the sources of criminal law. These are the constitution, principal legislation, subsidiary legislation, precedent, common law, doctrines of equity, statute of general application and international law.

Municipal Laws

❑ The Constitution

- ❑ Constitution is the law which set the state in power. It is a supreme law in the country which defines state powers, relationship between the state and individuals and defines rights and responsibilities of the citizens. Constitution is the source of all other laws in the country and that any other law derive their legitimacy from the constitution. In relation to criminal law the constitution is the source of law as it provides for presumption of innocence, set out court structure through which accused of crime is tried, provides for right to appeal and other related matters.

Principle Legislation

- ❑ Principle legislation is the law which is made by the Legislature-Parliament. This law is known as Act of Parliament. Act of parliament in law are referred to as Statute. There are many statutes in Tanzania which are source of criminal law. The following are the examples:- the Penal Code, CAP 16 RE 2002, the Sexual Offences (Special Provisions) Act, which is part to the Penal Code, the Prevention and Combating of Corruption Act of 2006, the Economic and Organized Crime Control Act, CAP RE 2002, the Tax laws, and many others.

Subsidiary Legislation

- ❑ Subsidiary legislation is the law which is made by other organs than the Legislature. There other organs like the Ministry, Municipal Authorities, District Authorities, State Agencies, which make laws. The laws which are made by other organs than the state are known as By-Laws, Regulations, Rules and Government Notes.
- ❑ Power of these organs to make subsidiary legislation is derived from the Principal Legislations. For that one of the cardinal principle is that subsidiary legislation is not allowed to contradict the Constitution and Principle Legislation.

Precedent

- ❑ Precedent is the decision or judgment of the court of records-the High Court and the Court of Appeal. When these two courts make decisions or judgments they create rules or principles. Those rules and principles become part of the laws of Tanzania. A best example of precedent is the decision in the case of doctrine of recent possession.
- ❑ Precedents are in two forms. There are those precedents which are made by the local courts and the decisions of the foreign courts. Decisions of the local courts have strong power and bind all the subordinate courts while decisions of the foreign courts have persuasive value.

Received Laws

vi. International Law

- ❑ International law is the law which is made by the international organizations or two or more states. These laws are in the form of Convention, Treaties, Charter and Protocol. Examples of international law of criminal nature are the Geneva Convention of 1949, the Convention in the High Sea of 1958, the Slavery Convention of 1926 and the Convention for the Suppression of Traffic in Persons of 1956.

General Principles of Criminal Responsibilities

❑ Introduction

- ❑ For the act or omission to be crime it must be declared by the state. The state declares certain acts or omission to be crime through criminal statutes. However for the act or omission to be declared as crime, it must have two major elements. These are actus reus and mens rea.

i. Actus Reus

- ❑ Actus reus means physical element of the crime. It is the physical element of a crime which is prohibited by law. For that for the act or omission to be crime it must have physical element. Any crime which does not have physical element is not a crime.
- ❑ Actus reus differ from one crime to another. However for the act or omission to be crime it must have physical element or actus reus.
- ❑ In determining actus reus of a crime it is important to determine three things; which are conduct, circumstances and consequence of the conduct. Conduct means a voluntary muscular contraction; circumstance is the situation or condition while consequence is the result or outcome of the conduct.

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- For example if the law prohibits stealing, the conduct is taking the property of another with intention to deprive ownership, circumstance is the property capable of being taken and result is deprivation of ownership. For the offence of murder conduct is act of killing a person, circumstance is unlawful killing while result is death of someone.

Forms of Actus Reus

- Actus reus may be in the form of action, attempt or omission. In the Penal Code all of these three are offences or crimes. This is provided under section 5 of the Penal Code, which defines the term offence/crime. This section defines offence or crime to mean an act, attempt or omission punishable by law. Omission is offence or crime because the law requires positive action on pain of punishment. For example driving motor vehicle without valid driving license, omission to pay tax are offence/crimes in the form of omission.

ii. Mens Rea

- Mens rea means a guilty mind of the offender/ criminal or accused person. It is a blame-worthy state of mind of the accused person. Mens rea is a mental state of the accused person to commit a crime or offence.
- As a general rule no person can be found guilty without mens rea. For that a person may be found guilty if there is actus reu and mens rea. This statement is explained in Latin maxim, which state that ***“Actus non facit reum nisi mens sit rea.”***

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- This maxim means an act alone does not constitute a crime unless that act is accompanied with guilty mind. In this sense therefore the accused person will be guilty if he committed an act with intention to do that act. For that if any person does an act which is a crime or offence without intention or involuntary he is not guilty of the offence or crime. This provided under section 10 of the Penal Code:-
- *“Subject to the express provision of this code relating to negligent acts and omission a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or an event which occurs by accident.”*

Anthony Mhikwa vs. R (1968) HCD 460

- In this case the accused was charged of contempt of court as he made peculiar noise while the court was in progress. The Primary court convicted the accused but on appeal he was acquitted. This is because he explained that he made unusual noises because a fly had flown into his nose, something which forced him to snort and sneeze. The High court accepted the explanations and acquitted him on the ground that his act was involuntary.
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Forms of Mens Rea

- There are three forms of mens rea. These are intention, recklessness and negligence.

Intention

- This is the highest degree of mens rea. At this degree or stage the accused person is said to intend a consequence of his act. The accused is said to have intention if he foresees what it may result and he desires for that to occur.
- In statute intention is expressed in words like “intentionally” or “with intent to” or “willfully” or “malice aforethought” or “willingly” or “fraudulently”.
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- If the statute requires intention, then it is upon the prosecution to prove existence of that intention on part of the accused.

Brazila vs. R (1968) HCD 304

- ❑ The accused was the messenger employed by Bukoba district council and was in charge of prisoners. He was accused to have let two prisoners to escape contrary to section 117(1) of the Penal Code. It was stated that the accused let the prisoners out of their cells to wash their clothes while he went for a walk thereby the prisoners escaped.
- ❑ The section under which the accused was charged requires intention on the part of the accused, which provides; any person who aids a prisoner in escaping or attempting to escape from lawful custody commits an offence. Mustafa, J., held that the word “aid” in the provision imports an element of intention of helping the prisoner to escape. The evidence tendered by the prosecution did not prove intention of the accused; instead it proved only that the accused was negligent. Thus the High court acquitted the accused.

Recklessness

- ❑ Reckless occurs where the accused person does the act which is a crime or offence and he knows or foresees the possibility of the consequence of his act but he does not desire the consequence to occur or he is indifferent as to whether it occurs or not. Recklessness occurs where the accused person act in a rash or swift manner without desire for consequences.
- ❑ This degree of mens rea normally occurs in offences relating to motor vehicle driving.

iii. Negligence

□ The accused person is said to be negligent with respect to the consequence of his act or omission without knowing or foresee the consequences when he ought to have foreseen it as a reasonable man. For example driving a motor vehicle without checking it is negligence.

Intention and Motive

❑ Motive means object or purpose or reason or emotion for which the accused person commits the offence or crime. It is the ulterior intention of the accused person for which he commits the offence or crime. In criminal law motive does not change the state of criminality, whether the motive is good or ill motive-bad.

Case

❑ R vs. Windle (1952) 2 QB 826

❑ Pili Kafiti vs. R (1969) HCD 152

Exceptions to the Rule of Actus Reus and Mens Rea

- ❑ For the accused person be guilty of the offence or crime charged, there are two ingredients required. These are the actus reus and mens rea. It means therefore that the accused person cannot be convicted of the offence unless it is proved that accused acted with intention to commit the crime/offence. Further more the accused person will be liable for the crime charged or offence if that person act voluntarily to commit the crime or offence.

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- ❑ Although this is the rule-that an act alone does not constitute a crime or offence unless that act is accompanied with guilty mind, this rule has exception. There are circumstances whereby the accused person may be found guilty even where there is no mens rea. This is possible where the crime or offence fall under strict liability, vicarious liability, collective liability and corporate liability.

Strict Liability (Absolute Liability)

- ❑ The general principle that for the act to be a crime or offence must be accompanied by mens rea does not apply in strict liability cases. In strict liability cases, the intention or mens rea of the accused person is irrelevant to establish a guilty mind of the accused person. What is important is only the actus reus—physical act—which constitutes a crime or offence.

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- ❑ In order to know the offence falls under strict liability, one is required to look at the wording of the statute which creates the offence. This was confirmed by Wright, J. in the case **De Rutzen vs. (1895) QBD 918**
- ❑ In this case Wright, J. stated as follows:-
 - ❑ *“There is a presumption that mens rea...is an essential ingredient in every offence; but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered.”*

How to Identify Strict Liability Offences

- ❑ It is not easy to know whether the section creating an offence or crime creates it as strict liability or not. However, absence of the words “knowingly,” “with intent to,” “intentionally,” “with malice aforethought,” and “fraudulently,” implies that the crime or offence is under strict liability.

Case

- ❑ In this case D was licensed to sale liquor under the Licensing Act of 1872. However section 13 of the Act prohibited any licensed person to sell liquor to the drunken person. D was charged for selling of liquor to the drunken person. The evidence tendered in court showed that D did not know that the person was drunk and there was nothing to show that the person was drunk. This means that the accused person had no intention (mens rea) to commit the offence of selling liquor to the drunken person. But section 13 of the Act which created the offence did not have the word requiring mens rea of the acc used. For that the court convicted the accused person of the offence charged despite absence of mens rea.
- ❑ Strict liability is part of the law in Tanzania. Several cases have so far been decided based on strict liability

Maulid vs. R (1970) HCD 346

- ❑ The accused was the employer. He was charged of failure to prepare and maintain records of account of oral contract of employment of his employees and failure to pay minimum wages. During the trial the accused argued that he was ignorant of as to the requirement to maintain the records. This argument meant that the accused person had no intention (*mens rea*) to commit the offence charged. In deciding this case Biron J., held that apart from the fact that ignorance of the law is not a defense the offence which the accused was charged was under strict liability-requiring no *mens rea*.

