CRIMINAL PROCEDURE LAW IN TANZANIA.



Prepared

BY

DATIUCE DIDACE LWABUGIRWA

TOPIC ONE: INTRODUCTION TO CRIMINAL PROCEDURE LAW.

MEANING OF CRIMINAL PROCEDURE LAW

Criminal procedure law entails a frame work of laws and rules that govern the administration of justice in cases involving individuals accused of committing crimes. The procedure begins with the initial investigation of the crime and concluded with either unconditional release of the accused by the virtual of the acquittal or by imposition of s term of punishment pursuant to conviction for the crime.

▪ PURPOSES AND IMPORTANCE OF CRIMINAL PROCEDURES

The importance of criminal procedure was stated in the case of **Joseph Masunzu v R**[1]**,** where Justice Katiti held that"….We can't peaceful make our journey through life without the law telling us the light direction to follow, and sometimes even the time to follow and when to start our journey and through which route…."

The fundamental purpose of criminal procedure was also stated in the case of **Kamundi v R**[2]**,** where it was held that the all purpose and intention of criminal procedure is to laid down provisions and procedures to see that justice is done.

▪ DIFFERENCES BETWEEN CIVIL PROCEDURE AND CRIMINAL PROCEDURE

• The burden of proof in criminal procedure is that beyond reasonable doubt, ***while***, the burden of proof in civil cases is on balance of probabilities.

• A person is said to be prosecuted in criminal cases, ***while***, In Civil cases a person is said to be sued.

• Criminal cases are instituted by lodging a charge sheet of information before the court of law as per section 132 of CPA, ***while,*** civil cases are instituted by presentation of plaint as per order 4 rule 1 & section 22 of CPC.

[1] CRIMINAL APPEAL NO. 3 OF 1991.
[2] [1957] EA 540.

• Criminal procedure entails the frame work of laws that govern the administration of justice in cases involving an individual who has been accused of a crime, ***while,*** Criminal procedure on the other hand entails the frame work of laws that govern the administration of justice in cases involving an individual who has been accused of a crime.

• Civil procedure is the written set of rules that sets out the process that the court will follow when hearing cases of civil nature, ***while***, criminal procedure is the written set of rules that sets out the process that the court will follow when hearing cases of civil nature.

• In civil matters the controversy is between individuals and it is put to one of them to bring an action against the other, ***while,*** criminal procedure is different from civil procedure because the burdens and results are dramatically different. In criminal matters action is taken by the state against an individual or organization for violation of law. In case an accused person has been convicted of crime he can put-on probation or ordered to pay fine or confined to serve term in jail.

• Criminal Procedures rules on the other hand are designed to give both parties a set of equal rules to go by, ***while,*** the rules of criminal procedure are different from civil procedure because the results and objectives of the litigation differ. Criminal procedure rules are generally designed to protect right of the suspect and the accused person.

Differences between Criminal law and Criminal Procedure	
Criminal law	**Criminal Procedure**
1. Substantive Law	1. Remedial/Procedural Law
2. It declares what acts are punishable	2. It provides how the act is to be punished

3. It defines crimes, treats of their nature and provides for their punishment	3. It provides for the method by which a person accused of a crime is arrested, tried or punished.

▪ SOURCES OF CRIMINAL PROCEDURE

➢ **Constitution**

How Constitution is the source of criminal procedure?

• Constitution is the fundamental law of any country, Constitution is said to be the source of criminal procedure because principally the validity of any written law is determined against what is contained in the constitution. No law is valid if it is contravenes any of the provisions of constitution in terms of sprit or procedure or otherwise.

• Article 13 of the Constitution of the United Republic of Tanzania of 1977 provides for the right to fair hearing. Therefore if there is any law of criminal procedure that is against what is contain in article 13 then that law would be illegal.

• The constitution contain also the fundamental rules of criminal justice, one of them is the presumption of innocence that is the person is presumed to be innocent unless otherwise is proved beyond reasonable doubt as provided under article 13(6) (b) of the Constitution of the United Republic of Tanzania. Therefore no law of criminal procedure is valid if it creates the presumption of guilty before the same been proved.

• Again no person is to be punished for an offence which does not exist as per article 13(6) (c) of the Constitution of the United Republic of Tanzania. Therefore they can never be a criminal procedure which allows a punishment of a person for a non-existence offence as that rule would be illegal.

➢ **Statute**

Piece of legislations made by the parliament or any other bodies authorized to do so form a basic source of criminal procedure in Tanzania. For example the Criminal procedure Act is a basic source of criminal procedures, For example section 4(1) of the Criminal Procedure Act provides that all offences under the Penal Code shall be inquired into, tried and otherwise dealt with according to the provisions of this Act. Section 4(2) provides that all offences under any other law shall be inquired into, tried and otherwise dealt with according to the provisions of this Act, except where that other law provides differently for the regulation of the manner or place of investigation into, trial or dealing in any other way with those offences. What can be observed from section 4 is that once an offence is committed under the Penal Code procedures to be followed are those contained in the Criminal Procedure Act.

➢ **International law**

International law entails a total of norms accepted by the international community to regulate relation between state and also between states and their subjects. The international laws are applicable in Tanzania subject to the provision of Article 63(3) (e) of the Constitution. International law is also one of the sources of criminal procedure especially in the areas of human right promotion and protection. There a number of international convections which have a direct bearing to the administration of criminal Justice, One of the convection of this nature is the convention of the right of the child of 1990. This convention protects the child under the age of 18 years against capital punishments or life imprisonment and calls of a separate detention facilities from adults.

➢ **Precedents**

It is another important source of law in Tanzania. These are cases arising from the decision of the High Court and Court of Appeal. They are either reported cases or unreported. Therefore they form the basic precedents of Tanzanian laws and bind lower courts thereto. Reported cases in Tanzania can be found in a number of Law Reports. Between 1957and 1977 cases reported from the High Court of Tanzania and the East African Court of Appeal appeared in East Africa Law Reports. Precedents or case laws are substantially the basic source of criminal procedure, for

example the case of **Mwango s/o Manana vs R**[3]**,** lay down important criminal procedures regarding conducting identification parade.

▪ The current criminal procedures in Tanzania

❖ Investigation[4]

Investigation is most important step after a report or of any criminal offence, because it's the only thing that will help the prosecution to have the basis for their case in court through accumulation of evidence. Apprehension can be done at the scene of crime; if not detection work of various kinds may occur until the police have a suspect.

❖ Arrest[5]

Police Officer has powers to arrest with or without warrant depending on the certain circumstances as provided for under S. 14 of the Criminal Procedure Act, which includes when commission of offence is done at his presence. Arrest can be done by private person without warrant when involving injury to property by the owner of the property or his servants or a person authorized by the owner of the property and other circumstances provided by s.14 of the Criminal Procedure Act. Arrest can be done by magistrate as well, when the commission of offence is within the local limits of his jurisdiction s.17 of the Criminal Procedure Act.

❖ Search[6]

Search must be carried in accordance with the law and laid procedures, because it interfere ones privacy, liberty and freedom. Hence you must seek search warrant from appropriate authority. Two types of search; first is warranty from in charge of a police station s.38 Criminal Procedure Act. This may be issued to any person including police officers. The second one is search warrants by the court.

❖ Charge Sheet (Charge)[7]

Charge is a foundation of institution of criminal proceedings against an accused. This is a document that states the offences and provisions of the laws that the accused has breached,

[3] 1936]3 EACA, pg.29.
[4] Section 10 of the Criminal Procedure Act [Cap 20 R.E 2002]
[5] Section 14 of the Criminal Procedure Act [Cap 20 R.E 2002]
[6] Section 38 of the Criminal Procedure Act [Cap 20 R.E 2002]
[7] Section 132 of the Criminal Procedure Act [Cap 20 R.E 2002]

together with his personal information. Prosecution will draw charge if the case is triable by subordinate courts or information if the offences are triable only by High Court. There are certain offences triable by High Court only such as incest, murder, arson and treason.

❖ **Plea Taking**[8]

Here the accused will be required to plead for the charges read to him .The accused will be asked by the court to give a plea of *guilty* or *not guilty*. If the accused plead guilty the plea must be *unequivocal* , which means clear plea if the plea is not clear court enters a plea of not guilty. If plea of not guilty is entered by the court the prosecution will be allowed to proceed to present their case. If postponed the accused will have a chance to ask for bail, if is bailable offence. If the plea of guilty is entered then the procedure will skip to Acquit/Convict till the end.

❖ **Bail**[9]

Most of time if accused plead guilty and plea is entered bail do not apply. After plea a person is remanded or bailed. Bail is constitutional right s.13 (6) (b) of United Republic of Tanzania Constitution, [Cap 2, R.E 2002], presumption of innocence. There are unbillable offences like Treason, armed robbery, defilement and murder under s.148 (5) of Criminal Procedure Act. Police bail can be granted before matter set to court; court bail is when the matter is set in court.

❖ **Preliminary Hearing (PH)**[10]

This is an important stage where the parties meet to draft a memorandum of agreed fact so as to expedite the case speed .The parties have to meet decide on what matters are not in dispute and those matters are not supposed to be brought during trials neither party is required to prove any of those facts except the facts in dispute only.

❖ **Trial Stage**

This is when the case is set for hearing or mention and the prosecution have to prove whether they have case against the accused or not before the court.

[8] Section 275 and 228 of the Criminal Procedure Act [Cap 20 R.E 2002]
[9] Section 148 and 63 Section of the Criminal Procedure Act [Cap 20 R.E 2002]
[10] Section 192 of the Criminal Procedure Act [Cap 20 R.E 2002]

❖ **Prosecution Case**[11]

This is a stage where the prosecution have to present their case ,where the prosecution will call upon the witnesses to give their testimonies and present any other evidence that support their case, for court to decide whether there is a case to answer or not. It is in this stage where the witness will be examined by prosecution at first **(Examination in Chief**), then will be examined by defense **(Cross examination)** lastly will be reexamined by prosecution **(re-examination).** Importantly: Generally the burden of proof lies on Prosecution and the standard of proof is beyond reasonable doubt.

❖ **Case to Answer /No Case to answer**[12]

This is a stage where the court has to decide on whether there is a case to answer or not, basing on the evidence provided by prosecution. If no case to answer the court will acquit the accused, if there is a case to answer accused will be having chance to present evidence in his support.

❖ **Defense Case**[13]

Basically here the defense team will present their evidence, witness be examined in chief, cross examined by prosecution and re-examined by the defense.

❖ **Final Submission: This** is a summary of the whole presentation from each side; defense will be the first to make their final submission then followed by the prosecution side. Final submission can be orally or in writing, this have to be with the leave of the court.

❖ **Acquit or Convict**

This is a stage where by the court will rule depending on the submission by prosecution and defense if the accused is found guilty or not. Therefore the accused can be found not guilty, if found not guilty, game over, he will be acquitted and set free, If found guilty the next step will follow.

❖ **Mitigating and Aggravating factors**

[11] Section 288 of the Criminal Procedure Act [Cap 20 R.E 2002]
[12] Section 230 and 231 of the Criminal Procedure Act [Cap 20 R.E 2002]
[13] Section 294 of the Criminal Procedure Act [Cap 20 R.E 2002]

When the accused is convicted, Defense will be given chance to present factors that tend to diminish the magnitude of sentence whereas prosecution will be give factors that tend to increase the magnitude of the sentence.

❖ Sentence[14] and Judgment[15]

This will be second last thing, the court will read the sentence in the judgment and there is a set rule in the law that it shall be within ninety days under s.311 of the Criminal Procedure Act. The contents of the judgment are provided by the law under s.312 of CPA.

❖ Right to Appeal Explained

The judge /magistrate must pronounce the right to appeal for any aggrieved party with the decision.

Note: The ***sixty days rule*** established under section 225 of CPA require criminal prosecution to be finalized within 60 days from the day of their commencement subject to certain exceptions like in serious offences whose investigation is likely to protracted such as treason.

TOPIC TWO: COURTS JURISDICTION IN CRIMINAL LAW & PROCEDURE

➢ INTRODUCTION

In criminal matters, it is essential for a legal counsel: whether an advocate or prosecution attorney to have knowledge of jurisdiction of courts. Indeed the question of jurisdiction lies at the root of judicial functions. Courts are creatures of statute and can only exercise such powers as conferred by statute. They may not exercise powers which the law does not, expressly or impliedly, vest in them.

Jurisdiction is fundamental; it is not simply a question of form for it prescribes the boundaries of the authority of a court. If a court tries a case over which it has no jurisdiction the sentence

[14] Section 316 of the Criminal Procedure Act [Cap 20 R.E 2002]
[15] Section 311 of the Criminal Procedure Act [Cap 20 R.E 2002]

passed and handed to the accused after such trial cannot stand. For instance it would be illegal for a Primary court to try and convict an accused person charged with murder.

➢ **Meaning of jurisdiction**

Simply defined the jurisdiction of a court refers to the extent to which or the limits within which, courts or magistrates or judges may act in the course of handling a particular type of a case or pass a particular sentence.

The limits within which a court may exercise its powers may be geographical or pecuniary or may be prescribed according to the subject matter; that is by categorization of offences which should be tried or inquired into by a certain court or the sentence which such court may impose.

➢ Categories of Jurisdiction

➢ **Original Jurisdiction**

Original jurisdiction means the power of a court to hear or try a case as a matter of first instance. This requires that a particular type of case should only be commenced and tried in the lowest court in the ladder before moving to the next court in that hierarchy if need be. A court with original jurisdiction may hear the case; make various findings and orders, pass judgment and sentence the accused within the limits provided for in the law. According to sections 18, 40 and 41 of the Magistrates Courts' Act, Primary Courts, District Courts and Resident Magistrates' Courts in Tanzania mainland have original jurisdiction in criminal matters as provided by the First Schedule (jurisdiction of primary courts) and Second Schedule (jurisdiction of district courts) of the Act and any other law. The High Court of Tanzania has unlimited original jurisdiction.

Further guidance regarding original jurisdiction of courts is to be found in other laws. The First Schedule to the Criminal Procedure Act, Cap. 20, for instance, sets out the offences in connection with which the High Court and district courts may exercise original jurisdiction. Similarly original jurisdiction in relation to economic crimes lays with the High Court, in accordance with section 3 of the Economic and Organized Crime Control Act, Chapter. 200.

➢ **Territorial Jurisdiction**

Territorial jurisdiction means the geographical area within which a court may exercise its powers. A District Court has jurisdiction within the district in which it is situated, and a court of a resident magistrate has jurisdiction in the region within which it is situated (See Sections 4–5 Magistrates' Courts Act, Cap. 11). On the other hand the High Court has jurisdiction within the territorial limits of a State (See Article 108 Constitution of the United Republic 1977). Territorial jurisdiction of the primary court is provided under section 3 of Cap. 11.

The case of **Sharma v. R**[16]**,** sufficiently illustrates the point as to the importance of territorial jurisdiction. In that case territorial jurisdiction was in issue. The Court of appeal for Eastern Africa pointed out that proof of place of commission of offence is essential to the prosecution's case and that although it is not always capable of exact proof, evidence should be led on which the necessary inference can be drawn.

➢ **Subject Matter Jurisdiction**

Jurisdiction by subject matter, also termed jurisdiction by categorization of offences is expressly conferred by legislation stating which offences are triable by what court. The First Schedule to the Criminal Procedure Act, for instance, sets out what offences are triable by subordinate courts and which are triable by the High Court. Similarly the First Schedule to the Magistrates' Courts Act, Cap. 11 set out which offences may be tried by primary courts in addition to other subordinate courts.

The case of **R v. Mrisho s/o Seffu**[17]**,** sufficiently illustrates the issue of subject matter jurisdiction. In that case the accused was tried and convicted by a district court of the offence of incest by males contrary to section 158 (1) of the Penal Code. The High Court in revision declared the trial a nullity as the offence is triable only by the High Court. Consequently the conviction was quashed, the sentence set aside, and the case was remitted to the subordinate court for committal proceedings at the option of the Republic.

[16] 20 EACA 310
[17] [1968] HCD 140

➢ **Pecuniary Jurisdiction**

Pecuniary jurisdiction, which usually applies to civil cases, means limitation of the powers of a court by the value of the subject matter in issue. For the purpose of this paper it is only of passing interest and need not detain us any further (See the provisions of Written laws miscellaneous Amendments Act no. 3 of 2016).

