

INTRODUCTION

1. What is a crime?

To date there is no agreed definition of the term crime. Various writers have tried to define this term differently depending on their philosophical outlook and other various material factors in the society they come from.

Some criminologists, namely Michael J, and Mortimer J. defined the term crime as;

“The most precise and least ambiguous definition of crime is that which define it as a behavior which is prohibited by the criminal code.... this is the only possible definition of crime”.

Crime Law and Social Science New York, 1933, at p.2.

Another legalistic definition says crimes are;

“...Wrongs which judges have been held or parliament has from time to time laid down as sufficiently injurious to the public to warrant the application of criminal procedure to deal with them”. *Smith, J.C. and Hogan Criminal law 6th Ed.*

According to **Osborn, P.G.** in his **concise law Dictionary 5th Ed.** Crime is defined as

“An act, default or conduct prejudicial to the community, the commission of which the law renders the person responsible liable to punishment by a fine or imprisonment in special proceedings”.

In **Kenny’s Outlines of Criminal Law 17th Ed.** at p.5 three major characteristics of crime are pointed out;

- i) That it is harm brought about by human conduct, which the sovereign power in the state desires to prevent.
- ii) That among the measures of prevention selected is the threat of punishment.
- iii) That the legal proceedings of a special kind are employed to determine the guilty of the accused before being punished.

2. What is Criminal Law?

Is a branch of public law (public law include; Administrative law, Constitutional law, and criminal law) and it is designated to protect the interest of the public.

It defines the duty, which a person owes to the society in contrast to civil law, which primarily concerned with rights of individuals among themselves.

The term criminal law, sometimes called penal law, also refers to any of various bodies of rules in different [jurisdictions](#) whose common characteristic is the potential for unique and often severe impositions as punishment for failure to comply. [Criminal punishment](#), depending on the [offense](#) and [jurisdiction](#), may include [execution](#), loss of [liberty](#), government supervision ([parole](#) or [probation](#)), or [fines](#). There are some archetypal crimes, like [murder](#), but the acts that are forbidden are not wholly consistent between different criminal codes, and even within a particular code lines may be blurred as civil infractions may give rise also to criminal consequences.

In criminal law it is the state, which prosecutes. When we talk of criminal law is that where the state is directly interested.

The end result of any criminal offence procedure is to determine whether the person is guilty or innocent.

Criminal sanctions

Criminal law is distinctive for the uniquely serious potential consequences of failure to abide by its rules. Every crime is composed of [criminal elements](#). [Capital punishment](#) may be imposed in some jurisdictions for the most serious crimes. Physical or [corporal punishment](#) may be imposed such as [whipping](#) or [caning](#), although these punishments are prohibited in much of the world. Individuals

may be incarcerated in prison or jail in a variety of conditions depending on the jurisdiction. Confinement may be solitary. Length of incarceration may vary from a day to life. Government supervision may be imposed, including house arrest, and convicts may be required to conform to particularized guidelines as part of a parole or probation regimen. Fines also may be imposed, seizing money or property from a person convicted of a crime.

Five objectives are widely accepted for enforcement of the criminal law by punishments: retribution, deterrence, incapacitation, rehabilitation and restitution. Jurisdictions differ on the value to be placed on each.

- **Retribution** - Criminals ought to suffer in some way. This is the most widely seen goal. Criminals have taken improper advantage, or inflicted unfair detriment, upon others and consequently, the criminal law will put criminals at some unpleasant disadvantage to "balance the scales." This belief has some connection with utilitarianism. People submit to the law to receive the right not to be murdered and if people contravene these laws, they surrender the rights granted to them by the law. Thus, one who murders may be murdered himself. A related theory includes the idea of "righting the balance."
- **Deterrence** - Individual deterrence is aimed toward the specific offender. The aim is to impose a sufficient penalty to discourage the offender from criminal behavior. *General* deterrence aims at society at large. By imposing a penalty on those who commit offenses, other individuals are discouraged from committing those offenses.
- **Incapacitation** - Designed simply to keep criminals *away* from society so that the public is protected from their misconduct. This is often achieved through prison sentences today. The death penalty or banishment have served the same purpose.
- **Rehabilitation** - Aims at transforming an offender into a valuable member of society. Its primary goal is to prevent further offending by convincing the offender that her conduct was wrong.
- **Restitution** - This is a victim-oriented theory of punishment. The goal is to repair, through state authority, any hurt inflicted on the victim by the offender. For example, one who embezzles will be required to repay the amount improperly acquired. Restitution is commonly combined with other main goals of criminal justice and is closely related to concepts in the civil law.

3. Crime and Morality

There is a difference between crime and morality. As you know each society has its morals. However you may find that sometimes morals and crimes coincides.

Morals emerged earlier than state and law. Morals and customs regulated the relations of people during the primitive mode of production. Where there is a class society the dominant system of moral is that of the ruling class. This is so because by the use of apparatus of ideological influence, political and legal institutions the dominant class strives to impose its morals on the whole society.

At one point there was an attempt to extend criminal law to morals. This however has led to some legal problems. In the case of **Shaw v. D.P.P [1962] A.C 220**, Shaw published a "**Ladies Directory**" in order to help prostitutes to get customers and he was charged, inter alia, with conspiracy to corrupt public morals. He was convicted of this offence, and the Court of Criminal Appeal and the House of Lord upheld his conviction. Lord Simonds at page 267 said he entertained no doubt that in the sphere of criminal law;

"There remains in courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard against attacks which may be more insidious because they are morals...."

We see that this decision was extending criminal law to morals. However this decision did not stand the test of time. The case of **Knulier L.T.D. v. D.P.P [1973] A.C 435** reversed the position.

In this case the House of Lords emphasized that the courts did not have residual powers to extend criminal law by creating newer offences and widening existing ones, to enforce good morals.

You have to note that many of the rules enforced by criminal law have nothing to do with morality, and many of the rules of morality are not enforced by criminal law.

Law consists of rules established in a specific way by the state organs and fixed in legal acts. Morals however do not include just norms but also concepts, views and feelings.

Legal acts consist of the will of the class in power while moral may include this will in the form of public opinion.

Moral norms embrace a sphere of relations that is considerably broader than that regulated by law.

Law and morals are also based on measures of coercion but these differ. In morals coercion takes the form of public opinion. Moreover, moral norms do not regulate in advance specific measures and form of coercion.

In the event of violation of law, however, corresponding law enforcement agencies are obliged to take measures envisaged by the law.

4. Sources of Criminal Law

1 The Constitution

The constitution provides for the rights and duties of its citizens. The constitution of Tanzania for example provides for the presumption of innocence to the accused person. The constitution is the basic source of criminal law.

2 Statutes

Statutes consist of Acts of Parliament and Subsidiary legislation. The laws that were passed by the legislative council in the colonial period are referred to as Ordinances, whereas, after independence laws passed by the parliament are known as Acts of the Parliament. The major source of criminal law is the Penal Code (Cap.16). This was introduced in the country in 1930.

There are other statutes, which cover specific crimes or group of crimes e.g. The Prevention of Corruption Act, Cap.329, Economic and Organized Crimes Control Act, Cap. 200, The Road Traffic Act, Cap.168.

Persons or bodies to whom power has been delegated by the Parliament make subsidiary legislations. Normally this power is delegated to the Minister, local government authorities and public corporations. The reason for delegating power is to fill in more details giving effect to the principles of enabling Act. These subsidiary legislations cover vast areas of life such as commerce, health, sanitation etc. in these legislations penal provisions are always provided for defaulters.

3 Common Law of England, Doctrine of Equity and Statutes of General Application.

The laws we have in Tanzania are either those we inherited from the colonial masters or have been enacted after independence. The laws of Tanzania are based on English Jurisprudence in which common law, Doctrine of Equity and Statutes of General Application forms an important part. This is another source of criminal law in Tanzania. The basis of this is the Tanganyika Order in Council of 1920, section 17 (which is commonly known as *reception clause*) which provides that; criminal jurisdiction in Tanganyika, so far as circumstances admit, shall be exercised in conformity with the Criminal Procedure and Penal Code of India and where the same was not applicable, the court were to apply Common Law, Doctrine of Equity and Statutes of General Application in force in England on or before 20th day of July 1920. This position was reintegrated after independence by the reproduction of the section in section 2(2) of the Judicature and Application of Laws Ordinance 1961. In addition the Penal Code allows the application of the Common Law and Doctrine of Equity in the circumstances specified in section 3(1) PC.

4 Precedents/Case laws

The lower courts are bounded by the decisions of the superior courts. This is the practice of the inferior courts in common law jurisdictions. This being so, the decisions of the former East Africa

Court of Appeal, the Court of Appeal of Tanzania and important decisions of the High Court of Tanzania on important matters are also a source of criminal law.

5 International Law

The basic source of International law among others is treaties. These treaties however before binding to the country they have to be incorporated in the local Act and this Act must be passed by the parliament. Some of these treaties deal with international criminal law. Some of the most outstanding international crimes are;

War crimes

The Geneva Convention (I—IV) of 1949

Piracy on the High Sea:

The Convention of High Seas 1958.

The Seizure of Aircraft and Other Attack on the Security of Civil Aviation:

The 1950 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Montreal Convention for the Suppression of Unlawful Act Against the Safety of Civil Aviation.

Salve Trade

The Slavery Convention of 1920 as amended in 1953. The supplementary Convention on the Abolition of Slavery, Slave Trade and Institution and Practices similar to slavery 1966, the Convention for the Suppression of Traffic in Person and the Exploitation and the Prostitution of other 1956.

5. The Nature and Function of Criminal Law Under Different Modes of Production.

i) Primitive Mode of Production

In the primitive mode of production there was no law let alone criminal law. The law emerged together with classes.

ii) Slave Mode of Production

In this society there were two classes;

The slaves who were the main class

Slave owners

The law in the slave mode of production was used for two major functions;

The suppression of resistance put by the slaves and other exploited strata of the population. E.g. The Greco-Latin Antiquity produced the law book of Gortyn, The Helensis. In Rome the Law of the Twelve Tablets, The Lex Aquilia and the Corpus Luris Civile. The Codes offered a statutory definition of conduct constituting a danger to society (criminal law) conduct, which entitled the consequence, held out by the law and enforced by a sovereign power. Severe coercion e.g. death penalty were resorted to only against slaves. The slave master could kill a slave of his own with impunity whereas the killing of a slave owned by another merely entailed the payment of compensation.

The second function was the protection of the slave owner's property. Ferocious sanctions were afflicted on offences against property. This was intended to safeguard the institution of private property and the social order relying on this institution. In graver cases theft was punished with death. E.g. in Rome according to the law of Twelve Tablets, for gravest theft, a freeman was reduced to slave whereas the slave had to suffer death. Milder case of theft was maiming the offender.

iii) Feudal Mode of Production

Chronologically, the feudal state belongs to the Middle Ages (5th-17th A.D). This was also a class society;

The big landowner

Mass of peasant labour.

The main functions of criminal law were;

To put down resistance on the part of the exploited peasant masses as well as anti-feudal uprisings of the urban population.

Protecting feudal ownership of land and providing various forms of compulsion of the peasant to offer their labour for the landlord.

iv) Capitalist Mode of Production

The main function of criminal law included;

The protection of the political foundations of the capitalist society

To put down the resistance of the working class and other masses

To take reprisals against political opponents.

Protection of private property

Establishment of the general conditions for the functioning of the capitalist economy.

In the capitalist era criminality grew to a mass phenomenon and in particular offences against property showed an upward trend and manifested itself in entirely new forms. Most offenders were workers, jobless and other poor people, e.g. offences like corruption, and extortion, industrial espionage sabotage etc were on the forefront.

v) Socialist Mode of Production

Criminal law here is used for two main purposes;

To protect the socialist state system against opposition

To protect the socialist property and its relations.

Property, which was owned by private person, was nationalized and taken by the state. Thus laws were enacted to safeguard the new property relations. The only effective method was the use of criminal law to control resistance or counter-revolution.

6. History of Criminal Law in Tanzania

i) Criminal law in pre-colonial Tanzania.

The first unit to emerge was the family and was later followed by a clan. The clan was linked with a higher organization, the tribe. At the level of tribal organization, there were tribal territory with common dialectic, religious mythology and political leadership led by a king or a chief. The relationships in pre-state communities were regulated by customs. The emergence of the state necessitated the introduction of law to protect it. Thus with the state, custom was raised into law, hence the emergence of customary law. In tribal societies, proceedings were mostly inter-family, inter-clan or even inter-tribal, but with the emergence of the state, the individual had to be fully and personally responsible for his acts and omissions. The state took the authority to punish for those actions and omissions prohibited by it.

In pre-colonial Tanzania treason and espionage were considered to be very serious crimes. Such crimes were punishable by death. E.g. the Sukuma and Chagga where spies were killed. Another offence, which was punishable by death, was witchcraft.

However, some forms of homicide were considered reconcilable. Where reconciliation was not possible the normal cause of action was blood feud, and this depended on the authority of the chief. Where chiefs were less powerful e.g. Rombo, feuds were common. In most cases chiefs favoured reconciliation since this reduced friction within the chiefdom. Even where compensation was paid (blood money) the money could be contributed by the whole clan. E.g. the Haya, Nyamwezi, Sukuma and Hehe. Another offence was adultery.

ii) Criminal Law in the German Period

a) The process of colonization.

The Germans took over Tanganyika in 1885 and at that time it was known as German East Africa and included Rwanda and Burundi. The Germans used the divide and rule tactics and brutal force.

However the Germans did not achieve full control of the territory easy, e.g. 1891 Major Von Wissman had to use Sudanese and Zulu troops to subdue chief Sina of Kibosho, in June 1892 chief Meli of Moshi defeated German troops and it was until August 1893 when 800 troops under the German officers defeated Meli. Other tribes, which resisted were the Hehe, Ngoni etc.

Furthermore, individual Europeans displayed their authority by the indiscriminate use of corporal punishment to the local people. They used to walk around with a whip made of hippopotamus hide cut (kiboko).

b) The Emergence of Institutions of “Law and order”

The Germans considered the non-European population as insufficiently advanced for the laws of the white man. For this reason jurisdiction over natives was exercised by the District Officers and officers in command of military stations. Since there was no law for non-European population, the Germans used and maintained the authority of Native Chiefs. Where there were no chiefs, akidas and jumbes or liwalis were appointed.

The so-called “established customs” and “rules of Procedure” were modified to suit the German state needs. Minor cases were handled by native authorities but the serious ones were forwarded to the district officers. Whilst akidas favoured corporal punishment, native chiefs resorted mostly to pre-colonial method of dispute settlement.

c) Use of Criminal Law for ‘Development Programs’

It was the Germans who first used the penal sanctions to generate development in Tanganyika. The Natives were required to offer their labour for public works by force and generally unpaid for. In addition to that there were labour legislation which contained very punitive provisions in civil matters such as breach of contract e.g. breach of employment contract was punishable with three months imprisonment in chains.

Taxation is another legislation, which used criminal sanctions. The legislation (taxation) was introduced in 1898. In 1912 a comprehensive House and Poll Tax Ordinance was enacted. Failure to pay these taxes gave the government an excuse for conscripting defaulters in public works and in private farms.

Subsidiary legislations were also enacted e.g. Tanga and Dar es Salaam were established as municipalities. They were given power to make by-laws which included the duty to cultivate cotton, prohibition of hunting certain animals, mining certain minerals etc.

(iii) Criminal Law during the British Colonial Period 1918-1961

(a) The Establishment of British Colonialism in Tanganyika.

After the defeat of the Germans in WW1 German East Africa was handed to the British (1919) and in January 1920 the British christened the Country Tanganyika. The mandate was formally concluded in July 1922 giving Britain full powers of legislation and administration. In 1920 by **Order in Council** the office of the Governor was formally established with Horace Byatt as the first governor. He was given powers to enact ordinances, rules and regulations alone subject to His Majesty’s approval until the constitution of the legislative council at the end of 1926 when the powers were vested in the Governor in Council. District officers were appointed however; the akidas left by Germans were replaced by hereditary chiefs.

In 1926 the governor created eleven provinces under provincial commissioners above the district officers. Under the district officers were native authorities created in 1920 as substitute for akidas and jumbes under the German administration. Native authorities ensured that the whole territory was effectively controlled by the British. This set up made colonial exploitation easy.

(b) Reception Clause

In 1920 British issued Tanganyika Order in Council (TOC) which was equivalent of a constitution. Section 17 of the Order stipulated that:

“subject to the other provisions of this order such civil and criminal jurisdiction shall so far as circumstances admit be exercised in conformity with the civil procedure, criminal procedure and

penal code of India and other Indian Acts and laws which are in force in the territory at the date of the commencement of this order or may hereafter be applied or enacted; and subject there to and in so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrine of equity and statutes of general applications in force in England at the date of this Order and with the powers vested in and according to the procedures and practice observed by and before courts of justice and justice of peace in England...”

Thus from the reception clause you can get the main body of primarily criminal legislation:

- Penal Code of India
- Criminal Procedure Act
- The Evidence Act
- Oath Act.

(c) Customary Criminal Law

TOC also sanctioned the application of the customary criminal law in all cases to which the natives were parties provided that it was not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance.

However it is to be noted that the British and local standard of ‘justice and morality’ differed. In most cases the repugnant clause was used to prevent cases ranging from trial by ordeal, the indiscriminate killing of witches to the extension of criminal responsibility to the next of kin. A good example is the case of **Gwao Bin Kilimo V. Kisunda Bin Ifuti 1 T.L.R. (R) 403**, where the high court said that customary principle which held a father liable to pay part of the compensation in a case in which his son was liable is repugnant to justice and morality...the son was solely responsible for his action. The judge used the standard of justice of the British.

(d) Penal Code and the Related Penal Statutes

Apart from the application of customary criminal law, the main source of criminal law in Tanganyika was penal code.

In early 1920's the impact of the penal code was not immediately felt as most people in the rural area resorted to traditional methods of dispute settlement. You will also note that some of offences created by the code did not at the beginning reflect the existing social conditions. Offences like armed robbery did not surface until 1931 when it was first reported to the police. Thus we see the code was imported wholesome defining several acts and omissions as criminal even before there was evidence of their existence in the territory. A good example is the growth of vagrancy, there was no such problem until it started in DSM in 1930's due to the world economic depression. To combat this problem was a host of statutes which were already in force ranging from provisions on ‘idle and disorderly persons ordinance’ and ‘rogue and vagabonds’ The Destitute Persons Ordinance and The Township (Removal of Undesirable Persons) Ordinance (1944). Many other crimes like prostitution, assault, rape were the result of slums and alcoholism.

(e) The Administration of Justice

The Native Courts Ordinance was introduced in 1929 which took away the Native Court outside the jurisdiction of the High Court, and placed under the district and provincial administration, final appeal to the governor.

In 1951 Local Court Ordinance was enacted. There was a change of name Native to Local Courts and with appeals lying directly from the District Commissioner to the Native Court of Appeal.

In practice serious crime was dealt with by the subordinate courts under the received law while minor crime committed in rural areas was dealt with by Native Courts applying customary law. This system operated up to the independence of Tanganyika.

(iv) Criminal Law in the Post-Independence Era 1961-to date.