Test for Strict Liability

- ❑ In the case of Joseph Hawksworth Georges, C.J., put three factors for consideration before the court can declare the offence is strict liability or not. These factors are the following:-
 - ❑ The intention of the parliament,
 - ❑ The problem of proving mens rea in particular cases, and
 - ❑ The gravity of then harm.

ii. Vicarious Liability

❑ Vicarious liability is the liability of the employer for the offence or crime committed by his employee, servant or his agent. However for the master to be held liable for the act of his servant the act or crime two elements must be present:-

❑ the act crime must be committed in the course of employment,

❑ the employer must have authorized or aided the act or crime,

Examples of scenario for vicarious liability:-

❑ The proprietor of newspaper may be liable if his servant prints seditious article,

❑ The employer may be liable if the Accountant commit offence of tax avoidance or tax aversion.

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❑ In Tanzania vicarious liability is provided for under section 54 of the Interpretation Act, CAP 1 RE 2002. This section provides as follows:-

❑ *“Where any offence under any Act is committed by a person as an agent or employee then, unless a contrary intention appears, as well as the agent or employee, the principal or employer shall be guilty of offence and shall be liable to be proceeded against and punished accordingly unless he proves to the satisfaction of the court that he had no knowledge, and could not, by the exercise of reasonable diligent, have had knowledge, of the commission of the offence.”*

Ali Mohammed Osman vs. R (1952)

ITLR 391

- ❑ The appellant was charged with an offence to permit his lorry to be used on a road while then tyres were defective. As a result the tyres burst and turn boy of the lorry was injured. The Appellant was charged of the offence despite the fact that at the material time the lorry was being driven by his driver.

Collective Liability

- ❑ This is the liability of group of persons for the act or crime committed by one of the members of the group. It is punishing persons for the act done by one or several persons who form part of group.

v. Corporate Liability

- ❑ Corporate liability is the liability of legal person or legal entity. Legal entity is any entity which is duly formed according to the laws of the country. It includes companies, institutions, institute and others of the like. Although corporate are persons in law, they are not persons in physical existence but only persons in the eye of law.

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- ❑ Corporate may be liable for certain crimes. This is because the acts of its Directors or employees in the course of employment are taken to be the acts of the corporate. Thus if the Directors of the company or employee of the company commit offence in the course of employment, the company will be liable for that offence.
- ❑ However corporate may be liable for offences which attract fine or cancellation of licenses only-they cannot commit crimes which attract imprisonment or corporal punishment offences.

Parties to the Crime

❑ Introduction

- ❑ For any act to be crime or offence there is to be some one to do certain act which is forbidden by law. That act must be done with intention of the person who is accused to have done such an act. It is possible for one offence to be committed by more than one person jointly. All those who participate in one way or another in commission of the offence are parties to that offence. However every one of them will be judged according to the extent of his participation in the commission of the crime. Therefore in any criminal liability there are parties to crime.

Parties to Crime in England

- ❑ At common law there are four types of the parties to crime. These are principal offender in the first degree, principal offender in the second degree, an accessory before the fact and accessory after the fact.

Principal Offender in the First Degree

- ❑ This is the actual offender. It is the person who actually participated in the commission of the crime. Principal offender in the first degree is the party whose actus reus and mens rea are the result of the consequence of the crime committed.
- ❑ The principal offender in the first degree may commit the crime himself or may commit the crime by using an innocent agent (unsuspected agent). For example the principal offender may use an animal or a child which is not criminally liable.

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- ❑ It is possible in one crime to have more than one principal offender in the first degree. This is possible if more than one person form a common intention to carry out certain act which is a crime. Again it is not necessary for the person to be at the place of the commission of the crime himself or physically during which the crime is committed. It is enough or possible for the principal offenders to be far away from the scene of the crime and still such a person may be held liable for the crime so long as he planned for the commission of the crime.

Principal Offender in the Second Degree

- ❑ This is the person who aids or abets the commission of the crime. This part may assist the crime while the crime is being committed. For a person to be principal offender in the second degree, he must either render effective assistance or encouragement to the person who commits the crime. For that a mere presence at the scene of the crime or if the person does not assist the arrest of the criminal does not make him a principal offender in the second degree.

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- ❑ What makes someone to be principal offender in the second degree is that he must know the intention of the criminal and decide to aid or abet on the carrying out of his intention. In other words the person becomes principal offender in the first degree if he has common intention with the criminal at the time the crime is committed but without having prior agreement on that.

Accessory Before the Fact

- ❑ Accessory before the fact is a person who directly or indirectly counsels, procures or commands any person to commit crime. For the person to be accessory before the fact he must know the crime is to be committed, he must approve and encourage the act and he must approve and encourage it before the crime was committed.

R vs. Betts and Ridley (1930) Cr. App. **148**

- ❑ In this case Betts and Ridley agreed that Betts should rob X by pushing X down and seizing his bag, which he was carrying. It was agreed between them that while Betts was robbing X Ridley would be waiting around the corner in a car by which Betts would use to escape. Instead Betts struck X with strong force and thus X died. Betts and Ridley were convicted of murder. Ridley appealed and argued that Betts committed the crime in different way as he counseled Betts. However the court held that if the person complies with counseling and commits a crime, varying only in circumstances of time or place or in the manner of execution of the crime counseled does not excuse the other person from liability. In this case Betts was the principal offender in the first degree while Ridley was the accessory before the fact.

Accessory After the Fact

- ❑ Accessory after the fact is a person who knowingly that the crime has been committed shelters or assist the accused person to escape or elude justice.

Parties to Crime in Tanzania

- ❑ In Tanzania there are two parties to the crime. These are principal offender and accessory after the fact.

Principal Offender

- ❑ The definition for principal offender in Tanzania is provided for under section 22 of the Penal Code *CAP 16 RE 2002* . According to this section principal offender means every person who actually does the act or makes the commission which constitutes the offence, every person who enables or aids another to commit the offence, every person who conceals or procures another to commit a crime.

Kamau vs. R (1965) EA 501

- ❑ The law of Kenya, like that of Tanganyika as stated in the case of ***Sita vs. R (19857) EA 308 (CA)*** The law of Tanganyika does not use the expression accessory before the fact but by section 20 of the Penal Code (section 22 of the Tanganyika Penal Code) makes every person who counsels or procures or aids or abets the commission of the offence a principal offender

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❑ Section 24 of the Penal Code, *CAP 16 RE 2002* clarifies further the circumstances under which counseling to commit a crime is punishable. This section states as follows:-

❑ *“When a person counsels another to commit an offence and the offence is actually committed after such counseling by the person to whom it is given, it is immaterial whether the offence actually committed is the same as the counseled or different one, or whether the offence is committed in the way counseled or in different way, provided in either case that the facts constituting the offence actually committed were a probable consequence of carrying out the counseling. In either case the person who gave the counseling is deemed to have counseled the other person to commit the offense actually committed by him.”*

R vs. Betts and Ridley (1930) Cr. App.

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□ From section 22 of the Penal Code, *CAP 16 RE 2002*, it is possible for one crime to be committed by more than one person. In case that happens all of the persons participated in commission of the crime are principal offenders. However for those persons to be known as principal offenders there should be common understanding or intention among them to commit the offense and the offense committed should be a probable consequence of the common intention among all

R vs. Mughuira and Others (1943) 10

EACA 105

□ In this case nine Appellants had formed common intention to commit the crime of burgling a house. During the commission of the crime, one of the Appellants killed the owner of the house by stabbing him with a spear. They were charged of murder to which they denied to have formed intention to commit murder. However the trial court convicted them of the offence charged-murder. They appealed to the Court of Appeal for East Africa on the ground that they had no common intention to commit murder but only to commit burglary. The Court of Appeal held that even though only one member of the party who had formed the intention to commit burglary was armed the enterprise of burglary was unlawful, and the resistance by the owner of the premises burgled was a probable consequence and the overcoming of such resistance by violence if necessary, by the burglars would probably be resorted to were sufficient factors to bring all of the accused persons within the doctrine of common intention, thus making them equally responsible in law for the act of the first accused."

Common Intention of the Accused

- ❑ For the group of persons to be said to be principal offender all of them must have common intention to commit the offense. To constitute common intention among the accused does not mean that there is a need for them to have a formal meeting or agreement. Common intention of the accused may be formed at the scene of the crime-at the spur of the moment.

R vs. Tabulayanka s/o Kinya and Others (1943) 10 EACA 51

□ In this case a suspected thief, Mikairi, was discovered sitting near the door of the hut at night. An alarm was sounded and several persons came rushing to the spot and at once proceeded to be-labour the said Mikairi with fists, feet and such weapons they hands on. The result was death from multiple injuries. The issue was whether there was common intention among the persons who participated in be-labouring the deceased. The court said:-

□ *“To constitute common intention...it is not necessary that there should have been any concerted agreement between the accused prior to the attack their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the assault.”*

Difference Between Common Intention and Similar Intention

- ❑ Similar intention does not mean common intention. So where two or more persons have intention to commit similar offence, in similar manner or place does not mean that they have common intention.