➢ **Sentencing Jurisdiction**

Section 170 (1) of the Criminal Procedure Act, prescribes what sentences subordinate courts may lawfully pass. That sub-section provides that in cases where such sentences are authorized by law, a subordinate court may pass a sentence of imprisonment for a term not exceeding five years, as a general rule. Similarly it may not impose a fine of more than twenty million shillings.
For instance, where a subordinate court convicts a person of the offence of stealing from the person of another (s. 269 Penal Code), an offence which carries a maximum sentence of ten years imprisonment, the maximum sentence it can impose on the convicted person is five years imprisonment, regardless of what the aggravating circumstances may be.
If however, a subordinate court convicts a person of an offence scheduled under the Minimum Sentences Act, Cap. 90, and such sentence is authorized by law, it may pass a sentence of imprisonment for such offence for a term not exceeding eight years.

➢ **Appellate Jurisdiction**

Appellate jurisdiction means the power of a court to hear or try matters on appeal from another court inferior to it. For instance section 20 of the Magistrates' Courts Act gives district courts the power to hear appeals from decisions of primary courts, while section 21 stipulates what district courts may do in exercise of their appellate jurisdiction. Further, in terms of section 25 of the same Act; parties aggrieved by decisions of district courts in the exercise of their appellate jurisdiction may further appeal to the High Court. Finally, in accordance with section 4 of the Appellate Jurisdiction Act, Cap 141, the Court of Appeal has jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction.

As such in criminal matters a person convicted on a trial held by the High Court or by a subordinate court exercising extended powers may appeal to the Court of Appeal. Similarly if the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order, as the case may be.

➢ **Extended Jurisdiction**

When a subordinate court is given power to try offences not ordinarily tried by subordinate courts, it is said to exercise extended jurisdiction. Indeed it ought to be borne in mind that extended jurisdiction is not for the courts but for the Magistrates. In terms of section 173 of the Criminal Procedure Act, the Minister responsible for legal affairs may, after consultation with the Chief Justice and the Attorney General, by order published in the Gazette invest any resident magistrate with power to try any category of offences, or specified cases which, would ordinarily be tried by the High Court, specifying the area within which he may exercise such extended powers. Similarly by virtue of section 45 of the Magistrates' Courts Act, a magistrate may be vested by the Minister with appellate jurisdiction ordinarily exercisable by the High Court.

A magistrate exercising extended jurisdiction has the power to impose any sentence which could lawfully be imposed by the High Court. Therefore, for the purposes of any appeal from or revision of his decision in the exercise of extended jurisdiction, such resident magistrate is deemed to be a judge of the High Court, and the court presided over by him while exercising extended jurisdiction shall be deemed to be the High Court.

➢ **Revisional Jurisdiction**

Revision jurisdiction is the power vested in a superior court to examine the records of an inferior court in order to satisfy itself as to the correctness, legality or propriety of any decisions or orders made by such (inferior) court. Thus, in terms of section 22 of the Criminal Procedure Act a district court may call for and examine the records of proceedings in primary courts and revise them.

Similarly a Resident Magistrate-in Charge may call for and inspect the record of any proceedings in a district court and the High Court has revision jurisdiction over matters originating in primary courts, as persons aggrieved by a decision of a district court in the exercise of its revision powers over primary courts may appeal to the High Court.

Similarly section 372 of the Criminal Procedure Act empowers the High Court to call for records of a subordinate (magistrate's) court for the purpose of examining such record and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by that court. The revision jurisdiction of the primary court is provided under section 21 of Ward Tribunal Act Cap 206.

➢ **Summary Jurisdiction**

Criminal trials before subordinate courts involving offences which fall within the ambit of jurisdiction of subordinate courts are normally disposed of by way of summary trial. This happens because the subordinate court is vested with the power to try such offences and impose the appropriate sentence. Criminal offences triable by subordinate courts are also technically known as summary offences. As such they may be said to be disposed of in by way of summary trial[18], and the subordinate court involved in disposing of the cases may rightly be said to exercise summary jurisdiction. The First Schedule to the Criminal Procedure Act contains a list of some of the offences which subordinate courts may dispose of by way of summary trial. Where offences not triable by a subordinate court are involved, it has to hold committal proceedings[19]. The terms summary trial and summary jurisdiction have, by some authorities on Criminal Procedure, been associated with (and sometimes restricted to) the provisions of section 213(1) of the CPA which lay down the procedure that may be followed by subordinate courts in the case of minor offences detailed in sub-section two of that section, which may be tried without recording the evidence.

[18]Section 2 of the Criminal Procedure Act defines summary trial to mean 'a trial held by a subordinate court under Part VII of the Act'. This part of the Criminal Procedure Act details the procedure to be followed in trials before subordinate courts.

[19]Section 244 of the Criminal Procedure Act explains the circumstances under which committal proceedings are to held.

➢ **Supervisory Jurisdiction**

The High Court exercises general powers of supervision over all courts in the exercise of their jurisdiction and therefore has power to:

• call for and inspect the record of any proceedings in a district court or primary court and examine the records or register thereof; or

• direct any district court to call for and inspect the records of any proceedings of the primary court established in its district and to examine its records and registers thereof, in order to satisfy itself, as to the correctness, legality and propriety of any decision or order and as to the regularity of any proceedings therein; (see s.30 (1) Magistrates' Courts Act).

Similarly a resident Magistrate-in-Charge may call for and inspect the record of any proceedings in a resident magistrates' court, a district court or a primary court and examine the records or registers thereof for the purpose of satisfying himself as to the correctness, legality or propriety of any decision or order and as to the regularity of any proceedings therein: (See section 30(2) of **the Magistrates' Courts Act.).**

TOPIC THREE; INVESTIGATIONS

Investigation can be defined as a way to look into carefully in order to uncover facts or gain information make through examination of the facts about the situation of crime[20].

In the legal situation it is very solely and sometime practical impossible to conduct the criminal trial and complete it for a just one day sitting of the court, thus investigation should take place so as to prove or disapprove allegations subject to the provision 10 of the Criminal Procedure Act as states hereunder; *"If from the information received or in any other way a police has reason to suspect the commission of an offence or to apprehend a breach of the peace he shall, where necessary, proceed in person to the place to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender where the offence is one for which he may arrest without warrant*."

[20] Macmillan. School Dictionary, William.D.Halsey Edit Director. (supra)

Powers of prosecution the decision to prosecute or not to prosecute a suspect is inevitable. Usually this decision is made by a senior police officer in charge of criminal investigation at the police station and it depends on the amount of evidence obtained from the victim of the crime, the scene of crime, the accuser's recorded statement and interviews of witnesses.

▪ Purpose of Investigation

The purpose behind the law on investigation here is to protect the interest of both parties to case as well as to maintain justice requirement. But the problem is that the law on investigation itself is silent to the good cause of making it. Thus gives room to those people who invested power to make it to misuse their power and the consequences of this is to the delay of justice, this delay directly affect the right of the accused person because as justice delayed is a justice denied. In **R.v. Mwita Nyangitimo**[21]**,** The accused person in this case was charged with stealing a sub-machine gun. Following the failure of the police to accomplish the investigation due to the loss of the police case file, the case took almost six years up to the finality. Eventually the accused person was found not guilty of an offence despite the six years' experience of torture in prison.

• Powers and Duties of Police Officers when Investigating Offences are stipulated under section 46 of CPA.

TOPIC FOUR; ARREST

▪ Meaning of Arrest

Simply put, arrest can be described as the process of stopping, seizing, or apprehending a person by lawful authority; or the act of laying hands upon a person for the purpose of taking his body into custody of the law; the restraining of the liberty of a man's person in order to compel obedience to the order of a court of justice, or to prevent the commission of a crime, or to insure that a person charged or suspected of a crime may be forthcoming to answer it[22].

▪ How arrest is made?

[21] [1980] TLR, No 317
[22] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed

The provision of section 11(1) of CPA enumerate on how arrest is made, and with respect to this section, arrest is deemed to be made when a police officer or any other person effecting an arrest actually touch or confine the body of a person to be arrested. Further the provision of section 11(2) of the CPA, empowers a person effecting an arrest to use all necessary means to effect arrest in the event where a person to be arrested forcibly resists to be arrested.

However an arrested person should not be subjected to more restraint than necessary to prevent his escape as per section 12 of the CPA.

▪ **Who may effect arrest?**

According to the provision of the CPA, three class of person may effect arrest that is a police officer, a magistrate or a private person.

• **Arrest by private persons,** the provision of section 16 (1) & (2) of CPA, gives power to a private person to arrest any person who in his presence commits any of the offences referred to in section 14 of CPA. Further the sub-section 2 empowers the owner of the property to arrest without a warrant any person found committing an offence involving injury to property.

Arrest by magistrate, the provisions of section 17 and 18 of CPA empowers a magistrate to arrest any person whom he reasonably believes has committed an offence within the local limits of his jurisdiction, and this can be done by issue of warrant directing such arrest.

• **Arrest by police officer,** as per section 14 which empowers a police officer to arrest any person without warrant for offences and circumstances provided therein.

▪ **What to do and not to do during arrest?**

• It's imperative that a person who is arrested to be informed of the substance of offence for which he is arrested, however subject to certain exception a person cannot be informed with the substance of the offence if (a) if, by reason of the circumstances in which he is arrested, that person ought to know the substance of the offence for which he is arrested; or (b) if by reason of his actions the person arrested makes it impracticable for the person effecting the arrest to inform him of wthe offence for which he is arrested, (See Section 23(1), (2), & (3)).

▪ Section 21 (1) of the CPA is to the effect that, a police officer or other person shall not, in the course of arresting a person, use more force or subject the person to greater indignity than is necessary to make the arrest or to prevent the escape of the person after he has been arrested.

▪ **An arrest warrant**

Is an official document, signed by a judge (or magistrate), which authorizes a police officer to arrest the person or people named in the warrant. Warrants typically identify the crime for which an arrest has been authorized, and may restrict the manner in which an arrest may be made.

▪ **Form, contents and duration of warrant of arrest.**

In the law of Tanzania a warrant of arrest shall be under the hand of the judge or the magistrate issuing the same and shall bear the seal of the court, and every warrant shall remain in force until it is executed or until it is cancelled by the court which issued it. Generally the form, contents and duration of warrant of arrest is provided under section 112(1), (2) & (3) of CPA.

➢ Subject to the provision of section 119 of CPA, a warrant of arrest may be executed at any place within the United Republic of Tanzania.

▪ **Who may issue an arrest warrant?**

The provisions of section 13 of CPA is to the effect that a warrant for arrest is sought and given by either magistrate, ward secretary or secretary of the village after receiving information under oath that a person has committed an offence, (See Section 13(1), (2), (3), (4) & (5) of the CPA).

▪ **Arrest by Police officer**

Arrest can be made ***with or without warrants*** by police officers. The categories of persons who can be arrested without warrant are enumerated in the Criminal Procedure Act (CPA).

The provision of section 14 of CPA empowers a police officer arrest any person without warrant, where:-

• Any person who commits a breach of the peace in his presence;

• Any person who willfully obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;

• Any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to such thing;

• Any person whom he finds lying or loitering in any highway, yard or garden or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit an offence or who has in his possession without lawful excuse any offensive weapon or housebreaking implement;

• Any person for whom he has reasonable cause to believe a warrant of arrest has been issued;

• Any person whom he suspects upon reasonable grounds of having been concerned in any act committed at any place out of Tanzania which, if committed in Tanzania, would have been punishable as an offence, and for which he is, under the Extradition Act, or otherwise, liable to be apprehended and detained in Tanzania;

• Any person who does any act which is calculated to insult the national emblem or the national flag;

• Any person whom he suspects of being a loiterer.

It should be noted that CPA does not make room for arrests out of the whim or caprice of the arresting police officer. For police officer to be able to arrest without warrants the offence for which any person is arrested must be a cognizable offence is, generally speaking an offence punishable with two years imprisonment or more.

The right to break into or out of a house allowed by the CPA if necessary[23], it is illegal for any police officer to arrest detains the wife or child of a suspect as a means for compelling his or her appearance.

Any police officer or person making an arrest is bound, without unnecessary delay, to commit the suspect to the nearest police station for further legal processes appropriate[24].

The CPA empowers the police to put any arrested person under restraint for purpose consistent with the investigation of any offence he is alleged to have committed. Restraint may necessitate keeping the person in custody overnight for twenty-four hours; in the case of an arrest able offence[25]. The period for interviewing a person under restraint is statutorily regulated. It normally four hours, unless extended to eight hours or such hours as magistrate may determine on application by the interviewing officer[26].

The police are required to commit an arrested person before a magistrate without twenty four hours or as soon as it is practicable, in the case of persons arrested some distance from the local jurisdiction of the nearest court.

TOPIC FIVE; SEARCH SEIZURE.

Search and Seizure in **section 23**.of the Criminal Procedure Act, A person arrested should be searched immediately following arrest. This is necessary to check if anything may be discovered which may be used in evidence and also to identify the suspect, his personal effects, hidden weapons and so forth.

In the case of female suspects, it is mandatory that other women do the search. This should be done with strict regard to decency and should not be done in the presence of men as per section 26 of the Act. The power of search and seizure extends to the search of premises, vehicles, ships or vessels aircraft as per section 25 of the law.

[23] Section 19 of the Criminal Procedure Act [Cap 20 R.E 2002]
[24] ibid
[25] Section 32 of the Criminal Procedure Act [Cap 20 R.E 2002]
[26] Section 50(1) of the Criminal Procedure Act [Cap 20 R.E 2002]

A search can be done on any day including Sunday. Normally it must be at any time between sunrise and sunset but the court may authorize a person making a search to do at any hour, the same extends to the execution of search warranties as per section 40(1) of the CPA.

Section 41 of the CPA is to the effect that, a police officer may search the person or the clothing that is being worn by or property in the immediate control of, a person and may seize any thing relating to an offence that is found in the course of the search. When the article being searched for is seized and brought before the court, it may detain until the conclusion of the case as per section 44(1) of the Law.

The CPA empowers the police, when conducting a criminal investigation to search any building or vessel, carriage, box, receptacle or place in order to recover any thing connected with the commission of an offence as per section 38 (1) of the law.

Also a police officer may search under emergences in circumstances enumerated under section 42(1) (a)-(d) of the CPA, for example a police officer may search under emergences where the police officer believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence.

TOPIC SIX: CHARGE SHEET/COMPLAINT/CHARGE

Generally there are two ways in which criminal proceedings are instituted in subordinate Court that is:-

• By laying a complainant[27] in a court in terms of section 128(1) of the Criminal Procedure Act.

• By bringing the accused person before magistrates in terms as per section 128(1) of the Criminal Procedure Act.

❖ FORMULATION OF CHARGE SHEET OR COMPLAINTS

Although a magistrate has a duty to see the charge is correct, the responsibility of correctness of a charge is that of a public prosecutor. It is therefore, a public prosecutor's duty to satisfy himself

[27]Section 2 of the Criminal Procedure Act defines "complaint" to means an allegation that some person known or unknown has committed an offence.

that the charge he is about to file is correct and that the court in which it is to be filed has jurisdiction to try the offence or inquire into it.

❖ **What is a charge sheet?**

A charge sheet is a formal statement of an offence as preliminary step to prosecution. A Charge is a written accusation against accused person of an offence or allegation of an offence which he is said to have committed. It is a complaint formal drawn up or formal written accusation of an offence is drawn up by the magistrate or police officer signed by as required by the law for the use in criminal trial or in preliminary proceedings (committal proceedings).

A charge sheet is equivalent of pleadings in civil cases. It contains allegations against the other party. That means the accused party. It specifies and furnishes necessary details in summary form. In Tanzania, normally a charge sheet is prepared in our police stations or State Attorney Chambers to commence criminal proceedings against the accused persons.

❖ **The purpose of a charge sheet**

The purpose of a charge sheet the purpose of a charge is to inform the accused and the court, with sufficient clarity, the allegations against the accused person.

• To avoid taking the accused by surprise. And hence help him to prepare for defense.

• It helps the court to issue necessary process, for example issuing summons.

• The charge also helps the court to control the proceedings and confine evidence and arguments only to what is in dispute. Respect for the rule of law that, any government respect the rule of law should not take people straight to prison without any charge.