(a) The Reception of English Legal System.

Just after independence the Judicature and Application of Laws Ordinance (**JALO**) No.57 of 1961 (**CAP.452**) was enacted. Section 2(2) of the JALO (the reception clause) reproduced the 1920 reception clause where in the jurisdiction of the High Court was to be

“...exercised in conformity with the written laws which are in force...in conformity with the substance of common law, Doctrine of Equity and the Statutes of General Application in force in England...with the powers vested in and according to the procedure and practice observed by and before courts of justice of peace in England.”

The independent government inherited the legal framework of the British. The JALO took the same position on customary law as that found in the reception clause of 1920. This means customary law both civil and criminal continued to exist subject to the limitations specified in section 9 of JALO. However customary law was abolished in 1963 by the Magistrate’s Court Act of 1963 (CAP 537) under section 66. In this law the courts were unified giving rise to one-tier structure, from primary court at the bottom to the High Court. Administrative officers ceased to perform judicial functions.

(b) Selected Penal Statutes and Offences

The Penal Code

This is the major source of criminal law in Tanzania. There have been some amendments to accommodate politico-economic changes that took place after independence. For example:

- Section 89C of the Penal Code was introduced by Act No.61 of 1962, made it an offence to dissuade others from assisting with self-help schemes.
- After the 1967 Arusha Declaration the Minimum Sentence Act No. 2/72 was enacted to increase punishments in the Penal Code for stealing from public enterprises.
- The emergence of the problem of shortage of essential commodities in 1970’s witnessed the creation of the offence of hoarding of goods—s.194A Penal Code.

In short there have been no major changes in the Penal Code since independence.

The Minimum Sentences Act No.29 of 1963

This is said to be the harshest legislation introduced by the independent government. The aim was that the government was worried by the increases of theft in government offices, stock theft, housebreaking and burglaries, robbery and corruption. This Act introduced corporal punishment. In 1972 the corporal punishment was removed (Act No.1/2), but was reinstated in 1989 through Act No.2/89.

Vagrancy Laws

By Act No.11/83, section 176 Penal Code was widened the categories of “idle and disorderly persons” to include unemployed persons and those who absent themselves from their places of duty.

Corruption and Ant-Corruption Laws

The Prevention of Corruption Ordinance (CAP 400) was enacted in 1958. The central provisions were on ‘officials Corruption’. Corruption started to be a serious problem in the 1970’s. A new Prevention of Corruption Act No. 16/71 was enacted. The Act repealed and replaced the 1958 Ordinance. New features of the Act included drastic increase in punishment for corruption offences, the expansion of corruption offences to cover public officers who live or are found with property beyond their known source of income etc.

Economic and Organized Crimes Control Act No. 13/84

The government took a major clam-down on what it called ‘racketeers and economic saboteurs’ in 1983. The crack down was aimed at people dealing illegally with foreign exchange, those hoarding commodities, those possessing unlicensed firearms and ammunition and those found with government trophies. The government enacted the Economic Sabotage (Special Provisions) Act No.9/83. This Act established special Tribunal to hear all economic sabotage cases with a final and conclusive jurisdiction not subject to any review by any court or person in any capacity. However some of the abnormalities of this Act were corrected by Act No 13/84.

Use of Criminal Law for Development Purposes

The use of criminal law initiated by the colonial masters continued after independence. A few examples suffice:

- *Taxation* the use of taxation legislation continued after independence for eight years. Local rates were abolished in 1970(January), but was reintroduced in 1983 and was called development levy. Coercion was the major means of securing compliance by the people.
- *Subsidiary Criminal Legislation* so far we see that cities, towns, and district councils have wide powers of enacting by laws which carry penal sanctions. These range from those regulating farming, education, trade, health, the production, storage and sale of foodstuffs, manufacture and sale of intoxicating liquor to public order. These by laws apply only within their areas of jurisdiction. Other institutions also make some by laws e.g. crop authorities. Some statutes give powers to the minister to make by laws for the same purpose.

GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY**Basic Elements of Crime**

The criminal law generally prohibits undesirable *acts*. Thus, proof of a crime requires proof of some act. Scholars label this the requirement of an actus reus or *guilty act*. Some crimes — particularly modern regulatory offenses — require no more, and they are known as strict liability offenses. Nevertheless, because of the potentially severe consequences of criminal conviction, courts also sought proof of an *intent* to do some bad thing, the mens rea or *guilty mind*. As to crimes of which both *actus reus* and *mens rea* are requirements, courts have concluded that the elements must be present at precisely the same moment and it is not enough that they occurred sequentially at different times.

Before a man can be convicted of a crime it is usually for the prosecution to prove:

- a) That a certain event or a certain state of affairs, which is forbidden by the criminal law, has been caused by his conduct.
- b) That this conduct was accomplished by a prescribed state of mind—mens rea.

1. Actus Reus

Actus Reus is Latin words. **Actus** simply means an act and **reus** is that prohibited by law. Therefore actus reus may be described as such result of human conduct as the law seeks to prevent. The word conduct here covers both acts and omissions. It may be accomplished by an action, by threat of action, or exceptionally, by an omission to act. For example, the act of *A* striking *B* might suffice, or a parent's failure to give food to a young child also may provide the actus reus for a crime. The actus reus includes all those elements in the definition of the crime other than the accused's state of mind.

(i) Proof of Actus Reus

Actus Reus must be proved; if there is no actus reus there can be no crime, since a person cannot be convicted solely because of the state of his mind. The mere intention to kill is not punishable as such; there must have been a killing. e.g.

- Where **A** takes **B's** property with intent to steal it but unknown to **A**, **B** has given his consent to its being taken.
- **D** believes that he is appropriating **P's** property he cannot in any circumstances be guilty of theft if the property belongs to no one. **D** has the mens rea but actus Reus of the crime is missing/ lacking.

(ii) Actus reus and will

If the actus reus includes an act, that act must be willed by the accused. If the man is unable to control the movement of his limbs it seems obvious that he should not be held criminally liable for

that movement or any of its consequences. “actus reus is a muscular contraction and something more. A spasm is not an act. The contraction of the muscles must be willed”

In the case of **R. v. Charlson [1955] 1 ALL E.R 859**, the father invited his ten year old son to look out of the window at a rat in the river below, and when the boy did so, struck him on the head with a mallet and threw him out of the window, causing him grievous bodily harm. There was no evidence of provocation or motive.

The father said he did not know why he hit the boy but remembered was being in his car. There was a history of ill health in the father’s family and according to medical evidence; he possibly had a cerebral tumor. A man from cerebral tumor is liable to an outburst of impulsive violence over him which he has no control. The accused was acquitted because he did not act on his own volition.

In the case of **Hill v. Baxter [1958] 1 ALL E.R 193**, the respondent being a driver of a motor vehicle on public road, drove across a road crossing in disregard of a halt sign, and his vehicle collided with another motor vehicle. A police constable arrived at the scene and found the respondent in a dazed condition and at the hospital to which he was taken he said;

“I remember being in Preston Circus going to Withden. I don’t remember anything else until I was searching for my glasses. I don’t know what happened”.

The accused’s plea failed, for the evidence showed that the accused had driven a considerable distance along a busy street between the point where his memory was alleged to have failed and the point where the offence occurred.

(iii) Actus reus as ‘State of Affairs’

A crime may be so defined that it can be committed although there is no act. There may be no necessity for ‘willed muscular movement’. Instead it may be enough if a specified ‘state of affairs’ is proved to exist. Under the Road Traffic Act, for example, there is or could be a rule that any person who, when in charge of a motor vehicle on a road or other place is unfit to drive through drink or drugs commits an offence. It is not taking charge of the vehicle or becoming unfit which is the offence, but simple **being** in charge or **being** unfit. Thus an offence may be committed by the accused being in a particular place, or being in possession of something or being in charge of something.

It must be shown that the accused did not do an act or omitted to do an act but also certain circumstances resulted from that act or omission. E.g. **A & B** decided to shoot different persons;

A kill, **B** misses therefore only **A** can be guilty of murder.

All offences include a number of ingredients, which must be present. Some offences may be only committed;

- a) By a particular class of person
E.g. A repudiated thief
- b) Against a person of particular age
E.g. indecency with a child
- c) Against a particular class of public servant
E.g. assault on a constable
- d) In respect of a property of a particular type
E.g. theft of motor vehicle
- e) Without the consent of the victim
E.g. rape
- f) There is a particular relationship between the accused and the victim
E.g. Incest
- g) At a particular time
E.g. Burglary
- h) In a particular place

(iv) Actus Reus and Causation

An actus reus may be nullified by an absence of causation. For example, a crime involves harm to a person, the person's action must be the but for cause and proximate cause of the harm. If more than one cause exists (e.g. harm comes at the hands of more than one culprit) the act must have "more than a slight or trifling link" to the harm. When the definition of an actus reus requires the occurrence of certain consequences it is necessary to prove that it was the conduct of the accused, which caused those consequences to occur. In murder or manslaughter for example it is necessary to prove that the act of the accused caused the death. If the death came about solely through some other cause then the crime is not committed, even though the other element of the actus reus and mens rea are present.

A person is said to have caused something to happen only if that thing would not have occurred at the time and in manner in which it did occurred if he had not done what he did. So if **A** puts a poison in **B's** drink, intending thereby to kill him, but before **B** drinks it or a fatal amount of it, **B** dies of heart attack, **A** cannot be guilty of murder. Causation is not broken simply because a victim is particularly vulnerable. This is known as the thin skull rule. However, it may be broken by an intervening act (*novus actus interveniens*) of a third party, the victim's own conduct, or another unpredictable event. A mistake in medical treatment typically will not sever the chain, unless the mistakes are in themselves "so potent in causing death."

An actus reus may also consist in failure to take action where action is required by the criminal law, i.e. sometimes in criminal law an offence can be committed by an "omission".

Section 5 of the Penal Code defines offence to include an act, attempt or omission punishable by law.

Omission in particular is not punishable unless there is law permitting it. However once it has been shown that a particular offence can be committed by omission it must be shown that the accused was in the circumstances under a duty to act.

The common law rarely punished omissions. The usual illustration of the common law attitude is that of a group of people watching a child whom they could save drown in a shallow pool. If they are in no specific relationship with the child, it is said that they commit no crime. If however one of them were the parent or guardian of the child this relationship would impose a duty to act, violation of which would be a breach of the criminal law.

In the case of **The Queen v. Instan (1893) 1 QB 450**, the accused a woman lived with the deceased. The deceased felt sick and could not support herself. The accused didn't supply her with food nor did she secure/procure for her, any medical or nursing attendance. The deceased's death was accelerated by want of food or nursing or medical attendance. The court said that

A duty was imposed upon the prisoner under the circumstances to supply the deceased with sufficient food to maintain her life, and that the death having been accelerated by the neglect of such duty; the prisoner was properly convicted of manslaughter.

The common law seems never to have imposed a duty to act in protection of another's property. The duty to protect another's property arose only where there was some special relationship such as parent or guardian with that other, or where is under a duty to take care gratuitously.

(v) Actus Reus Specific Elements

For the purpose of criminal law it is sometimes necessary to break down an **act** into the constituents of:

- Conduct (which is the central feature of the crime)
- Circumstances (the surrounding material)

E.g. section 134 of the Penal Code, abduction of girl under sixteen years;

Conduct—here the conduct, which is the central feature of the crime, is the physical act of taking away the girl.

The material circumstances are

The absence of lawful authority (unlawful) or excuse (against the will)

That the girl is unmarried and under sixteen.

That she was in possession of the parents or guardian.

If any of these circumstances is missing/is not present, the crime is not committed. Thus if **D** was acting under the order of a competent court or if **D** was married, or seventeen or if she was not in the possession of any parent or guardian in none of these cases would there be an actus reus.

2. Mens Rea

Mens rea is another Latin phrase, meaning "guilty mind." A guilty mind means an intention to commit some wrongful act. Intention under criminal law is separate from a person's motive. If Mr. John robs from rich Mrs. Mwajuma because his motive is to give the money to poor Miss Julia, his "good intentions" do not change his criminal intention to commit robbery. Mens rea is also knowledge of the wrongfulness of the act, state of mind, mental capability required in a guilt and state of mind defined in the act, (actus reus), generally a blameworthy state of mind accompanying the forbidden acts expressed in the three different degrees (though not every offence requires these three degrees) although as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been an intention to break the law or otherwise do wrong or not. Many minor statutory offences however are punishable irrespective of the existence of mens rea.

(i) Intention

According to section 10 of the Penal Code, a person is not criminally responsible for an act or omission which occurs independent of his will or accidental. But where the intention to cause a particular result is expressly declared by the section creating an offence to be an essential act or omission is immaterial. When a man's conduct has produced a consequence prohibited by the definition of the actus reus of the crime charged the most common question that is asked is whether he intended such consequence to occur? An affirmative answer to that question is generally justified if the accused had one of the two types of intention with regard to the prohibited consequence.

Direct intention an act is said to be directly intended if the person aimed at achieving it and believed that he was likely to succeed.

Oblique intention an act is said to have been intended obliquely when although was not aimed by the person it was foreseen by him as a probable or certain.

A man intends a consequence of his act when he foresees that it may result and desired that it should do so. If the consequence is desired it is immaterial that the chances of it resulting may be small. Thus if **A** hoping to kill **B** were to shoot at him from a miles range, knowing that the chances to kill him were small, it would be intentional killing if the one came up.

Intention in statutory offences is frequently expressed as "intentional" or "with intent to..." or "willfully" etc.

E.g. section 196 of the Penal Code "...malice aforethought...."

Section 258 (1) of the Penal Code "... fraudulently..."

Section 294 "... with intent to..."

Section 319 "... willfully...."

If a person is charged under a section requiring a specific intention such intention must be proved. In the case of **Brazila v. R. (1968) H.C.D No. 309**, the accused was a messenger employed by the Bukoba District Council, was in charge of prisoners held at a primary court. He let two prisoners out of their cells and ordered them to wash their clothes while he went for a walk. The prisoners escaped. The accused was charged under section 117(1) of the Penal Code, which applies, to "any person who aids a prisoner in escaping or attempting to escape from lawful custody..."

It was held that the word "aid" imports an element of positive assistance and or an intention of helping the prisoners to escape. The evidence only showed that the accused was extremely negligent and careless.

In many cases of contempt of court, the High Court of Tanzania has demanded something higher than mere negligence or recklessness to secure a conviction. In the case of **Gordon v. R. (1972) H.C.D No.36**, the appellant was summarily convicted of contempt of court for failing to turn up in answer to summons to give evidence c/s 114(1) (b) of the Penal Code. He claimed that he was in the toilet at the material time. The court held that;

It is to be presumed that an offence under section 114 of the Penal Code requires mens rea. The appellant's explanation negates any such mens rea or intentional disrespect.

In the case of **D.M. Patel v. R. (1969) H.C.D No. 60**, the accused that was participating in a court case called out to one of his witnesses "wewe shahidi kaa huku" while the court was in session. He was charged with and convicted of contempt of court under section 114(1)(a) of the Penal Code, on the ground that he spoke without the court's permission, although the accused pleaded that he did not realized that such permission was required. The court held that;

The conviction was improper, and intentional disrespect was an essential ingredient of the offence. The court pointed to the fact that the section in question after listing an array of different forms of contempt, ended by including "and other acts of intentional disrespect" i.e. section 114(1) (i), which implies that other acts listed were also intentional.

(ii) Motive

A person's motive is his reason for acting as he did. According to section 10 of the Penal Code motive is immaterial when a person is charged in a criminal case. This section refers to the motive, which induced a person to do something prohibited by the law or to omit to do something, which he was duty bound to do.

However under the same section i.e. section 10 of the Penal Code where it is expressly declared in a fewer cases it is possible for a person to commit a crime but with good motive. But in criminal law, generally speaking, motive should not affect liability. Therefore if a person causes an actus reus with the requisite means rea, he is guilty of the crime in spite of his good motive.

A man who kills his incapacitated and suffering wife out of motive of compassion is just as guilty of murder as the man who kills for revenge. In **R. v. Windle [1952] 2QB 826**, the appellant was married to a woman 10 years his senior, she was certified insane, and led him a most horrible and wretched existence. She was always threatening to commit suicide. As a result of living with her, he too suffered from a form of communicated insanity known as "folie a deux". He gave her 100 aspirin tablets from which she died. At the time he did so he knew that it was against the law, but he believed that what he was doing was right and that, in view of his wife's condition it was something which should be done and which he ought to do.

It was held that since the appellant knew his act was contrary to law, he was guilty of murder.

In **R. v. Senior (1899) 1 QB 283**, the accused was charged with the manslaughter of his infant child of which he had the custody. He belonged to a sect who objected on religious ground to calling on medical aid, and to the use of medicine, and he had deliberately abstained from providing medical aid and medicine which were necessary for the child, though he knew it to be dangerously ill, but in other respect he had done all he could in his best interests of the child.

It was held that the accused has willfully neglected the child in a manner likely to cause injury to its health and having thereby caused or accelerated its death, he was rightly convicted of manslaughter. His religious motive could not help him.

In evidence motive is a relevant factor. Therefore if the prosecution can prove motive for **X** murdering **Y** the existence of that motive makes it more likely that it is **X** who committed the actus reus.

Motive is also relevant in determining the type of punishment to be given or in assessing the sentence. A person who had a good motive will normally be punished leniently.

(iii) Recklessness

Intention cannot exist without foresight but foresight can exist without intention. A man may foresee the possible consequences of his conduct and yet not desire them to occur. Nonetheless if he persists on his course he knowingly runs the risk of bringing about the unwished result. In recklessness a man takes unjustified risk. In some other words the accused had some actual awareness of the risk he was taking although he did not desire the consequences. Under chapter XXII of the Penal Code the degree of mens rea required is that of recklessness.

(iv) Negligence

A man is negligent with respect to a consequence of his act when he does not foresee the possibility of the occurrence of those consequences at all when he ought as a reasonable man to foresee it. E.g. a driver who drives a motor vehicle with defective tires without minding to check the condition of his tires is negligent.

In manslaughter cases it is sufficient to prove that the accused was negligent or reckless. In the case of **R. v. Chepe Kalangali 1973 L.R.T N.77**, the accused failed to take care of the deceased child who was in his custody, and who was suffering from cold. The resultant exposure to cold hastened the death of the deceased.

Mnzava J (as he then was) found the accused guilty of manslaughter within the meaning of section 203 of the Penal Code. He observed that for a person to be guilty of manslaughter by negligence, it must be proved that he had a duty to take care, that he failed to discharge that duty thereby causing the death of the deceased.

Sometimes the borderline between negligence and recklessness is obscure and in a number of offences; e.g. the Road Traffic Act, one may find both words used in the alternative e.g. section 50 says

Any person who uses, parks or stands a motor vehicle or trailer on any road carelessly or without any reasonable consideration for any other person using the road shall be guilty of the offence.

Again the whole of chapter XXIII of the Penal Code is devoted to offences of criminal recklessness and negligence.

(v) Mens Rea and Voluntariness

Since it is said that mens rea includes those acts willed by the accused, an involuntary muscular movement will not contain mens rea. Involuntary acts would protect a man who suffers an epileptic fit while driving causing death or sleepwalking and other unconscious states. —Section 10 Penal Code.