*R vs. Okute and Another (1941)*⁸

EACA 78

□ In this case the deceased died from shock resulting from injuries received in two separate and independent assaults. The first assault was made by the first Appellant and three others who were convicted of manslaughter but did not appeal. The trial court held that the first appellant intended to cause grievous harm but that the other assailants had not so serious intention. Although the injuries inflicted in this assault were serious there was no evidence that they were sufficient of themselves to cause death. After the first assault and independent of it the second appellant acting in a manner which clearly showed his intention to cause grievous bodily harm at the least committed a second and independent assault upon the deceased who was in weakened condition as a result of this prior beating and caused a fracture of his breast bone which was one of the injuries from the cumulative effect of which the deceased died. On appeal the Court of Appeal stated that the second Appellant, having intent to cause grievous bodily harm, inflicted an injury on one who was already in a weak state was properly convicted of murder. The conviction for the first Appellant was quashed and appeal allowed.

Accessory After the Fact

❑ Section 387 of the Penal Code, *CAP 16 RE 2002* defines accessory after the fact.

According to this provision accessory after the fact means the following:-

❑ *“A person who receives or assists another who is to his knowledge, guilty of an offence in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”*

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- ❑ However the proviso to section 387 of the Penal Code, *CAP 16 RE 2002* provides that spouses cannot be termed or regarded as accessory after the facts if they assist or enable another spouse to escape punishment. Further more in order for a person to be guilty as accessory after the fact, the accused must take active participation while knowing that he is assisting the principal offender to escape from punishment or arrest. In case the accused of accessory after the fact does not know of the commission of the offence, his participation will not make him guilty of assisting principal offender to escape liability. In other words, the offence or crime of accessory after the fact requires mens rea of the person accused to have assisted another to escape punishment or arrest.

Andrea Nicodemo vs. R (1969) HCD

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□ In this case the accused persons were charged of stealing a bicycle-the second accused being Nicodemo, who was joined as accessory after the fact. The reason for Nicodemo was joined as accessory after the fact was that after the first accused to have stolen the bicycle he took it to the Appellant-Andrea Nicodemo. The second accused received the bicycle and kept it for several days. He even assisted the first accused to remove the saddle of the bicycle. However the second accused did all this without knowing that the bicycle was stolen. Later on both were arrested and the second accused was charged and convicted as accessory after the fact contrary to section 387 of the Penal Code. On appeal the High Court acquitted the second accused on the ground that he did not know of the offence-that the bicycle was stolen, although he assisted to keep the bicycle and remove the saddle thereof. For that he did not assisted the first accused to escape punishment.

The Principle of Causation

- ❑ Causation means to facilitate something to occur which otherwise such a thing would not occur at that time and in that manner. For that for the accused to be liable for the offence there must be a link between actus reus and the consequence of that actus reus. When there is a link between actus reus and consequence of the actus reus, the actus reus is said to be causation of the consequence-crime or offence.

Test for Causation

- ❑ There are seven circumstances under which the principle of causation may be examined.

Where there is no Physical Participation

- ❑ The accused person may be held liable for offence even where he did not physically commit the offence. This occurs where the accused person procures, abets, or incites another to commit the offence.
- ❑ If the accused assist or incite another to commit any offence and that other real commit the offence then the person who procures or incites is also liable for the offence. This is because his incitement or procurement is said to have caused commission of the crime.

Where there is Indirect Participation

- ❑ In case the accused person has misled a person to commit the offence that person who misled the other is also liable for the offence. This is because he indirectly participated to the commission of the crime by causing another to act in certain way. This normally occurs where the accused person act under negligence situation.

Case

R vs. LOW (1850)3 C&K 123

- ❑ In this case the accused person was working in the mines. His work was to operate the machine which was used to take mine workers down and up mining shaft. One day he left the machine under the charge of a person incompetent to operate the machine. Due to his incompetence, the machine caused the death of one of the mine workers. The accused was held liable for his negligence of leaving the machine under the charge of incompetence person.

Where there are Subsisting and Supervening Causes

- ❑ The accused person is liable for the offence committed along to subsisting and supervening causes. This occurs where the causes does not break the chain of causation of the crime. But if there is a break of chain of causation, then the accused of the offence committed under subsisting and supervening will not be liable.

Where the Victim is the Cause of the Offence

- ❑ Where the offence occurred but due to contribution of the victim of the offence, the accused is still liable for the offence irrespective of negligence or contribution of the victim of the crime

Case

R vs. Holland (1841) 2 M & R 351

- ❑ The accused assaulted the deceased person by cutting his finger. The Surgeon recommended for the finger to be imputed, but the deceased refused. Later on the finger contracted lockjaw disease, which then caused the death of the deceased. The accused was found guilty of murder despite the fact that what killed the deceased was lockjaw and not wound which the accused inflicted on the deceased.

Where the Participation of the Accused is Superfluous

- ❑ Even where participation of the accused is superfluous to the offence charged, the accused will still be liable as the chain of causation is not broken

Case

R vs. Macklin (1838) 2 Lew 225

- ❑ A, B and C were beating Y. Abruptly X joined and administered a severe blow on Y, which caused the death of Y. A, B and C argued that they were not liable as the death of Y was caused by the blow of X. they were found guilty despite the fact that their participation in beating Y was superfluous for the death of Y.

Where the Crime is Committed Without Expectation of the Accused

- ☐ Where the accused does an act and the result of that act is different from what he intended or planned, still the accused person will be liable for the offence.

Case

R vs. Curley (1909) Cri. App. R 109

- ❑ The Appellant quarreled with a woman in the house-room. The Appellant ran at her with intention to hit her. Before the Appellant actually hit her she jumped out through the window and died. The Appellant did not intend that woman to die but since he planned to hit her he was convicted of manslaughter despite unexpected result of his action.

INCHOATE CRIME

- **Not completed crime or Imperfect**
 - ❑ **The essence of criminal law such as; a person does not break the criminal law simply by having evil thought. To plan and scheme in one's mind to commit an offence is not in itself unlawful, Where however a person take step towards affecting that plan to commit a substantive offences.**

Cont...

- It is important to note that these inchoate offences are step on the way to the commission of a substantive offence. The common law gave birth to three general offences which are usually termed inchoate crimes: Attempt, Conspiracy, incitement.

Attempts and Conspiracy

- **Attempts**
- **Introduction**
- Some times the accused person may plan to commit the offence. But some events may occur and interrupt the completion of the commission of the planned offence. In law even at that stage, there is crime or offence committed. This offence is known as attempt

Meaning of Attempt

- Attempt means a mental commemoration of the accused to commit certain offence which is accompanied with actus reus of such offence. It is the offence which is committed only at the stage when the accused put into action his contemplated crime but before the crime or offence is fully committed or carried out. It is the offence which its actus reus is not yet fully carried out by the accused person. For that attempt offence is normally incomplete offence-inchoate offence.

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- Attempt is provided for under section 380 of the Penal Code, *CAP 16 RE 2002*. This section reads as follows:-
- *“When a person intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment and manifested his intention by some overt act, but does not fulfill his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence. It is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”*

Actus Reus in Offence of Attempt

- In attempt there is actus reus, although the actus reus is not complete. The actus reus in attempt offence is the intention to commit the offence contemplated-planned. The actus reus in attempts is known as “overt act.”
- Overt act occurs where the accused person plan to commit the offence, make preparations for the commission of the offence and then put into execution some of the actions which will facilitate commission of the offence. The action which facilitates the commission of the offence may be interrupted or may accelerate the offence. If the action is interrupted and the planned offence does not occur or complete, then the accused person is guilty of attempt to commit offence. If the action accelerates the offence then the accused person will be guilty of the offence itself. In case the accused person just contemplate-thinks to commit the offence and he makes preparations for the offence without overt act, then there is no offence of attempt committed.

Case

R vs. Miskell (1954) WLR 438

- In this case the court said:-
- *“The mere intention commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit but acts immediately connected with it are.”*

Rules Governing Attempt

There are two rules which govern the offence of attempt. These are proximity rule and equivocality rule.

Proximate Rule

- Proximity means nearness. For the crime to be attempt, the act or overt act must be very near-sufficiently proximate towards the intended crime or offence. For that acts remotely leading towards the crime is not crime of attempt.

Case

R vs. Cook (1963) Cr. App. 48

The accused was found in the car fiddling with the ignition lock on the dash board of that car. He was charged of attempting to steal the car. The court convicted him on the ground that the accused's act was proximity to the offence of stealing that car.

Case

Mulira vs. R 20 EACA 223

- The appellant was charged and convicted by the trial court of attempting to commit rape. The evidence showed that the Appellant entered into the room of the wife of his employer, switched off the light, put his hand over the mouth of the woman, removed his shirts and lifted his petticoat. At that stage the woman screamed for help and a boy entered the room and shone a torch. The Appellant then ran out of the room, being arrested later and charged of the offence. The East African Court of Appeal quashed the conviction and acquitted the Appellant on the ground that the facts showed only an assault with intention to ravish, the facts which are not sufficiently proximate to offence of attempting rape. What the Appellant did was just preparation to commit the offence but not attempt to commit the offence of rape.

R vs. Andrew Avarity (1973) LRT 92

Mfalila, J.,

- In this case the accused was charged of the offence of attempting rape. The facts showed that on the material date, at night, the complainant, a woman, was walking from shopping to her home around 10:00 pm. She was walking along the path which was surrounded by mango trees. There after the accused came from behind her, got hold of her and started stripping her clothes. The complainant shouted for help. People appeared on the scene thereupon the accused ran away. He was arrested two days later and brought in court to answer his charge. In deciding this case, Mfalila, J., held that stated that the concepts of preparation and proximity do not exist in Tanzania Penal Code-section 380. According to him offence of attempt in Tanzania is complete only when three elements exist:-
- (a). the intention by the accused to commit an offence,
 - (b). the manifestation of the intention by embarking upon it by means adopted to its fulfillment by way of an overt act, and
 - (c). proof of the overt act.