• It the principle of law that no person should be convicted of an offence unless the offence is defined in a written law. In the case of **Musa Mwaikunde v. R**[28]**,** The court held that: It is always required that an accused person must know the nature of the case facing him. And this can be achieved, if the charge discloses the essential elements to be alleged. As rule, charges must be reduced into writing.

• It enables the court to know whether or not it has jurisdiction to inquire into or to try the case.

[28] [2006] TLR 387

• It enables the court to control proceedings by confining the evidence and arguments to what is alleged in the charge and what is distributed.

❖ ESSENTIAL PARTS OF A WELL DRAFTED CHARGE SHEET

Formulation of charges is an important part of public prosecutor's duties; and no public prosecutor should be forgiven for his ignorance in formulating charges. A charge has three parts:-

• **Particulars of the accused person,** this part contain the following things Name of the accused person. ***Age of the accused person***. ***Nationality or tribe of the accused person***. ***Occupation or Address of the accused person.***

• **The offence alleged to have been committed and citation of section of the law or rule Or order alleged to have been contravened.**

• Particulars of the alleged offence, Particulars here means a brief but clear statement of the acts or omissions alleged has been done or omitted to be done by an accused person. The particulars should contain: Date Time Place the alleged offence was committed the act or omission complained of, the name of the victim, if any the property involved, if applicable, and its value, etc. as per section 132 of the CPA.

NOTE: - This explanation on how to draw a charge has been explained under section 132 of the CPA. Also for the case of drawing a charge under Primary Court the mandatory conditions has been provided under section 21(b) of the MCA (Third Schedule).

• As provided under section 21(2) of the MCA (Third Schedule) is that every charge shall be brought in the name of the Republic acting on the complaint of the complainant who shall also be named.

❖ SPECIMEN OF A CHARGE SHEET

CHARGE SHEET

(Name of the court)

i. Name of the accused: Emmachiuce s/o Didace

ii. Age : 20 years

iii. Tribe or Nationality: Haya, Tanzanian

iv. Religion : Christian

v. Address: House No. 100, Kanyigo, Missenyi.

vi. Offence, Section and law: Robbery contrary to sections 285 and 286 of the Penal Code

vii. Particulars of offence: Emmachiuce s/o Didace on or about 17th Aug, 2018 at about 6 p.m. at Kigarama, within the district of Missenyi, Kagera Region, did steal a laptop valued at 800,000 shillings, the property of Emmanuelina, Prisca, and at, or immediately before or after such stealing did use personal violence to the said Emmanuelina, Prisca, in order to steal or retain the said property.

viii. Sgd, Lwabugirwa. PUBLIC PROSECUTOR Central Police Station MISSENYI Date: 17th Aug, 2018

❖ **JOINDER OF ACCUSED PERSON**

This is the practice of joining more than one accused persons in one charge and try them together. The circumstances where accused person may be tried jointly are contained under section 134(1) of the CPA, where the accused person may be charged jointly where:-
Persons accused of the same offence committed in the course of the same transaction Persons accused of an offence and persons accused of abetting or an attempt to commit such an offence. Persons accused of different offences committed in the course of the same transaction. Persons accused of any offence under Chapter XXV to XXXI of the Penal Code Persons accused of any offence relating to counterfeit coin under Chapter XXXVI of the Penal Code Persons accused of any economic offence under the Economic and Organized Crime Control Act.

❖ **JOINDER OF COUNTS**

Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character as per section 133(1) of the CPA. Also it is provided under section 21(3) of the MCA (Third Schedule) which provides as follows: "A charge may contain more than one offence if the offences charged are founded on the same facts or form part of a series of offences of the same or similar character but where more than one offence is contained in the same charge it shall be separately stated…"

❖ DEFECTS OF CHARGES

▪ DUPLICITY

Duplicity of a charge simply means that the charge is double. A charge is said to be duplex where it contains two distinct offences in a single count.

A simple example will clarify the point. It is alleged that **Shariph Athuman**, broke into the house of **Marry Fidelis** at night and store a radio there from. Your public prosecutor then brings before you a charge sheet which reads as follows.

IN THE UNITED REPUBLIC OF TANZANIA

CHARGE SHEET

Name of the accused person: **Shariph Athuman**

Age: **24 years**

Tribe/Nationality: **Haya/ Tanzanian**

Religion: Moslem

Address: **House No. 200, Iremela, Mwanza Township**

Offence, Section and Law: **Burglary and stealing** c/s 294(1) and 265 of the Penal Code [CAP 16 R.E [2002].

Particulars of the Offence: Shariph s/o Athuman On the night of 22nd May 2017 at about 4.00 a.m at Kanoni Village in the District and Region of Mwanza did break into the house of Marry d/o Fidelis and stole there from a radio valued at shs 900,000/= , the property of the said Marry d/o Fidelis.

It will be noted from both the citation of the offence and the particulars of the charge, that in that single count the charge is alleging the commission of two distinct offences namely burglary and stealing.

Such a charge is said to be bad for duplicity. Should you convict on such a charge, the conviction may well be quashed on appeal if the appellate court should take the view that the duplicity occasioned a failure of justice.

▪ **VARIANCE BETWEEN CHARGE AND EVIDENCE**

Variance renders the charge defective unless it is amended and the amendment causes no injustice to the accused and as so long as the accused person had notice of amended charge from the face of the original charge. This has been covered also under section 234 of the CPA.

▪ **CHARGE ON A REPEALED SECTION**

A charge on repealed section or law is curable provided that, the offence is in every essential the same under the old and the now section or law, no failure of justice may result from the alteration and the charge and the particulars are clear.

The above conditions is verified through the case of **Magesa s/o Mjunja v R**[29]**,** where the court held that a charge and conviction under a repealed law is an irregularity which is curable if the repealed section is re-enacted in identical words in the current statute such that it cannot be said that the accused has in any way been prejudiced by the irregularity...".

However if the old and new section or law differ and do not repeat in a similar terms the language of the old section/law the defects can't be cured. This has been explained also in the case of **Peter Zakaria v R**[30]**,** In this case the appellant insulted and threatened a court broker with bloodshed if his car was attached. He was convicted of unlawfully obstructing a court officer c/s 119, Penal Code. The section had previously been repealed and replaced by s. 114A. But the court held that on the facts of the case at hand, it is clear that the new section, s.114A, is broader than the old section, s. 119, and does not repeat in similar terms the language of the old section. Moreover it is unclear from the particulars which part of the new section the offence

[29] [1986] TLR 10
[30] [1969] HCD NO. 236.

would fall under. Therefore, in the circumstances, the charge cannot be cured, and the conviction null.

▪ **MISQUOTATION OF SECTION NUMBERS**

Failure to quote a proper section number isn't fatal unless it is shown specifically that there was a miscarriage of justice that is the accused was prejudiced. This has been explained in the case of **Nyabilimo Andrea V R**[31]**,** In this case the accused was charged and convicted of "robbery with violence c/s 286 of the Penal Code." The charge correctly quoted the section of the Code appropriate to this offence, but gave wrong section number. The court was held that "The number of the section was obviously quoted in error and I invoke the provisions of Crim. Proc. Code s. 346 ….. As this error cannot occasion any miscarriage of justice or prejudice to the appellant as the particulars of the offence are quite clear. He knew what he pleaded to and with what offence he was charged."

▪ **NON QUOTATION OF SECTION NUMBER**

It is important that the proper section must be quoted in the Charge. Non quotation of section number is a curable irregularity but it shouldn't be encouraged as it will cause incompetence and recklessness on the party of the prosecutors. Therefore this irregularity is curable if 1. The accused wasn't prejudiced. 2. It was just a slip of the pen. 3. It wasn't a result of mistake of law.

❖ **CHARGE IN THE ALTERNATIVE**

Sometimes facts alleged in a case may be such as to indicate that one or two offences was committed. In such a case the way out of the problem is to prefer two counts in the alternative. For example, a cashier is alleged to have occasioned a loss of tshs 6,500/=in cash. The facts are such that he neither stole the money nor lost it as the result of negligence or misconduct. In such a case two distinct counts may be preferred in the alternative, occasioning loss through negligence.

Where counts are so preferred, it is imperative that the words "In the alternative" must be included. In other words, one count will allege the commission of one offence and below it will

[31] [1967] HCD NO. 345.

be the words: "In the alternative" and then will follow the count alleging the commission of the second offence. The omission of the words "In the alternative" will render the charge defective in that it will tend to prejudice the accused defense.

The above position is affirmed in the case of **R v Jumanne Mohamed**[32]The accused was charged with unlawful wounding. After the prosecution witnesses had testified the public prosecutor substituted a fresh charge of causing grievous harm. Without complying with the provisions of s.234 of the Criminal Procedure Act, 1984 the magistrate convicted the accused as charged and sentenced him to three years' imprisonment. When the matter reached the High Court the learned judge considered the effect of failure to comply with the provisions of s. 234 of the Criminal Procedure Act, 1984, and held that Failure to comply with the provisions of s. 234(2) (a) of the Criminal Procedure Act was in the instant case, a serious error capable in law of vitiating the decision arrived at by the trial magistrate.

In the case of **Thuway Akonaay v R**[33], where the appellant was originally charged with threatening violence, but the charge was withdrawn and a new charge alleging arson was substituted therefore. The appellant was not called to plead to the new charge, or first appeal the judge was satisfied that provisions of s. 234 of the Criminal Procedure Act were complied with because the appellant saw no need to recall previous witnesses immediately after the charge of arson had been substituted for that threatening violence and PW.I alone had testified. Held: It is mandatory for a plea to a new or altered charge to be taken from an accused person; failure to do that renders a trial a nullity.

❖ **REMIDIES ON DEFECTIVE CHARGES, SECTION 288-436 OF THE CPA.**

A. Amendment of a charge.

When the charge is defective, the magistrate may do the following things: ***May amend it***. ***Substitute anew charge***. ***Draw up an additional charge***.

The magistrate may amend the charge which is defective either in substance or form provided that the required amendments can be made without injustice. When the charge is amended or altered formalities must be strictly followed as follows: ***The court must call upon the accused to***

[32] [1986] TLR 232
[33] [1987] TLR 92

plead afresh to the altered charge. The accused person has the right to requested that any witnesses be called to give evidence again or to be cross examined. The prosecution may call ad examine any witnesses who may have been examined.

B. Withdraw and Re-Institution of a charge

This is governed under section 98 of the CPA. This is done by the Public Prosecutor at a stage of the proceeding before judgment is pronounced. A Public Prosecutor must obtain the consent of the court or may instruct by the Director of Public Prosecutions. Withdraw is done where the charge is defective with a view of instituting a proper charge.

Where the charge is withdrawn before the accused hasn't defended himself he may be discharged. This discharged will not operate as a bar to subsequent proceedings against him on account of the same facts. This has been explained also in the case of **Pagi Msemakweli v R**[34]**,** The court held that the withdrawal of the charge under s 98(a) of the Criminal Procedure Act did not operate as a bar to subsequent proceedings being preferred against the appellant on the same facts. The payment or phoney payment made to PW 1 did not undo a criminal act which was already complete and the offence of cattle theft was not capable of compromise.

C. Nole prosequi as per section 91 of the CPA.

Under this the prosecution stops the prosecutions by the DPP and the accused person is discharged. This discharge is not a bar to any subsequent proceedings against him based on the same facts should need arose. Withdraw of charge under section 91 of the CPA was discussed in the case of **R v Nicolaus Mamuu**[35]**,** In this case while police investigations were still under way, and after he had been charged with murder, the accused escaped from custody. About a year later, and on application by the public prosecutor, the District Court of Rombo withdrew the charge against the Accused in terms of Section 98(a) of the Criminal Procedure Act. On revision to this Court, the Court restored the charge of murder against the Accused. It was held as

[34] 1997] TLR 331
[35] [1996] TLR 154

follows: (i) Section 98 speak of the withdrawal of charges in respect of `any trial before a subordinate court'; and given that the crime of murder is triable only before the High Court, the trial on the charge could only have been properly brought before the High Court and thus Section 98 could not have been used to withdraw the charge. (ii) The withdrawal of the charge in question should have been brought in terms of Section 91(1). (iii) The order of the District Court is quashed and set aside, and the charge of murder against the Accused is restored.

- **PROCEDURE TO BE FOLLOWED WHERE CHARGE IS ARTERED, SECTION 234(2) OF THE CPA.**

It is provided under that provision that where a charge is altered under that subsection then the court must follow the following procedures:

• The court shall thereupon call upon the accused person to plead to the altered charge.

• The accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

• The court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.

In **Andrea s/o Kimbulu V R**[36]**,** accused was charged in Primary Court with housebreaking, theft, and assault. At the close of the prosecution case, the magistrate substituted a charge of robbery [P.C. s. 286], and accused was duly convicted of that offence. The record indicates that after the original charges were read and the accused was addressed in terms of section 41(2) (b) of the Magistrates Courts Act, he stated that he did not wish to be tried by the court. The record also indicates that after the charge was altered and read to the accused, he denied guilt and was altered and read to the accused, he denied guilt and was put upon his defense. The court, it was held that "The alteration or substitution of the charge at the end of the case for the prosecution

[36] [1968] HCD NO. 312

should have been followed by the appellant being given the option recalling and previous witnesses and cross-examining them the procedure outlined in s. 21 of the Third Schedule to the Magistrates Courts Act."

In **Sephen s/o Munga V R**[37]**,** the accused was initially charged with attempted murder, to which he pleaded not guilty. After the prosecution had presented its evidence, the magistrate, finding that the evidence did not show intent to murder, altered the charge to one of causing grievous harm. The appellant was not required to plead to this charge, nor was he given the opportunity of recalling the prosecution witnesses for cress-examination. After making his defense accused was convicted of causing grievous bodily harm and sentenced to 18 months imprisonment. The court, it was held that the trial was a nullity.

TOPIC SEVEN ; THE ACCUSED'S PLEA

▪ **Introduction**

When an accused person is first brought before the court charged with an offence by which the court has a competent jurisdiction to inquire or to try, the first thing as required by the law is the Magistrate to ask him to plead to such charge; in other words the magistrate must read over and explain the charge to the accused and ask the accused whether he admits or denies it. His reply thereto is called his **"plea**".

▪ **Meaning of a plea**

A plea is a reply to the charge about its truthfulness, the law requires that the substance of the charge shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge.

The accused then subject to the general right to remain silent, will have to plead either;

(a) guilty[38]

(b) not guilty[39]

(c) Autrefois convict or Autrefois acquit[40]

[37] [1968] HCD NO. 225
[38] Section 282 of the Criminal Procedure Act [Cap 20 R.E 2002]
[39] Section 279 of the Criminal Procedure Act [Cap 20 R.E 2002]

(d) pardon[41],

(e) lack of jurisdiction of the court to try the accused.

▪ **Prerequisite of a plea**

The plea should be *personal*, *voluntary, done by a fit person*, and *free* for nobody can be forced to plead, an involuntary plead is void in law, it also must be done by a fit person capable of understanding the proceedings and what he is pleading to, including the effect of his plea in law.
Thus when in the course of a trial the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defense it shall, before the inquiring into the fact of such unsoundness of mind and notwithstanding the fact that the accused may not have pleaded to the charge, call on the prosecution to give or adduce evidence in support of the charge. This basically applies to the disabled and the insane (See section 216 of CPA).

▪ **Categories of pleas**

➢ **Plea of guilty (Section 282 of CPA).**

In simple terms, a plea of guilty means a confession to the offence charged. It further means that the accused person having listened to the charge and its particulars admits their truthfulness. The court is required to record everything the accused person says in his own words which indicate that he has actually pleaded guilty.
This is important because as it was said in the case of **Patrick Rimmer v R[42],** in which the court stated" a plea of guilty has two effects; first of all, it is a *confession of fact*; secondly, it is such a *confession that without further evidence the court is entitled to* and indeed in all proper circumstance will act upon it and result in a conviction.
A plea also must be clear and free from ambiguities, that is to say it must be an ***unequivocal plea.*** Pleas like" *Iam sorry*"," *that is correct*", "*I admit*", *it is true*", "It is true but... ","*I did it because*", "*I did wrong*", are for practical reasons not clear and full of ambiguities. They are said

[40] Section 280(1) (a) of the Criminal Procedure Act [Cap 20 R.E 2002]
[41] Section 280(1) (b) of the Criminal Procedure Act [Cap 20 R.E 2002]
[42] [1972] 56 Cr. App. R. 196

to be ***equivocal,*** therefore an *equivocal plea* simply means an ambiguous or vague plea that is a plea in which it is not clear whether the accused denies or admits the truth of the charge.