In the case of **Bratty v. A. G. For Northern Ireland [1963] A.C 386**, Lord Denning at page 409 said “no act is punishable if it is done involuntarily, and an involuntary act in this context...means an act done by the muscles without any control by the mind such as spasm, a reflex action or a convulsion or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or while sleepwalking”.

In **Anthony Mhikwa v. R. (1968) H.C.D No.460**, the accused was convicted of contempt of court c/s 1141(1)(a) of the Penal Code on the grounds that he had shown disrespect to the court by laughing and making peculiar noises in the course of the trial in which he was involved. On appeal he explained that a fly had flown into his nose, causing him to snort and sneeze. The High Court accepted the explanation and quashed the conviction. The reason given was lack of mens rea because the accused’s reaction was instinctive and not subject to conscious control.

Exception to the General Principles of Criminal Liability

In this part we are going to deal with a situation where a person may be held criminal responsible for his/her acts though there is no required element of the mind (mens rea). This means that a

person may be held liable only on the strength of the actus reus without the presence of the mens rea.

(vi) Strict Liability

In strict liability cases the accused is held guilty on the strength of the actus reus only without proof of mens rea. Offences of strict liability are also known as offences of absolute prohibition. It is not easy to recognize offences of strict liability one cannot also predict with confidence whether the courts will rule that a particular statute imposes strict liability. This has led some criminal law writers to argue that crimes of strict liability are the creation of the courts rather than parliament. Read Smith and Hogan, Criminal Law, London, Butterworths, 1965 at p.56.

In **Joseph Harkworth v. R. (1970) H.C.D No.27**, the accused were Englishmen, they crossed the Songwe Valley from Malawi to Tanzania and walked to Kyela and reported at the police station. They were arrested and charged with unlawfully entering into Tanganyika.

The particulars alleged that they entered into Tanganyika by way of Songwe river, which was not an official port of entry. During the trial the first appellant said *"I realize my mistake now, I entered unlawfully into Tanzania, I was misled by the customs officials in Malawi to come this way."* The second appellant said *"I admit this offence I did not follow the official ports of entry to Tanzania."* They were convicted.

On appeal the defense council submitted that the trial magistrate should not have entered a plea of guilty since mens rea was an essential pre-requisite for the commission of the offence. In deciding the appeal the judge had this to say:

- Regarding the intention of the legislature,
"I would hold that at the present time, the regulation of entry into Tanzania through proper ports is a subject which the legislature did intend to control rigorously"
- Regarding the problem of proving mens rea,
"In this type of case...it would be extremely difficult to prove in most instances that the person charged did intend to break the regulation"
- Regarding the gravity of the harm (not the offence) likely to be caused to the public,
"I am well aware that the security of this country along its southern border is a matter of concern."

As the result the appeal was dismissed.

It has to be noted that the act of the accused person must be willed. It must also appear that he was responsible for the act, which brought this about, i.e. muscular movement was willed. For this reason it has been suggested that the liability is strict and not absolute.

What is the justification for this rule?

- The good sense of the court is to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health, safety and moral.
- If mens rea were to be proved in every offence some guilty defendant would escape simply because of lack of evidence.

Vicarious Liability

As a general rule the law does not regard the master as having any criminal liability for the acts of his servant. Whatever may be his liability in civil, tort or contract unless he has himself actually authorized or aided and abetted him.

Exceptions to this general rule:

- At common law the proprietor of a newspaper may be liable criminally for libels published by his servants in conducting his newspaper even though he had not authorized their publication.
- In cases of public nuisance, it is possible for the master to be vicariously liable for the acts of his servants.

Vicarious liability is mainly restricted to cover cases of negligent masters. E.g. Section 54 of **General Interpretation of Laws and General Clause Act 1972 Cap.1**,

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

The reason advanced for holding a master liable is that a statute would be rendered ineffective and the will of the parliament thereby defeated if he were not held so.

The case of **Hamad Abdallah v. R. [1964] E.A 270** shows the situation where the master was held vicariously liable for the acts of his servant after delegating to him the performance of certain duties cast on him through the license. The facts were that, the owner and holder of a license for a public service vehicle was convicted of failing to comply with a special condition of his road service license c/ss 23(3) and 26 of the Transporting Licensing Ordinance Cap.373.

On appeal it was argued that he was not on the vehicle when the offence was committed or that he was a part thereto or even knew of it.

The court said that section 26(1) creates an absolute liability, and it was no defense that the appellant was not a party to or even aware of the breach of the special condition.

Corporate Liability

This is a situation whereby a company is held criminal liable for the acts/offences committed by its employees. When we look at the **General Interpretation of Laws Clauses Act** the definition of a person includes “any body of persons whether corporate or unincorporated”—S.3

Section 53 provides that:

“Where any offence under any Act is committed by a body corporate then, unless a contrary intention appears, as well as the body corporate, any person who, at the time of the commission of the offence was concerned as the director or an officer with the management of the affairs of such corporate body shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly, unless he proves to the satisfaction of the court that he had no knowledge and could not by the exercise of reasonable diligence have had knowledge of the commission of the offence”.

Although the corporation has a legal personality, it has no physical existence and as such cannot form intention of any kind except through its directors or servants. As each director or a servant is also a legal person quite distinct from the corporation, it follows that a corporation’s legal liabilities are all a sense of vicarious.

However, since the people acting in the company’s business are considered to be company, the courts treat the company personally not vicariously liable. The acts of these officers within the scope of their employment are the company’s acts and the company is held liable not for the acts of its servant but for what are deemed to be its own acts.

Limitations on Liability of Corporations

- It is the acts of the responsible officers of the corporation only, like the managers, or members of the board of directors, which will be considered as the acts of the corporation itself. Wrongful acts and omissions by the subordinate staffs of a company would not in ordinary circumstances be sufficient to fix criminal responsibility on a company.
- A corporation can only be convicted of offences, which are punishable by fine, because there is no other way by which a corporation can be punished. There are offences which it is inconceivable that an official of a corporation can claim to have committed within the scope of his employment e.g. murder, sexual offences etc.

Burden of Proof

This part concern with the burden and standard of proof in criminal cases. The question of proof in most criminal cases is very important. Every allegation put forward by the prosecution must be

proved by strong or concrete evidence. Throughout the burden of proof is on the prosecution. This burden does not shift.

The standard of proof is that the prosecution has to prove its case beyond reasonable doubt, whereas the defense has to prove its case on the balance of probabilities. The prosecution has the burden of proving its case beyond reasonable doubt that the accused person is guilty of the offence charged.

This burden of proof doesn't change, the accused person is always presumed to be innocent until the contrary is proved.

The accused person under the normal circumstances is simply required to raise a reasonable doubt. There are certain instances where the accused may be required to prove certain things e.g. ownership in cases of dealing with possession of properties suspected to have been stolen. Even on such cases the burden is very light so that he is only supposed to prove the matter on a balance of probabilities

GENERAL RULES OF CRIMINAL RESPONSIBILITY

In this chapter we will discuss provisions of the law regarding criminal responsibilities. Earlier we discussed that for a person to be criminal liable he must act on his own free will coupled with the necessary evil mind i.e. the crime committed must contain the two elements required – Actus reus and Mens rea. However in certain circumstances criminals who commit crimes may be considered criminally not liable for such offence. Here under, we are going to discuss the rules that operate as defense of a general nature, and may be raised in appropriate situations in criminal trials.

Ignorance of Law

The law regarding ignorance of law is provided u/s 8 **T.P.C.** According to this section, ignorance of law is no defense in criminal trials. The ignorance of law cannot afford any excuse for any act or omission, which would otherwise constitute an offence. The existence of this rule is presumably passed on the presumption that everybody knows the law. This section has its origin from the Latin word “*ignorantia juris non excusat*” – “*ignorantia fact excusat*”, which means ignorance of law cannot afford any excuse while ignorance of fact can be a good excuse.

The justification of this rule is expedience for it would be very difficult to prove that an accused person in every case knew the law he violated. Let us look an example of an old English case where a sailor was convicted for contravening an Act of the Parliament. This Act was enacted when he was away at sea and the offence was committed before the news of its enactment could reach him. See **R. v. Bailey 1800 R & R.1**. In a Tanzanian case **Maulid v. R. (1970) H.C.D No. 346**, the appellant was convicted of failure to prepare and maintain records of oral contracts in respect of his employees, failure to insure in respect of liability to his employees and failure to pay minimum wages. The evidence showed that he paid his barmaid Tshs.60 wages was Tshs. 170 PM. The appellant pleaded ignorance as to the requirement of having employees insured or contract made out for them. The plea was rejected on the ground that ignorance of law doesn't afford an excuse.

The judge went further to say that “apart from the finding on the facts that the appellant didn't know the law, I'm inclined to the view that these statutory offences are absolute and no mens rea is required, even so it is pointed that there is no such presumption that everybody is presumed to know the law. In fact, I very much doubt if such presumption would hold good of even those who administer the law. The principle is that ignorance of the law doesn't afford a defense, which, as the Magistrate will appreciate, is not the same as presuming that everyone knows the law. Read **Musa & Others v. R. [1970] E.A 42.**

Bonafide Claim of Right

This defense is provided u/s 9 T.P.C this defense is available to an accused person under the followed conditions.

The claim must relate to the property

The accused may raise this defense only if he is charged with an offence relating to property e.g. when A destroys B's car on the ground that B has beaten his child, A will be charged with malicious damage to property. The defense of claim of right will be available to him as his claim is directed to property. This is so because the defense is not limited to the offence of theft only. The section expressly provides that the offence must relate to the property. This position was further settled in the case of **Yusuph Hussein v. R. (1969) H.C.D No.36** where it was decided that the defense of claim of right doesn't only apply to offences of theft, but also the offences relating to property such as malicious damage to property. Things will be different if A beat B's child on the ground that B injured his cow, the claim will not be available to A as the claim is directed to the person of another person and not to property.

The claim of right must be made bona fide.

The person appropriating the property of another must do so bona fide or in good faith, honestly and without fraud, in respect, of that property. Here we have to look at the intention of that person appropriating the property of another. If his intention in interfering with another's property was not fraudulent as defined u/s 258 T.P.C his claim is said to be made bona fide.

A good example of a bona fide claim of right is the case of **Mohamed Hassan v. R. (1969) H.C.D No.71**. In this case the appellant was employed as house servant by the complainant. He admitted that he took clothes from complainant's room by opening the window and "pole fishing" them out. He justified this by declaring that the complainant had dismissed him from his employment owing him three months wages, and the complainant had failed to pay the wages due to him despite repeated requests he decided to take his clothes. *On an appeal against the conviction of burglary, the High Court allowed the appeal on the ground that if his story were true it would constitute a defense to the charge, as the appellant may well have thought he was acting under a claim of right.*

The same reasoning was applied in the case of **Lenderito Laidosoli v. R. (1970) H.C.D No.169**, the complainant was a tenant of the appellant and left without paying rent. Complainant rented another house and when the appellant demanded his rent he failed to pay him, whereupon appellant told him that he would see the consequences in the evening. That evening the appellant took the complainants' two suitcases and bed sheet. On appeal;

Since the appellant took the goods of the complainant because he refused to pay him his rent, the obvious conclusion was that the appellant acted under a claim of right.

The claim to be made with honest belief that he is entitled in law to do what he did.

The claim should not refer to the actual legal right but should base on a belief in legal right. What the accused claim should not necessarily be permitted by law. It is sufficient to show that the accused honestly believed that the law permitted him to do what he did. In **Salum Mbegu v. R.[1981] T.L.R. 38**, the court said that in considering a claim of right the court is not required to find the right claimed is recognized in law, it is sufficient for the court to find that the person honestly believed that he had such a right in respect of the property concerned.

In the case **Oyat v. R [1967] E.A 827**, the accused seized five oxen, which had damaged his crops. The owner of the oxen was ordered to pay the accused Tshs 20 for compensation of damaged crops. Accused returned four oxen and retained one. Later he sold it in order to get his Tshs.20 and remit the balance to complainant. Before he could do so he was arrested and convicted. On appeal it was held that he had a good claim of right.

Another case is **Salum Ibrahim v. R. (1971) H.C.D No.481**, the appellant and complainant were married for about 8 years, but were later divorced. It was agreed that complainant should remain with household goods all of which were bought by the appellant. Appellant visited the complainant whom he learned that she had been having an affair with another man. Because of

this he demanded all his former property from her. He assaulted the complainant and removed a number of articles from the house. He was charged and convicted of robbery with violence. On appeal:

- (1) That the bonafide claim of right could be accepted with regard to those things, which he removed although legal; the goods belonged to the woman.
- (2) That a claim of right may be unfounded in law but if it was honestly held and was not manifestly unreasonable it can be a good defense to a charge of stealing.
- (3) Since the appellant might have thought that he was entitled to demand his things back from the complainant in the circumstances. The appeal was allowed on this count, but not for the count of assault.

Mistake of Fact

Mistake of fact is another defense provided u/s 11 T.P.C. This defense extends to all mistakes of fact but not law. Example; if **A** and **B** were caught hunting in a restricted area where hunting is illegal and **A** says that he was not aware that it is illegal to hunt in a restricted area, while **B** says that he was not aware that they had crossed boundary from the non – restricted area; **A** will be pleading ignorance of law while **B** will be pleading mistake of facts. Therefore **A** will not be excused while **B** may be excused. According to S.11 T.P.C. the defense of mistake of fact must base on an honest, reasonable and mistaken belief.

The mistake of fact, which is relied on by the accused person, must be such that he could have been excused if the real state of things had been such as he believed to exist. While some mistakes of facts negatives mens rea, some don't have this effect and don't prevent the accused from being convicted.

E.g.: If **A** intending to kill his enemy **B** mistakenly kills **C**, he will still be guilty of murder because had he supposed circumstances been real, **A** would still have been convicted of the offence.

Mistake of fact must be honest and reasonable as was decided in the case of **R. v. Sultan Maginga (1969) H.C.D. No.33**, the deceased and a woman were in a rice field at night after having sexual intercourse. The accused on his way to guard his shamba against incursions of wild pigs saw a movement in the grass and shone his torch in that direction but the batteries were weak and could see little. He called out, asking whether it was an animal or people. There was no reply. The couple then ran off in different directions. The accused threw his spear at one of the shadows, hitting and fatally wounding the deceased who died later on. He was charged with murder. The court found that:

The evidence supported the view that the accused did not know that he was throwing a spear at a man and the charge of murder could not be sustained.

The judge declined to find the accused guilty of manslaughter because the evidence did not show requisite degree of recklessness.

On the argument that the accused should have known that it was a common practice in Rufiji that many couples go off into the bush at night and during the day for love making, the judge said that he was absolved from recklessness because he called out, asking whether the object was human or not. Since he got no reply, he may well have thought it was a pig.

Another case where the standard of reasonableness was used is the case of **R. v. Selemani Hassani (1969) H.C.D No.250** where the facts were slightly different leading to a different decision. The accused went out at night to chase away wild pigs, which were destroying crops in his shamba. Believing the pigs had ran away into the shamba of the deceased, a neighbour and relative, he went over to the deceased's house where he woke up the deceased's wife who told him that she did not know where her husband was. He went to the shamba alone and he found the pigs he fired his shotgun. Later he heard a voice "you have already shot your brother- in- law". The deceased had in fact been in the shamba and was found to have died from a gun wound. He was charged with manslaughter.

What the accused did amounted to recklessness of an extreme kind, and that the degree of negligence was so high that what he did amounted to the offence of manslaughter.

The accused went into the deceased's shamba that was full of maize, and at the same time saw some pigs, he saw a black shadow and without warning he opened fire immediately. Since he had found deceased missing in his house that night, it was reasonable to expect that the deceased could have gone into his shamba to hunt pigs.

The question whether the mistake is reasonable or not is solved objectively not subjectively. Therefore it is possible for a mistake to be honestly held, but if it is ruled unreasonable it will not afford a defense in a criminal trial. In the case of **R. v. Kajuna (1945) 12 E.A.C.A 104**, the appellant killed his father in the honest but mistaken belief that the later was causing death of the appellant's child by supernatural means. The trial judge convicted him of murder. On appeal;

A mere belief founded on metaphysical as opposed to something physical, that a person is causing the death of another by supernatural means however honest that belief cannot in law be reasonable one.

The proviso in S.11 TPC "*the operation of this rule may be excluded by the express or implied provisions of the law relating to the subject*". The effect of excluding this rule would be to create an offence of strict liability.

Insanity

The law relating to insanity is provided u/s 13 T.P.C. However this law was codified from the rules laid down in the famous case of **R. v. M'Naghten (1843) 10 Col. And F.200 (T.A.C.)**. The facts were that DANIEL M'NAGHTEN was suffering from mental disease wanted to kill Sir ROBERT PEEL but instead killed his secretary EDWARD DRUMOND. The acquittal of M'Naghten on the ground of insanity provoked such a wide spread dissatisfaction that it became the subject of debate in the House of Lords. In consequences of the debate the Lords submitted to the judges certain abstract questions respecting persons afflicted with insane delusions. The famous "M'NAGHTEN RULE" is found in the answers to the first and second questions. The answer to the first question is:

Every person is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime until the contrary is proved to the satisfaction of the jury.

The answer to the second and third questions is:

To establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

The answer to the first question is the same as the provisions of section 12 T.P.C that states that every person is presumed to be sane until the contrary is proved.

The answer to the second and third questions is reflected in section 13 T.P.C. According to this section, a person is not criminally liable if at the time of doing or making the omission he is through:

- a. Any disease affecting his mind incapable of understanding what he was doing,
- b. Of knowing that he ought not to do the act or make the omission.

At the time of making the act or omission he was incapable of understanding what he was doing

If a person does an act or makes an omission and at the time of doing so he was suffering from a disease affecting his mind to such extent that he was incapable of understanding what he was doing.

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doing, then he will not be held criminal responsible. A good case which illustrates this is that of **R. v. Tomson Msumali (1969) H.C.D No.26**, whereby the accused was subjected to epileptic fit and for this reason, he used to sleep with his father in the same house for care if a fit come on. On the material night he was found standing outside the house by the dead body of his father with a heavy stick alongside. He told his mother that he had killed a thief. When asked why he had killed his father, he made no reply. In an extra judicial statement he said that earlier that day he had been visited by a man who wished to marry his sister and asked the accused to use his good offices to arrange the marriage. The accused refused and the suitor left, threatening to return later and deal with him. That night the accused dreamed that the suitor had come back, had entered the house and was beating his father. In defense of his father, the accused took a stick and beat the supposed assailant. Later he dragged the body of the assailant outside. There he was

told that the man he had killed was his father. The evidence showed that the accused was confirmed epileptic. While under observation in the hospital after the killing he suffered three epileptic fits, remained in a confused state for about two hours after each one. The court found that:

- 1) *The accused was the person who killed his father. He killed him in circumstances, which would have amounted to murder had he been sane.*
- 2) *At the time of the killing, by reason of a disease affecting his mind he was unable to understand what he was doing and that he could not realize that he ought not to have done what he did.*

At the time of making the act or omission he did not know that he ought not to do the act or make the omission

This part requires that the accused person at the time of doing the act or making the omission must not know that what he is doing is wrong and is prohibited by law to do so. In **Nyinge Suwatu v. R (1959) E.A.C.A.974**, the appellant killed an inspector of police under the delusion that he was plotting his death. He surrendered himself to the police and stated, *"I have come here to be killed because they wanted my head"* Medical evidence showed that the accused would know what he was doing, but not that it was wrong. The trial judge accepted that the accused was insane in medical sense, but held that the accused's statement to the police showed that he knew that what he had done was wrong and convicted him of murder.