Equivocality Rule

- ❑ The offence of attempt is committed only where the overt act indicates beyond reasonable doubt that it is directed towards the crime or offence intended. If the overt act is not directed towards the crime or offence contemplated, there is no crime or offence of attempt.

Impossible Actions

- ❑ Sometimes the person may contemplate to commit a crime which is impossible to occur in certain circumstances. However if the accused makes requisite preparations and puts some actions to facilitate that act, the crime of attempt is committed. This is provided in part under section 380 of the Penal Code, CAP 16 RE 2002, which reads as follows:-
- ❑ *“It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”*

Cont.....

- ❑ From this section it is clear that act may be attempt although the commission of that crime is impossible either by the means chosen or by other reasons. The only thing required to constitute offence of the attempt is intention of the accused and overt act to commit that offence.

Mens Rea in Attempts

- ❑ Attempt requires mens rea of the accused person. So in order for the accused person to be convicted of the crime of attempt there must be evidence to prove that the accused person had intention to commit certain crime or offence.

Case

R vs. Ngambilo (1967) HCD 388

- ❑ The accused person entered into the house of the complainant with a gun in hand. Then he pointed the gun at the knee of the complainant and said; “today you shall die.” He then fired the gun on the said knee. He was arrested and charged with the offence of attempting murder. The court held that in order to convict a person for attempted murder the actual intention to kill must be proved. In this case the accused did not show actual intention to kill as he fired the gun at the knee.

Case

R vs. Mlatende (1971) HCD 471

- ❑ The accused secured the front and back doors of the house in which three persons were asleep. Then he set the house into fire and he ran away. The complainants managed to escape and the accused was arrested and charged with the offences of arson and attempting murder. He was convicted on both of the offences.

Conspiracy

- ❑ conspiracy is agreement between two or more persons to commit an offence. It is agreement between two or persons to carry out unlawful act or lawful act by unlawful means. Conspiracy is a statutory offence under the Penal Code, *CAP 16 RE*

2002.

- Section 384 of the Penal Code, *CAP 16 RE 2002* states as follows:-

Cont....

❑ *“Any person who conspires with another to commit any felony or to do any act in any part in party of the world which if done in Tanganyika would be a crime and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of an offence...”*

Cont...

- ❑ Conspiracy is early stage toward commission of the offence. It is however an independent offence, which is inchoate or incomplete offence. It is the offence which is committed only by mere agreeing to carry out the act which is forbidden by certain law. Conspiracy is therefore committed by mere agreement, even where parties to such agreement do not act or perform what they have agreed to do.

Actus Reus in Conspiracy

- ❑ Being an offence conspiracy must have actus reus. The law requires that for conspiracy to take place, mere knowledge of the plan to commit an offence is not enough to constitute the offence of conspiracy.
- ❑ Actus reus of conspiracy is the state of two or more persons to make agreement to carry out unlawful act. Actus reus of conspiracy therefore is evidence to show that these persons had had agreement to pursue common objective which is forbidden by law. Actus reus of conspiracy is formed where two or more persons know of the existence of any scheme to perform illegal act. This agreement is not necessarily to formed by direct communication between and among the persons, it may be facilitated by third party.

Cont...

- ❑ Actus reus of conspiracy therefore is the existence of agreement and knowledge of the accused of the common plan to commit the offence.

Mens Rea of Conspiracy

- ❑ Mens rea of conspiracy is plan or objective of the persons to carry out unlawful act. it involves mental planning and creation of scheme to commit the proposed offence.
- ❑ Case
- ❑ *R vs. Whitchurch (1890) 24 QBD 420*
- ❑ Whitchurch believed that she was pregnancy. However she was not ready to mother and thus she planned to conduct abortion. Whitchurch agreed with other women to use instruments and administer things into her which would cause miscarriage. However there was no evidence that Whitchurch was pregnant and so no miscarriage occurred. Whitchurch was arrested and would be charged for abortion. However as she was not pregnant the offence of abortion would not stand. Instead Whitchurch was charged of conspiracy to commit abortion.

Proof of the Offence of Conspiracy

- ❑ It is not easy to have direct evidence of conspiracy. Most of the time the offence of conspiracy is proved by circumstantial evidenced or inference.

Ongodia and Erima vs. Uganda *(1967) EA 137*

- In this case it was alleged that on February 24 1966 the two Appellants arrived at the officers' mess at entebe at about 2 pm. The first Appellant , Ongodia, in the presence of the second Appellant, Erima, informed Anguram and Guweddeko in the mess that war had broken out, that the army headquarters at Mbuya had been surrounded and they had managed to escape. Ongodia asked Anguram if he had confidence in his platoon and on receiving an affirmative reply, Angodia asked Anguram to take his platoon to Baitababiri on the Kampala/Entebe road and set up a road block with the object of arresting the Prime Minister, Dr. Obote. Angodia added that other troops were advancing from Kampala and they could be arriving at any moment. Erima remained silent throughout the conversation but nodded his head from time to time. It was not established at what precise moment of the conversations he nodded his head. The Judge Advocate in his direction stated that if the evidence of Anguram and Guweddeko that the first Appellant Ongadia conspired with a person or persons unknown to arrange for a road block to arrest the Prime Minister and the finding on the first charge was confirmed. It was also found that the evidence was insufficient to establish that the second Appellant was acting in concert with the first Appellant and a finding of not guilty was substituted. On the second charge both Appellants were found not guilty for lack of sufficient evidence.

Cont...

- ❑ The husband and wife can commit conspiracy as an offence. This situation is provided under section 386 (2) of the penal code.

INCITEMENT

- Incitement occurs when people invites or request another to commit crime. It focused on three components;
- Mental state
- Physical act
- Social harm

General Defenses for Criminal Liability

- ❑ Any person who is charged of any offence may raise as many defenses as possible. However the defense raised must be relevant to the charge. Some of the defenses which accused may rise are provided under the criminal law while other are provide in other subjects. In criminal law the following are the general defense for criminal liability.

Insanity

- Insanity means lunacy or mental illness of the accused. The accused may raise the defense that at the time he committed the offence he was off mind-lunatic. The insanity is accepted defense due to the fact that if the accused person committed the offence during lunacy then he had no mens rea to commit that offence. As a general rule no crime is committed if there is no mens rea. *actus non facit reum nisi mens sit rea.*
- However every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved. This is provided for under section 13 of the Penal Code, CAP 16 RE 2002.

Question

- Mr. Michael deliberately killed his wife under the insane belief, due to disease affecting the mind, that God had commanded him to sacrifice his wife, as Abraham was called to sacrifice Isaac. He then turned himself over to the police saying **“I have killed my wife as God told me”**. Mr. Michael was charged with murder. While testifying, he was asked “Did you know that what you were doing was against the law? Mr. Michael answered; **“I knew it was against the law but I was bound to obey God.”** In the light of the above facts, give a brief reasoned opinion as to whether Mr. Michael can succeed in a defence of insanity?

Test for Defense of Insanity

- For the defense of insanity to be accepted in court, there are three tests which must be proved in court during \trial. These tests were listed by the House of Lord in the case of M'naghten

R vs. Daniel M'naghten (1843) 10 CL ***and F 200***

- In this case the accused person was charged for the murder of one Edward, by shooting him in the back, as he was walking up whitewall on 20 January 1843. The accused pleaded not guilty. After evidence had been given of shooting of Mr. Edward and of his death in consequence thereof, witnesses were called on the part of the accused to prove that at the time of committing the act, he was not in a sound state of mind. Some of the medical witnesses who gave evidence had previously examined the accused; others had never seen him until he appeared in court and they formed their opinions on hearing the evidence given by other witnesses. The accused was acquitted on the ground of insanity. As a result debate took place in court as to the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort. At the end of the debate the House of Lord gave the test of insanity. To plead the defense of insanity successfully three conditions must be met:-

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- it must be proved that the accused was suffering from a disease of mind at the time of doing the specified act or making the omission,
- it must be proved that the accused did not know the nature and quality of the act he was doing,
- if the accused knew the nature or the quality of the act, then it must be proved that he did not know that he was doing wrong. The disease of mind must have given rise to a defect of reason.
-

Cont...

- Although insanity is a defense, it is a defense if it is established that the accused did really not understand what he was doing when he was committing the offence, due to mental illness or insanity. This qualification is provided for under the proviso to section 13 of the Penal Code, *CAP 16 RE 2002*.

Case

Phillip Musele vs. R EACA 622

- In this case the Appellant was convicted of murder of his wife. During the trial the Appellant argued that when he killed his wife he did not know what he was doing. There was expert opinion of a psychiatrist that he thought the Appellant was very depressed and thought that he was justified in killing his wife. However there was another evidence which showed that his killing of his wife was coloured by the belief that his wife practicing witchcraft on him. The Court of Appeal stated that it would not be a defense to prove that although the accused knew that what he was doing was legally wrong he believed that it was morally right. It must be proved that, if he was capable of understanding what he was doing, he was incapable of knowing that his act was contrary to law. The court finally held that the evidence fell short of establishing even the probability that the Appellant through a disease effecting his mind was capable of knowing that what he did was contrary to the law.

Cont...

- The defense of insanity to succeed the accused person is required to prove it in court that he was insane at the time he was committing the offence. Mere allegation will not assist, but a proof of the defense at least to the balance of probability is needed on the party of the accused person.

Intoxication

- Intoxication means a state of being drunk. It is the allegation that the accused committed the offence under the influence of alcoholism. Intoxication is not absolute defense, but if it is proved that at the time the accused was committing the offence he did so under the influence of alcoholism, it assist to reduce punishment-it act as a mitigation.
-
- Intoxication is accepted as a defense because alcohol weakens the restraints and inhibitions which govern conducts and judgment of persons. So if a person is drunk he may do some acts which he would never do while sober. So intoxication removes mens rea of the accused for the offence he had committed.