The statement above can be verified in the case of defilement as the best example, thus when the accused pleads "it *is true"* he might be admitting to the act of having the carnal knowledge with the girl but not aware that she is under the age of fourteen. It is for this reason that the court must explain to the accused all the facts and the ingredients of the offense and ask him to plead all of them.

As evidenced in the case of **Nyaku Ntandu v R**[43]**,** where it was Held: (1) In the circumstances, and considering that the facts recited by the prosecution *were not inconsistent with the accused's statement*, if accused thought, as he had reason to believe, that the man who came to his house late at night was "an enemy," this would be a defense to the charge. (2) Accused *did not unequivocally plead guilty* to the charge. Conviction quashed.

In Musau s/o Muya v R[44]*, it is well settled that the word "nilikosa" meaning "I have done wrong" by itself should not be treated as unequivocal plea of guilty without enquiry as to what it was that the appellant admitted he had done.*

Where, therefore, an accused person unequivocally pleads guilty to a charge, he will be found guilty of the offence charged and will be convicted on his own plea. Thus "If the accused person admits the truth of the charge , his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary"

It is also for the reasons that judicial wisdom has developed to the extent that no conviction can be entertained unless the prosecution gives the facts of the case by facts in this case it is the *summary of the evidence* which the prosecution would have tendered had the accused pleaded not guilty to the charge. There after the magistrate to ask himself "whether or not the facts constitute the offence charged. If he is not satisfied, he will record a plea of "***not guilty***" and witness will then have to be called to prove the charge. If on the other hand, the magistrate is satisfied that the facts do constitute the charge, he will turn to the accused and ask him if he has

[43] 1968] HCD 56
[44] 1962] E.A. 643

understood the facts and what he has to say about their correctness or otherwise. If the accused says that those facts are correct, the magistrate will record a conviction against him.

The Holding in the case of **Adan v R**[45]**,** the court of appeal for East Africa reiterated the above point and said "*The statement of facts serves two purposes; it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defense and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of the facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for the statement of the facts to precede the conviction.*

▪ **Plea of not guilty (Section 279 and 283 of CPA)**

It means denial of the accusation charged against the accused that is the accused disagrees to the expressed charge by the court to him in such terms as "*it is not true*", "*it is a lie*", and so on the magistrate must record that as a plea of "*not guilty*".

If the accused denies the allegations read before him by the court of competent jurisdiction to try or inquire the case then the court as required by the law will enter a plea of not guilty to the accused and that means that the accused is putting in issue everything that has been alleged against him and so it will be for the prosecution to prove every fact and circumstance alleged against him.

A plea of not guilty is necessitated by a direct plea of not guilty, an equivocal plea of guilty, accused standing mute, failure by cooperation to enter an appearance, accused failure to enter appearance or remaining at large.

▪ **Accused standing mute (Section 281 of CPA)**

If the accused person refuses to plead, the court shall order a *plea of not guilty* to be entered for him. The magistrate in some cases may come across accused persons who refuse to plead to a charge, or stand mute or not to answer directly to the charge as nobody can be forced to plead. In

[45] [1973] E.A

such case if the magistrate is satisfied that the accused has understood the charge is required by the law to enter a "*plea of not guilty*" to the charge and the accused will be taken to have so pleaded.

Muteness of an accused person may be for *out of malice* or through the *visitation of God*. If therefore an accused person stands mute, a magistrate should hold inquiry to into such muteness. The said accused is mute out of malice where he fully understands the charge against him and can defend himself in the normal way but he deliberately stands mute. If the magistrate should after such inquiry, find the accused to be mute of malice, he will enter *a plea of not guilty* and proceed to try the charge.

An accused person is said to be mute by the visitation of God if he is deaf and dumb, or is suffering from some disease of mind, or is so deaf that he cannot hear when the charge is read over to him. Such an accused person can, if he is sane, be tried if he can read or write, or if intelligence can be conveyed to him by signs or symbols.

▪ **Pleas of "autrefois convict" and "autrefois acquit" and" pardon"(Section 280 (1) (a)**

As an accepted general principle in the administration of criminal justice "that no person shall be tried twice for the same offence arising out of the same facts provided that the previous acquittal or conviction has not been set aside or revised or where the original court had no jurisdiction to try the subsequent charge. Knowing that the plea is one of autrefois acquit or autrefois convict will lie in the accused person's reply to the charge. The accused person may plead by saying "*I was convicted of that charge by this court last year or I was acquitted on that charge, or I have been pardoned at law for this offence or some other statement to that effect"* If the accused pleads that he has been previously acquitted of the same offence or he has obtained a pardon at law for his offence, the court shall first try whether or not in fact such plea is true. For this purpose and depending on the nature of the plea, the court may receive in evidence court proceedings in the alleged previous trial and any document related there to, and such other evidence as may be relevant for a decision in the matter.

▪ **Change of pleas**

It sometimes happens that on the first occasion the accused pleads guilty or indicates that he is pleading guilty. But on a subsequent occasion he reconsiders his plea and wants to change it to one of "*not guilty"*. In such a case the magistrate may allow him to do so.

The law is that where an accused person pleads guilty to a charge, a magistrate has the discretion to allow the accused to change his plea from one of guilty to the one of not guilty, provided that such change of plea is sought to be made at any stage of the trial before sentence is passed or before a final order disposing of the case is made.

Authority for this proposition is in the case of **Kamundi v R**[46]**,** where it was held *that the pleas were unequivocal and that the court had no power to quash its own conviction and refused to allow the appellant to change his plea*.

On second appeal it was argued that a magistrate should be able to alter a plea of guilty at any time before pronouncing sentence. Conversely as was stated in ***Kamundi's case*** *a magistrate may allow an accused person at any time in the course of trial to change his plea from one of not guilty to the one of guilty.*

If the change is made after the substance of the prosecution's case has already been given in evidence and magistrate holds the view that such evidence discloses the offence charged, he can sum up such evidence to the accused person and ask him if he admits the same. If the accused accepts the evidence so summed up as the truth then the magistrate will proceed to record the conviction on the accused owns plea.

But if the change in plea is made earlier the magistrate will call upon the public prosecutor to narrate the facts as usual.

TOPIC EIGHT; BAIL AND BOND

Bail is founded on the Constitution[47] generally and the Criminal Procedure Act[48] in particular.

Meaning of Bail and Bond

[46] [1973] E.A
[47] Article 13(6) (b) of URT Constitution as amended time to time
[48] See sections 148 & 163 of the Criminal Procedure Act

Bail, may be defined as an agreement between the accused (and his sureties as the case may be) and the court that the accused will pay a certain sum of money fixed by the court, should he fail to appear to attend his trial on a certain date[49].

A bond, on the other hand is the sum of money which the person to be released (or his surety) binds himself to pay, if he fails to appear or attend his trial on the agreed date.

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

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

Security, it is the amount of money which the accused person will be required to pay should the accused person default.

➢ The guiding provisions regarding bail are to be found in sub-section one of section 148 of the Criminal Procedure Act which states.

Purpose of Bail or Bond

In **Jaffer V R**[50], it was stated that"…The primary object of remanding an accused in custody is to ensure that he will appear to take his trial and not seek to evade justice by leaving the jurisdiction of the court…"

The prime purpose of bail stem its root from the principle of the presumption of innocence which is enshrined in the Constitution of the United Republic of Tanzania, which in Article 13 (6) (b) provides for the presumption of innocence of every person charged with a criminal offence. Consequently, bail secures a temporary release of an accused person upon certain conditions pending the finalization of court proceedings. The purpose of bail therefore, is to shield the

[49] Brown, D. (1970). *Criminal Procedure in Uganda and Kenya (2nd Ed),* Sweet and Maxwell, London.
[50] [1972] HCD NO. 92

individual arrested from being incarcerated prior to his guilt being established in court, because until such time as his guilt is proven, the person is, at law, presumed to be innocent.

Is Bail a matter of right or privilege?

As stated earlier on bail is a security required by the court or police for the release of an Accused person or a prisoner who must appear in Court or police station in a future time[51]. The security given can be in form of cash, bond, or word from a reputable surety. In Tanzania bail can be sought and be granted by only two institutions.

(a) **By Police**, the Criminal Procedure Act gives power of granting bail to police. However, police bail can only be obtain when the matter yet to be instituted before the Court of law.

(b) **By the Court**, when the case is instituted before the court of law, police power to grant bail is curtailed. Under this situation bail can only be sought in court.

In that sense it is very clear under the Tanzania legal position, that there are bailable offences and non-bailable offences. And bail can only be granted on bailable offences. For bailable offences bail is a right though it is not an absolute right because it depends on court discretion and fulfillment of bail conditions.

The decision on whether to grant or not to grant bail rests on the court. Right to bail draws its genesis from the principle of presumption of innocence which is enshrined under Art 13 (6) of the Constitution of the United Republic Tanzania. Mwisumo, J in the case of **Tito Douglas Lyimo v R**[52], stated "Bail is a right and not a privilege to an Accused person." Therefore, under our law accused person is entitled with right to bail. From that premise it is therefore argued that denial of bail to an accused person without legal justification amount to infringement of constitutional right.

[51] Blacks' Law Dictionary 9th ED
[52] [1978] LRT 55

The same position was affirmed in the case of **Patel v R**[53]**,** where Biron, J held "a man whilst awaiting trial is as of right entitled to bail, as there is a presumption of innocence until the contrary is proved…"

Bail by Police Officers

A person arrested without warrant by a police officer must be charged before a court of law within twenty four hours of such arrest[54], where after twenty-four hours after the person was arrested, no formal charge has been laid against him he must be set free unless the police officer in question reasonably believes that the offence suspected to have been committed is a serious one[55].

Where a person was arrested without warrant and a formal charge has been laid against him while under the custody of the police; but there is insufficient evidence on which to proceed with the charge and thus further inquiries must be carried out or the offence does not appear to be a serious one; a police officer in charge of a police station may, upon that person executing a bond, with or without sureties, to appear before a court if so required, release him on police bail[56].

When a person is admitted to bail by a police officer, no bail money is paid to such police officer; instead the person may be required to execute a bond with or without sureties, to appear before such police officer at a date to be determined by such police officer. To this effect section 31 (4) of the Police Force and Auxiliary Services Act provides: "Notwithstanding any other written law for the time being in force relating to the grant of bail by police officers, no fee or duty shall be chargeable upon bail bonds in criminal cases, recognizance to prosecute or to give evidence, or recognizance for personal appearance or otherwise issued or taken by a police officer".

Matters Relevant to the Grant of Police Bail

[53] [1971] HCD 391
[54] See section 31 of the Police Force and Auxiliary Services Act, [Cap 322 R.E 2002].
[55] Section 64 (1) (c) of the Criminal Procedure Act [Cap 20 R.E 2002]
[56] S ection 64(2) of the Criminal Procedure Act [Cap 20 R.E 2002]

Section 65 of the CPA lays down three categories of matters (**criteria's**) which police officers must take into account when considering the grant of police bail that is:-

- Those related to the probability of the person appearing in court such as his community ties, residence, employment, the circumstances in which the offence was committed, the seriousness of the offence the strength of the evidence etc. (See section 65 (a) of CPA).

- Those related to the interests of the person himself such as the period that the person may be obliged to spend in custody if bail is refused, the conditions under which he would be held in custody, the needs of the person to obtain legal advice, or the need of the person for physical protection etc. (See section 65 (b) of CPA).

- Those related to protection of the community such as the likelihood of the person interfering with the evidence through intimidating witnesses or hindering police inquiries in any other way. (See section 65 (c) of CPA).

Entitlement to Police Bail

The right to liberty of the individual is guaranteed under Article 15 of the Constitution of the United Republic and consequently a person under police custody who fulfils the conditions lay down by section 66 CPA becomes entitled to the grant of police bail. The **conditions** are:-

- Undertaking in writing to appear before a specified court at a specified time and place, or at such other time and place as is notified to him by a police officer;

- Undertaking in writing to observe specified requirements as to his conduct while released on bail,

- Getting another person acceptable to the police to acknowledge in writing, that he is acquainted with him and regards him as a responsible person who is likely to appear in court to answer the charge;

❖ The accused himself or another person acceptable to the police, entering into an agreement, with or without security, to forfeit a specified sum of money in the event he fails to appear in court to answer the charge;

❖ The accused himself or another person acceptable to the police, depositing with the police, a specified sum of money to be forfeited in the event he fails to appear in court to answer the charge.

Refusal to Grant Police Bail Police

Bail must not be unreasonably refused. It can only be refused for good cause; and where a police officer refuses to grant bail, not only must he record in writing the reasons for so refusing but also must, cause the person so refused police bail to be brought before a magistrate as soon as is practicable to be dealt with in accordance with law. (See section 67 (1) - (2) CPA).

❖ **Breach of Conditions and Revocation of Police Bail**

Police bail may be revoked and the person arrested if the police believe he is absconding or planning to abscond or to breach an undertaking he made as a condition for bail. (See section 68 CPA). And unreasonable failure to comply with an undertaking given by a person as a condition of his release is an offence which on conviction attracts a penalty not exceeding the maximum penalty that could be imposed on him upon conviction for the offence in respect of which he was arrested and then released on bail (See section 69 (1) of the CPA).

Statutory Restriction to Police Bail

The following categories of persons may not be admitted to bail by a police officer: (see section 148 (4) and (5) of the CPA).

❖ Certificate of the DPP under Section 148 (4) CPA: Where the Director of Public Prosecutions has issued a certificate to the effect that the release of such person is likely to prejudice the safety or interests of the Republic, (CPA)

❖ The person is charged with murder, treason, armed robbery, or defilement; illicit trafficking in drugs against the Drugs and Prevention of Illicit Traffic in Drugs Act, an offence involving heroin, cocaine, prepared opium, opium poppy (papaver setigerum) etc.

Bail by the Court

A court may admit to bail at any stage of the proceedings a person who appears before it, charged with an offence. Admission to bail by a court may be by taking bail from such person or by requiring him to execute a bond with or without sureties. Admission to bail by a court is also subject to the provisions of section 148 of the Criminal Procedure Act which lays down circumstances under which an accused person may not be admitted to bail by a court of law.

Under the Economic and Organized Crime Control Act

The power and jurisdiction to grant bail where economic and organized crimes are concerned is determined in accordance with the stage at which the proceedings have reached at the time the application for bail is filed. If the application for bail is presented between the stages of arrest and committal of the accused for trial by the Economic Court; the application will be heard and determined by the district court or court of a resident magistrate[57].

On the other hand if the application for bail is presented after committal or during the trial by the (Economic) Court; the application for bail shall be considered and determined by the Economic Court. Finally in all cases where the value of the property involved exceeds ten million shillings jurisdiction to consider an application for bail, at any stage of the proceedings, shall lie in the High Court[58].

❖ **Who may apply for bail?**

Bail may be said to bear broad similarities with the writ of Habeas Corpus. In principle any person who is able to show sufficient cause in the matter may apply for the release on bail of any

[57] Section 29 (4) (a) of the Economic and Organized Crime Control Act, [Cap. 200 R.E 2002]
[58] See section 29 (4) (b) – (d) Economic and Organized Crimes Control Act, [Cap. 200 R.E 2002]

person detained. Thus the accused on the day of his first appearance in court may stand up and ask for bail. Where the accused is already in custody; his advocate, friend or relative may all apply for bail on his behalf. If the accused person is illiterate and unaware of his constitutional rights to bail, the court has a role to play by informing him of his right to bail. If the Prosecuting Attorney has no objection to the grant of bail, and the accused person is able to produce credible sureties, the court may proceed to admit him to bail.

❖ **Formalities for the Grant of Bail in Subordinate Courts**

In practice there are two scenarios under which bail may be applied for and granted in a subordinate court namely: on first appearance in court when the suspect is charged with an offence. In such an instance the accused person or his advocate may stand up and apply for bail and such application will be considered by the court accordingly. The second scenario is when the accused is already in remand prison. In such a case if the court deems it expedient it will issue a removal order in advance of the hearing of the application for bail or after bail has been granted; whichever procedure is more convenient for the court.

Stages in hearing and determination of application for bail

There are five stages in the hearing and determination of an application for bail.

The **first** is the submission of the application for bail to the court by the accused person, his advocate or a relative.