On appeal, conviction upheld on the same ground. The court noted further that the accused by saying "I have come here to be killed" indicated clearly that he was accordingly not merely admitting a justifiable killing such as killing by accident or even one in justifiable self – defense

When asked in cross – examination "did you know what you were doing was wrong – against the law?" he replied, "it was wrong, but they wanted to kill me".

If the disease of the mind does not produce any of the effects u/s 13 **T.P.C.** a person may be criminally responsible; **R. v. Said Mwamwindi (1972) H.C.D No.212**, where it was held that:

"The insanity must relate to the act complained of it is not enough to show that the accused had a history of mental disease. It must be shown that the mental disease affected his act in the way specified in the section".

The issue of insanity is a question of fact to be resolved by the court aided by assessors. It is not enough for medical expert to come to the court and say generally that in his opinion the accused is insane. The court in the case of **Saidi Mwamwindi** said that, while respecting the opinion of a medical expert it is not bound by it.

In determining the issue of insanity, normally the courts employ the objective test. In **R. v. Windle (1952) 2 QB 826**, it was held that

"a man may be suffering from defect of reason, but if he knows what is doing is wrong – and by "wrong" is meant contrary to law he is responsible. So a man who after killing goes forthwith to the police station to surrender himself and give a lucid account of what

he has done, could certainly seem to know the nature and gravity of the act committed, and to know that in doing it he did wrong”.

What does disease affecting the mind mean?

In **R. v. Kemp [1957] 1 QB 299**, the issue was whether a physical disease affecting the brain was a disease of the mind. The answer was:

The law is not concerned with the brain but with the mind, in the sense that mind is ordinarily used, the mental faculties of reason, memory and understanding.

If one read for “disease of the mind” “disease of brain” it would follow that in many cases plea of insanity would not be established because it could not be proved that the brain had been affected in any way either by degeneration of the cells or in any other way—the primary thing that has to be looked for is the defect of reason. In **R. v. Magata Kachehakana [1957] E.A 330**, the accused killed his father because he believed that his father was Satan and that he had bewitched him and other members of his family. The evidence of the psychiatric was that the accused appeared to be mentally normal during the examination.

LYON, J (Uganda HC) said:

“I have considered the words ‘disease of the mind’ in section 12 UPC. I am of the opinion that an African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such extent that it may be described as disease of the mind. Here the killing is unexplained, and in any opinion inexplicable, except upon the basis that the accused did not know what he was doing”

However it is not easy to reconcile this case with that of **Muswi Musule v. R. (1956) 23 E.A.C.A 622**, the appellant killed his wife believing that she was bewitching him. A psychiatric testified that the accused knew what he was doing when he killed his wife, but he could not say whether the accused knew that what he was doing was against the law, and that the accused was in a state of mind depression, with background of family insanity and history of episodes.

Even if he believed he was justified in killing his wife because she was practicing witchcraft, there was no evidence that such belief arose from any mental defect, it is a belief held by entirely sane Africans.

The defense of insanity operates only as a partial defense. This is because, even if it is accepted it doesn’t lead to the release of the accused but instead the accused is detained as a criminal lunatic. —S.219 CPA.

Insane Delusion

The answer to the forth question concerning with insane delusions does not appear in the Penal Code. However, the answer is relevant since it defines common law position towards insane delusions. The answer is:

*“—the answer must be—depend on the nature of delusion—He must be considered in the same situation as to responsibility as if the facts with respect to which delusion exists were real. E.g. if under influence of his delusion he supposes another man to be in the act of attempting to take away his life and he kills that man, as he supposes in **self-defiance**, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune and he killed him in **revenge** for such supposed injury he would be liable to punishment.*

When the defense is held under insane delusions the accused is not convicted as a criminal lunatic, rather may be acquitted of the offence or imprisonment.

In the case of **R. v. Kibiegion Arap Bargutwa (1939) 6 E.A.C.A 142**, appellant and father were passing a night at appellant’s hut. Around 6 am a neighbour heard shouts from the hut. Appellant was attacking his father with a sword. Also appellant wounded five goats in the hut. When seized by neighbours he was very violent. Father died due to multiple injuries. When asked why he did so, appellant said that his father had tried to have unlawful connection with him. He repeated so to the s.v. MSHANA

doctor, during preliminary inquiry and at the trial. According to the medical testimony, the attack was so violent that it suggested that the appellant couldn't have been in right senses. He was convicted of murder. On appeal:

Though such incomprehensible acts are not in themselves sufficient to establish insanity in law; nevertheless, such act coupled with the facts that at the moment when he was compelled to cease his attack he made the allegations against the deceased there was good reason to think that the appellant may at least have been labouring under an insane delusion that the deceased had made an indecent assault upon him.

He was convicted of manslaughter, sentenced to imprisonment and not a special finding of "guilt but insane".

In **Hilda Abel v. R. [1993] T.L.R 246**, the issue was whether the defense of insanity applies where a person suffering from defective reasoning due to delusion of understanding what she was doing.

The appellant was convicted of murder. At the trial she raised the defense of insanity. The doctor reported that she was sane at the time of the alleged murder as she was suffering from defective reasoning due to delusion of the thought and imperative hallucination. After analyzing and evaluating of evidence and directing himself on the cautioned statement of the appellant in which she admitted killing the deceased and gave a detailed account of the incident the trial judge held that though the appellant was mental disturbed at the time, she was sane within the meaning of section 13 of the Penal Code. On appeal:

- 1) *Insanity within the context of section 13 of the Penal Code is a question of fact, which would be inferred from the circumstances of the case and the conduct of the person at the material time.*
- 2) *Courts are not bound to accept medical expert's evidence if there are good reasons for not doing so.*
- 3) *As the law now stands in Tanzania, though the appellant may well have been under diminished responsibility, no destruction could be made in terms of criminal responsibility, there is a need to update the law in this field.*

Intoxication

As general rule intoxication afford no defense to any criminal charge. However, there is an exception to this general rule. According to section 14(2) of the Penal Code. Intoxication can be a defense where:

- i. A person charged at the time of the act or omission complained of didn't know what he was doing.
- ii. If the state of intoxication was no produced by the person charged, but rather by another person by negligence or malice.
- iii. Where the person charged was by reason of intoxication insane temporarily.

Where a person raises the defense of intoxication and is accepted the person is discharged and not acquitted. This gives the prosecution room to re-institute criminal proceedings in the future in case new evidence is unhardened which will discredit such defense.

In **D.P.P v. Beard [1920] A.C 479**, the accused ravished a girl of 13 and in furtherance of the act of rape placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defense was a plea of drunkenness. His appeal against murder was dismissed on the ground that he knew that he was committing rape that is why he put his hand on the girl's mouth to stop her from screaming which indicated that he knew that he was doing an act of violence in furtherance of an act of rape.

There are certain cases of intoxication, which leads to insanity such as delirium tremens. Such a state must have been produced at the time of the act or omission complained of.

This matter was dealt in the case of **R. v. Rotief (1941) E.A.C.A 71**, where it was stated:

Insanity whether produced by drunkenness or otherwise is defense to the crime charged. The law takes no notice of the cause of insanity and if actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete an answer to criminal charge as insanity so produced by any other cause. It is immaterial whether the insanity induced was permanent or temporary and if a man's intoxication were such as to induce insanity so that he didn't know the nature of his act or that his act was wrongful, his act would be "guilty of the act charged and insane when he did the act". The burden of proof of insanity is on the accused and the degree of proof required is that required of a plaintiff on a civil case.

Furthermore, intoxication is taken in account to determine whether the person charged had formed any intention. E.g. if a man though intoxicated is able to select lethal weapon or is able to select his victim, or is able to act with motive then the defense cannot stand.

In the case of **Kinuthia Kamau v. R. (1950) 17 E.A.C.A 137**, the accused without any apparent reason/motive or purpose smashed a window chased a small boy, stuck a person on the arm with a panga and threw it at him and then struck the deceased on the back of the head with a piece of firewood. He was falling several times as he did this, and later on he was found asleep on top of a panga smelling heavily of alcohol.

The court on appeal substituted the conviction of murder for one of manslaughter on the ground that the actions of the accused could only be accounted for by his excessive drunkenness, which made it extremely unlikely that he was able to form the specific intention to kill or cause grievous harm.

In **R. v. Nyode Wopera (1948) 15 E.A.C.A 145**, the accused participated in a beer drinking party which had been going on continuously for 12 hours. He suddenly drew a knife from his waistband and without a word and without getting up, stabbed a 10 years old boy in the thigh fatally wounding him. He was convicted of murder. On appeal

There was no provocation, and the act done was only explicable if the accused was very drunk. We feel that the only reasonable conclusion that can be drawn from the evidence as a whole is that the appellant, when he stabbed the boy, had formed an intention to kill, or cause grievous bodily harm and in the absence of such intention he should no have been found guilty of murder.

In the case of **R. v. Michael Chibing'ati [1983] T.L.R. 441**, at or about 8 P.M on 18/09/1981 the accused returned home. He found his mother and his three brothers in the house of one of brothers'. The mother had gone there to summon the three to her hut to eat. The accused somehow conceived this gathering as one aimed at criticizing him. His mother assured him that there was nothing of the sort, and that she was there to invite his brothers to eat, the accused was unsatisfied. He pursued his mother to her hut where he bounced on her in an attempt to throttle her. The other brothers came to their mother's help. They wrenched him from his mother and one (the deceased) slapped him as he was led away to his hut. The accused rushed to his hut, came out with a bill-hook (hengo) and cut the right arm of one brother (Jackson) and the neck of another (Yonas) who fell and died instantly. He threw the weapon down and went into hiding. Later he re-emerged at the mortuary to see the body of his dead brother where he was arrested and charged with murder.

The accused gave an un-sworn statement and pleaded intoxication but also alluded to self-defense. The defense of provocation was not raised but the trial judge explained to the assessors circumstances under which it could be available.

- i) *In the instant case there was undisputed evidence that the accused was violently wrenched from his mother and slapped but there were no wrongful acts since the accused was engaged in a criminal and murderous act of throttling his mother, in which case provocation could not arise.*
- ii) *In the instant case, the accused claimed to have got drunk after drinking kangara brewed out of honey from 1 PM until night and there was sufficient corroborative*

evidence, which enabled the court to find without hesitation that the accused was drunk at the time he was not insane in the legal sense.

- iii) *Considering the degree of intoxication, the accused had reasonable ground to believe that his brothers were about to attack him and or his family; a belief, which entitled him to rely on the defense of self-defense, based no mistake of fact.*

Immaturity

For the purpose of this section, immaturity is that age whereby a person is said to be incapable of committing criminal offences.

According to section 15 of the Penal Code a person under the age of ten years is incapable of committing criminal offences. This is irrebutable presumption—**S.15 (1) PC**

There is rebuttable presumption when a person under the age of twelve years i.e. the age between ten and twelve years commits any offence. It is the prosecution, which has the duty to rebut this presumption by showing that at the time of doing the act, or making the omission the child had capacity to know that he was doing something wrong.

In sexual offences, the presumption is irrebutable—a person under the age of twelve years is incapable of having carnal knowledge.

In **R. v. F. 2 N.R.L.R.185**, a boy aged ten years found a wristwatch at a swimming bath and took it home. His mother told him to take it back to the bath. Instead of doing it the boy took it to a shop to sell it. The boy told the shopkeeper that he had been given the watch as a present, but as he had two watches already, he wanted to sell it. When a shopkeeper demanded a note to authenticate his story, the accused juvenile got a friend of his, aged fourteen years of age to forge a note and on the strength of the forged note, the watch worth about eight pound was sold for one pound.

Because of the untruth told by the accused juvenile as well as the deceits practiced by him, the court had little difficulties in finding that the boy had capacity to know what he was doing was wrong and was found guilty of theft.

Compulsion and Coercion

It is the act of forcing someone to do what he is not willing to do by using force on him or threatening to use force on him. —S. 17 of the Penal Code.

A person relying on this defense must show the following:

- The accused together with another person(s) did the offence charged. In **Josiah v. R. [1972] E.A 157**, the accused was charged alone. It was held that “the two or more offenders do not have to be jointly charged to allow the accused to rely on the defense of compulsion.”
- It must be shown that the accused person was at the material time under threats of instantly being killed or grievously injured in case he refused to commit the crime with which he is charged. The threats must be directed to the accused person and not another person or property. Threats of future injury will not excuse any offence. See **Josiah V. R.**
- He must also show that the threats directed to him continued to operate through out the time of the offence. See **Josiah V. R.**

Judicial Privilege

Section 16 of the Penal Code protects judges, justices of peace, and other judicial officers against criminal prosecution for an act or omission done bona fide in the exercise of their judicial functions. E.g. where a magistrate imposes a sentence of imprisonment while the appropriate sentence is fine.

In the case of **Mzee Selemani v. R. (1968) H.C.D No.364**, the accused a divisional executive officer was convicted u/s 253 and 96 of the Penal Code. The complainant went to seek a permit to hold a ngoma. He was told by the accused no such permit was available. Complainant apologized for bothering him. Accused rebuked complainant for bothering “*bwana mkubwa*” and ordered his arrest. No warrant was issued. Complainant was charged under section 124 of the Penal Code and s.v. MSHANA

released on bail. The charge was dropped. Accused argued that because he was an ex-officio of justice of peace he was immune from prosecution under section 16 of the Penal Code and section 60 of **M.C.A.**

The immunity of judicial officers extends only to those actions taken by the officer in the performance of judicial functions.

Compulsion by Husband

According to section 29 of the Penal Code a married woman has a defense of compulsion by her husband if the offence charged with is;

- Any offence other than murder or treason.
- Committed in the presence of her husband
- Is committed under his coercion.

Defense of Person or Property

The law relating to defense of person or property is provided under section 18 of the Penal code. According to this section:

- i) In defense of his own person, a person may use all such measures to defend himself as are reasonable having regard to the nature of the assault.
- ii) A person entitled to use all reasonable force to prevent the commission of a violent offence upon another.
- iii) In defense of his own property a man may use all such means and force as are reasonable in all the circumstances.
- iv) In defense of a person or property, a person is criminally responsible for any excess of force according to the nature and quality of the act, which constitutes the excess.

Defense of Person

The test that is applied in defense of person is reasonableness. It is to be observed that the defense of self-defense is only available if there is reasonable apprehension of death or grievous harm, and if the person who claims to protect himself from death or grievous harm was to kill his assailant.

According to **Kenny**,

“If a felonious attack is made upon a man he has the legal right to stand his ground and to resist, and if he kills his assailant the homicide will be justifiable, provided that the measures of resistance which he takes are reasonable in the circumstances. But if the assault is not felonious then the person attacked must if safely possible retreat, and must not use force against his assailant unless he is placed in such a position that he cannot otherwise evade the attack, as it used to be said, he must flee until he is driven to the wall”. —**Cecil Rurner, Kenny’s Outline of Criminal Law.**

This rule was reinstated in the Court of Appeal for Eastern Africa in **Selemani Ussi v. R. [1963] E.A 442**, where it was held that a person against whom a forcible and violent felony is being attempted has no duty to retreat. It was further observed that “*if the force used is excessive, but if the other elements of self-defense are present, there may be a conviction of manslaughter*”. The court is therefore going to consider whether the accused acted reasonably in the circumstances.

In the case of **R. v. Nyakabo (1970) H.C.D No. 344**, the accused was charged with murder of her father in law by slashing him to death with a panga. The deceased an old man of 60 years entered the house of his son, the husband of the accused, where the accused was sleeping convalescing from TB attack and locked the door. The accused was suddenly awakened to find the deceased lying between her legs, his trousers striped down to his feet, trying to have sexual intercourse with her. When she refused to have sexual intercourse with him, he tried to throttle her to stop her from shouting for help, where upon accused jumped out of the bed, picked up a panga and cut the deceased several times on the head and arms. The deceased died from those wounds. Acquitting the accused, SAID, J. held that:

There was no doubt whatsoever that the accused was in the circumstances entitled to defend herself against the assault on her by the deceased. The deceased "misbehaved so grossly when he was a guest in his own son's home where his own ill wife was being nursed. The accused exercised her right of self-defense when the deceased throttled her. If she didn't do so, she would have been choked to death."

"...Under the law a woman is entitled to defend her chastity against a man who wants to have carnal knowledge of her forcibly."

"The accused had both the right to defend her chastity and also the right to defend her life when the deceased tried to throttle her in a bid to overcome her and be able to ravish her".

Therefore if the defense of person is reasonable, in the circumstances a person may be acquitted of the offence. If the defense is unreasonable a person may be convicted of manslaughter. And if the means adopted for self-defense are grossly unreasonable, a person may be convicted of murder.

In the case of **Daudi Sabaya v. R. [1995] T.L.R 148**, the appellant was charged and convicted of murder by the High Court. The trial court found that the appellant killed with malice aforethought because he used excessive force and rejected the defense of self-defense. The appellant inflicted several serious cut wounds on the deceased whom he found stealing from the shamba he was guarding and who after some pursuit stopped and started advancing towards the appellant holding a knife in hand. On appeal;

- i) *Having regard to all the circumstances of the case as a whole, the defense of self-defense was properly founded.*
- ii) *The appellant used greater degree of force than was necessary in the circumstances, he should have been found guilty of manslaughter.*

In another case of **Salum Abdallah Kihonyile v. R. [1995] T.L.R 349**, the issue was whether the defense of self-defense is available where the accused speared deceased from the back while pursuing him. The answer is

"When the appellant speared the deceased from behind while pursuing him he was not then defending himself against anything as the deceased was no longer aggressive".

In **Claylaway v. R. [1992] T.L.R 72**, the issue was whether killing on suspicion one has been poisoned constitute self-defense.

"The plea of self-defense cannot by any stretch of imagination be applicable to the appellant. Was the appellant by hacking the deceased defending himself from further poisoning?"

In **Moses Mungasiani Laizer @ Chichi v. R. [1994] T.L.R 222**, the issue was whether a plea of self-defense is available also to a person who started the fight.

The defense of self-defense is available also to a person who started a fight depending on the circumstances of the case.

Where death occurs as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder.

The defense of others was dealt in the case of **Ilapala Ibrahim v. R. 20 E.A.C.A 300**, in this case the court held that a killing in defense of another is justifiable where an accused person acts without vindictive feelings and believes on reasonable grounds that a person's life is in imminent danger and that his action is absolutely necessary for the preservation of life. Again the courts are going to consider whether the accused acted reasonably in the circumstances.

Defense of Property

Like the defense of person, the test of lawfulness in defense of property is reasonableness. The English saying that “an Englishman’s home is his castle” is reflected in the principles underlying the defense of property in English law. It is generally recognized that the owner of a house or his family member may kill a trespasser who would forcibly dispossess him of the house, and that in protecting one’s house there is no duty to retreat for in so doing that would amount to giving up one’s home to his adversary.