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- Intoxication is provided for under section 14 of the Penal Code, *CAP 16 RE 2002*. According to this section intoxication shall be a defense to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know what he was doing. However intoxication is defense under two major conditions. These conditions are provided under the same section-section 14 of the Penal Code, *CAP 16 RE 2002*. The conditions are the following:-
 - if the state of intoxication was caused without the consent of the accused but was caused by malicious or negligent act of another person, or
 - if intoxication made the accused to be temporarily insane at the time of the commission of the crime.

Cont....

- Although the statute-section 14 of the Penal Code, *CAP 16 RE 2002* distinguishes between voluntary and involuntary intoxication, and that for defense of intoxication to stand there is to be involuntary intoxication, in practice, judges do not distinguish between the two intoxications. What the judges find is only the fact that during the commission of the crime, the accused person did not know what he was doing due to the influence of drunkenness. Again drunkenness may be caused by narcotics, alcohol or drugs.

R vs. Stanislaus (1969) HCD 32

- In this case the accused person and the deceased went to a drinking spree at the house of Mshamba. Later on the deceased left the house and little moment later the accused followed the deceased. When the accused met the deceased, he caught her hands and folded them over her chest. But suddenly thereafter the accused drew out a knife and stabbed the deceased, who died of severe stab. The accused was convicted of manslaughter due to the fact that the killing was under the influence of intoxication *which was voluntary*
intoxication.

Self Defense, Defense of Another (Person) and Defense of Property

- Self defense is a defense which allows a person to use force to resist crime. Under this defense individual person is allowed to use certain amount of force in defense of his property, himself or someone how is under care to defend commission of the crime to himself, other person or property. Defense of person, another or property is provided for under section 18 of the Penal Code, *2002* *CLP 16 RE*. According to this section a person is not criminally liable for an act done in the exercise of the right of self defense or defense of another or defense of property against any unlawful act of seizure or destruction or violence.

R vs. Mohammed s/o Ndowe (1970)

HCD 211

- In this case the accused persons were watchmen and they were charged of murder. The fact showed that on the material date a number of men came to where the accused were guarding to steal corrugated iron sheets. The accused attacked one of the thieves to death. They were charged of murder but the court acquitted them. In acquitting the accused, the court stated as follows:-
- *“...they were doing so in defense of their lives and their employer’s property.”*
-

Limitations of This Defense

- The defense of person, another or property is not absolute. This means that individual is not allowed to use whatever force and at whatever circumstances under the ground that he was defending himself, person or property. For this defense to help the accused must comply to the following limitations:-
- there must be reasonable apprehension of fear that violence or unlawful act is to happen to the accused,
- the person who wants to harm the accused or his property must threat to use violence or force,
- the accused must use reasonable force to counter or resist the violence or threat or force which other will use.

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- These three limitations are provided for under section 18B of the Penal Code *CAP 16 RE 2002* . it should be understood that if the above three limitations are met the person may use the defense of self defense even where the defense has caused death of the enemy. This is provided for under section 18C of the Penal Code, *16 RE 2002*.

R vs. Nyakalio (1970) HCD 344

- In this case the woman killed a man of 60 years of age who had entered into her house, trying to rape her and when she resisted, he tried to throttle her preventing her to shout for help. The woman then uses panga which was in the house and made two blows on the man who died later on. The woman was acquitted of the charge of murder.

Bona Fide Claim of Right

- This is a defense whereby the accused person exercises his claim of right and in the way of doing so, he commits a crime. The person who exercises his right and then alongside it commits a crime is not criminally liable and ought to be acquitted from any criminal charge. The defense of bona fide claim of right is provided for under section 9 of the Penal Code, 16 RE 2002 . Bona fide claim of right means the accused person help himself from the properties of the complainant (victim of the offences) to compensate his right he claims from the complainant.

Cont...

- However bona fide claim of right is a defense under the following circumstances;-
- For offence relating properties-*especially theft (stealing) or malicious destruction of property* .
- If the person is not criminally liable for crime if he exercise honest claim of right and without intention to defraud,
- If the property used to help himself has proportional equal value to the value of the claim or right of the accused person.

Case

Salum Ibrahim vs. R (1971) HCD 481

- In this case the accused was charged of robbery with violence. The facts showed that the accused person and the complainant were spouse who divorced. Upon divorce they distributed the household equally, and each went to live away from each other. Later on the accused visited the complainant and found that she was living with another man. He became furious and took some of the households which they had shared on divorce. He was arrested and charged of the offence of robbery with violence. However on appeal he was acquitted on the ground that what he did was claim of his right-his properties which he had given to the ex-wife! The appellate court stated that defense of bona fide claim of right; if it was honestly done it is a good defense to a charge of stealing.

Read

- *Mohammedi Hassan vs. R (1969) HCD 71,*
- *R Vs. Selemani (1969) HCD 250*
- *R vs. Tomson (1969) HCD 26*

Mistake of Facts

- The person may do certain act or omission under mistakes. Mistakes means an error as to the state of facts under which the person does or omit to do certain act. In case a person does certain act which is a crime, but he does such act under mistake of facts, he is not criminally liable for such act. This is provided for under section 11 of the Penal Code, *AP 16 RE 2002*. However for mistake of fact to be a defense the person who does or omit to do certain act must do so under an honest and reasonable belief that what he does or omit to do is right and nothing but right for the time and place being. The reason for mistake of fact to be a defense is that a person who act or omit to do anything under mistake, he does so without mens rea-and absence of mens rea make any person not criminally liable (actus non facit reum nisi mens sit rea-*act alone doesnot make a person criminally liable unless it is accompanied with guilty mind-mens rea*)

R vs. Sultan Megiga (1969) HCD 33

- In this case the accused was charged of murdering a person by spear. The fact showed that the deceased and a woman were having sexual intercourse at night in rice field. The accused was passing along the place where the two were having their fun, when he saw movements in the darkness. He shone his torch in the direction of movement, but batteries of the torch were weak and he could see a little. He then called out asking whether it was an animal or people, but the deceased and the woman did not reply. Thereafter the deceased and the woman ran toward different directions. The accused, mistakenly, that these were goats or other wild animal, and so he threw his spear to one of the shadows. He hit the deceased and killed him. The trial court found that the accused person did not know that he was throwing the spear at a man and so the charge of murder could not stand against him. He was acquitted-set free.

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- For the defense of mistake of fact to help, the accused must exercise reasonable care to prevent making of the mistakes. In other words the accused must demonstrate that he honestly acted with reasonable care to believe that what he was doing was right and not wrong-he was genuinely in error.

Provocation

- Provocation means a person is being incited or roused or inflamed by another person and due to such provocation, the person inflamed or provoked commits an offence. The person who commits offence under provocation is not criminally liable under sections 201 and 202 of the Penal Code, 16 RE 2002. Section 202 defines provocation to mean;

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- *any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed..."*

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Cont...

- Provocation is a defense even for the offence of murder. According to section 201, when a person kills another under provocation, he shall be guilty of manslaughter not murder-manslaughter is lesser offence to murder!

Elements of Provocation

- The case of *R vs. Johali Ismail (1974) LRT 23* provided for the elements of provocation. There are four elements which are present and proved in court, the defense of provocation shall help the accused person against the charge he faces. These are:-
- the provocative act or word (*insult/abuse*) must be wrongful act or word (*insult/abuse*),
- the provocative act or word must be grave (*severe/serious*) enough to deprive a person his power of self control,
- the offence committed by the accused must be done in the heat of passion of provocation-there should be no time for the accused to cool down his temper *offence must be done instantly after provocation*,
- the means of relation applied by the accused person must be proportional to the gravity of provocation.

Cont...

- However for provocation to be a defense, the accused person must act as a reasonable man *ordinary person in the community*. The accused person should not act abnormally- *like the person who reacts even if the act or insult is a minor or just a joke*. This test was discussed in the case *Mpagema s/o Challo vs. R (1970) HCD 70*. In this case the accused person had married to one Violet and they lived for some time. Later on the two quarreled and Violet returned back to her parents. The accused then demanded refund of his dowry from the parents of Violet. Before the dowry was paid back, the accused met Violet with new man. Accused became furious and attacked Violet to her death. It was stated by the assessors that according to Gogo customary law, the act of Violet to have an affairs with another man before dowry was repaid was provocation enough among the Gogo. The accused person was convicted of manslaughter not murder.

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- Cooling time is very important factor to consider in deciding whether there was provocation or not. This goes to the interval from the time the accused person was provoked to the time the accused person committed the offence. If there was reasonable lapse of time passes, the accused can not succeed to raise the defense of provocation. This means for the defense of provocation to stay the accused person must commit the offence at the heat of passion of the act or insult which is provocative. The accused person must commit the offence suddenly upon being provoked! In case the accused delay to commit the offence upon provocation, indicates he intends to revenge and he did not acted upon provocation. This is because if temper of the accused person after being provoked cools out, he regains his self control.

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❑ Provocation must be caused by acts and words (insults) and not by Words (insults) alone. If the accused person reacts on words alone the defense of provocation may not be accepted by the court of law. In the case of *P vs. Mahamudu s/o Kibwana (1968) HCD 186*, the court held that for words (insult) alone to be provocative, such words must be of devastating in character to the extent of depriving the accused person his self control. In the case of *Leesbin: (1914) 3 KB 116*, the accused person was charged of murder. The facts showed that he went to the firing range and the girl, who was the in charge of firing range made some impertinent personal remarks to him, to the extent that the accused was annoyed. He then asked for a revolver and fired the girl to death. He was charged of murder and during trial he raised the defense of provocation. The defense was dismissed because there was only words (insults) without act and so he was convicted of murder as charged.