The **second stage** is for the court to ask the Prosecuting Attorney whether he has any objection to the grant of bail or whether there are any legal impediments to the grant of bail; for instance whether in the instant case bail is proscribed under section 148 (4) – (5) CPA.

The third stage is the decision of the court. The granting or refusing to grant bail by courts of law in respect of bailable offences is a matter in the discretion of the Judge or magistrate. Since this is a judicial discretion it must be exercised judicially.

The fourth stage is the decision of the court as to the conditions to impose on the grant of bail. In relation to the conditions to impose the court may be guided by the provisions of section 148 (6) & (7) CPA; for instance: surrender of passport, restriction to movement, periodic reporting to a police station, and abstention from visiting specified localities or premises etc. In

any case the court may impose any other condition which in the court's opinion appears proper and just and will ensure the appearance of the accused person for the trial of his case.(See section 148 (7) (c) CPA).

The fifth and final stage is the requirement of the accused to execute a bond with or without sureties as the court may determine in accordance with the circumstances of the case.

Considerations to be taken into account in bail applications

There are a number of considerations to be taken into account in bail applications, in addition to those fixed by statute. In any case, depending on the facts and circumstances of each case, the court must be satisfied that the case in point meets the test in bail applications. As to the test in bail applications, it is now settled law that the true test is whether the granting of the application "will be detrimental to the interests of justice and good order" and the keeping of public peace[59]. To that effect the following are a few of the considerations the court must take into account in considering whether to grant or refuse a bail application.

- **Whether the applicant is likely to interfere with investigations**. If investigations or witnesses are interfered with by the accused or third parties, no fair trial can take place. The court must therefore consider this. If the court is satisfied that the accused person would so interfere or has already started to interfere, the application for bail should be refused. However an allegation as to such interference or possible interference must be satisfactorily proved by the Prosecuting Attorney. In **Bhagwanji Kakubhai's** case (supra) **Wilson Ag**. CJ said " There should be a definite allegation of tampering or attempted tampering… supported by proved or admitted facts showing reasonable cause for the belief that such interference with the course of justice was likely to occur if the accused is released".
- **Whether the applicant will abscond.**
- **Whether the applicant is likely to commit other offences while on bail**.

[59] See Bhagwanji Kakubhai v. R. I TLR (R) 144

❖ **Whether release of the applicant will adversely affect peace and good order**. This is in accordance with the test in all bail applications which we saw above: "whether the grant of bail would be detrimental to the interests of justice and good order and the keeping of public peace". In **Abdul Nassor v. R**[60]**,** where the accused was charged with offences of assault and the prosecution resisted an application for bail, on the ground iter alia that if released on bail there would be unrest or further breach of the peace among Somalis and Baluchis in the Nzega area where the offence was alleged to have been committed; the High Court granted the application for bail, stating that it thought law enforcement authorities would cope with such a situation if it arose. Nevertheless the High Court took heed of the allegation, for one of the conditions it attached to the bail was that the accused should remain in Tabora and its immediate environs (some seventy five miles from Nzega) until it became necessary for him to go to Nzega to take his trial.

❖ **Whether the offence is a serious one**. It is logical that the more serious the offence the greater the punishment it attracts, and the greater will be the accused person's temptation to flee and to evade justice.

❖ **Whether the sureties are reliable**. In essence bailis the delivery of a party accused of a crime into the hands of his sureties. As such, the accused person is accounted by law to be in the custody of his sureties, who binds themselves on the pain of forfeiting their bonds, to produce the accused before the court on an appointed day. It is therefore logical that the sureties should satisfy the court that they are reliable members of the society and are able to ensure that the accused will be there to take his trial. The court must therefore enquire into the reliability and substantiality of the proposed sureties. A known criminal or a person who is himself facing a criminal charge would definitely not be a reliable surety.

❖ Whether the applicant has a known and reliable domicile.

[60] 1945] I TANGANYIKA LAW REPORTS 289

❖ **How long has the applicant been in custody?**, the nature of the evidence in support of the charge. In a situation where the application for bail is made when the hearing is already under way the court is perfectly entitled to take into account the strength of the evidence so far received. If the evidence suggests that there is a strong case against the applicant, and the offence is one of those that attract a custodial sentence, it would be wise for the court to refuse to grant the application.

❖ **The age of the applicant**. In appropriate cases the age of the applicant may be taken into account. It is felt that, as far as possible, young children ought not to be kept in custody where their character is likely to be soiled by rubbing shoulders with hard-core criminals. In most cases it is neither in the interests of such children nor those of Society to remand them in custody.

❖ **Powers of the High Court to Grant Bail**

Being the highest court of record the High Court has unlimited jurisdiction in relation to matters of bail. More specifically it has the following powers, to vary terms of bail by lower court which includes deciding appeals against refusal to grant bail by a subordinate court. (See section 149 CPA), to order sufficient bail when that first taken is insufficient, (See section 154 CPA), to direct levy of amount due on certain recognizance (See section 162 CPA).

Under the Economic and Organised Crime Control Act, where the value of the property involved exceeds ten million shillings; jurisdiction to consider an application for bail is vested in the High Court[61].

❖ **Statutory Restrictions to Bail**

> The principal restrictions to the power of the court to grant bail are to be found in section 148 of the Criminal Procedure Act and sections 29 and 35 of the Economic and Organised Crimes Control Act. The restrictions to the grant of bail fall under two categories; firstly offences which are by law declared to be non-bailable and secondly offences in respect of which bail may be restricted under certain circumstances, although they are ordinarily bailable.

[61] See section 29 (4) (d) Economic and Organised Crimes Control Act

❖ **Non-bailable offences**, In terms of Section 148 (5) CPA a person charged with the following offences may not be granted bail by a police officer or a court. The offences falling in that category are:

• murder, treason, armed robbery, or defilement,

• illicit trafficking in drugs against the Drugs and Prevention of Illicit Traffic in Drugs Act,

• an offence involving heroin, cocaine, prepared opium, opium poppy (papaver setigerum), poppy straw, coca plant, coca leaves, cannabis sativa or cannabis resin (Indian hemp), methaqualone (mandrax), catha edulis (khat) or any other narcotic drug or psychotropic substance, where the value of such drugs has been certified by the Commissioner for National Co-ordination of Drugs Control Commission, as exceeding ten million shillings.

❖ **Restrictions on Bailable Offences**

Section 148 (4) and (5) (b) – (e) CPA provides that bail may not be granted by a police officer or a court under the following circumstances, that is:

• If the Director of Public Prosecutions, certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced; (See section 148 (4) CPA).

• if it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years, (See section 148 (5) (b) CPA)

• If it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded; (See section 148 (5) (c) CPA). It may be noted in analysis of this provision that failure to comply with conditions of bail will, as a matter of logic, include commission of an offence while on bail.

• If it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety; (See section 148 (5) (d) CPA),

• If the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings unless that person deposits cash or other property equivalent to half

the amount or value of actual money or property involved and the rest is secured by execution of a bond: (See section 148 (5) (e) CPA. The condition of depositing cash does not apply to police bail since in terms of section 31(4) of the Police Force and Auxiliary Services Act; no fee is chargeable on police bail.

• If the act or acts constituting the offence with which a person is charged consists of a serious assault causing grievous harm on or a threat of violence to another person or of

• having, or possessing a firearm or an explosive. This provision was added to the CPA by virtue of an amendment introduced by Act No. 12 of 1987.

❖ **Conditions of Bail**

There are two types of conditions that may be imposed by the court on the grant of bail that is; mandatory conditions which must be imposed and discretionary conditions which may be imposed at the option of the court.

❖ **Mandatory Conditions**

Section 148 (6) of the Criminal Procedure Act lays down the following mandatory conditions, that is:

• Surrender by the accused person to the police of his passport or any other travel document; and

• Restriction of the movement of the accused to the area of the town, village or other area of his residence.

❖ **Discretionary Conditions**

Section 148 (7) CPA provides that the court may also impose any one or more of the following conditions which appear to the court to be likely to result in the appearance of the accused for the trial or resumption of the trial at the time and place required or as may be necessary in the interests of justice or for the prevention of crime, namely:-

• Requiring the accused to report at specified intervals to a police station or other authority within the area of his residence;

• Requiring the accused to abstain from visiting a particular locality or premises, or associating with certain specified persons, or o any other condition which the court may deem proper and just to impose in addition to the preceding conditions.

❖ **Bail Pending Appeal, Revision or Confirmation of Sentence.**

❖ **Bail Pending Appeal**

Bail pending appeal is encompassed by the provision of section 368(1) of Criminal Procedure Act. Upon recording in writing a reasonable cause, the court may grant bail to a person who has been sentenced to a term in prison pending hearing his or her appeal.

This section does not specify which reasons are '*reasonable causes to suffice the grant of bail'.* But the court throughout practices, it has set some pre-condition tests by which an applicant must suffice for successful grant of bail pending appeal.

It was held by Bahati, J in the case of **R v Nicholas Alfred Kiyabo**[62]**,** that *"for bail pending Appeal to succeed there has to be overwhelming chances of success of the appeal filed and not chances of success."* This is the classical and old test in court practice by which some judges avoid applying it as it attract premature discussion on merit of the appeal. Where Shangwa, J. in **Amiri Mohamed vs. R**[63]**,** found that:-*"Illness such as hypertension, diabetes, and high blood pressure which does not suit poor prison condition is a good ground for bail pending appeal".*

The most fundamental ground for consideration in bail pending appeal is whether the appeal has an overwhelming chance of success, and where this is shown then there is no justification for depriving the applicant of his freedom. This rule was laid down in **Lamba v. R**[64]**,** as the test in applications for bail pending appeal.

However, Courts have formed two tests for granting bail pending appeal. According to the Judge, Bail pending appeal is only granted on exceptional circumstances and where the applicant has shown that the appeal have overwhelming chances of success.

[62] 1987] TLR 39
[63] Crim. Ap. No. 170 of 2004 HC of Tanzania at Dar es Salaam (unreported).
[64] 1958] EA 3376

Therefore, It can be stated that as far as Bail pending appeal is concern, there are two test to be carried out for the court to determine whether to grant or not, namely:-

• Overwhelming chances of success of the appeal filed and

• Exceptional circumstances which includes illness which does not suit poor prison conditions.

❖ **Bail Pending Revision**

Section 372 of the Criminal Procedure Act empowers the High Court to call for records of a subordinate (magistrate's) court for the purpose of examining them and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by such court. The Magistrates' Courts Act also grants similar powers to District Courts in relation to records of Primary Courts. (See section 22 of Magistrates' Courts Act. The process of revision is an alternative to an appeal. There is nothing in the Criminal Procedure Act to suggest that the accused person cannot petition the High Court for revision in fitting cases.

❖ **Bail Pending Confirmation of Sentence**

Section 172 (1) of the Criminal Procedure Act empowers a subordinate court which passes a sentence requiring confirmation to release the person sentenced on bail pending confirmation of the sentence by the confirming court. If the accused person may not have been released on bail pending confirmation by the subordinate court, the person would be released on bail pending confirmation of sentence by the High Court because sub-section five of section 172 of the CPA empowers the High Court exercising confirmation jurisdiction to exercise the same powers as it exercises in relation to revision, which as we saw include the grant of bail.

❖ **Consequences of Bail Defaults (Breach of the Conditions of Bail)**

There are two situational settings under which breach of bail conditions may occur: firstly on discovery of the intention of the person admitted to bail to escape and consequent cancellation of his bail by arresting him and secondly abscondence of the person admitted to bail.

❖ **On Discovery of an Intention to Escape**

• **Cancellation of Bail:** Section 157 of the Criminal Procedure Act provides that if a police officer:

• Has reasonable grounds for believing that a person released on bail is likely to break the condition that he will appear at the time and place required or any other condition on which he was admitted to bail,

• Or is notified in writing by any surety for the person admitted to bail that the surety believes that that person is likely to break the condition that he will appear at the time and place required and for that reason the surety wishes to be relieved of his obligation as surety,

• Police officer may arrest without warrant such person who has been admitted to bail, and produce him before the court which granted such bail or preferably the court before which he is required for resumption of the trial.

• And before such court a person who is arrested on reasonable suspicion of planning to abscond or breach the conditions attached to his bail may not be considered for further bail in the same case. As such his bail is for all intents and purposes effectively cancelled. (See section 158 CPA).

❖ **Abscondence of the person Admitted to Bail**

Confiscation of his Property: Section 159 of the Criminal Procedure Act provides that if a person admitted to bail absconds or conceals himself so that he may not be arrested and fails to appear in court on the day fixed:

• such of his property, movable or immovable, as is commensurate to the monetary value of any property involved in the case, may be confiscated by attachment, o and the trial in respect of that person will continue irrespective of the stage of the trial when the accused absconds,

• After sufficient efforts have been made to trace him and compel his attendance.

❖ **Discharge of Sureties**

There are three situational settings on the occasion of which the bond of a surety may be discharged, namely: on application by the surety, on death of the surety and on finalization of the case.

• **On Application of the Surety,**

A person who stood as surety for the appearance and attendance of a person released on bail may at any time apply to a magistrate to discharge the bond either wholly or so far as it relates to the applicant or applicants.

• On receipt of the application the magistrate shall cause the person on bail to be brought before him and he shall direct the bond to be discharged, and call upon such person to find another surety. If he fails to do so the magistrate may commit him to prison. (See section 155 CPA).

• **On Death of the Surety,**

if the surety dies, his bond will be discharged. In such an event the court may require the accused person to find a new surety unless the circumstances of the case are such as to show that the reduction of the bond by the death of the surety will not jeopardize the interests of justice. (See section 156 CPA).

❖ **On finalization of the Case**

When the case against the accused person in respect of which the bond was executed is finalized the bonds are automatically discharged. If a sum of money was deposited as cash bail that sum of money is refundable.

❖ **Forfeiture of Recognizance**

When a surety executes a bond or enters a recognizance, he binds himself to ensure that the accused person will appear and take his trial. Therefore when the accused person jumps bail or absconds,

• The court which released the accused person on bail will call upon the surety to show cause why the bond should not be forfeited, or

• If he fails to show good cause, he may be ordered to pay the whole or such lesser sum of the bond as the court may deem just,

• If he fails to raise the money, his movable property may be attached and sold to recover an amount equivalent to the value of the bond. (See section 160 CPA).

TOPIC TEN; PRELIMINARY HEARING (PH)

▪ Meaning of Preliminary Hearing (PH)

Manner on which preliminary hearing is conducted is stipulated under section 192 of CPA. Admittedly, this is an important stage where the parties meet to draft a memorandum of agreed fact so as to expedite the case speed. The parties have to meet decide on what matters are not in dispute and those matters are not supposed to be brought during trials neither party is required to prove any of those facts except the facts in dispute only. In **Emmanuel Malahya V. R[65],** the court has audibly argued that preliminary hearing is NOT hearing but as the phrase suggest, it is a Preliminary inquiry of facts".

▪ Effects of not conducting Preliminary Hearing

In **Charles Widman V R[66],** Munuo, J, stated that, non compliance with section 192 of the Criminal Procedure Act that is failure by the Court to hold a preliminary hearing does not vitiated the trial if the accused person was not prejudiced. However conducting a preliminary hearing is a necessary prerequisite in a criminal trial. It is not discretionary. The procedures stipulated under s. 192 are mandatory. And needless to say, s. 192 was enacted in order to minimize delays and costs in the trial of criminal cases. However, in the most unlikely 2 event that a preliminary hearing is not conducted in a criminal case that trial that proceeds without it will not automatically be vitiated, the proceedings could be vitiated depending on the nature of a particular case ….."(See also **Pagi Msemakweli v. Republic**, (1997) TLR 331)

▪ Does Preliminary Hearing subject to every case?

[65]Cr Appeal no. 212 of 2004
[66] Criminal Appeal No. 72 of 1999

Preliminary Hearing is not likely to be conducted in every cases, this stage of criminal procedure is sought to be conducted only when the accused has pleaded not guilty to the charge as per section 192 of the said Law and is normally done in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor.

▪ **Aim of conducting preliminary hearing**

The general purpose or aim of conducting preliminary hearing is to ascertain which matter are in dispute and which are specifically not, therefore in ascertaining such matters that are not in dispute the court shall explain to an accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation as per section 192(2) of CPA.