Before any force can be used against a non-violent trespasser the owner of the house must first request the trespasser to depart. Should he refuse to leave, the owner of the house may use reasonable force to expel him. If the trespasser fights back the law entitles the owner or the householder to apply the principles of self-defense proper. But since the householder is being fought by the trespasser in his “castle”, whether it is a felonious or non-felonious attack, the householder has no legal duty to retreat. When the trespasser’s entry has been obtained forcibly as by burglary, the trespasser may be at once forcibly ejected.

Courts have insisted that use of lethal weapons in defense of property should only be exercised where the life of the defender himself is threatened. In **Mohamed Ally v. R. (1969) H.C.D No.54**, the appellant had a coconut shamba and for sometimes had been troubled by thieves. While in his shamba one day he heard sounds from three people who had come to steal coconuts. He fires his gun and wounded the complainant. He was subsequently convicted of unlawful wounding. On appeal against the conviction **George C J** (as he then was) said;

“Basically the common law does not favours the use of firearms in the defense of property unless the life of the defender himself is threatened”

The judge observed further (obiter) that the appellant would have been entitled under provisions of section 32(2) **CPC** (S.16 (1)) **CPA** to arrest any one found committing any offence involving injury to his property and under section 19(1) **CPC** (21(1)) **CPA** he would be entitled if such person attempt to avoid arrest, to use all means necessary including the use of firearms to effect arrest.

A similar observation was made in the case of **R. v. Mohamed Ndewe And Others (1970) H.C.D No.211**, the three accuse watchmen were confronted with an unknown number of armed thieves and killed one of the thieves. The judge held that:

“I must say that a person is not entitled to kill a thief to retrieve his stolen property. He can arrest him and take him before the court. But if the thief uses force so that the property which he has stolen should not be recovered, and in doing so he uses a weapon in a manner in which he causes grievous harm to kill the owner or the person who guards the property, the person who guard the property can defend to the extent of even killing the thief, because he will be defending his life and the property. None of the accused used more force than was necessary in law and they were doing so in defense of their lives and their employer’s property”.

However in defense of property like defense of person, it must be a question of fact in each case whether the degree of force used in defense of property which caused death was, in the particular circumstances of the case, justifiable, or if not justifiable, whether it was such as to constitute the offence of murder.

Necessity

The defense of necessity is a common law defense, which is not codified in our Penal Code. It is a defense, which is sometimes available where a man who has done something wrong did so for the purpose of saving himself or others from greater harm e.g. breaking the speed limit to take a casualty to hospital, driving at night on a lampless bicycle to fetch a fire engine etc. some statutes recognize the necessity of breaking the law in order to avert some greater danger e.g. The Road Traffic Act in section 54 concerning emergence vehicles.

In serious cases like homicides, this defense has been given strict interpretation. It has always been insisted that the value preserved must be greater than that destroyed. Where it is a case of life for life, the doctrine of necessity normally will be silent because the two lives must be accounted equal in the eye of law and there is nothing to choose between them.

In **R. v. Dudley & Stephens (1884) 14 QB 273**, three ship wrecker seamen a drift in an open boat with practically no food for twenty days killed and ate a cabin boy who was with them. On arrival in England they were tried for murder of the boy. The court said:

Where it is a case of protecting one man's life or another's at the expenses of an innocent person, the law has not conceded the right to destroy a life in the interest of self-preservation. They were found guilty of manslaughter.

In another case of **R. v. Abbas Mohamed (1969) H.C.D No.113**, the accused pleaded guilty for driving without a proper license. His uncle had gone to DSM to receive medical treatment. Accused received a message that his uncle had arrived at the Zanzibar Airport and that he was very sick and needed to be collected. Accused took his uncle's motor vehicle to the airport to pick his uncle and bring him home on which he was stopped by the police. The accused was a post office van driver. He hold a government license which is issued free of charge to government drivers and which authorized him to drive government vehicles only. He was fined 100/=

On revision, KIMICHA, Ag.J (as he then was) said that:

The accused was faced with an emergence situation and it is hardly surprising that he drove to the airport without thinking about licensing technicalities. He was a competent driver; in deed he made his living as a driver, so it cannot be argued that he was endangering public safety.

Economic necessity has never been accepted as a defense to criminal charge. The reason is that where it ever countenanced, it would leave to the individuals the right to take law into their own hands.

In larceny cases, economic necessity is frequently invoked in mitigation of punishment, but has never been recognized as a defense, nor is it available as a defense to a charge of riot. The fact that a riot is spontaneous makes it nonetheless premeditated. Premeditation may and frequently does arise on the instant. A lawful assembly may turn into a riotous in a moment of time over trivial incident or substantial provocation. When it does, those participating are guilty of riot, and neither the cause of riot nor their reason for participation in it can be interposed as a defense.

PARTIES TO OFFENCES

Introduction

We have already seen that the law always demands an Actus Reus as a necessary ingredient of a criminal liability. As we have seen the reason for the requirement is that the danger perceived in the mental attitude of one criminal inclined is truly as dangerous as it might appear. In most cases that which comprises the criminal act is part and parcel of the criminal harm accomplished. Thus the murder is the man who kills the thief the man who steals.

But there is a whole category of persons who are guilty of crime even though their activity is not thus intimately connected with a situation where the offence is committed by more than one person. Each person will be held criminally liable. But the question arises as to how and what extent should each held liable. This occurs when and where several offenders perform different roles in the execution of a common deed.

(a) Parties to offences in England**i. An accessory Before the Fact**

This is the person who is absent at the time of the commission of the offence but yet procure, counsel, command or abet another person to commit the offence. To be an accessory before the fact;

- He must have known the particular deed contemplated,
- He must approve it,
- His approval was expressed in some form, which operated to encourage the principal to perform the deed,

The above three elements came into existence before the time when the offence was being committed.

If the offence is committed in the different manner prescribed by the accessory before the fact, it doesn't excuse him from liability. E.g. **A** hires **B** to poison **C** but **B** instead kills **C** by shooting—**B** is liable as an accessory before the fact to **C's** murder.

Where the principal makes mistake in performance of the act, accessory before the fact will not be excused. E.g. **B** mistakenly kills **C's** brother instead of **C**, **A** will still be liable.

ii. Principal Offenders In The First Degree

This is the actual offender, a person who executes a criminal act. It is stipulated that no man can be a principal offender unless he be present, but there are situation where he will not be present. E.g. in a case of willful poisoning whereby he lay or infuses a poison with intent to poison any person and the person intended or any other person take it in his absence. Another situation is where the principal uses the hand of an innocent agent. E.g. a man who uses a child in committing an offence, a man who uses his dog to assault his enemy, a doctor who poisons and kills a patient by using an innocent nurse.

It is possible to have more than one principal offender in the first degree especially where there is joint or common participation in the actual doing of the prohibited act.

iii. Principal Offenders In The Second Degree

This includes aiders and abettors. E.g. a man who offers his motorcycle/ vehicle to facilitate robbery. A man who aids a thief by keeping watch outside the house where theft is taking place.

A person may become an aider or abettor without necessarily being at the scene of the crime. To render a person liable, the aid or assistance must be intentional.

iv. Accessory After The Fact.

This is the person who knows that a crime has been committed but subsequently shelter or aid the offender in such a way as to enable him to evade justice. Accessory after the fact includes also person who rescues a person from being arrested. It includes a person who intentionally and voluntarily shelters another person who is in his custody who has committed a crime from being apprehended or to enable him escape. It must be shown that active assistance was given before a person is convicted as an accessory after the fact. Mere sympathy is not enough.

(b) Parties To Offences In Tanzania

The law relating to parties of offences in Tanzania is not the same as that in England. In Tanzania there is no distinction between accessory before the fact and the principal offenders in the first degree and second degree. In Tanzania there is only two categories of parties to offences: ***Principal offenders and accessory after the fact.***

i. Principal offenders

According to section 22 of the Penal Code, if the offence is committed each of the following persons may be deemed to have taken part in committing such offence:

- A person who actually does the act or make the omission,
- A person who does or omit to do any act for the purpose of enabling or aiding another person to commit the offence,

- A person who aids or abets another person to commit the offence
- A person who counsel or procure another person to commit the offence.

Illustration of section 22 TPC

Suppose **A** persuades **B** to murder **C**

C knowing of the plot gives **B** a gun

D, who also knows of the plan, drives **B** to **X**'s house

Whilst **D** keeps watch outside **B** shoots and kills **X**

From the above illustration;

A falls under section 22(d) TPC

B falls under section 22(a) TPC

C and **D** fall under section 22(b) or (c) TPC

From the above, it is quite possible that a person may be convicted with an offence although he did not perform the actus reus, which constitutes the offence.

Furthermore, we find that a person who participate in the commission of an offence under section 22(d) PC he may either be charged with the commission of an offence, or with counseling or procuring its commission.

When a person is convicted for counseling or procuring the commission of an offence, he will face the same consequences as if he had been convicted for committing the offence.

If the person procures another person to do or omit to do any act, and that person does such act or make such omission, then the person who so procures, will be responsible as if he had done it or made the omission himself.

When two or more persons are jointly charged with the offence and it is impossible to ascertain which particular one committed the offence, then all of them must be acquitted, unless there be established on the part of the accused person common intention to commit the offence charged.

Mere presence at the scene of crime is not itself an offence in the case of **Damiano Petro And Jackson Abraham v. R. [1980] T.L.R 260**, the issue was whether the presence of the second appellant at the scene of the crime, and of flight with the principal and advice the principal to discard the weapon were sufficient to constitute him an aider or abettor.

According to the evidence given before the court is that the first accused was seen with the knife, which was used to murder the deceased. The second accused was seen in the company of the first accused. When spotted, the second accused and first accused throw the knife away.

As pointed above are these acts sufficient evidence of aiding and abetting by the second accused?

The court declined to accept this as sufficient.

The court said mere presence at the scene of crime is not sufficient/enough to constitute a person an aider and abettor; the person must also participate in the crime to some extent.

To constitute an aider or abettor some active steps must be taken by words or actions with the intention to instigate the principal(s). It is not criminal offence to standby, a mere passive spectator of a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had power to do so or at least to express his dissent, might under some circumstances afford cogent evidence upon which a court would be justified in finding that he willfully encouraged and so aided and abetted the person to commit the offence.

In the case of **Jackson Mwakatoka and Two Others v. R. [1990] T.L.R 17**, the three appellants were convicted for murder. In a trial for murder caused during a fight, the trial judge found that the appellant were guilty of murder on the evidence that the first appellant was identified as being present when the second and third appellants attacked the deceased on the fateful night and thus participate in murder under the doctrine of common intention.

Mere presence of the first appellant at the scene of the crime was not sufficient to invoke the doctrine of common intention and implicate him for murder.

If it is established that the accused participated in the commission of an offence, the court will convict all of them for committing the offence. In the case of **George Walter and Two Others v. R. [1980] T.L.R 313**, the appellants were convicted: two of them for forgery and the third of attempting to obtain money by false pretences.

The first and second accuseds were both employed by Oyster Bay hotel, the former was a storekeeper and the later as a cook. The third accused was a fishmonger who used to supply the hotel with fish. On the material day, the General Manager (GM) of the hotel while looking out of the window of his room in the hotel, notice that the accused were taking a long time in weighing a basket of lobsters brought by the third accused. The weighing was taking place outside the store, which was visible from his point of observation. He went to the spot to investigate and found that the weighing of the lobsters shown on the scale was 18^{1/2} KGS whereas a receipt voucher written and signed by the second accused gave the weight of the lobsters as 25KGS. The lobsters were weighed again in his presence and that of his wife and it was confirmed that they weighed only 18^{1/2} KGS. By the time the lobsters were weighed again the third accused had already taken the receipt voucher to the cashier and was told to come for payment on the morrow.

The magistrate convicted the first and second accused of the first count i.e. forgery and acquitted them of the second count. The third accused was convicted of the second count i.e. attempting to obtain money by false pretences and acquitted him of the first count. On appeal:

The High Court found that the first and second accused were also guilty of the second count, given the fact that they conspired with the third accused to rob their employer, and possibly instigated the offence.

From the fact given during the trial, it is possible that all three accused were deliberately trying to defraud the hotel, and as such the magistrate should have convicted them all on both counts as charged.

Thus as provided by section 22 PC where conspiracy to defraud is proved, all parties concerned should be convicted.

ii. Common Intention by Joint Offenders

According to section 23 PC for persons to be charged as joint offenders:

- There must be two or more persons
- They have to form a common intention to prosecute an unlawful purpose
- Such unlawful purpose must be committed
- Such commission must be a probable consequence of the prosecution of their unlawful purpose.

To fulfill the requirements of this section, it is not necessary that there should be an agreement among the parties prior to the commission of the offence. In the case of **Mathias Mhenyi and Another v. R. [1980] T.L.R 290**, the appellants were convicted of murder. The first appellant enlisted the second appellant in assaulting the deceased with whom he suspected of having an affair with his former concubine. On the material date the second appellant held the deceased's hand to prevent the deceased from fleeing and from defending himself against the assault. On appeal to the Court of Appeal;

The court found the second appellant principal offender in that he was an active participant in the vicious assault of the deceased. By holding the deceased's hand not only made it impossible for the deceased to flee from his assailant but also to ensure that the first appellant in carrying out his evil deed would not meet no resistance from his victim.

Thus where a person is killed in the prosecution of a common unlawful purpose and the death was a probable consequence of that common purpose, each party to the killing is guilty of the murder. In the case of **Msengi Mkumbo v. R. (1955) E.A.C.A 500**, the two appellants went to a maize

shamba to break and remove maize cobs. They were armed with sticks. The deceased surprised them. The second appellant threw a stick not very heavy one to the deceased and thereby caused his death. Both appellants were convicted of murder. On appeal against the conviction the court held that:

The two accused being in the shamba with intent to commit the felony of theft, they both being armed with sticks showed that they were prepared to offer violence in pursuit of their common intention and as death resulted from the act of one of them, the element of malice aforethought necessary to constitute murder has been established [S.200 (1) PC]

In another case of **Mughuira Bwaya and Another v. R. (1943) 10 E.A.C.A 105**, nine appellants formed a common intention during famine for burgling a house and carried out this plan. During burglary one of the appellants who alone was armed, speared and killed the owner of the burgled house. The appellants denied any intention of murder. They were convicted of murder. On appeal against the conviction;

The court said that even though one member of a party i.e. the first appellant was armed, the enterprise of burglary was unlawful and resistance by the owner was a probable consequence and the overcoming of such resistance by violence if necessary by burglars would probably be resorted to, were sufficient factor to bring all the accused within the doctrine of common intention.

In **Shene Kimboka v. R. (1968) H.C.D No.52**, the five accused were convicted of two counts of robbery and malicious damage to property. A tax driver had taken a passenger to a certain home let where he waited while the passenger went to his house for money to pay the fare. When the passenger returned a group of persons including the five accused had gathered about the car. They questioned the driver and the passenger, indicating that they suspected them of being thieves. Dissatisfied, they set upon the pair, during the struggle, the two were injured and property and money were stolen from them. It is not clear that any of the five stole any of the valuables. The court held that;

Clearly, the accused participated in the assault. Conviction entered accordingly.

However, although the accused "shared a common intention to prosecute an unlawful purpose namely, the beating of the so called thieves" it is not clear that they themselves committed any robbery.

In another case of **Jumanne Salum Pazi v. R. [1981] T.L.R 246**, the appellant was jointly charged with another person, the first accused with unlawful possession of government trophy. On the day in question he was traveling to DSM. He then directed the bus to the appellant's home to pick some bags of rice, from there to be transported to DSM. On arriving at the appellant's home he informed the appellant, whose one leg was lame, that he has brought the bus. Then he (the first accused) and the turn boys loaded three bags of rice on the bus and just as they were leaving the appellant asked the first accused to pay Tshs 5 loading charges to the turn boys. At some point on the way, the bus was stopped and upon inspecting the three bags were found to contain not only rice but also elephant tusks—thirteen in all.

On being asked, the first accused claimed that the three bags belonged to the appellant who requested him to convey them to DSM. In his defense the appellant denied the charge.

The issue here is whether there was joint possession of the tusks by the accused persons; on this issue the court found that,

- 1) *The first accused led the bus to the appellant's home and dully informed him that he had brought the bus. This goes to suggest that the appellant had an interest in the matter. I.e. if the first accused merely brought the bus there to collect his own property, that is, the three bags, then why should he find it necessary to inform the appellant that he had brought the bus?*
- 2) *After the bus had arrived at the appellant's home, the appellant had a conversation with the turn boys of the bus after which the turn boys proceeded to load the three bags on the bus. This*

shows that the appellant was a person who had an interest in the bus coming to his home and taking away the bags. Because if the bus merely came to collect the property of the first accused, why should he (the appellant) go to talk to the turn boys on this business which didn't concern him.

- 3) *After the bags were loaded on the bus and the bus was leaving, the appellant asked the first accuse to pay Tshs.5 to the turn boys as loading charges. If the appellant had no interest in the whole business and had nothing to do with the bags, then why should he take the trouble and pain of seeking to ensure that the turn boy was accordingly paid for the services he rendered in loading those bags on the bus?*

From the above observations, the court came to the conclusion that the appellant had an interest in the bags in question and took part in making arrangement to transport them to DSM; as such he was a joint possessor of the bags. The appellant as a joint possessor, he was a principal to the commission of the offence.

It is not always that common intention is formed from the outset. It may be formed at the spur of the moment. This is common in cases of thief beating or drives in cases where a pedestrian has been knocked down. In **Tabulayenka Kirya v. R. (1943) 10 E.A.C.A 51**, it was said that, to constitute common intention to prosecute an unlawful purpose within the meaning of section 22 UPC (section 23TPC) e.g. to beat a so called thief there being no suggestion that the violence used was necessary to effect the thief's arrest, it is not necessary that there should have been any concerted agreement between the accused prior to the attack of the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the assault.

We can see therefore that, when a person is jointly charged with another, he can only excuse himself from criminal responsibility for the offence if has either;

- Disassociate himself from such common purpose e.g. by taking steps to prevent it or reporting the matter to the authority concerned, or
- If it can be shown that the offence committed was not a probable consequence to the one intended.

NB it is not sufficient for joint responsibility for an offence under section 23PC that the offence actually committed was likely to occur as a result of the several persons acting together, but the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention.

iii. Counseling Another to Commit an Offence

A counselor is a person who advises, encourages or persuades another person to commit an offence. According to section 24 PC for the offence of counseling to be committed:

- A person must counsel another person to commit an offence,
- The offence has to be committed by the person, to whom counseling was given,
- It is immaterial whether the offence committed was the same or a different one as that counseled,
- It is immaterial also whether the offence was committed in the same manner as counseled or not,
- The offence committed must be a probable consequence of carrying out the counsel.

Illustrations:

A counsels B to steal X's motorcycle. B instead of stealing it set it on fire. The act of setting it on fire is not a probable consequence of the counseling.

If B afraid of stealing the motorcycle himself employs C to steal it, it will be no defense to A that he intended B to do the act himself.