❑ Read

✓ *Alistahiki s/o Masumbuku (1967) HCD 343*

The Doctrine of the Last Straw in Provocation

The doctrine of last straw explains the effect of cumulative provocation as defense for crime committed thereafter. This means if the accused person commits the offence on cumulative acts and insults, even if the last act and insult may not be such a grave act or insult, he will succeed on provocation looking at the previous (series of) acts or insults made to the accused *last straw doctrine*. This was what was discussed in the case of *Revs. of Mohali Islamil* above

Other Defenses for Criminal Responsibility

- ❑ Apart from the above discussed defense there are other defenses like immature age (dole incapax) *a presumption that a person below 12 years cannot commit an offence*)-section 15, judicial privilege-section 16 and compulsion and coercion-section 17 and 20

Offences Against Property

- ❑ Offences against properties are provided for under Part XXVI of the Penal Code, *CAP 16 RE 2002* . These offences are theft, offences allied to stealing, robbery, extortion, burglary and house breaking, receiving and retaining stolen property, fraud by person in trust false pretence and offence against safety of aviation.

Theft

- ❑ Offence of theft is provided for under sections 257 to 275 of the Penal Code, *CAP 16 RE 2002*. Section 258 (1) defines theft. According to this definition, theft means fraudulent and without bona fide claim of right, taking of anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof, anything capable of being stolen. So theft connotes two things;-
 - ❑ (a). “fraudulent taking of anything capable of being stolen, or
 - ❑ (b). “fraudulent conversion (*changing ownership*) of anything capable of being stolen”

Elements/Ingredients of Theft

- ❑ From the meaning of theft as provided under section 258(1) of the Penal Code, there are four elements/ingredients for the offence of theft to be committed. These elements are things capable of being stolen, taking/movement of that thing, without bona fide claim of right and fraudulent taking or conversion of that thing.

1. Things Capable of Being Stolen

- ❑ Not every thing may be stolen-there are things capable being stolen and others which are not capable of being stole. For offence of theft to be the thing involved therein must be thing capable of being stolen. Section 257 of the Penal Code defines/explains thing which is capable of being stolen. According to this provision, thing capable of being stolen must have three elements; it is inanimate (~~animate~~ *living/dead/lifeless*), it is a property of any person and if it is capable of being movable (*shifted*) from one place to another.

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- ❑ From this explanation it means that;
- ❑ Living things like animals, human beings and plants (*not crops*) are not capable of being stolen under section 258 of the Penal Code. No one can steal them,
- ❑ Things which have no owner (*un-owned things*) are not capable of being stolen. Owner of the thing may be a real owner, special owner or legal owner. It is possible for real owner to steal thing from special owner or legal owner or legal owner to steal thing from special or real owner or special owner to steal thing from legal or real owner. In the case of *Rose vs. Matt (1951) K.B 810* it was held that an owner of goods who entrusts them to another person in such a circumstances that the owner has special property in them, is guilty of theft if he fraudulently takes them away again.
- ❑ Things which are not movable (*immovable things*) are not capable of being stolen under section 258 of the Penal Code.

2. Taking/Movement of the Thing

- ❑ The thing to be stolen must be moved (*shifted*) from where originally it was to another place. Movement of the thing capable of being stolen in criminal law is known as asportation. This is the actus reus of theft. For asportation to occur the distance from original place of the thing to the new place need not be very far distance. Even slightest movement is enough to constitute asportation for the purpose of offence of theft. This was discussed in the case *Mazengo Magale vs. R (1969) HCD 156*. In this case, Magale had driven cattle from the boma but was arrested while he was still within the vicinity (compound) of the owner of the cattle. He was convicted of the offence of stealing and appealed. On appeal the issue was whether there was enough asportation for offence of theft to occur. Biron, J., held that stated that asportation in law is always present as long as anything has been moved from its usual place. If taking is not complete, there is attempt theft. That is why immovable things are in the group of things incapable of being stolen. *there is no asportation of such things*.

3. Fraudulent Taking/Conversion of the Thing

- ❑ For the offence of theft to be committed taking or conversion of the thing capable being stolen must be done fraudulently. The word fraudulently in relation to theft connotes *mens rea* of the offence of theft. It means the person alleged to have stolen a thing must have intention (*mens rea*) to deprive the owner of that thing. In the case of *Yusuf Salim Mkali vs. R (1969) HCD 264*, the accused spent the money of his employer. He then reported to his employer of the incident and it was agreed that deductions would be made from his salaries to reimburse the amount. This was done for sometime. But later on he was arrested and charged of theft-stealing. Georges, C.J., as he then was stated that there was no fraudulent on part of the accused person when he used the money of his employer.

Cont...

- ❑ Section 258(2) of the Penal Code identifies various types of takings or conversions which if proved amounts to fraudulent taking or fraudulent conversion. Fraudulent is presence if:-
 - ❑ the accused has intent (*intention*) to permanently deprive (deny/dispossess) the owner that thing,
 - ❑ the accused intent to deal with such a thing in such a manner that that thing cannot be returned in the condition which it was at the time of the taking or conversion,
 - ❑ the accused intent to part with the thing on condition that not to return that thing to then owner.

4. Without Bona Fide Claim of Right

- ❑ The offence of theft is committed if the taking or conversion of the thing capable of being stolen is made without bona fide claim of right on the part of the accused person. This means if the accused person takes thing capable of being stolen under honestly and bona fide claim of right, he does not commit the offence of theft. In the case of *Mohammed Hassan vs. R (1969) HCD 71* the appellant successfully pleaded the defense of bona fide claim of right and was acquitted of the offence of burglary (theft at night). He argued that he worked for the complainant (his employer) for 3 months without being paid his salary and so he decided to help himself from the clothes of the employer to pay his salary. He was acquitted because although what he did was theft, he did so under bona fide claim of right from the complainant.

The Value of Thing capable of Being Stolen

- ❑ Value of the thing capable of being stolen is irrelevant to constitute offence of theft. The accused person is still guilty of theft even where the thing capable of being stolen has no value. The key word is “fraudulent taking of thing capable being stolen” *there is no even implied need of value here.* So value of the thing capable of being stolen is irrelevant.

R vs. Kambengwa (1968) HCD 333

❑ In this case the accused had stolen a bonnet stand of the motor vehicle. He was arrested and charged with the offence of theft and was convicted. In mitigation the accused stated that he thought that a bonnet stand has no value and so he took it and used it as a walking stick. The appellate court held that it was irrelevant that the property taken may be of no value or that the owner may intend no further use of it.

Doctrine of Recent Possession

- ❑ This is doctrine which was developed by the court of Tanzania to establish further offence of theft. This doctrine states that where a person is found with an article recently reported stolen, that person may be held to have stolen it. The person who is found with thing capable of being stolen is regarded as the actual thief or a guilty receiver. This offence is a result of precedent ~~is not~~ *provided for under the Penal Code.*

Cont...

□ This doctrine was stated firstly in the case of *Michael Mhuto vs. R (1975) LRT 81*. In this case Mhuto was found driving a motor vehicle which was recently reported to have been stolen. He was arrested and charged of the offence of theft. He was convicted and on appeal his appeal was dismissed. Biron, J., in dismissing the appeal held that the doctrine of recent possession is a rebuttable presumption of fact based upon finding of property recently stolen in the possession of the receiver. Where recently stolen property is found in the possession of a person the possessor of such property is deemed to have either stolen it himself or received it knowing to have been stolen or unlawfully obtained unless he can give a reasonable explanation of how he came to possess the article.

Length for Recent Possession

- ❑ It is important to determine how recent enough to constitute recent possession is. However there is no general rule of how recent is recent for recent possession to stand. Each case is decided depending on its facts. But the case *Naftali Ngalya Vs. R* (1976) LRT 45, Mnzavas, J. stated that in order to determine the recent the court must have regard to the nature and value of the property.

Recent Possession and Other Offences

- Although in the beginning the doctrine of recent possession was only applied in property offence, new development of criminal law in Tanzania witnesses' expansion of the doctrine. This means it is now possible for a person to be convicted for murder or any other offence based of evidence of recent possession. For example if a person is found in recent possession of the property of the deceased person, such a person may be convicted of murder of the deceased person. A person who is found in possession of fake notes may be charged of that offence.

ROBBERY

- ❑ The core of robbery is “theft”
- ✓ Section 285 of the penal code
- ❑ The person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses any force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

Cont...

- ❑ In simple way robbery combines two offences such as **Theft** and **Assault**
- ❑ The person is guilty of Assault if
 - ✓ **Attempt to cause Bodily injury to another**
 - ✓ **Attempts by physical threat to put another in fear of imminent serious bodily harm**

BUT: In Criminal law combined these two offences as robbery

- ❖ Generally, the offence of robbery is related to the offence of theft
- ❖ The following are the ingredients or elements of robbery;
 - ✓ Stealing
 - ✓ Accompanied with use or threat to use violence
 - ✓ The use of threat must be directed to any person or property
 - ✓ The use of violence or threat of violence is used in order to obtain the property to be stolen.

HOUSE BREAKING AND BURGLARY

❖ These offences are defined by section 293 of the penal code

❑ The elements of these offences are;

✓ Dwelling house

✓ There must be breaking

Breaking could be direct or indirect

✓ Entry

✓ Night or day

RECEIVING STOLEN PROPERTY

- ❑ This offence is provided under section 311 of penal code
- ❑ It is not only a crime to steal someone else's property, it is also a crime to receive (accept) property someone else has already stolen.
- ❑ The only purpose is to punish those individuals who benefit from another person's action.
- ✓ Actus reus of this offence is the act of receiving the property
- ✓ Mens Rea-Knowledge

Offences against person

- ❖ In criminal law, an **offence against the person** usually refers to a crime which is committed by direct physical harm or force being applied to another **person**. They are usually analysed by division into the following categories: **Fatal offences and non fatal offences**.