▪ **Effect of conducting Preliminary Hearing**

One of the effects of Preliminary Hearing is that, normally after its conclusion a draft or a memorandum of agreed facts is prepared and it has to be red over and being explained in language which is understood by the accused, and then finally being signed by the accused and his advocate (if any) and by the public prosecutor, and then filed. This is provided under Section 192(3) of CPA. The fact contained in the memorandum will be deemed to have been dully proved, unless the contrary is demanded, as per Section 192(4) of the said law.

Also, if circumstances permit then the accused person will be tried immediately on the conclusion of Preliminary Hearing or the case can be adjourned due to absence of witness or any other cause as per section 192(5) of the Law.

TOPIC ELEVEN: SUMMONING WITNESS, EXAMINATION OF WITNESS AND HEARING

▪ **Summons Generally**

Summons is a written official document issued by the court requiring a person to procure his appearance before the court on material date, time and place indicated on such document for the purpose of either defending himself, or to give evidence. The provision of section 100 of CPA require that such document shall be in writing, in duplicate and being bearing a seal of presiding officer of the court.

▪ **Service of summons**

It's the requirement of the law that summons must be dully served to the person required to appear before the court of law and such service must be made in person either by a police officer or by an officer of the court issuing it or other public servant or such other person as the court may direct, and every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt for it on the back of the other duplicate, (See Section 101 of CPA).

▪ **Mode of serving a summons**

➢ **Mode of Service when person summoned cannot be found**

Subject to the provision of section 102 of CPA, where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult member of his family or with an adult servant residing with him or with his employer; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt for it on the back of the other duplicate.

➢ **Mode of serving a summons when service cannot be personally effected**

If the service in the manner provided by sections 101 or 102 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides and thereupon the summons shall be deemed to have been duly served, (See Section 103 of CPA).

➢ **Service on servant of Government**

Where the person summoned is in the active service of any department of the Government or of a public corporation, the court issuing the summons shall ordinarily send it in duplicate to the head of the department or public corporation, as the case may be, in which the person is so employed, and the head shall thereupon cause the summons to be served in the manner provided by section 101 and shall return it to the court under his signature with the endorsement required by that section, (See Section 104 of CPA).

➢ **Service on company**

Service of summons on an incorporated company may be effected by serving it on the secretary, local manager or other principal officer of the company at the registered officer of such company of by registered letter addressed to the chief executive officer of the company and in the case of a registered letter, service shall be deemed to have been effected when the letter would arrive in the ordinary course of post, (See Section 105 of CPA).

➢ **Service outside local limits of jurisdiction**

When a court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall send the summons in duplicate to a magistrate within the local limits of whose jurisdiction the person summoned resides or is to be served, (See section 107 of CPA).

▪ **Summons to witness**

After the preliminary hearing has been conducted, the court will set a date for the hearing of the case. Before the date of the trial the public prosecutor or his investigator will file in court a list of witnesses which the prosecution desires to call at the trial. On receipt of such list the magistrate will cause to be issued under his hand witness summonses for service to be effected on the witnesses by police (see s. 142 CPA).

The witness summons contains the name of the court issuing it, the place of trial, the case number, the name of the parties to the case, the name and address of the witness and the date and time of the trial. In some cases a court officer may serve the summonses[67].

Normally the strength or weakness of the prosecution or defense case depends on the kind of testimonies adduced by either side. It is necessary therefore those testimonies of relevant witness should be procured. This is normally done by either procuring the attendance of witness to testify in court or documentation witnesses attendance may be procured in different ways, namely;

- The party who would like the service of such a witness asking him to court on a specified date (this is without summons) ;
- By court issuing witness summons under section 142 (CPA)
- By a court issuing a warrant of arrest to a witness who is likely not to appear if a mere summons was issued section 143 & 144 (CPA)
- By a court issuing an order to produce a person who is in custody for the purpose of examination under section 146 or 390 (1) CPA

➢ In the event where a person has been summoned as witness fail to appear without any lawful cause or having attended, departs without having obtained the permission of the court or fails to attend after adjournment of the court after being ordered to attend, shall be liable by order of the court to a fine not exceeding five hundred shillings and such fine shall be levied by attachment and sale of any movable property of the witness as per Section 147(1),(2)(3) & (4) of CPA.

NB. As per section 127(1) of TEA any person is competent to testify, therefore any person may be summoned as a witness though the law of evidence enacts some qualifications as to their competence and compellability. Generally all categories of witness are competent and compellable except:-

• **Children of tender ages:** below the age of 14 years they are competent witness but their testimonies may only be received if the court is satisfied through a ***voire dire***[68] that they know

[67] Chipeta, B.D. Manual for Public Prosecutors

the nature of an oath (the duty to tell the truth) and further that such testimonies are corroborated as per section 127(2) of TEA.

• **Wife and husband;** spouses are competent but not compellable witness against each other unless either of them opts voluntarily to give evidence against each other. Section 130 of TEA, However they may become competent and compellable witness if among other thing a husband or wife charged with an offence under Chapter XV of the Penal Code or against section 164 of the Penal Code.

• **Advocates, their interpreters and servants:** though competent but cannot give evidence against their clients because of the rule of confidentiality as per section 134 and 135 of TEA.

• The mentally unfit, old age, tender years and disease of body or mind may vitiate one's mental ability much as to fail him to understand the questions put to him and give rational answers to them. Such people are competent but not compellable witness.

➢ As it was held in the case of **Jacob Tibifunga v R**[69]" a trial magistrate had the discretion to refuse and of course give reasons for refusing, to call a (defense) witness where such witness's evidence has no bearing upon the case. Whether or not a person should testify as a witness will normally depend on the discretion of the court as to the relevancy of his testimony when tendered.

❖ **Mode of examination of witness (Section 146 (1), (2) & (3) of Evidence Act and Section 195 (1) & (2) of Cap. 20).**

There are three stages in the examination of witness these are examination- in- chief, cross examination and where necessary, re-examination. Examination in chief is conducted by the person calling witness usually the public prosecutor; cross examination is done by the opposite

[68] See the recent decision of court of appeal on voire dire in the case **Kimbute Otiniel V. Republic Criminal Appeal No. 300 of 2011.**

[69] [1982]TLR 125

party, that is the accused or his advocate; and re- examination is done by the party calling the witness[70].

Examination in chief (S. 146 (1) of TEA)

The party calling the witness does this type of examination. Usually the public prosecutor does this in order to extract from his witness, subject to rules of evidence and procedure, everything known to the specified witness so as to advance the party's case. The public prosecutor must adhere to the rules of procedure and evidence for example he is not allowed to ask leading questions on matters that are clearly material or cross examine his witness unless such witness has turned hostile.

Cross Examination(S. 146(2) of TEA)

This is done by the opponent party the accused or his advocate mainly with two intentions in the first place for the purpose of discrediting or disapproving the witness's story in order to neutralize or weaken the witness's evidence in chief by asking questions tending to show that the witness has a poor memory, is biased or exaggerating the story or an out liar.
Secondly the purpose of building up the case of the cross examiner, this is done by extracting from the witness facts which are favorable to the case of the cross examiner. Those being the purposes of cross examination the accused or his advocate is not bound to cross examine a witness. Therefore the court cannot force a party to cross examine a witness after examination–in-chief.

Re-examination (S.146 (3) of TEA).

This is done by the party calling the witness. Since the purpose of cross examination is to discredit, to weaken or to destroy the effect of the evidence given in examination-in-chief or to extract from the witness matters favorable to the party cross-examining, the purpose of re-examination is to repair the damage caused to the evidence of the witness by the cross-examination. Sarkar states " *The object of re-examination is to give an opportunity to reconcile*

[70] Section 146(1) (2) and (3) of Evidence Act [Cap 6 R.E 2002]

the discrepancies ,if any, between the statements in examination –in-chief and cross examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross examination. The right to re-examination, needless to say, only arises when there has been cross examination.

TOPIC TWELVE: PROSECUTION CASE, RULING OF PREMAFACIE CASE & DEFENSE CASE.

❖ **TRIAL**

In law, a **trial** is when parties to a dispute come together to present information (in the form of evidence) in a tribunal, a formal setting with the authority to adjudicate claims or disputes.
Since the burden of proof lies on the prosecution case, therefore they will be the first to open hearing or hearing and the standard of proving their case is beyond reasonable doubt.

▪ **Opening of prosecution case**

In the high court, the advocate for the prosecution shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge as per section 288 of CPA. Further the provision of section 289 limit the prosecution side to add additional witness whose statement or substance of evidence was not read at committal proceedings unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness. Such notice shall state the name and address of the witness and the substance of the evidence which he intends to give. The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness; but no such notice need be given if the prosecution first became aware of the evidence which the witness would give on the date on which he is called, (Section 289 (1), (2), & (3) of CPA).
The prosecution case will be closed subject to the provision of section 293 of the CPA.

❖ **RULING/PRIMA FACIE CASE (Case to answer or no case to answer).**

On hearing the evidence in support of the charge and such summing up, submission or argument as may be put forward, summing up and submissions by the prosecutor and defense respectively. After which the court shall consider whether or not a prima facie case has been established. If it appears to the court that a case is made out against the accused person sufficiently it will require him to make a defense in respect to the provision of section 231 of CPA. **Bhatt v R**[71]**,** where the court defined a prima facie case as one where a reasonable court directing its mind to the law and evidence would convict if not explanation were offered by the defense.

Where the court is of the opinion that the prosecution has failed to establish a prima face case; then a detailed reasoned ruling will be written leading to an acquittal under Section 230 (1) of the CPA and the accused shall be set at liberty accordingly.

❖**DEFENCE CASE**

At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defense either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of the CPA, he is liable to be convicted, as per section 231(1) of the CPA.

The accused shall commence his defense by calling his witnesses referred to as defense Witnesses (DW). The practice is for the accused where he has elected to give evidence whether sworn or unsworn first, (See Section 231(1) (a) & (b) of the CPA. In the event where the accused person elects to give evidence not on oath or affirmation, he shall be subject to cross-examination by the prosecution as per section 231 (2) of the law.

This procedure ensures that the accused person who must be present throughout the trial does not have the advantage of listening to his witnesses and thereby probably tailoring his own evidence to corroborate such witness statements.

[71] [1957] EA 332

In the event also where the accused elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence, as provided under section 231 (3) of CPA. Also in the event where if the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses, as provided under section 231(4) of the said law.

• The accused shall then call witnesses who shall be sworn or affirmed and shall give their evidence in chief, be cross examined by the prosecutor and re-examined by the defense and finally they may be examined by the court.

• The weakness is that most accused persons are unrepresented and don't know what to do, they may be led by the court if they are unable. The other challenge is if an accused is unrepresented they lead themselves and are cross-examined but they cannot re-examine themselves, the ideal will be for court to re-examine them for clarification.

• After calling all the witnesses the defense shall signify to the court the close of their case. Both the defense and the prosecution may then address the court as per section 233 of the CPA. The procedure is like during the examination. The argument will be to support each side's position. After the close of the defense case the accused or his advocate have the being the address to the court; with the prosecutor having an automatic right of reply where the accused has adduced evidence (calling witnesses other than himself).

• After listening to the arguments from both sides the court will proceed to write the judgment. At the ruling stage the ruling can amount to an acquittal in the same way that a judgment can amount to an account where the court has established there is no prima facie case.

• Procedures for defense case in the high court are enumerated under section 294 of the CPA, and defense case starts as soon as the prosecution has closed their case under section 293 of the said law.

TOPIC THIRTEEN : CONVICTION AND SENTENCING

▪ **Conviction**

Shaving found the accused guilty of the offence charged the appropriate conviction must be passed accordingly as the general principle states. However there are certain exceptions to the general rule that the accused cannot be convicted for offences not charged as per section 300-309 of CPA.

The law allows conviction for both minor and cognate offence even though the charge was for serious offence based on the fact that the minor offence had all necessary elements covered by the serious charged offence.

The accused must at all-time be said to have known and understood the charge he is facing, for it is illegal to convict a person of an offence the facts of which have not been told to him and given an opportunity to defend himself against such allegations.

The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Cap.16 Penal Code, (Section 235 (1) of CPA).

▪ **Sentencing**

Refers to the punishment that courts impose after convicting an accused person, in all respect sentences is supposed to be in form of punishment. According to **Black Law Dictionary**, sentence is defined to mean punishment imposed on a criminal wrongdoer.

In other word sentence is a punishment given by the court to the accused person after being found guilty and such punishment can take different forms, that is a form of actual punishment or psychological suffering to the accused, a form of deterrent to the accused person in particular and to the society in general, a form of measure to protect the interest of the society.

Since there is no standard form of punishment, it is the duty of the magistrate to impose a punishment which fit the crime committed by the accused.

▪ **Purposes of sentence**

The purpose of criminal justice is to punish the guilty. That is why almost all penal statutes also prescribe penalties for offences which such a statute creates. What is then, are the purpose of punishment. We all know them: as stated in Salmond on Jurisprudence on page 115: "….The ends of criminal justice are four in number and in respect of the purposes so served by it , punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these the first is the essential and all-important one, the others being merely accessory…."

- **Deterrent**

Punishment is deterrent in the sense that it may serve as a warning to those who might have similar mind with the convicted person.

- **Preventing**

Punishment is preventive in the sense that the convict is prevented, for instance in his incarceration, from committing other crimes during such period of his incarceration, and his absence from the society has the effect of putting the mind of the general public at rest & peace. Incarceration means putting somebody in imprisonment.

- **Reformative**

Reformative come from the word "Reform" which means turning back into a proper direction. Punishment is reformative in the sense that by such punishment the convicted person may realize that there is nothing to be gained in pursuing with criminality and therefore it is much better for him or her to turns over new directions.

- **Retributive**

Retributive means severe punishments. Punishment is retributive in the sense that it tends to satisfy our human desires from revenge. Or in other word some people prefer to put into effect that "an eye for eye and a tooth for tooth" so through retributive human desires for revenge are

➢ **Age of accused and clean record**

The generally accepted view is that young first offenders, all things being equal, should be treated relatively leniently. The rationale for this is that youthful first offenders are usually susceptible to reformative influence. In the case of **Hattan v R**[72]**,** George, C.J., (as then he was) made this point when he said as follows: "…Whenever a first offender is concerned the emphasis should always be on the reformative aspect of punishment unless the offence is one of such a serious nature that an exemplary punishment is required, or unless the offence is so wide spread that severe punishment is needed as a shock of deterrent…"

Similarly, where an accused is an old man and the first offender, this is too should be taken as a mitigating factor as explained in the case of **R v Mitimingi kaganda**[73]**.**

➢ **For how long has he been in custody?**

To remand a man in custody is, of course not the same thing as sentencing him to imprisonment. However remanding a man in custody involves some curtailment of his liberty to do whatever he likes. It is, therefore only proper that such period as an offender has spent in remand custody be taken into account in assessing his sentence.

➢ **Temptation**

Court sometimes takes into consideration the circumstances in which the offender found himself in committing a particular crime, and temptation has sometimes been taken as a mitigating factor. In the words of the Court of Appeal for Eastern Africa in the case of **Hopley v R**[74], where it was stated that *"…There is a different in the decree of criminality between a person who his own volition commits an offence and one who, in the face of great temptation which he hasn't himself brought about, succumbs to it…"* being satisfied.

▪ **Procedure in sentencing**

[72] [1969] HCD NO 234
[73] [1973] LRT NO 17
[74] [1964] 16 E.AC.A. 110, on page 111

A. In Mitigation

When the trial has resulted into a conviction and the judgment has been duly delivered in open court, the magistrate will ask the public prosecutor if the accused has any previous record, he is said to be a first offender. If that is the case, the magistrate will ask the accused to say anything in mitigation of sentence, that is to say something which the court may consider as justifying leniency. In mitigation, the accused is expected to tell the court such matters as his family commitments, how long (if at all) he has been in custody, his poor health, (if he is honest enough) what drove him to commit offence, his age, his education, his occupation, just to mention a few.

After mitigation, the magistrate may (and usually should) should ask the accused any question pertaining to the accused's antecedents. This is called ***"Allocutus".*** Allocutus is intended to enable the magistrate to elicit more information about the accused so as to arrive at an appropriate mode and severity of the sentence to be imposed.

It is essential that the accused must be heard in mitigation and also to contradict, if he can, the previous record or other facts stated by the prosecution regarding him. On this point, it should be pointed out that it isn't every accused person who knows what he has say "in mitigation". You will, therefore, come across accused persons who on you're asking them to address you in mitigation, will go back and repeat their defense to the charge. In such an event it is necessary that you should ask him specific questions such as his background, his education, occupation, family problems. It is for this reason that "allocutus" is important.