If B breaks X's house to get the motorcycle, both B and C will be responsible for the burglary since burglary was a probable consequence of the act of stealing the motorcycle.

In the case of **R. v. Biguli S/O Lwemara (1947) 14 E.A.C.A 115**, the second appellant was charged with counseling the first appellant to set fire to the deceased's house, deceased died in the fire. The second appellant advised the first accused to burn the house of the deceased because he possessed the knowledge that it was the deceased's wife who was responsible for the death by witchcraft of some of the first appellant's children.

On appeal against the conviction for murder it was argued that the trial judge misdirected himself when he held that the evidence established that the second appellant had given the first appellant advice to destroy deceased's life.

The court held that, there was no evidence that the counseling of the first appellant went further than an injunction to burn the deceased's house.

Whether the mere injunction to commit arson not necessary at night places the second appellant in a position where he can rightly be convicted for murder.

Under section 24 PC where one person counsels another to commit an offence, the offence actual committed must be a probable consequence of carrying out the counsel. In this case it could not be reasonably held that loss of human life is a probable consequence of arson per se.

Everything will depend upon the circumstances in which the crime is committed. In this case the first appellant committed the crime at night and without warning the deceased and others who were sleeping in the hut, but there is no evidence that those were the circumstances in which the second appellant counseled the first appellant to commit the crime.

Where the person counsels another person to commit an offence it is immaterial whether the offence committed in the same way as counseled or not.

In the case of **Choitram v. R. (1952) 26 K.L.R 93**, the accused had made a statement to the police that he had handed a diamond necklace to an agent in Mombasa with instruction to have the diamonds removed from it by a jeweler and to bring the diamonds to him, which had been done.

Accused counseled the agent to confirm that statement which was false. The agent made two statements to the police:

- 1) That he had never received a necklace from the accused
- 2) That he had taken the accused to a jeweler whose assistant had removed the diamonds and handed them to the accused. The accused was convicted of counseling another to give false statement to the police.

On appeal against the conviction, the court said that where the offence, which has been advised, is committed and the mode of committing the offence differs as in this case but slightly from the mode advised by the appellant, he cannot in law be excused from liability for it.

iv. Accessory After The Fact

Section 387 PC define accessories after the fact as a person who receives or assists another who is to his knowledge, guilty of an offence, in order to enable him to escape punishment. Before a person can be convicted of an accessory after the fact the prosecution must prove the following:

- The person has committed an offence,
- Another person knew or believed that the first person had committed it, even though he may not know the actual identity of the first person,
- That the second person did an act with intent to impede the apprehension or prosecution of the first person and
- The act was done without lawful authority or reasonable excuse.

In the case of **Andrea Nicodemo v. R. (1969) H.C.D NO.25**, the two accused were charged with theft. There was evidence that the first accused had stolen a bicycle and had taken it to the house of the second accused. The second accused kept it for several days and assisted the first accused in removing the saddle. The police then recovered the bicycle. The trial magistrate found that the

second accused knew that the bicycle had been stolen and convicted him of being an accessory after the fact.

The court on appeal held that, to be convicted as an accessory after the fact, an accused not only must know or have reason to know about the offence, but must take steps for the purpose of enabling the offender to escape punishment. There was no evidence that the second appellant took such steps.

A person may be an accessory after the fact if for example to murder he offers shelter to the murderer with the intention of enabling him to escape punishment. Similarly if a person aids an offender to escape or if he aids an offender by way of destroying incriminating evidence.

Persons who help hide the body of a person knowing that person to have been murdered are accessories after the fact to the murder, whereas a natural and probable consequence of their acts it must be likely that the authorities would trace the murderer and the result of that might be that he would escape punishment.

But where a person buries a dead body in fear of his own safety he cannot be convicted as an accessory after the fact to the murder or manslaughter.

A wife cannot be an accessory after the fact for receiving or assisting her husband who is guilty in order to enable him to escape punishment. Furthermore, the wife cannot be an accessory after the fact for receiving and assisting another person who is guilty of an offence in the presence of her husband and for which her husband is involved. Likewise the husband cannot be an accessory after the fact for receiving and assisting his wife in order to enable her escape punishment.

ATTEMPTS AND CONSPIRACIES

Attempts

These are considered to be inchoate offences in the sense that they are not complete. We see that the law does not punish the intent alone, ordinarily there must be some criminal harm accomplished before liability will be imposed.

Section 380 of the Penal Code is concerned with offences where people require the formation of intention, the preparation and the execution of the offence. In preparation we have remote and proximate acts of preparation.

Remote acts—actus reus is not complete, hence act not punishable.

Proximate—actus reus is complete hence act punishable for it is an attempt.

Mens rea

In attempt it is mens rea, which the law regards as of primary importance and desire to prevent. Where the law prohibits certain consequences like death or injury to person then in order to be convicted of an attempt, the accused person must have foreseen that the consequence were likely to occur and desired that they should or conduct himself in the prohibited manner. E.g. crime of arson, the accused must have intended to set fire to the house; foreseen burning was a likely consequence and desired that consequence.

Actus Reus

As already stated above, mere intention to commit an offence doesn't constitute an attempt. An attempt to commit a crime is an act done with intent to commit the crime and forming part of a series of acts, which should constitute its actual commission if it were not interrupted.

To constitute an attempt, the act done must be immediately and not merely remotely connected with the commission of the offence. In other words, it must be something more than mere

preparation for the commission of the offence. It must be proved that the accused began to put his intention into execution by means adapted to its fulfillment and that he manifested his intention by an overt act.

In **R. v. Robinson [1915] 2 KB 342**, the appellant was charged with an attempt to obtain money by false pretences. He insured his jewelries after concealing jewelries and shouted for help when rescued and when jewelries were found in his shop he admitted that he wanted to obtain money by false pretences from the insurance company.

On appeal against conviction it was held that what he had done was merely preparation for the commission of the crime not a step towards the commission of it. However the court held that (obiter) a claim for the money from the insurance company or a communication to them of the pretended burglary would have been sufficient to make him guilty of attempt.

Attempt Theft

In cases of theft, there are no specific clauses of any attempt, and here asportation is very important, the thing must move from one place to another. In **R. v. Rino & Others (1892) Cox 17 c.c. 491**, it was held that in order to prove that an attempt to commit an offence has been committed it is not necessary to prove that had the attempt not been frustrated the offence could have been committed?

In the case of **Ambokile Mwamalongo v. R. (1967) H.C.D No.275**, the accused was convicted of stealing from the person of another. He was pulling a purse out of the pocket of another person when a sudden movement by the intended victim prevented the accused from obtaining the purse. However, the purse was far enough out of the intended victim's pocket so that when he sat down immediately thereafter his purse fell to the floor. On appeal;

There was enough asportation and the accused was guilty of attempted pick pocketing.

In **Kombo Abdaraman v. R. [1980] T.L.R 90**, the appellant was convicted of attempted pick pocketing, the appellant with another person pushed one Zefania Mmasi while the appellant unsuccessfully tried to force his hands into Zefania's pockets and both fled when Zefania become inquisitive. The charge cited section 380 of the Penal Code and no more. On appeal:

In order to constitute an attempt the act of the accused must be such that if not interrupted they would end in the commission of a particular offence. When the appellant tried to force his hands into the complainant's pocket, he had clearly put his intention into execution by means adapted to its fulfillment.

Attempted Murder

In murder there is specific provision—section 211 of the Penal Code. On a charge of attempted murder it is not enough to show an intention to cause grievous harm. It must be proved that there was intent to kill. In **R. v. Christopher Ngambilo (1967) H.C.D No.388**, the accused was charged with attempted murder of one William. He came to William's house and while aiming a gun in a general direction of William's knee he said, "Today you will die". He then shot William in the knee. The court said.

Where a charge is murder, the intention to cause grievous bodily harm will suffice to establish malice aforethought, but where the charge is attempted murder "the actual intention to kill must be proved".

In **R. v. Rukondo Kamaro (1968) H.C.D No.48**, the accused was charged with attempted murder. He and several others shot a shower of arrows at the complaint. They shot from about 40 paces away and one of the arrows hit complainant in the buttocks causing a wound. On appeal:

In view of the distance from which the arrows were shot and the other circumstances of the case, accused was guilty of the offence of an act intended to cause grievous harm, rather than attempted murder.

Attempted Rape

The rule is: on a charge of rape, it must be shown not only that the accused intended to gratify his passion but that he intended to do so at all costs and not withstanding any resistance on the part of a woman. —S.132 PC.

In the case of **Mulira v. R. 20 E.A.C.A 223** the appellant was convicted of attempted rape of his employer's wife. The appellant entered her bedroom, switched off the light, put the hand over her mouth and with the other hand removed his shorts and lifted her pet coat. The woman screamed for help and when a torch was shone in the room he ran away. On appeal

The conviction was set aside and substituted an assault with intent to ravish because it had not been proved beyond reasonable doubt that the accused intended to rape despite any resistance on the part of the woman.

In **Omar v. R. (1971) H.C.D No.362**, the appellant was convicted of attempted rape. He grabbed the complainant, threw her down, tore her underpants and laid on her. The complainant stated however that he didn't unbutton his trousers in preparation of penetrating her private parts. On appeal it was held that:

From the proven facts it is quite clear that the appellant's acts didn't constitute an attempt to rape the complainant. The appellant didn't undress, therefore appellant was found guilty of indecently "assaulting the complainant".

From the above cases we see that the courts were very strict in convicting an accused person of attempted rape. The rule laid down in the **Mulira** case was that mere preparation was not enough, the act of the accused must be proximate. The rule was known as **the pants down rule**, in that the accused must have undressed, if not, the accused was only guilty of indecent assault.

In the case of **R. v. Andrew Avarity 1973 L.R.T N.92**, **Mfalila, Ag. J.** (As he then was) dealt at length with the question of attempted rape. The facts of this case were that, on 13/06/72 the complainant one Gaudencia d/o Mwesengera was walking home from a shopping expedition. This was at night, around 10.00 pm. The path she took passes through mango trees and as she was thus walking the accused came upon her from behind, he got hold of her and started stripping off her clothes. The complainant shouted for help. People appeared at the scene, thereupon the accused ran away. But he was arrested two days later and charged with attempted rape. He was convicted of indecent assault.

On revision Mfalila dealt at length with previous cases dealing with attempted rape. He found that in those cases judges concerned themselves with proximate and remote acts of the accused. He further stated that had the judges followed the principles laid down under section 380 of the Penal Code leaving aside the concepts of preparation and proximity, the result would have been different.

He observed that in the cases of Haruna and Omar, the intention to rape was established and in both cases the accused had started putting their intentions into execution by overt acts clearly adapted to their fulfillment, namely, the holding of the complainants, stripping their clothes including underclothes and proceeding to lie on them.

Furthermore the judge went on to look at the expectation of an ordinary member of the society. He used the example from the case of Haruna that an ordinary member of the society would unhesitatingly say that the accused was guilty of attempted rape. He will say that having dragged the complainant to the ditch, placed his hand over her mouth and pulled down her underclothes while lying on top of her but stopped short and fled when he was observed, the accused clearly had attempted rape.

The judge after discussing past cases, he confined himself in the provisions of section 380 of the Penal Code.

- Whether the accused intended to rape the complainant
- Whether he had started putting his intention into execution by some overt acts adapted to its fulfillment.

- Whether the overt acts had been established.
- a. With regard to intention the accused himself admitted as much in his own words. He certainly began to put his intention into execution when he got hold of the complainant and started stripping her clothes.
- b. To constitute attempted rape there must be evidence of an attempt to have sexual connections with a woman notwithstanding her resistance and execution of his intention by overt acts clearly adapted to its fulfillment.
- c. Where existence of overt acts is established, it is not required to classify further the overt acts into preparatory and non-preparatory, proximate and remote.
- d. It is immaterial, except as regard sentence that the accused desisted from his own motive or otherwise from the further execution of his intention.
- e. For any legal system to be effective, the concept of rights and wrongs must not be divorced from the expectation of the ordinary member of the society in which it operates.

Impossibility

In a literal sense, there is no such thing as “legal impossibility” because any behaviour and any conduct can be made criminal. What is meant is the distinction between conduct, which has been forbidden in penal law, and conduct, which is legal. Legal impossibility is therefore an awkward expression of the principle of legality. In sum:

Unless the intended end is a legally prescribed harm, causing it is not criminal, hence any conduct falling short of that is not a criminal attempt i.e. the principle of legality.

If the intended end is a legally prescribed harm, the failure to effect it because of the lack of factual condition necessary to its occurrence is no defense i.e. factual impossibility.

Section 380 of the Penal Code expressly provides that it is immaterial that by reasons of circumstances not known to the offender it is impossible in fact to commit the offence. Thus it is clear that impossibility is not a defense to a charge for attempt to commit an offence.

Furthermore, the use of ineffective means of carrying out a crime doesn't negative the conduct of the person using those means from amounting to an attempt to commit the crime. Example, where the intention is to blow a safe, the use of weak explosives for that purpose is no defense.

It is also clear that where the sole intention of the accused is to commit a crime, the fact that there circumstances unknown to him which render the commission of the crime impossible doesn't negative the attempt. E.g. the taking of something by a pregnant woman with intent to procure her own abortion of something, which she believed to be a “noxious thing” but which in fact, is harmless.

Another situation is where the offender's sole intention was to do an act not in itself criminal but where he believes that the particular circumstances he would be involved in criminal conduct. E.g. A man attempt to have sexual intercourse with a girl who is in fact over eighteen but who he believes to be under eighteen.

Why conviction for an attempt?

The answer is that he stands in need of a punishment or correction because he has shown that although he knows that legally he ought not to do this thing, he is prepared to defy the law in order to pursue his own self-ends. He thus shows himself to be a dangerous man, prepared to break the law when it suits him.

In the case of **Edward Michael v. R. (1948) 1 T.L.R 308**, the appellant was charged with attempting to sell diamonds. He pleaded guilty to the charge. The objects turned out not to be diamonds but only pieces of glass.

The issue on appeal was whether a plea of guilty was rightly entered in view that the ‘diamonds’, which the appellant had admittedly attempted to sell, were not diamonds at all. The court held:

- i) It is immaterial that by reason of circumstances not known to the offender it is impossible, in fact to commit the offence.
- ii) We must look at the intention of the offender and to what he thinks he is doing when he began to carry it out. In this case the appellant must be held to have committed the offence because he intended without license or authority to sell diamonds and believed that the objects he was trying to sell were in fact diamonds.

It is not the intention in itself, which constitute the offence there, must of course in addition to some overt act manifesting the intention. But where there is a clear intention to commit an offence and an overt act putting that intention into execution and belief that what is being done is something which is an offence, then that overt act undoubtedly constitute an attempt to commit that offence, although for some reasons outside the doer's knowledge the offence attempted can't actually be committed.

Some Specific Offences of Attempt

- 1) Section 45—attempted mutiny
- 2) Section 132—attempted rape
- 3) Section 150—attempt to procure abortion
- 4) Section 155—attempt to commit unnatural offence
- 5) Section 158—attempt to commit incest
- 6) Section 211—attempted murder
- 7) Section 217—attempted suicide
- 8) Section 226—attempt to injure by explosives
- 9) Section 287—attempted robbery
- 10) Section 290—attempted extortion
- 11) Section 320—attempted arson
- 12) Section 322—attempting setting fire on crops
- 14) Section 324—attempt to cast away vessels
- 15) Section 327—attempt to destroy by explosives
- 16) Section 382—punishment generally for attempts.

Conspiracies

Conspiracy is an agreement between two or more people to do unlawful act or to do a lawful act by unlawful means.

Ingredients of conspiracy:

- There must be more than two or more persons.
- There must be an agreement, which is unlawful.
- There must be a particular thing that is aimed at.

The actus reus of conspiracy is “agreement” mere knowledge of the plan is not sufficient nor the mere intention to achieve unlawful object. To be conspiracy more than one person must agree, thus husband and wife for this purpose are no longer one person. —S.386 PC.

Conspiracy may be completed even if no further act is done in pursuance of the agreement and provided that the stage of negotiation has been passed, even though the parties have not yet settled the means to be employed.

To constitute conspiracy there need not be direct communication between the members nor there to be proved that the accused was present at its origin. The conspirators may join conspiracy at various times; any one may not know the full extent of the scheme to which he attaches himself. It is sufficient to prove that each conspirator knows that there is in existence or coming into existence a scheme, which goes beyond the illegal acts, which he agrees to do, and attaches himself to the scheme. Quite slight participation in the scheme will suffice.

Conspiracy to commit an unlawful acts even an offence of strict liability requires mens rea. The prosecution must prove not only an agreement to amount to conspiracy between the conspirators to

carry out an unlawful purpose but also an intention in the mind of the individual conspirator to carry out the unlawful purpose.

Since there is no agreement of one person alone, if one conspirator is acquitted then the other shall be acquitted even if he pleaded guilty.

One person may be convicted alone of conspiracy with persons who are unknown or not in the court, or dead or whose trial has been postponed. This is because, it is very difficult sometimes to get all the people who have conspired, and sometimes it is only possible to have only one person alone, provided that there is enough evidence of “unknown other or others”.

In the case of **R. v. Karia 16 E.A.C.A 116**, the appellants were convicted for conspiracy to export diamonds from Tanzania, and individually for being in possession of diamonds. On appeal against the conviction the court confirmed the conviction;

“Conspirators do not normally meet together and execute a deed setting out the details of their common unlawful purpose. It is a common place to say that an agreement to conspire may be deduced from any acts with the presumption of a common plan. That is why the prosecution is bound to call all the material witnesses before the court even though they give inconsistent accounts, in order that the whole of the facts may be before the court.”

In **Ogodia & Erima v. Uganda [1967] E.A 137**, the two appellants were convicted of conspiracy, the charge read as: that on Feb.24, 1966 at Entebbe they had conspired with other persons unknown to effect unlawful purpose namely to set up a road block and arrest the then prime minister Milton Obote. The court said

Evidence was sufficient to justify the inference that the first appellant conspired with a person or persons unknown to arrange for roadblock to arrest the Prime Minister.

OFFENCES AGAINST MORALITY

Rape

Section 130(1) of the Penal Code creates the offence of rape, thus it is an offence for a male person to rape a girl or a woman.

Section 130(2) of the Penal Code provides circumstances where a person can be said to have committed rape after having sexual intercourse with a woman or a girl.

- If a male person carnally knows a woman not being his wife or if she is his wife, they have separated and without her consent.
- If the woman consented to the sexual intercourse with that man and the consent was obtained by using force, threats or intimidation or he put her in fear of hurt or while she was in unlawful detention.
- If the woman consented, but the consent was obtained when she was of unsound mind due to intoxication induced by any drug or matter or other thing, and administered to her by the man or other person. However if it is proved that there was prior consent between the two, then the man will not be liable.
- When the woman gives the consent when the man knows that he is not her husband, but the consent of the woman was given because she has been made to believe that she is legally married to the man.

- If he has sexual intercourse with a girl who is under eighteen years of age. Here consent of a girl is immaterial. However the man will not be criminally liable if the woman is his wife and is fifteen or more years of age and they are not separated.