Murder

- ❑ Penal code defined murder to mean any person who, with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.
- ❑ Section 196 and 197 of the penal code

Elements of murder

- ❖ Malice aforethought which is defined under section 200 of the penal code,
 - ✓ Under this provision listed four circumstance which shows a person having malice aforethought
- ❖ The person must be killed
- ❖ The people who commit a murder must be a person of sound mind

Assault

- ❑ Is an act of the person which causes the victim reasonable apprehension of the infliction of battery .
- ❑ Refer to section 240 ,241 and 243 of the penal code

Essential elements of assault

- ❖ **Preparation or gesture constituting a threat of force**
- ✓ The person has to show in an action for assault to stand there must be some gesture or preparation which constituted a force, but mere threatening words are not enough to constitute an offence of assault.

Cont...

- ❖ A reasonable apprehension of the use of force
- ❖ Ability or capacity of the person to carry out the threat
- ❑ Although "**assault**" is an independent crime and is to be treated as such, for practical purposes today "**assault**" is generally synonymous with the term "**battery**", and is a term used to mean the actual intended use of unlawful force to another person without his consent.'

Battery

- Is the intentional application of force to another person without his or her consent or lawful justification. Here force must be actually being inflicted as opposed to merely threatened. **The term force is somewhat misleading.** All that is required for a battery is that the accused person touches the victim without consent or without any other lawful excuse. Touching must be without consent.

Cont...

- ❖ Battery is the application, intentionally or recklessly, of unlawful force on another person
- ❑ Actus reus of battery: the actual use of force against the victim
- ❑ Mens rea of battery: an intention to apply unlawful physical force or recklessness as to whether unlawful force has been applied

There are three essential requirements of battery

❖ The use of force

The victim must prove the existence of force. Mere accidental contact with body of a person does not amount to battery.

❖ It should be intentional

The use of force must be intentionally.

❖ Without lawful justification

Consent which is express or implied is a lawful justification. For instance friendly push or hand shaking is not battery.

Cont....

- ❑ For battery it is essential that the use of force must be intentional, willingly and without lawful justification.

Defences

- ❖ Self-defence
- ❖ Consent
- ❖ Lawful justification

Abortion and child destruction

- ❑ Section 150 of the penal code defined abortion
- ❑ Section 151 explained abortion done by women
- ❑ Section 152 explained abortion using some drugs

Cont...

- ❑ Life means every aspect of vitality which puts a human being in good shape for self-determination which includes bodily health and freedom from the pain that did not affect organic malfunctioning or injury.
- ❑ Right to life is considered to be one of the most sensitive rights in the world. This right is reflected in the legal measures as an adequate standard of living and to the freedom from cruel, inhuman or degrading treatment or punishment

Cont...

- ❑ The right to life is inherent right which most of the philosophers have written on it. For example Hobbes with the ideas of inalienable natural right emphasizes that an individual naturally inborn right to life. The entire world recognises this right as among of the basic human right. Most of the states stipulates in their constitutions as an intrinsic value to every individual.

Cont...

- ❑ The most inalienable right is the right to life which guarantee by the state and also the individuals or human's himself. The right is protected at all level and even the individuals who disobey this right are subject to the punishment.

Cont...

□ There is the philosophical reasoning on the right to life especially those people who decide to commit voluntary euthanasia and suicide, was clearly explained by Thomas Jefferson in his famous words that;

“all men... are endowed by the creator with certain unalienable rights that among these are right to life...”

Cont...

- ❑ Penal Code criminalizes “unlawful abortion, indicating that there are circumstances under which procuring an abortion is lawful. It further makes explicit, in section 230, that termination of pregnancy is not criminalized if done to preserve the woman’s life. This life exception has been interpreted to include an exception for the Preservation of the woman’s mental and physical health as well.

Cont...

- ❑ Section 219 of the Penal Code also provides for the separate offence of “child destruction.” This section criminalizes the destruction of a “child capable of being born alive” and stipulates that there is a presumption that the foetus is capable of being born alive after the 28th week of pregnancy. While this section criminalizes a termination of pregnancy performed in the final weeks of pregnancy, as with the provisions criminalizing “unlawful abortion, “there is an exception when the termination is done to preserve the pregnant woman’s life or health. See also section 204,.

Wounding and grievous bodily harm

- ❑ Grievous bodily harm with intent is the most serious of the non-fatal offences against the person. The offence is committed when a person deliberately inflicts serious injury. By contrast the offences of wounding or inflicting grievous bodily harm can be committed recklessly, that is if the defendant foresaw that some physical harm, however minor, would occur.

Cont...

- ❑ Section 225 of the penal code defined grievous harm and the punishment.

Assault occasioning actual bodily harm

- ❑ Actual bodily harm is committed when a person assaults another which results in injury. 'Assault' bears the same meaning as it does for common assault.
- ❑ The difference between actual bodily harm and common assault is that ABH requires a degree of injury whereas common assault does not.

Cont...

- ❑ Section 228 and 234 defined wounding and actual bodily harm

OFFENCES AGAINST MORALITY

- ❑ Morality is the belief or recognition that certain behaviors are either “good” or “bad” and our morality plays a crucial role when formulating laws and policies. An offence against morality takes many forms such as rape, sexual assault defilement, incest, and many others. This type of violence is a reflection of gender inequality in a society where men exercise power over women and girls.

RAPE

- Section 130 of the penal code explains what acts constitute rape.
- ☐ Rape is provided under section 130 and 131 of the penal code.
- ☐ Rape is defined as; the insertion of the penis into a vagina by force and against the will of the woman.
- ☐ Or Rape is defined as:
Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without his/ her consent is guilty of the offence of rape.

Cont...

- In General
- Sexual penetration is very broad and includes penetration of genital organs, a person's anus or mouth and includes penetration by genital organs, part of the body of one person, objects and the genital organs of animals,

Cont...

❑ The Law stresses much on the word “**CONSENT**”. What does it mean by the word consent? And moreover ‘**free consent!**’

Under the **Law of Contract Act** defines ‘free consent’ to include the absence of;

- 1.*Fraud* 2.*Misrepresentation* 3.*Coercion* (force) 4.*Mistakes* and 5.*Undue influence* . So, in relation to SOSPA these matter a lot when proved for an individual to claim that there was no consent in the sexual act hence rape.

or

❑ Consent is defined as:

❑ “voluntary or uncoerced agreement”

Rape involves four elements

- ❖ Penetration into the person of another person into any orifice or opening in the victim's body such as the vagina, anus or mouth.
- ✓ In the case of **chanda V state** the appellant after failing to penetrate the complainant vagina because his penis was too larger, penetrate her anus. The court accepted the injury as evidence of penetration into the anus and convicted the appellant of rape.
- ❖ It may be affected by a man's penis or by any other instrument.
- ❖ The penetration is for the purpose of sexual gratification
- ❖ Without the consent of the victim.

Cont...

- ❑ Any degree of penetration will suffice.
- ❑ As to the instrument of penetration it may be a man's penis or any other object such as piece of wood.

Cont...

- ❑ The mens rea for rape is the intention to have sexual intercourse or to penetrate the body of another person for sexual gratification and knowledge that the other person does not consent.
- ❑ The actus reus the act of penetration

Cont...

- ❑ The Act also provides for the offence gang rape to cover situations where rape or defilement is committed in association with others, as well as for attempted rape. Section 131 of the penal code.

PROSTITUTION

- ❖ Prostitution refers to the granting of sexual access on a relatively indiscriminate basis for payment either in money or in goods, depending on the complexity of the local economic system
- ❖ It is translated in Kiswahili as umalaya and the prostitute as Malaya. Umalaya is used to refer to the sex life of an individual considered to be promiscuous or loose in sexual relations.

Cont...

- In the case of
- **R v. Nganderu**
- prostitution was judiciary defined by Francis, J as the practice of offering the body for promiscuous or indiscriminate sexual intercourse with them. Prostitution which is in existence ever since the earliest time of civilisation in the world has got its way in Tanzanian society where a new form emerged in the late 1990"s and it was nicknamed 'uchangudoa'(CD) to mean prostitution and the prostitute been named a „changudoa'. So far it is not considered to be an offence under Penal Code but immoral. With this attitude it lead to the increase of rate of spread HIV/AIDS and other venereal diseases. This is due to the fact that although the societies consider it to be morally wrong, people both women and men involve themselves in this field.

Cont...

- ❖ Section 148 of the Penal code prohibits people to live whole or partially on earnings prostitution or persistently soliciting for immoral purpose and declare that any person who keeps a brothel is guilty of an offence.
- ❖ NB: The law does not provide any provision which declares prostitution to be an offence and it neither states the position of the prostitute. This shows that prostitution is not an offence.

Cont...

- Also see section 145,146,147 of the penal code explain the acts of prostitution.

Defilement

❖ Defilement is defined by section 137 of the Penal code as the commission of an act which causes penetration with a child. “Child” has the meaning assigned to it in the Child Act that is a person below the age of 18 years. The penalties for defilement which vary according to the age of the child. The aim of these provisions is to protect young, vulnerable people in society.

Incest

❖ Definition: Persons who may not lawfully marry each other on account of consanguinity (blood relationship), affinity (by marriage) or an adoptive relationship and who unlawfully and intentionally engage in an act of sexual penetration with each other are despite their mutual consent to engage in such act guilty of the offence of incest. This is defined under section 158 of the penal code.