The High Court of Tanzania stressed this point in the case of **R v Suleimaini Said & Another**[75]**,** in which Kisanga. J. (as then he was) said, "…Allocutus is an important right of an accused person and magistrates should always ensure that the accused person is given opportunity to exercise it because he may have something to say which could influence the magistrate to exercise direction in his favor…"

B. Procedure in case of previous conviction (Section 278 of the CPA)

If the prosecution says that the accused has a record of previous convictions, the prosecutor may either state orally the particulars of such convictions that are the offences, sentences, the

[75] [1977] LRT No. 29

sentencing courts, and dates. But usually the public prosecutor will produce a copy of such previous convictions.

Thereafter the accused will be asked if he admits such a record. If he admits the record, the record will be taken to be true and correct. If however the accused denies such record, then it is the duty of prosecution to adduce evidence to prove its authenticity or correctness on oath or affirmation. This was stressed in the Court of Appeal for Eastern Africa in the case of **Gulam Hussein V. R[76],** in which the Court stated, "…*It is improper for a prosecutor after conviction and before sentence to make any statement to the court against the convict which if challenged he would be unable to prove by legally admissible evidence…It seems to us that on a controversy as to the facts upon which sentence is to be based the same rules as to legal proof as in the substantive trial of the offence must apply…"*

In other words, the accused must be given an opportunity to contradict such evidence. When such evidence has been received, it is the duty of the magistrate to make a finding as to whether or not he finds such record of previous convictions proved. If he finds it proved, he is entitled to take it into account in assessing the sentence. If he finds that it hasn't been proved, he will ignore it. In the words of Georges, C. J., in the case of **Rashidi s/o Ally v. R[77],** "… *When the accused person denies a conviction appearing on his record, it is necessary to call someone who has present at the conviction. Entries may be made in files in error, and since previous convictions affect the severity of sentence…they must be strictly proved. Where they aren't strictly proved they can't be taken into account in sentencing…"*

▪ **Types of Sentences**

There are several categories of sentences and related orders that the court may pass or make on a convicted person. This includes the following:-

• Death Penalty as per section 25(1) of the Penal Code.

• Imprisonment as per section 25(2) of the Penal Code.

• Corporal punishment as per section 25(3) of the Penal Code.

[76] E. A.C.A. 167
[77] [1967] HCD No. 215

• Fine as per section 25(4) of the Penal Code.

• Absolute discharge as per section 38 of the Penal Code.

• Costs as per section 32 of the Penal Code.

• Conditional discharge as per section 38 of the Penal Code.

• Probation under the Probation Offenders Act.

• Police supervision as per section 341 of the CPA.

• Restitution as per section 357 of the CPA

▪ Concurrent & Consecutive Sentences

Generally the accused person may be charged in several counts in a single trial. Normally these counts they have different sentences for example it is theft and housebreaking, so each offence will have its sentence. So there are two modes of running those sentences namely as follows: ***Concurrently and Consecutively.***

➢ Concurrently Sentence

Concurrently, simply means the same cause of action. Concurrently sentences run where the offences charged are founded on the same facts or from series of offences of the same or similar character. This has been explained in the case of **John Ngarama v. R**[78]**,** accused was convicted on two counts of stealing, both arising out of the same transaction (taking money belonging to two people from a single purse.) The Magistrate's judgment stated that he was convicted "as charged" and sentenced to 9 months' imprisonment. It was held that where an accused is convicted on two or more counts, the sentence given must been allocated among the various counts, or to a particular count, sentence of 9 months on each count imposed to run concurrently.

➢ Consecutive Sentence (cumulative sentence)

[78] [1967] HCD No. 264

This happens when the offence doesn't run concurrently. This occurs to an offence which doesn't fall under the same transaction. This has explained in the case of **R v Lucas Katingisha**[79]**,** accused was charged in two separate counts of using a bicycle without a license and of using a bicycle without affective brakes. He pleaded guilty and was fined Shs. 10/. It was held that, when there is more than one count, each must be dealt with separately by the court, rather than passing one omnibus sentence. Sentence was altered to a fine of Shs. 5/ on each of the two counts.

TOPIC FOURTEEN: COMMITAL PROCEDINGS

Committal Proceeding is statutorily defined as; proceedings held by a subordinate court with a view to the committal of an accused person to the High Court[80]. Under the Tanzania Criminal Procedure committal proceeding is conducted, when the charge has been brought against the person for the offence not triable by the subordinate court or as to which the court is advised by the Director of Public Prosecutions in writing or otherwise that it is not suitable to be disposed of upon summary trial[81].

• Committal proceeding is mandatory when the law provides so. In cases of murder for example, an accused person cannot appear before a Judge for trial unless the P.I is conducted even if he pleads guilty, this was so said in **R v Asafu Tumwine**[82]**,** the court of appeal in this case gave a ruling that the High Court has no jurisdiction over a matter that was supposed to be subjected to Committal Proceeding and it was not.

▪ RATIONALE BEHIND COMMITAL PROCEEDINGS

The rationale behind committal proceeding is inter alia to:-

• The primary rationale of committals was and still is to ensure that an accused did/does not face trial on a serious criminal matter without sufficient evidence being garnered in advance.

[79] [1967] HCD No. 263
[80] Section 2 of the Criminal Procedure Act [Cap 20 R.E 2002]
[81] Ibid Section 244
[82] Criminal Revision no. 1 of 2006 (CAT) (Un-reported)

• Treat the accused justly, such that the accused is arraigned on justifiable grounds.

• Secondly is to save time as to decrease backlog of cases in the courts and

• To assure that evidence garnered is reasonably sufficient to establish the alleged offence.

➢ An attempt to argue on the importance of the committal proceeding was made by the Tanzania High Court in a notorious case in this discipline of study thus; **Brown Joseph Undule & 5 Others V. R**[83]**,** Briefly in this case the application to the High Court was brought forth to ascertain whether a magistrate conducting committal proceeding may grant bail in bailable offences even though they do not have powers to try the offences charged, the magistrate was hesitant to do that hence refrained to avail the same. Mihayo J (as he then was) answered this to the affirmative and hitherto discussed the overall significance of committal proceeding holding that the principal purpose of committal proceeding and examination in the P.I is to ensure that an accused will not be brought to trial unless a prima facie case is shown.

❖ **Procedures in conducting committal proceedings**

In the first Schedule to the Criminal Procedure Act 1985, the offences triable by subordinate courts and those triable exclusively by the High Court are provided for. Consequently, subordinate Courts cannot determine cases indictable exclusively by the High court. In such cases a magistrate has to conduct what is referred to as ***"Preliminary Inquiry"*** in the case and then commit the accused to the High Court for trial.

Justice Chipeta (as he then was)[84], has given a guideline on how a magistrate should statutorily conduct a committal proceeding, his guideline is as follows;

• **Firstly,** the Magistrate has to read over, or cause to be read over, and explain the charge to the accused in the language he/she understands, and he should strictly not be asked to plead thereto. The Magistrate duty at this stage is to let the accused person to know why he/she has been brought to court. To do that a magistrate may address to the accused the following words. *"This*

[83] Misc. Criminal Application No. 34 of 2008, High Court of Dar es Salaam (unreported)

[84]Magistrate Manual, T M P Tabora Publishers, 1989 at pg 153.

is not your trial. If it is so decided you will be tried later in the High Court, and the evidence against you will be then adduce. At the High Court you will be able to call your witness in making your defense".

• Under Section 245(1) (2) & (3) the Criminal Procedure Act the Magistrate can thereafter remand the accused person or release him on bail if the offence is bailable.

• **Secondly,** after the investigation is completed the police officer or any other public officer in charge of the investigation will cause the statement of the proposed witnesses in five copies to be printed out, then compiled and sent along with the police case file, to the Director of Public Prosecution or some other officer designated by him.

• **Vide** the CPA[85], if the D.P.P or such other delegate decides that the evidence justifies putting the accused on trial, he should proceed to draw an information, duly sign it and submit it, together with three copies of each of the statement of the proposed witnesses, to the Registrar or District Registrar of the High Court who will send the copy to the District Court where the accused was first presented.

• Thirdly, upon receiving the copy, the district court will summon the accused person and read to him in court the information as well as the statements of the proposed witness to be called at the trial. After summoning the accused person in court the district court has to tell the accused the statement as this: "*You have now heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defence, which you are at option to do, or say anything which is relevant to the charge against you. Anything you say will be recorded and may used in evidence at your trial".*

• At this stage before the accused person says anything the Magistrate must warn him that he/she has nothing to hope from any promise of favor and nothing to fear from any threat which may have been held out to him to make any admission or confession of his guilt.

[85] Section 245 (4) (5) (6) and (7) of the Criminal Procedure Act [Cap 20 R.E 2002]

• According to the C.P.A under section 246(1)(2)(3) and (4), After the Magistrate has given the warning he must tell the accused that given that warning any statement he/she will make may be taken in evidence at his trial regardless of any such threat or promises.

• **Lastly,** the Magistrate draws the list of the witnesses, including those the accused desires to call. The Magistrate will then commit the accused to the High Court for trial. In doing so the Magistrate may use the word as: *"I hereby commit the accused person to the High Court for trial at the next sessions."*

• The accused person is entitled to free copy of the charge, copy of the statement produced to the court during the committal proceedings, and the record of proceedings, before the court. Finally the accused can then be remanded in custody or have his bail extended incase of bailable offences. The records are then carefully compiled and transmitted to the Registrar of the respective High Court for necessary actions.

▪ **Weaknesses of Committal proceeding**

➢ The purposes of the committal proceedings are in practice often more theoretical than realistic.

➢ Committal Proceeding in Tanzania as a matter of fact takes too long to be culminated.

➢ It is likely that the committal process adds considerably to both cost and delay in the processing of criminal cases. The committal process adds significant cost and delay, tying up resources that could be better used elsewhere, such that the time of the court is held in entertaining incomplete case which should be the work of the police.

TOPIC FIFTEEN: QUESTIONS & ANSWERS, AS WELL AS RELATED NOTES FOR FURTHER REFLECTION

Question: **What is a Composition of High Court when trying treason trial?**

The composition of a High Court when trying a treason trial is a single Judge sitting with 2 assessors. See **Salum A. Kinongile vs. Republic [1992] TLR 349 pg. 351.**

Question: **What is the Composition of High Court when trying Homicide Cases in Tanzania?**

The composition of High Court when trying Homicide Cases in Tanzania is single Judge sitting at least with 2 assessors. **See Section 265 of Criminal Procedure Act Cap. 20 of [R.E 2002].**

Question: **What is a Composition of High Court when hearing defamation case under Newspaper Act.**

The composition of High Court when hearing a defamation case under News paper Act is a single Judge sitting with at least 2 assessors. **Check Newspaper Act Act. 1976 Cap 229 [R.E 2002]. Part VI section 38 to 47**

Question: What is accelerated trial?

An accelerated trial is provided under **section 192 of the Criminal Procedure Act. 185 Cap.20 [R.E 2002].** It has some meaning as preliminary hearing by definition; accelerated trial means a procedure in criminal cases in which the court determines matters which are not in dispute as between the parties.

N.B. The purpose of accelerated trial is to speed up the criminal trials.

Question: What are cases where the Courts sit with assessors?

Primary Courts – Magistrates in Primary Court. Court in Civil and Criminal Cases, that is, Primary Court Magistrate is required in Law to sit with assessors in all civil and criminal cases **see section 7 of Magistrate Court Act 1984 Cap. 11 [R.E 2002.**

High Court: high court judges are required to sit with assessors in the following cases;

I) Homicide

II) Treason

III) Defamation

IV) Economic crime

Question: Name different sentences that can be given to a person convicted of criminal offence.

Generally speaking, the type of punishment/sentence to be given to a person convicted of criminal offence in any case is determined by penalty provisions **Example**: **Penal Code Cap. 16.** As far as the Subordinate Court are concerned provides the following type of punishment/sentences:-

*Death; RM with extended jurisdiction

*imprisonment;

*Corporal punishment;

*Fine;

*Forfeiture;

*Payment of Compensation;

*Order of finding security to keep peace and be good of behavior; *Probation;

*Costs as per section 345 of Criminal Procedure Act. Cap 20;

*Police supervision

Notes: -The court may impose sentence other than that provided by statute see section 27(3) of **the Penal Code Cap 16** that is a person liable to imprisonment may be summoned to pay fine instead of imprisonment.

The courts Power to sentence is provided by **section 170 of The Criminal Procedure Act Cap. 20.** Also the Court's power to impose Corporal punishment is limited by provisions of **the Corporal Punishment Act, Cap 17.**

Question: How Residents Magistrates' Court hears the Organized Crime Offences?

Generally offences under **the Economic and Organized Crime Control Act, 1984** Cap 200 are tried by the High Court after the DPP Consents to be tried. However Courts subordinate to the High Court may hear Organized Crime offences if two things are done; thus:

i). DPP like in the High Court must give consent for prosecution of organized crime case per section 26 of Act No. 13 of 1984.

ii). DPP must issue certificate conferring jurisdiction to RMs' Court to try Organized Crimes case as per section 12(3A) of Act No. 13 of 1984 as amended.

N.B *Generally the jurisdiction to hear and determine economic crime cases is vested in high Court of Tanzania. See section 3(1) of Act No. 13 of 1984. The court sits as Economic Crimes Court per* section 3(2) of the same Act. The constitution of the Economic *Crimes Court is judge of the High Court and two lay members. See section 4 of the Act.*

Notice: section 26 of the Economic and organized Crime Control Act, 1984 provides for the requirements of DPP consent before instituting criminal trials in respect of criminal offences. Section 26(2) of the same Act empowers DPP by NOTICE published in the Gazette to delegate some of his powers in this referred to State Attorney by specifying Economic offences which require his personal consent and those that can be consented by some State Attorney. By Government Notice No. 191/1984 the DPP reserved to his own consent the prosecution of offences specified in Part 1 of the Schedule to the Notice and delegated to State Attorney in-charge of the Zone or Region in which the Organized offence took place. The power to consent to prosecution of offences specified under Part 11 of the Schedule to the Notice. Examples are offences under The **Wildlife Conservation Act** do fall under the Schedule to Government Notice No. 191/1984.

Question: What Court will do under the following circumstances;

a). witness take oath but refuses to give evidence.

b). Accused refuses to plea.

C). Accused retracts or repudiates his confession.

The witness who takes oaths but refuses to give evidence is known as **refractory witness**. If a witness having been sworn or affirmed refuses to answer any questions put on him the court will adjourn' the case for a period of not more than eight days, and may in meantime commit such person to prison, unless he soon consents to do what he is require of him see section 199(1) of Criminal Procedure Act Cap 20. Be it noted that, the court will do so if the witness offers no sufficient excuse. Against if after adjournment, the witness continuous to refuse to answer questions put to him the case will be adjourned for a period not exceeding eight days and the witness will be committed to prison as per section 199(2) of the CPA. Alternatively the court

may commit such witness for contempt of court under section 114(b) of Penal Code and be liable on conviction to imprisonment for six months or a fine not exceeding (500/=) five hundred shillings.

Further discussion:- Other circumstances falling under refractory witness are in section 199 of the CPA and these are:

i). Where a witness refuses to be sworn or affirmed; or ii). Where a witness refuses or neglects to produce any documents or things which he is required to produce, or

iii). Where witness refuses to sign his depositions. Also what writ could be applied in (i) to (iii) above, refer the above discussion i.e. **section 199(1) of the CPA** and **section 199(2)** of the same will apply or alternatively **section 114(b) of the Penal Code** may apply.

(b). If the witness refuses the plea section 228(4) CPA, 1985 will apply. The section provides that if the accused person refuses to plead, the court is required to enter a plea of no guilty. However, before entering a plea of what guilty under section 228(4) of CPA the Court is required to hold an inquiry into accused's refusal to plea or muteness in order to satisfy itself whether the accused stands mute out of malice or through the visitation of God. If it is found that the accused stands mute out of malice or refuse to plea, the Magistrate will enter a plea of not guilty' and proceed to try the charge. But where the accused does not plea to a charge or stands mute by the visitation of God, say, if he is deaf and dumb or is suffering from some decease of the mind or is so deaf that he cannot hear when the charge is read over to him such an accused person can, if he is sane, be tried if he can read or write or if intelligence can be conveyed to him by signs or symbols. See A Magistrates Manual by Justice Chipeta, page 32.