The Sexual Offences Special Provision Act No.4/98 adds a new subsection that is section 130(3) under which the categories of men who are deemed to commit rape if they have sexual intercourse with a woman or a girl under the following circumstances:

If a person takes advantage of his position to have sexual intercourse with a woman or a girl,

Being a person in a position

Being on the management or on the staff of a remand home, other place of custody or a woman's or children's institution,

Being a traditional healer,

Being a religious leader.

The issue of traditional healer taking advantage of their position to have sexual intercourse with their female patients was discussed in the case of **Kabulungu Juma v. R. [1991] T.L.R 154**, the appellant a medicine man was convicted of the offence of rape. However it was established that the woman voluntarily consented to the intercourse believing that it was part of her treatment by the appellant of her ailment. On appeal:

A woman who is enslaved by strange ideas and beliefs allows a medicine man to have intercourse with her in the hope that the sexual act was the medicine man's way of examining her pregnancy cannot be heard to complain of rape.

Nb this case was decided before the enactment of Act No.4/98. Now the position is clear, if a medicine man takes advantage of his position and have sexual intercourse with his female patients he will be committing rape, because the woman consented to sexual intercourse believing that it is the way the medicine man's treatment.

Another new feature of this Act is that it recognizes separations arranged by the family or clan members.

Ingredients of Rape

Having Unlawful Carnal Knowledge of a Woman or a Girl.

Unlawful carnal knowledge has a religious and historical background. It is unlawful when it takes place outside the marriage bonds. In the case of **R. v. CHAPMAN [1959] 1 QB 100**, the accused was convicted for having unlawful sexual intercourse with a girl aged 16 years old. This case said that unlawful sexual intercourse means illicitly sexual intercourse i.e. sexual intercourse outside the bonds of marriage.

As a general rule a husband can't rape his wife. But there are exceptions these are:

- i) Where there is a separation then if a husband has sexual intercourse with her he may be convicted of rape. The law recognizes even separation arranged by the family or clan members. —s.130 (5) of the Penal Code.
- ii) Another exception is where there is a decree nisi of divorce.

In the case of **R. v. O'brien [1974] 3 All E.R 663**, the court said that a decree nisi effectively terminate a marriage and thereupon the consent to marital intercourse impliedly given by a wife at the time of the marriage was revoked. It follow that the accused had committed the offence of rape if he had sexual intercourse with the wife after the date of the decree nisi without her consent.

For the purpose of proving rape, it is not necessary to prove the completion of the act by the emission of semen. Intercourse is deemed to be complete upon proved penetration only. Even slightest penetration is sufficient.

Furthermore, it is not necessary to adduce evidence of physical injuries to the body for the purpose of showing that sexual intercourse took place without consent. —s.130 (4) (a) (b) of Act No.4/98 of the Penal Code. It is not necessary also to prove that the hymen was ruptured.

One can see that, penetration is an important ingredient of the commission of rape. In the case of **Fundi Omari Madege v. R. (1970) H.C.D No.98**, the accused was convicted of rape. Complainant stated that she was raped but no evidence as to what she meant. She had said “*the accused threw me to the ground and threatened to kill me if I tried to raise an alarm, I was not wearing underwear*”. The court said that:

In a case of rape there must be evidence of penetration of penis into the vagina though emission of seeds is not necessary. The term rape as used by the complainant may amount to penetration or not.

Without Her Consent

Lack of consent is one of the most important ingredients of the offence of rape. The essence of rape is the absence of real consent on the part of the woman or girl. Therefore in a situation where the woman consents to sexual intercourse what arises therefore cannot amount to rape.

Earlier under Common Law, apart from lack of consent, there should be force or fraud. The current position is the emphasis on only one question; was the woman at the time of sexual intercourse consented to it?

It is not necessary for the prosecution to prove that what might otherwise appeared to have been consented was in reality merely submission induced by force, fear or fraud.

The distinction between consent and submission is still controversial in law, because a person submits where she/he yield or gives in to some pressure of some kind.

E.g.(1) **A**, a woman with **F** a fiancée insists to have sex with **A**. **F** threatens that if this transaction does not take place then engagement is broken, as a result **A** submits to have sex with **F**.

E.g. (2) **A** held down by **F**. **F** holds the knife upon her throat, threatening to kill her if she does not submit to sex.

In the first example there was no fear of her life while in the second there is fear of life. If the woman yields because the man promised to marry her that is not rape however there was submission.

The distinction between consent and submission is very controversial so judges/magistrates has to take each case so far as it is concerned.

In most cases, consent is one of the major defenses where a person charged with rape. If the accused can prove that there was consent, then there is no rape.

Confusion may cloud the whole concept of consent because different societies react differently in certain issues, in some societies there is a very strong belief that a woman will never say “yes” to sexual advances even if she meant it.

Consent Obtained by Force or Fear of Bodily Harm

If a woman gives in under fear or coercion, this does not amount to consent. In the case of **Mtunduchile and Others v. R. (1970) H.C.D No. 304**, the three appellants were convicted of burglary and rape. According to the evidence given by a woman and a daughter, the appellants broke into their house, stole some articles and demanded to have sexual intercourse with the daughter who was in an advanced stage of pregnancy. The mother fearing for the life of the daughter offered herself instead whereupon each of the appellants had a sexual intercourse with her in turn. On the appeal:

The woman volunteered as a substitute for her daughter. Such consent is initiated by fears of her daughter’s health. Consent obtained by fear of bodily harm is equal to rape.

Consent Obtained by Means of False Representation as to the Nature of the Act

This ingredient is relevant in situations involving young girls who are incapable of forming an opinion on the nature of the act being performed or intended to be performed. In the case of **R. v. Williams [1923] 1 K.B 340**, the appellant was engaged to give lessons in singing and voice production to a girl of sixteen years of age. He had a sexual intercourse under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under belief, willfully and fraudulently induced by the appellant that she was medically and surgically treated by the appellant and not with the intention that she should have sexual intercourse with her. On appeal:

Convicted for rape. A consent or submission obtained by fraud, it would not be a defense.

Personating as a Husband

The man who induces a woman to have sexual intercourse with him by personating her husband commits rape. This is so because where a husband is personated there is also an error as to the nature of the transaction because this is no longer a marital intercourse but adultery. Sexual intercourse is a transaction in which personality is of supreme importance because consent to have sexual intercourse with say **A** is not to have sexual intercourse with **B**. Therefore naturally, when a woman consented to have sex with her husband, she was not ready to have sex with the personator. In the case of **R. v. Dee (1884) 15 Cox 579**, a married woman consented to have connection with the accused under the impression that he was her husband. On appeal the court held that:

The accused was guilty of rape.

Rape Committed by Juvenile

Section 15(1) TPC a person under ten years is not criminally responsible for any act or omission.

Section 15(2) TPC under twelve years is not criminal responsible until it is proved that he had capacity to know that he ought not to do the act or make the omission.

Section 15(3) TPC a male person under twelve years is presumed to be incapable of having sexual intercourse.

Corroboration in Rape

To corroborate means to confirm or give support to a statement, belief or theory. It has for sometimes been suggested that the victim of rape—complainant—on the ground of experience is regarded as an accomplice and therefore as a matter of practice her evidence needs corroboration by some other evidence.

In the case of **Njuguna Wanguriumu v. R. 20 E.A.C.A 196**, the court said that:

Whilst it is not a rule of law that an accused charged with rape cannot be convicted on the uncorroborated evidence of the prosecutrix, it has been the practice of the Eastern Africa Court of Appeal to look for and require corroboration in sexual offences.

In **Abbas Ramadhani v. R. (1969) H.C.D No.226**, it was held that:

The requirement of corroboration is not a rule of law but of practice though it has been elevated to almost a rule of law but not mandatory, nor its absence fatal to conviction in the absence of corroboration.

It is therefore necessary to examine evidence in this case very careful;

First in order to determine whether there is corroboration,

Second even if there is no corroboration whether conviction can nonetheless be sustained.

In the case of **Shiku Salehe v. R. [1987] T.L.R 193**, the appellant was charged with and convicted of rape c/ss130 and 131 of the Penal Code. The conviction was based solely on visual identification and uncorroborated testimony of the rape victim. The issue on appeal was whether the conviction was proper. The court said:

- i. *Before basing a conviction solely on evidence of visual identification, such evidence must remove all possibilities of mistaken identity and the court must be satisfied that the evidence is watertight; since the trial magistrate considered these factors the conviction was proper.*
- ii. *In sexual offences, the court should warn itself of the dangers of acting on uncorroborated testimony of the complainant and having done so the court may convict if it is satisfied that the victim's evidence is true.*

The magistrate in this case gave these reasons on identifications; he noted that the victim (**PW1**):

- Knew the appellant and his colleague before the incident.
- That the appellant himself admitted this fact.
- That the victim **PW1** had been with the appellant in the pombe shop shortly before the incident.
- That it was the moonlight night.
- That she saw the rapist very closely to her as they each lay on her chest in the act of sexual intercourse.
- That she saw them for a long time while they took turns in raping her.
- That she immediately gave a description of the attire of the appellant and also gave their names.

From the above cases we find that the court may convict a person without corroboration provided that it is fully satisfied that the complainant is telling nothing but the truth, and is fully satisfied with her evidence.

Why Courts Have Been Insisting on Corroboration?

- i) It is to avoid the danger of a woman telling false accusation for sexual assault even where there has been none.
- ii) Even where the woman has actual been raped, there is always the danger of mistaken identity as to the ravisher—poor light or fear etc.
- iii) Even where the woman had consented to sexual intercourse, she may afterwards for a variety of reasons deny consent and accuse her partner for act of rape.

As a general rule of practice, the courts require corroboration of the evidence of a single witness and where the child of tender years gives evidence. —S.127 of the Tanzania Evidence Act. (**TEA**)

However, section 127(7) **TEA** adds a new dimension on the evidence of a single witness or that of a child of tender years. *When in any criminal proceedings involving sexual offence, the only independent evidence is that of a child of tender years, or is that of the victim of the sexual offence, the court is allowed to receive such evidence.*

It is to be noted that before receiving such evidence the court is required to assess the credibility of the child or the victim as the case may be on its merits.

After assessing the credibility of the child or victim, the court may convict on this evidence even where it is not corroborated.

The court before conviction is required to satisfy itself that the child or victim is telling nothing but the truth and shall record its reasons as to why it is of the opinion that the victim or child is telling the truth.

We see therefore that the magistrate is allowed to convict on the evidence of a child or victim only after giving reasons as to why he believes that the child or victim is telling the truth, where he is in doubt then he will require some corroboration.

Punishment of Rape

Section 131(1) of the Penal Code (Act No. 4/98) provides that punishment for rape is life imprisonment.

- In any other case—not less than 30 years with corporal punishment and with fine.

- To pay compensation to the victim in respect of injuries caused to her—the amount to be fixed by the court.

Section 131(2) of the Penal Code (Act No.4/98) if the offence is committed by a boy under 18 years

If first offender—corporal punishment only

If second offender—imprisonment for twelve months with corporal punishment.

If third offender and recidivist—life imprisonment.

Section 131(3) of the Penal Code (Act No.4/98) if the offence is committed to a girl less than ten years—life imprisonment.

Section 131A creates a new offence of gang rape. Punishment for gang rape is life imprisonment—section 131A (2) Act No.4/98.

In imposing sentence, the courts apart from obeying the statutory requirements also do look at:

- The nature of the circumstances under which the offence was committed
- The age of the accused
- The character of the accused—whether first offender or not.

In the case of **Amiri Ahmed v. R. (1968) H.C.D No.329**, the accused was convicted of rape. The version of the matter offered by the accused was that, the accused and complainant a virgin of 15 years of age agreed to undress and to engage into sexual intimacies with each other, the girl saying from the start that there would be no intercourse. After sometime together, accused did in fact have sexual intercourse with the girl, apparently having to overcome some resistance on her part with force. The court on appeal said:

If the girl.... laid down any condition however foolish she was allowing any sexual intimacy at all, the breach of such condition and penetration would constitute rape, that a woman may allow some form of sexual liberty to man does not entitle that man to proceed to have sexual intercourse with her without her consent.

The court must consider the fact that the accused have been entrapped by desires, which have been inflamed by the recklessness and foolishness of the complainant. Some person may be charged of a rape but also found guilty of attempted rape or defilement or indecent assault.

In **R. v. Amiri Ali (1969) H.C.D No. 40**, accused was convicted of defilement. He was sleeping in the same room as the complainant in the middle of the night he went to her bed and without awakening her, undress her and had sexual intercourse with her not only without her consent but without her knowledge. She however awakened and raised the alarm and the accused was apprehended on the spot. On appeal;

In this case the accused had temptation thrust upon him, in that sleeping together in the same room; he was affected by the proximity and tempted by the sight and presence of the sleeping girl so near him.

In those circumstances.... a short sharp lesson to teach the accused self-control would serve a much more useful purpose than sending him to prison where he will be exposed to hardened criminals. Sentence quashed, corporal punishment imposed instead.

The accused was seventeen years old; the complainant was under twelve years. The sentence was two years imprisonment and six strokes.

Attempted Rape

Section 132(1) TPC creates the offence of attempted rape. The punishment is life imprisonment and in any other case liable to not less than thirty years with or without corporal punishment.

A person is said to attempt to commit rape if with intent he manifests his intention by:

- i. Threatening the girl or woman for sexual purpose,
- ii. Being a person of authority or influence in relation to the girl or woman.
- iii. By false representation,

iv. By personating her husband.

Section 132(3) **TPC** if the offence is committed in manner specified under (c) and (d) the accused is liable to imprisonment for life and in any other case to not less than ten years.

Defilement

Section 136(1) **TPC** which deals with defilement of girls under the age of sixteen years has been repealed. This offence is now dealt under section 130(2)(e) **TPC** Act No.4/98.

This section adds an extra element—any girl under the age of eighteen years. However, if the woman is married to the accused and they had not been separated then the offence is not committed.

What is important here is that:

- i) The woman must be under eighteen years,
- ii) The accused must have unlawful sexual intercourse with the girl,
- iii) If the woman is married to the man, then she must be fifteen years or more, and not separated from the man,
- iv) Consent is immaterial in this offence.

We find thus, that the ingredients of this offence are the same as those of rape except;

- i) The age of the complainant is material, it is important that the prosecution must prove that the girl was under eighteen years,
- ii) Consent here also is immaterial; the person charged cannot raise the defense that the girl consented to the sexual intercourse. Even if the girl consented, the person charged will be held responsible. But if the man thought that the girl was above the age of eighteen years, a defense of mistake of fact can be held

In the case of **Ally Athumani v. R. [1991] T.L.R 59**, the appellant was convicted for defilement of a girl under the age of fourteen c/s 136(1) of the Penal Code. The entire proceedings give the impression that the magistrate proceeded on the assumption that the charge was one of rape c/s 130 and 131 of the Penal Code.

Appellant in his testimony did not deny having sexual intercourse with the complainant. His defense according to him is that, that was his girl friend for a long time and that was not the first time they had gone out for sexual intercourse. During the trial the age of the girl was not ascertained. On appeal:

- i) *The trial was a confused exercise and cannot sustain the conviction entered.*
- ii) *Rape and defilement are two entirely different offences, each one having its own ingredients requiring proof.*
- iii) *While in rape consent or lack of it must be proved, to make it rape or not, in defilement it is immaterial whether the girl consented or not. In defilement there must be proof of age.*

In the case of **Thomas Emmanuel v. R. [1996] T.L.R 373**, **PW1** Farida Mohamedi was a tenant in a house where the appellant also lived. She had a two-year old daughter, Buya Sylvester. On the material day, at about 11.30HRS she was in her room. She heard her daughter Buya crying in the appellant's room. She rushed there and found the appellant lying on top of the child. He was naked. She raised an alarm and one Masunga **PW 2** was the first person to arrive at the scene. Semen looking stuff was seen on the vagina of the child and on her buttocks. The appellant was arrested and subsequently charged with and convicted of defilement.

The child was examined and **PF 3** showed “*hakuna jeraha lolote la kimwili au la sehemu za uzazi lililoonekana. Uchafu ulikutwa sehemu za kike umeonyesha mbegu za kiume*”

On appeal against the conviction and sentence it was contended that the evidence had not proven that the girl defiled, who was two years of age, had been penetrated. It was held:

- i) *The evidence adduced did not show that there had been penetration, if there had been penetration, the complainant being a very young girl, would have shown some injury. In the circumstances, therefore the full offence of defilement was not committed.*
- ii) *The evidence did however prove the offence of attempt defilement c/s 136(2) TPC.*

Defilement of Idiots and Imbecile

According to section 137 TPC:

- 1) It is an offence to have carnal knowledge with an idiot or imbecile,
- 2) In the circumstances not amounting to rape,
- 3) Knowing at the time of the commission of the offence that the woman or girl is an idiot or imbecile.

Defense: lack of knowledge at the time of commission.

Idiot: this is a private person for a company cannot be idiot. An idiot is a person who is ignorant, a person destitute of reason or intellectual powers with very limited intelligence that cannot think or behave properly or normal.

In law: is a person in whose case there exists mental defectiveness of such a degree that he is unable to guard himself against common physical dangers.

Imbecile: mental weak, physical weak, a person who though mental deficient show signs of rudimentary intelligence, a person with abnormal low intelligence.

In law: is a person in whose case there exists mental defectiveness though not amounting to idiocy is yet so pronounced that is incapable of managing himself or his affairs. Therefore when a person is destitute of strength of either body or mind is called an imbecile.

Hence: an idiot is a person who is born without mind while an imbecile is born with full mental capacity but loses that later.

In the case of **Wilson v. Commonwealth (1942)** W was fixing a flat tire. A, a lady of 44 years called him and assisted him to enter a house through a window. Brother-in-law of a woman entered the room and found her having sexual intercourse with W. W was charged and convicted of rape.

During the trial the relative testified that she could not carry on an intelligent conversation, she had never learned to read and write. She was described as men crazy and that she could hang out on the window and call to men. On appeal W contended that he did not have reasonable ground to make him believe that this lady was incapable of consenting.

Sexual intercourse with an idiot or insane woman is not rape unless the man knows that she is insane or an idiot and takes advantage of that fact to accomplish his purpose.

Defilement by Husband of a Wife Under Fifteen Years

If a man is married to a girl under fifteen years, has or attempt to have carnal knowledge of the girl whether with or without her consent is guilty of an offence. Punishment is ten years.

If a person is a father or mother, or any person having the custody of a girl under fifteen years, permits such girl or parts with the possession or disposes her with the intention that she shall be carnally known by her husband, whether with or without her consent, while still under fifteen years is guilty of an offence. Punishment is ten years imprisonment. —S.138 TPC.

In the case of **R. v. Juma Mohamed (1970) H.C.D No.154**, the accused was convicted on his own plea of guilt of permitting the defilement by a husband of a wife under twelve years. Accused was the father of Tabu, did dispose her to be married to Tuluba knowing it to be likely that the girl was still under the age. The court held:

His plea didn't refer to any intention on his part to have the girl carnally known by her husband nor did he admit that it was likely to happen. He didn't intend his daughter to have carnal knowledge. "Intention is an ingredient of the offence which has to be proved. Accused said 'I warned the husband not to sleep with her until she was grown up'".