Sexual assault

- Definition: A person (X) who unlawfully and intentionally sexually violates a complainant (Y) without the consent of Y or inspires a belief in a complainant (Y) that Y will be sexually violated is guilty of the offence of sexual assault .This is defined under section 135 of the penal code.

Introduction to information technology crimes (IT Crimes) and cybercrimes

❖ Technology

- The term technology is often used to refer to mechanical devices that assist individuals in their day to day activities.
- ❖ **A computer** is an electronic device that allows the user to input information, process that information and then receive result that are based on the information provided by the user.

An information technology crimes

- ❖ **Refers** to any crimes involving the use of high technology devices in its commission. These are crimes that involve the use of computers, telephones, check-reading machine, credit card machines and any other devices that meet the previous definition of high technology.
- ❖ In past there have been several different ways of referring to crime involving high technology devices. The two best known classifications used to distinguish these crimes are computer crimes or cybercrimes

Cont...

- ❑ A computer crime would be a crime that involves a computer in one of the following ways;
 - ❖ The computer as an instrument of crimes
 - ✓ Eg individual who uses a company computer to embezzle funds from a company account the intention of stealing computers equipments
 - ❖ The computer as a repository of evidence.
 - ✓ E.g. Person who store illegal information/files in his computer

Cont...

- ❖ Example of information technology crimes are **hacking, digital child pornography, identity crimes online fraud.**

CYBERCRIMES

❖ **Cybercrimes** refer to any crime that involves a computer and a network, where a computer may or may not have played an instrumental part in the commission of the crime.

OR

❖ Cybercrimes can be defined as offences that are committed against individuals or groups of individuals through electronics means and telecommunication networks like internet chat rooms, mobile phones by way of text messages.

Cont...

- ❖ However, cybercrimes relate with information technology (IT) and the internet is being exploited to serve criminal purposes. Computer assisted crimes include email scams, hacking, distribution of hostile software (virus and worms) theft e.g. criminal act of involving theft of someone's personal information such as their credit card number and social security number, pornography, extortion, terrorism, fraud and impersonation.

Cont...

- ❖ **Hacking** refer to the unauthorized access of another person's computer and would be considered a computer crime under the preceding definition for several reasons.
- ❖ Offences of fraud mean the use of false representation to gain unjust advantage; dishonest artifice or trick person or think not fulfilling expectation or description or fraud as one person deceiving another person for the purposes of deriving a benefit or gain.

Similarities between information technology crimes and cybercrimes

- ❖ Both activities are crimes
- ❖ Both activities involve technology in the commission of the act.

The classification of cybercrimes and IT crimes

❖ Cybercrimes broadly describes the crimes that take place within that space and the term has come to symbolize insecurity and risk online.

The persons who engage in cybercrimes are known as cybercriminals.

Cont...

- ❖ **Cyber crimes can be broadly classified into the following two types;**
- ✓ Cybercrime in which one or more elements of the cyber infrastructures (computer mobile handsets, communication networks, electronic devices etc, itself is a target of attack by the cybercriminal.
- ✓ Cybercrime in which one or more elements of the cyber infrastructures (computer mobile handsets, communication networks, electronic devices etc. are used as a tool to commit the crime these crimes have existed for centuries such as fraud, theft blackmailing and forgery)

THE LEGAL FRAMEWORK REGULATING CYBERCRIMES AND IT CRIMES IN TANZANIA

- ❖ Firstly, Government of Tanzania has taken measures to ensure that all sim cards are registered for the purpose of preventing abuse of mobile phone usages.

THE CONSTITUTION OF UNITED REPUBLIC OF TANZANIA

- Article 16

THE PENAL CODE

❑ THE PENAL CODE

- ❖ The persons who used mobile phones and ATM cards to transfer money from other persons' accounts in Tanzania have been charged with the offence of theft contrary to section 265 of the Penal Code, Cap. 16. This provision reads as follows:
- ❖ “Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years.”

Cont...

- ❖ Another is the offence of forgery contrary to sections 333, 335(a) and (d), (i) and 338 of the Penal Code, Cap 16. Forgery in banks can take a number of forms. First, a person forges a transfer statement that authorizes movement of funds from one account to another. The form in this respect is paper based, but the actual transfer is done electronically, different to when a cheque is involved.

Cont...

- ❑ Section 333 of the Penal Code defines the offence of forgery as the “making of a false document with intent to defraud or to deceive.” From the provision of section 335 of this law, a person would be guilty of the offence of forgery if he
 - ✓ (i) Makes a document which is false or which he has reason to believe is untrue;
 - ✓ (ii) Alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document;
 - ✓ (iii) Introduces into a document without authority, whilst it is being drawn up, matter which if it had been authorized would have altered the effect of the document;
 - ✓ (iv) Signs a document

Cont...

- ✓ (v) In the name of any person without his authority, whether such name is or is not the same as that of the person signing;
- ✓ (vi) In the name of any fictitious person alleged to exist whether the fictitious person is or is not alleged to be of the same name as the person signing;
- ✓ The above provisions relate to forgery of documents and it is certain under the current law that a document does not include an electronic message, data or document

THE ELECTRONIC AND POSTAL COMMUNICATION ACT OF 2010

- ❖ The legal and institutional framework for combating cybercrimes in Tanzania has a long and storied development, Tanzania after embarking onto technological advancement found it necessary to transform her laws to reflect these changes. Evidence Act was amended and electronic and postal communication act.

Cont...

□ Section 116 of the Electronic and Postal communication run as follows:

Any person who installs, operates, constructs, maintains, owns or makes available network facilities without obtaining any relevant individual license, commits an offence and shall be liable upon conviction to a fine of not less than five million Tanzanian shillings or imprisonment for a term not less than twelve months or to both.

Any person who provides network services without obtaining any relevant individual license, commits an offence and shall be liable upon conviction to a fine of not less than six million Tanzanian shillings or imprisonment for a term not less than twelve months or to both.

- iii Any person who

Cont...

- (a) Provides application services without having first obtained any relevant individual license;
- (b) Provides content services without having first obtained any relevant individual license, or any relevant class license commits an offence and shall be liable upon conviction to a fine of not less than five million Tanzanian shillings or imprisonment for a term not less than twelve months or to both;

Cont...

- (c)Imports, distributes, or sells electronic communication equipment or
- apparatus or; establishes, installs, maintains and operates an electronic communication system or imports non type approved electronic communication equipment or apparatus into the United Republic without a license, commits an offence and shall be liable upon conviction to a fine of not less than five million Tanzanian shillings or imprisonment for a term not less than twelve months or to both.

Cont...

- Section 118 of the Electronic and Postal Communication Act makes an offence to create obscene communication like child pornography and other offence of such nature.
- Section 118 of the same Act run as hereunder,
- Any person who
- i. By means of any network facilities, network services, applications services or content services, knowingly makes, creates, or solicits or initiates the transmission of any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person;

Cont...

- ❖ ii. Initiates a communication using any applications services, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threatens or harass any person at any number or electronic

Cont..

- Section 120 of the Electronic and Postal Communication Act creates a penalty for interception of communication and it provides that: Any person who, without lawful authority under this Act or any other written law
- -
- Penalty for interception of communications
- (a) Intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept any communications; or
- (b) Discloses, or attempts to disclose to any other person the contents of any communications, knowingly or having reason to believe that the information was obtained through the interception of any communications in contravention of this section; or
- (c) uses, or attempts to use the contents of any communications, knowingly having reason to believe that the information was obtained through the interception of any communications in contravention of this section, commits an offence and shall, on conviction, be liable to a fine of not less than five million Tanzanian shillings or to imprisonment for a term not less than twelve months, or to both.

Cont...

- ❖ Section 122 deals with fraud with dishonest intent while Section 124 deals with illegal access to computer system like in the Budapest Convention. Section 123 inflicts penalty to a person for interference of electronic communication to be a fine of not less than Tshs 5 million or 2 years imprisonment or both fine and punishment. This is not the case to the Convention.

THE LAW OF EVIDENCE ACT

- ❖ Traditional criminal procedure law typically contains provision on the gathering and admissibility of evidence. When it comes to evidence in electronic form computer data can be altered easily. the recognition of electronic evidence in Tanzania can be traced back in the decision pronounced by Nsekela, J in the case *trust bank Tanzania ltd v. le marsh enterprises and others* , were stated that due to technological advancement electronic evidence is admissible before court of law.

Cont...

- ❖ Therefore in 2007 through the written laws Act, The Evidence Act was amended to incorporate changes of technological advancement.

CRBERCRIMES ACT 2015

- ❑ Generally due to advancement and technology that takes place in our world communities, Tanzania enacted the cybercrimes Act so as to deal with these changes.
- ❖ Section 15 of the Cybercrime Act provides a person shall not by using a computer system to impersonate another person.
- ❖ And subsection two provides a person who contravenes subsection one commit an offence and is liable on conviction to a fine of not less than five million shillings or three times the value of undue advantages received by that person, whichever is greater or to imprisonment for a term of not less than seven years or to both.

Cont...

- ❖ Section 14 deals with pornography
- ❖ Section 13 deals with child pornography
- ❖ Section 4 deals with illegal access
- ❖ Section 11 deals with computer related forgery
- ❖ Section 12 deals with computer related fraud.

REGULATORY AUTHORITY OF ELECTRONIC COMMUNICATION

- ❖ In 1993, Tanzania enacted the Communication Act. This was primarily geared at the regulation of postal and telecommunication services including their licensing. It centered along those lines i.e protection of postal and telecommunication, operations and licensing. In 2003 a communication Regulatory Authority was created in place of the commission. Its mandate was expanded to cover management of electronic technologies and other information and communications technologies.