(C). if the accused retracts or repudiates his confession the court is required to ascertain its reliability and, or seek corroboration.; the court of Appeal of Tanzania in **Shihobe Seni & Another vs. Republic [1992] TLR 330** said that where confessions are repudiated then there is a need for ascertain their reliability and or seek corroboration.

But how ascertaining reliability of repudiated or retracted confession can be done? It may be done by holding an inquiry for subordinate and trial within trial for high court.

And how can evidence corroborating repudiated or retracted confession can be sought?

*The Court may seek the evidence corroborating repudiated or retracting confession by ordering the prosecution to call witness corroborating repudiated or retracted confession.

Question: Who are excluded when High Court conduct trial within trial?

When the High Court conducts trial within a trial assessors are excluded.

(ii). Why assessors are excluded when the High court conducts trial within trial?

Trial within trial involves only matters on point of matter of Law. It does not involve matters on point of fact that is why assessors are excluded when High Court conducts trial within trial. It would appeal also that assessors are excluded when High Court conducts trial within trial because the same may influence assessors' opinion at the inclusion of hearing the main case.

Question: What Court should do when the convict of murder is pregnant woman?

Section **197 of the Penal Code Cap 16** provide for the punishment of murder that is, death sentence. **The proviso to section 26(1) of Penal Code exonerates the pregnant woman who is a convict of murder from death sentence.** The Provision to the proviso to section 26(1) in **the Penal Code** provides that, where the Court is satisfied that the woman convicted of an offence punishable with death is pregnant such court shall pass on her a sentence of imprisonment for life instead of a sentence of death.

Question: Explain the following:

(a). Suspended sentence

(b). Omnibus sentence

a). Suspended sentence as per **section 25(g) of the Penal Code** is that mode of punishment that resembles that **of conditional discharge**. It arises in a case where an accused person is convicted of an offence other than that specified in **Schedule VI in the Minimum Sentences Act, 1972** and no previous conviction is proved against such convicted person. If these two circumstances exist, the Court may pass a sentence of imprisonment but order that the whole or any part of it suspended for a period not exceeding 3 years on such conditions, such as costs or compensation be paid by the offender or otherwise as the court may specify in such order.

b). **Omnibus sentence** is a single sentence for all offences of which an accused person has been found guilt in a single trial.

According to **Justice Chipeta in Magistrate's Manual pages 140 to 141**, it is wrong to pass Omnibus sentence where the accused person in convicted on two or more counts in trial because the **sentence must be passed on each count separately**.

Question: Who are exempted from death Penalty?

The following convicts are exempted from death penalty:

(i) Pregnant: See proviso to section 26(1) Penal Code.

(ii) A person who in the opinion of the Court is under eighteen years of age as per provision of **section 26(2) of the Penal Code Cap. 16**

What is the Certificate of delay?

The Certificate of delay is the **certificate of assurance of completeness of record of proceeding** issued by registrar of High Court under the proviso to rule. **Section 3(1) of Court Appeal Rules** to a party who wants to appeal against the decision of High Court to Court of Appeal of Tanzania.

Question: What is probation?

Probation orders are governed by the **Probation of Offenders Act, Cap 247** of the Revised Law and Provisions of section 337 of the Criminal Procedure Act, Cap 20. Probation order is defined by section 2 of Cap. 247 to mean probation order made under the provisions of the Ordinance placing the people under the supervision of a probation officer.

Notes: Probation officer is defined under section 2 of Cap 247 to mean probation officer appointed under the provisions of section 15 of the Cap. 247. Section 3 of the Cap 247 provides that where a Court after convicting a person of an offence other than the offence specified under the schedule to **the Minimum Sentences Act, 1972**, and it is of the opinion that having regard to youth character, antecedent, home surroundings, health or mental condition of the offender, or the nature of the offence, or any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, such Court may make probation order at its discretion.

Section 4(1) of Cap 247 provides that Probation Order must be for a period of not less than one year and not more than three years.

Question: What is approved School Order?

Approved School Order is an order committing the offender to an Approved School, this mode of punishment is only available to Children and Young Persons.

Note: section 2 of Children and Young Persons Act, Cap 13 of Revised Laws defines Approval School.

Question: What is Preliminary Objection?

It is an Objection raised by party to a case or an application on matters of Law or procedure before the hearing or determination of the main case or the application.

Question: What do you understand by the following terms:

i). Conditional discharge

ii). Concurrent Sentence and Consecutive Sentence.

The difference between the two.

Conditional discharge is governed by provisions of section 38(1) of Penal Code Cap 16. It is a discharge of person convicted of an offence by the order of the Court subject to the condition that he commits no offence during such period, not exceeding twelve months of the Order. It is ordered by the Court if it is of the opinion that having regard to the circumstances including nature of the offence and the character of the offender it is in expedient to inflict punishment and that a Probation Order is not appropriate.

Note: *Simply, it is the Order of the Court discharging a person convicted of an offence subject to the condition that he commits no offence during such period, not exceeding 12 months of the order.* Absolute discharge is also provided under section 38(1) of the Penal Code. It is Ordered where the person convicted of an offence is discharged by court order absolutely is without attaching condition, that he commits no offence during such period no exceeding twelve months of the Order.

Concurrent sentence means sentences Ordered by the Court to be served together. That is sentences after the other. Concurrent sentence is ordered by the Court when offences are committed in course of the same transaction. See words of Love, J., in **Republic vs. Kassongo s/o Luhogwa, 2 TLR (R)) 47.**

Note: Sentences of fine must not be ordered to run concurrently. They must always run consecutively.

Sentence of imprisonment in default of payment of fine must always be ordered to run consecutively and not concurrently. See Chipeta J. in Magistrate's Manual, page 143.

Consecutive Sentences means sentences ordered by the Court to run one after the other. Consecutive Sentence is ordered where offences committed do not form part of the same transaction. **Note also:** *The difference between concurrent consecutive sentences are discussed in* ***Elias Joakim vs. Republic 1992 TLR 20 pg. 226.***

Question: What is refractory witness?

Refractory witness is governed by provisions of section 199(1) of Criminal Procedure Act. Refractory witness is the witness who falls under the following cases, namely: i). A witness who without sufficient excuse refuses to be sworn or affirmed; or ii). A witness who having been sworn or affirmed refuses to answer any question put to him; or iii). A person who without sufficient excuse refuses or neglects to produce any document or thing which he is required by court to produce, or A person who without sufficient excuse refuses to sign his depositions.

AMICUS CURIAE:

Is a Latin Maxim meaning a friend of the court. Is a person who is not a party to a lawsuit but who petitions the Court or is requested by the Court to file a brief in the action because that person has strong interest in the subject matter. See Black's Law Dictionary, 7th Edition.

Question: What are five presumptions of Law?

Five presumptions of Law are; Presumption of innocence sees Article 13(6) (b) of Constitution of the United Republic of Tanzania. 2). Presumption of sanity see section 12 of Penal Code Cap 20 [R.E 2002] 3). Presumption of marriage as per section 160 of Law of Marriage Act, 1971. 4). Presumption as to property acquired during marriage section 60 Law of Marriage Act, 1971.

5). Presumption as to gift between husband and wife see section 61 of Law of Marriage Act, 1971. 6). Presumption of death as per section 161 of Law of Marriage Act, 1971.

Question: (i) What is Hostile witness?

(ii) What is the value of Evidence of Hostile witness?

i). A hostile witness is the one who by his testimony, conducts, attitude or demeanor appears to be biased against the party calling him or is unwilling to tell the truth.

A hostile witness is the one who tells lies about what he obviously knows, or who deliberately changes his earlier story and from his demeanor and bearing he is clearly biased against the party calling him.

ii). When a witness has been treated as hostile, the evidence of that witness is hardly worthy of credit. The reason for treating the evidence of a hostile witness as being worth of no credit is that, such witness is unreliable. In **Alowo vs. Republic [1972] E.A.324** the Court of Appeal for East Africa said that the basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statements shows him or her to be unreliable and this makes his or her evidence negligible.

DEFENCE OF ALIBI:- *section 194(4),(5) and (6) of Criminal Procedure Act.*

It refers to the evidence that proves that an accused person was in another place at the time of commission of an offence and so could not have committed it. In the case of **Charles Samson vs. Republic [1990] TLR 39**, the Court of Appeal of Tanzania held that where the Court does not take cognizance whatsoever of alibi, both in summing up to the assessors and in the judgment, it amounts to mistrial and a consequential miscarriage of justice.

NOTE: Procedure before accused relies on alibi in his defense:

i). he or she must give a notice to court and prosecution of intention to rely on defense of alibi before hearing of the case. See section 194(4) of Criminal Procedure Act. ii). Where notice before hearing of the case of the intention to rely on alibi is not given, then the accused is required to furnish the prosecution with the particulars of alibi at any time before the close of prosecution case.

Question: Does the Opinion of Assessors bind judges in murder cases?

). The opinion of assessors does not bind the judge. The judge can disagree with the unanimous views of the assessors. However, the trial judge is required to give reason for so disagreeing. See views of judges of Court of Appeal of Tanzania in ***Abdullah Bazamiye & others vs. Republic [1990] TLR 42 pg 45.**

ii). What happens if assessors are not given opportunity to put questions to witness:

*Assessors' full involvement in the trial is an essential part of the process, its omission is fatal, and renders the trial annullity as per Lordships' views in Abdallah Bazamiye & Others vs. Republic [1990] TLR 42

iii). Why the trial is rendered a nullity If the assessors are not given opportunity to put questions?

The duty of assessors is to aid the trial judge in accordance with section 265 of Criminal Procedure Act and section 177 of the Evidence Act allows the assessors to put questions.

Question: What is a submission of no case to answer?

What effect does it have when raised in a criminal cases?

(i). A submission of no case to answer is the submission made by the defending party to a case that the plaintiff's or presentation's case has not been made out sufficiently to require him make the defense. The effect of raising it in criminal case is that, the court must make a ruling on it and if the court finds that there is no case to answer, the case will be dismissed and accused acquitted. But where it is found that there is a case to answer, the accused will be required to make the defense.

(ii). Can the accused appeal on the ruling for a case to answer?

Yes, the ruling for case to answer is subject to appeal.

(iii). What is the effect of the accused person refuses to make defense when prima a facie case has been established against him?

Section 231(1) of Criminal Procedure Act provides that the Court is entitled to draw an adverse inference against the accused person who refuses to make defense when a prima facie case has been established against him. The section also requires the Court as well as the prosecution to comment on the failure by the accused to give evidence.

(iv). What do you understand by term in camera?

The term in camera refers to conducting trials without the press or the public being present. E.g. conducting trial in Judge's or Magistrate's private chamber.

Question: Can you tell the powers of DPP and mention under what Law the powers are found?

The powers of DPP are governed by the provision of section **90(1)(a)-(c) of the Criminal Procedure Act, also read article 59B of the Constitution of the United Republic of Tanzania, 1977 and section 2 of the Office of the Attorney General Discharge of Duties Act, no. 4/2005** and these are:

(a). To institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person;

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

(c). To discontinue any such criminal proceedings instituted or undertaken by him or any other authority or person.

Question: What is adjournment sine die?

What happens to the suit adjournment sine die?

Adjournment sine die refers to adjournment of the suit or case or matter without fixing next date or day in which the same shall come before the court. When the suit is adjourned sine die, it remains stayed until such time when the order adjourning it sine die is set aside by the court.

Note: *Sine die is a latin maxim meaning without date or a day. It is a latin maxim meaning let him go without a date or day.*

Question: What is a diesnon?

Diesnon *non* *(juridicus)* means days on which no legal business can be transacted e.g. Sunday and Friday, Christmas day. |Rule 2 of the Court of Appeal Rules, 1979 defines ***Dies Non to mean a Sunday or public holiday and includes any other day or which the Registry is closed.***

Question: What do you understand by the term *Suo moto?*

Suo moto is a latin maxim meaning on its own motion. It is the power of court to determine matters of legal importance and of which it is required to take its judicial notice without being moved by the parties to the case.

What happens if the respondent in criminal appeal is dead?

Where the respondent in criminal appeal dies the appeal abates. However, the appeal from a sentence of fine does abate as per **section 371 of the Criminal Procedure Act**.

Question: What do understand by Burden of proof. What are the standards of proof?

Burden of Proof refers; the duty of a party to litigation to prove a fact or facts in issue. Generally, the burden of proof falls upon the party who substantially asserts the truth of a particular fact i.e. prosecution or the Plaintiff as the existence or nonexistence of fact in issue. Also be noted that there are no absolute standards of proof in both criminal and civil cases but there may be degree of proof within those standards.

Standard of proof refers the degree of proof required for any fact in issue in litigation which is established by assessing the evidence relevant to it. Example; in criminal cases the standard is proof beyond reasonable doubt, whereas, in civil cases, the standard is proof on balance of probabilities. That is in civil cases the plaintiff discharges his/her burden of proof when he/she adduces evidence of such a nature that the court can think it to be more probable than not. The burden doe not shift.

Note: there are two types of burden of proof namely; persuasive/legal burden and evidential burden.

Persuasive/Legal burden – it is the burden that is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue. Evidential Burden – is sometimes referred to as a burden of adducing evidence that means the duty of showing that there is sufficient evidence to raise an issue fit for the consideration by court.

Question. (i). Can you tell what do you understand on the following:- a). trial within trial

Trial within trial refers to a mini trial conducted within a main trial to establish the admissibility of a disputable piece of evidence which has been challenged by the defense. eg when the confession retracted/apologized for or repudiated/rejected**.**

Question: What changes were introduced in the Criminal Procedure Act, 1984 which was not in the Criminal Procedure Code?

changes introduced by CPA which were not in the Criminal Procedure Code are:

1). CPA empowers Ward Secretary or Secretary Village Council to issue warrant for arrest or summons requiring the person to appear before the court. See section 13 of CPA.

2). CPA requires the person under restraint to be treated with humanity and with respect of humanity.

3**).** CPA provides for Preliminary Hearing; as per section 192 of the CPA.

CPA provides the right to remain silent to the accused.

4). CPA provides for the Compensation for injuries, loses or death resulting from assisting Police, Magistrates or any other officer for stopping commission of an offence or in arresting a person suspected to have committed offence. Section 37 of the CPA.

5**).** CPA empowers the judge to take over and continue the trial commenced by the other. See section 299 of CPA.

6). CPA allows the accused to give evidence on oath-affirmation or not, but such accused is subject to cross examination. **Provision of section 231(2) of the CPA**.

7**).** CPA provides for requirement of notice before relying on defense of ALIBI; before hearing the case to furnish particulars of ALIBI; before prosecution a case is closed. See section 194(4) and (5) of CPA.

8). CPA restricts power of Courts to grant bail. See section 148(5) and DPP certificate refusing grant of bail.

(ii). If one is aggrieved by a decision of the District Court in Criminal matter what does he do?

A person aggrieved by a decision of the District Court in Criminal matters can appeal to the High Court as per section 359(1) of the Criminal Procedure Act.

Note: the procedure in appealing to the High Court is governed by section 361 of the Criminal Procedure. The procedure is; the appellant must give notice of intention to appeal within 10 days from the date of the findings, sentence or order. And in case of a sentence of a corporal punishment only, a notice of intention to appeal must be given within 3 days from the date of such sentence; see section 361(a) of Criminal Procedure Act. And the appellant must lodge his petition of appeal within forty (45) days from the date of the findings, sentence or order.

Note: Also that the appeal by DPP against acquitted, finding, sentence or order passed by subordinate court are governed by section 378 of the Criminal Procedure Act, thus;

a**).** DPP must give notice of his intention to appeal with 30 days of the acquittal, finding, sentence or order against which he wishes to appeal; and **b).** he must lodge his petition of appeal within 45 days from the date of such acquittal, finding, sentence or order.

What is private prosecution?

Private prosecution is governed by the provisions of section 99 of Criminal Procedure Act, Private prosecution refers to Criminal proceedings instituted and presented by an individual person.

**********END**********

** ☺☺☺ ☺☺☺☺☺☺☺☺

ENGIEENERED

BY;

DATIUCE DIDACE

Contacts:
Email: datiuced115@gmaiul.com
Phone: +255 685-563-704
Visit: https://bristol.academia.edu/DatiuceDidace