Section 138(5) TPC

- No person shall be convicted if the court is of the opinion that the girl has attained the age of 15 years.
- If the court is of the opinion that the accused had reasonable cause to believe and did in fact believe that the girl was or above fifteen years.

Section 138(6) TPC

- marriage is allowed if the person is of African or Asiatic descent, provided that it is not intended to be consummated before the girl attain the age of fifteen.

Incest**Incest by Male**

Any male person commits the offence of incest if he has prohibited sexual intercourse with a female person, who is to his knowledge; his granddaughter, daughter, sister, or mother.

In cases involving incest, consent is immaterial, thus a person charged cannot raise the defense that the female person consented. —S.158 (2) **TPC**.

If the female is less than eighteen years, if convicted to imprisonment for a term not less than thirty years.

If the female is eighteen years or more to imprisonment for not less than twenty years.

Incest by Female

A female person of or above the age of eighteen years permits: her grandfather, father, brother or son to have sexual intercourse with her, commits the offence of incest.

To amount to incest, a female person must have with consent permits and with the full knowledge that the male person is her grandfather, father, brother or son.

If convicted she shall be liable to imprisonment for life, or, imprisonment for not less than thirty years. In addition she may be ordered to pay compensation for the amount to be determined by the court.

If the male person is below ten years, to imprisonment for not less than thirty years.

No prosecution for the offence under section 158 and 160 **TPC** of the accused without the consent of the **DPP**. —Section 162 **TPC**.

Sexual Assault on Person and Indecent Assault on Women

Section 135(1) **TPC** has been amended to cover both sexes.

Any person who:

- Utters any word or sound,
- Makes any gesture,
- Exhibits any object,

intending such word, sound be heard or gesture or object to be seen by that person, commits the offence of sexual assault.

If convicted he will be liable to imprisonment for a term not exceeding five years or fine not exceeding three hundred thousand shillings or to both.

If it relate to a boy or girl under eighteen years it shall be no defense that the boy or girl consented.

OFFENCES AGAINST THE PERSON**Homicides**

Homicide is the killing of a human being by a human being. These can be divided into two categories:

Lawful killings

- Killing an enemy in execution of war.
- Killing in execution of lawful judgment.
- Killing in self-defense.
- Killing in the course of arresting or preventing a crime.
- Accidental killing.

Unlawful killings

Murder

Manslaughter

Suicide

Child destruction.

Who can kill?

A man of a sound memory and of age of discretion i.e. a man who is responsible according to the general principles of criminal responsibility.

Who is a victim of homicide?

One must be a living person. Section 204 of the Penal Code explains when a child is deemed to be a person capable of being killed.

When does the life end?

A person is termed dead when the brain stops working.

Causation in Homicide

Causation in homicides is provided under section 203 of the Penal Code. This section deals with complicated cases of homicide. According to this section, a person can be held to have caused the death of another person even if his act is not the immediate or sole cause of death. The following are the instances of causation.

Section 203(a) TPC

A person inflicts bodily injury to another person and that person dies after treatment. The person who inflicts wound will still be liable if the injured person receives good or proper medical treatment and administered in good faith and common knowledge and skill. However if the injured person receives mistaken treatment but administered in good faith either with good faith or bad faith together with common knowledge or without common knowledge the person will still be liable. In the case of **R. v. Stephano Alois (1972) H.C.D No.199**, the accused was convicted of murder. The accused fatally stabbed the deceased during circumcision ceremony. An argument developed as to why he drew a dagger and the accused stabbed the deceased. He died of shock and hemorrhage on the ninth day. The court said:

The fact that the life of the deceased might have been saved if he had received good medical attention cannot affect the legal responsibility of the accused for the deceased, that the deceased could have been saved if received good medical care cannot be of a defense in law or snap the chain of causation.

In another case of **R. v. Njarura Ndugo 11 E.A.C.A 59**, the deceased received from thieves a wound which was not itself dangerous. He died under anesthetic administered for the purpose of stitching the wound. All the usual precautions were taken before the anesthetic was administered. The doctor admitted in evidence that if the deceased had not been given anesthetic, he would not have died, and that it was quite possible that he would have survived had not been operated. The court found that

The trial court was justified in presuming that a qualified practitioner would not perform an operation unless it was in his opinion necessary and advisable. The thieves were liable.

In **Mwita Nyamhanga v. R. [1992] T.L.R 118**, the appellant using a panga, inflicted a cut wound on a person who died because of tetanus. He was convicted of murder. On appeal he challenged the conviction arguing that there was no evidence to connect the cut wound and tetanus, which

ultimately caused the death of the deceased. The wound was inflicted on **14/4/86** and the deceased died on **25/4/86** i.e. eleven days later.

Advocate for the appellant argued, whether the wound inflicted by the appellant brought about tetanus or that wound hastened death?

The post-mortem report showed that the cause of death was “respiratory failure caused by tetanus”. Advocate said that the report did not give the cause of tetanus and the doctor who performed the post-mortem was not called to testify. The advocate referred the court to two medical treaties which say that the incubation period for tetanus is a minimum of eight days, but the treaties don’t say what is the maximum incubation period nor do they indicate after how many days from the time of injury or when symptoms have appeared is death likely to result. The court said:

We cannot say beyond reasonable doubt that the wound by the appellant caused tetanus. There is evidence that the deceased had fever before the attack by the appellant.

Section 203(b) of the Penal Code

A person inflicts bodily injury, injured person doesn’t seek medical treatment it will be no defense if injured person does not seek medical treatment. If such person dies that person inflict bodily injury will still be liable. If the injured person seek medical treatment but doesn’t observe conditions imposed by medical experts and dies the person inflicting wounds will be still be liable.

In the case of **R. v. Holland (1841) 2 Mood & R 351**, the accused waylaid and assaulted the deceased. Among other wounds, the deceased was severely cut across his fingers by an iron instrument. His surgeon urged him to submit to amputation, but the deceased refused to allow this. The deceased attended the infirmary from day to day to have his wound dressed. After a fortnight however, lockjaw came on, induced by the wound on the finger. The finger was then amputated but it was too late to save the deceased’s life. The surgeon deposed that if the finger had been amputated in the first instance, the deceased would probably have survived. The court said that:

The accused was found guilty and was responsible for the death, but the sentence was, apparently, later respited.

In **R. v. Mubila 1955 (1) S.A 31**, accused stabbed the deceased. Two days later after the stabbing deceased was admitted to hospital. It showed that the wound had stopped bleeding and there was no evidence of internal bleeding. The deceased was warned to remain immobile. Nevertheless the deceased got up and moved about, the movement probably started the hemorrhage, the hemorrhage caused his death. It can’t be said with any certainty that the hemorrhage would not have restarted even if the deceased had not moved, the chances of recovery in any event were less than even.

There is no obligation in a person who is wounded to obtain any medical assistance at all. And hence no obligation to follow the instruction of the doctor if he does seek assistance. Hence the failure to take doctor’s advice can’t be an intervening cause as to relieve the accused of liability.

Section 203(c)

A person dies as the result of avoiding violence threatened by the accused.

In the case of **R. v. Pitts (1842) Car & M. 284**, the deceased threw himself into a river to avoid acts of intentional violence against himself by the accused. The deceased drowned.

Accused guilty of murder. “A person is responsible for homicide if by actual or threatened violence he causes that other person to perform an act which causes the death of that person such act being a means of avoiding such violence which in circumstances would appear natural to the person whose death is so caused”.

In **R. v. Agumagu Mwaoko 5 W. A. C. A 120**, the accused demanded the return of one pound he had paid as “head money” for his wife when she refused to continue living with him. She did not repay it. Accused brought a juju, pointed it at her, and said that since you refuse to pay me my money this juju will kill you”. She become depressed and six days later after the bringing of the juju she hung herself. On appeal the court held that:

The court reversed the conviction for manslaughter on the ground that the act of the deceased was not immediate consequence of the accused's invocation of juju; the act of woman hanging herself was held to be an independent intervening cause.

Thus we see that under section 203(c) of the Penal Code if one under a well-grounded apprehension of personal violence does an act, which causes his death, as for instances, jumps out of a window or into a river he who threatened is answerable for the consequences.

The proper test is not whether the accused foresaw the conduct of the victim, which resulted in actual bodily harm, but whether the conduct could have been reasonably foreseen as the consequence of what the accused was saying or doing. It seems immaterial whether the fear arises from violence or threat.

Section 203(d) TPC

Persons already sick, accused hastens death of sick person or dying persons.

In **R. v. Enyaju Eguruto 12 E.A.C.A 42**, during tribal dance, T willfully gave the deceased a violent poke on the head with the sharper end of his heavy dancing stick, piercing skull and causing the deceased's brain to protrude, the deceased fell to the ground and almost immediately E beat him violently on the other side of the fractured skull. The court found that:

Both T and E were rightly convicted of the deceased's murder. Successive but separate beatings causing death, it was no defense to E to say that the injuries that he inflicted upon the deceased would not have caused death but the prior assault.

In another case of **R. v. Okute Kalebi 8 E.A.C.A 78**, the deceased was first beaten up by four men and made to dig up some stolen meat. Sometimes later, as the deceased in a very weak condition was being taken to the chief he was assaulted by another. The deceased died from shock resulting from cumulative effect of his injuries.

The four men could not be held responsible for causing deceased's death, as on the evidence it was possible that the injuries inflicted by them might not have caused death but for the subsequent assault by X and there was no evidence of any common intention between them and X. But X was guilty of murder, for he had with intent to cause grievous harm, assaulted one who was already in a very weak state.

Section 203(e) TPC

In **R. v. Katunzi 13 EACA**, the appellant set fire to a hut made of millet stalks and with only one door, with the intention of causing death or grievous harm to the occupants. Z, K and four helpless children were in the hut at the time. Z with K's help evacuated the children. Then Z under mistaken belief that one of the children was still in the hut re-entered it and sustained burns from which he died next day.

The appellant was responsible for Z'S death and guilty of murder.

In the case of **R. v. Mpuluta 5 N.R.L.R. 377 (1954)** the accused while driving a lorry on a wide, dry-surfaced road endeavoured to overtake a lorry in front. In doing so he collided with another lorry. After the collision, the accused's lorry swerved all over the road. Two passengers in the back of the accused's lorry thought it safer to jump out than stay in it. One jumped clear but the other fell back under the accused's lorry and was killed. In the event the lorry didn't turn over.

The accused caused the deceased's death because the deceased had done the natural thing in the circumstances. The accused was not guilty of manslaughter, as the evidence did not go so far as to show that the accused foresaw or ought to have foreseen that his driving would likely to result in the death of the deceased. The accused was convicted of reckless driving.

The Problem of Causation/ Coincidence of Actus Reus And Mens Rea.

In this situation you may find that actus reus, which caused the act, may not be accomplished by mens rea. Thus where there is an intention to kill or cause grievous harm that intention may be presumed to continue throughout the course of the actus reus.

In the case of **R. v. Ojambo Nambio (1944) 11 E.A.C.A 97**, the deceased was caught stealing sugar cane in the appellant's shamba and tied up. The appellant then beat the deceased so severely that on being untied he fell down and seemed to be dead. The appellant believing him dead removed his body to a swamp.

The act of depositing the deceased in the swamp was the direct consequence of and consequence to the beating and that these acts were so closely connected as to constitute a continuing series of acts and one transaction the cumulative effect of which was the death of the deceased.

Such beating as was inflicted infers an intention to cause at least grievous harm and establish malice aforethought making the killing murder.

In another case of **Thabo Meli v. R. [1954] 1 W. L. R. 228**, the appellants in execution of a pre-conceived plan to kill the deceased took him to a hut where he was struck over the head with an instrument. Believing to be dead they took him out and rolled him over a low cliff and dressed the scene to make it look like an accident.

It was impossible to divide what was really one transaction. They set out to do all those acts as part of and to achieve their plan and it was too much refined a ground to judgment to say that because they mere misapprehension at one stage and thought that their guilty purpose had been achieved before it in fact was therefore they were guilty of murder.

Murder

Section 196 of the Penal Code defines the term murder. Ingredients of murder are:

- Causing death of another
- With malice aforethought
- By an unlawful act or omission.

In murder actus reus is found in causation—S.203 and intention/mens rea is found in malice aforethought.

Malice aforethought can be proved either by express or implied malice. Malice aforethought is proved under section 200 of the Penal Code.

Section 200(a) TPC

A person is said to have malice aforethought if he intended to cause death or to do grievous harm to any person. Once intention is proved, it doesn't matter whether the person intended to be killed is the one actually killed or not. But if intention is not proved then the person cannot be convicted for murder.

In the case of **Herman Nyingo v. R. [1995] T.L.R 178**, the appellant was convicted of murder by the High Court. In an unprovoked manner using a heavy stick, he had hit the deceased hard on the head. Subsequently the deceased died. The appellant was heard saying "*I am killing you because of your sorcery*". On appeal the appellant complained that the trial court should have accepted his defense of provocation and self-defense and found him of a lesser offence of manslaughter.

- *Normally the defense of provocation is available in circumstances, which would otherwise constitute murder except for the sudden loss of control of oneself as a result of some act, which provokes the accused person.*
- *There was no provocation at all in this case.*
- *In the absence of a fight between the appellant and the deceased and that it was the appellant who started attacking the deceased with a heavy stick forcefully the defense of self-defense was not available either.*
- *The appellant's utterance that he was killing the deceased because of his sorcery is a clear manifestation of malice aforethought.*

In **Moses Michael @ Tall v. R. [1994] T.L.R 195**, the appellant killed a woman he was cohabiting with and was convicted of murder. On appeal he argued that he ought not to have been convicted of s.v. MSHANA

murder because malice aforethought was not established. The issue was whether malice aforethought may be inferred from the amount of force used; and whether conduct may be indicative of malice.

- *Malice aforethought may be inferred from the amount of force, which the offender employs in inflicting fatal injury.*
- *The conduct of the accused may be indicative of malice aforethought as it was in this case where the appellant was persistent in beating the deceased for a long time and prevented intervention by persons who wanted to help the deceased.*

In **Wilson Nyamhanga v. R. [1984] T.L.R 340**, the appellant a prisoner, killed an inmate at Isanga prison. The deceased was fighting with a fellow prisoner. A commotion ensued. During such commotion, the appellant stabbed the deceased and uttered words to the effect that the deceased had to die on that day. The trial court found that all the ingredients of the offence of murder, including malice aforethought, were established and convicted the appellant of murder. On appeal—whether given the fight and commotion malice aforethought could be said to have been established.

The stabbing by the appellant took place in the heat of passion generated by the fight and commotion, although at one point of the fight and commotion the appellant told the deceased “lazima ufe Leo”, that is, “you must die today”, that statement by itself is not evidence of pre-meditated killing, since the statement was made in the course of and during the fight and commotion and not before.

In **R. v. Mohamedi Nite 1974 L.R.T N.36**, the accused murdered the deceased. The incident took place on the night when the deceased’s wife and the accused were returning home from the pombe party. When they were nearing accused’s house, the accused went for a short call and that as he was returning back, the wife heard the accused raising alarm. She saw accused fighting with her husband and that the accused felled him on the ground and stabbed him many times.

- i) *Malice aforethought is rarely proved by direct evidence it can often be inferred to the circumstances viewed as a whole. The nature of the weapon used and the manner in which the blow is inflicted are factors to be considered.*
- ii) *By using a lethal weapon the accused may be presumed to have formed either an intention to kill or cause grievous harm.*
- iii) *Where death ensues from a fight the person who causes death is normally guilty of manslaughter.*
- iv) *The benefit of doubt will be resorted in favour of the accused.*

In **Solomon Ulaya v. R. (1972) H.C.D No. 233**, the accused intended to kick his wife but kicked his mother instead and she died.

Had no intention to cause grievous. The weapon and manner used was not indeed to cause grievous harm, the fatal consequences could not be foreseen. ---Manslaughter.

Section 200(b) TPC

Under this part the person had knowledge of the occurrence of death, but does not wish/want or intend death to occur, he is indifferent whether death occur or not.

In the case of **R. v. Tirugurwa (1943) 10 E.A.C.A 44**, the accused set fire to deceased’s hut, as a result the deceased was burnt to death. The body of the deceased was badly burnt but was recognized as that of kazomba a cousin of the accused. The accused had been at the deceased’s hut for some hours previously to the hut being set on fire and according to accused’s own evidence parted from deceased’s company with a man called kifwete, after the deceased had said “it is two days now that I have been drinking like this and I want to go to bed, if you people wish to stay here and sleep you can do so, if you wish to go home you may go now”. This evidence is very important

for it shows that the accused had the best reasons for believing that kazomba had retired for the night. The circumstances in the case are that the accused was to some extent intoxicated.

The issue on appeal was whether the accused was intoxicated to such an extent when he set fire to the hut he was incapable of forming and did not form an intention either to cause death or to do grievous harm.

If a person is found to have burn the house and to have formed intention of doing so, with the knowledge or having reasonable ground for believing that a human being is asleep within, he must be held to have burn the house with malice aforethought within the meaning of section 189 UPS (S.200(b)TPC) in the sense that having the knowledge or grounds for believing he must at least take to have known that his act in burning the house will probably cause death or do grievous harm, and if death results he is guilty of murder.

The accused was not intoxicated enough not to be incapable of forming intention to cause death or grievous harm due to the fact that he was able to move about the countryside, able to take leave of his friend, able to return home, able to call for his pipe, his drink of banana juice and his saying to his father "I will burn your house if you make any trouble, as I have burned that of kazomba".

Section 200(c) TPC constructive malice

Under this part, the accused person has no intention to cause death or do grievous harm. The death was the result of intention to commit an offence e.g. abortion, robbery, rape, burglary etc.

In **Sentali Lemendwa v. R. (1952) 20 E.A.C.A 230**, the appellant was convicted of murder of a woman. The facts established that the deceased died in consequence of violence inflicted on her by the appellant in the furtherance of or in the course of committing an offence in her house (theft).

If death is caused by an unlawful act or omission done in furtherance of an intention to commit any offence, malice aforethought is established.

In another case of **Dienja v. R. [1973] E.A 546**, a pregnant girl died as a direct result of attempted abortion by the appellant who was unqualified and inexperienced in the obtaining of abortion. The trial judge convicted the appellant of murder holding that malice aforethought was established by an intention to commit a felony.

- i) *Malice aforethought is not necessarily established by proof of intent to commit a felony.*
- ii) *He who uses violent measures in committing a felony involving personal violence is guilty of murder if death results even in advertently.*
- iii) *Knowledge that the act will probably cause death or grievous harm is required before death as a result of abortion in murder. —Manslaughter.*

In **Mawazo Mandundu and Another v. R. [1990] T.L.R 92**, the appellants were charged with and convicted of the offence of murder, appealed against both conviction and sentence. The trial court based its conviction on the fact that the appellants were found in possession of stolen property a few hours after the watchman of a shop was killed. It was established that the property was stolen from the shop, which the watchman was guarding. When arrested one of the appellants asked to be pardoned and the other said matters were becoming serious and later cried at the **CCM** office. The incident took place at night at Majengo C area in Nachingwa, and the appellants were arrested the following day at about 10.00 AM at Chigudu village.

In the circumstances it was not wrong to conclude that the appellants were also responsible for killing the deceased, and because we are satisfied that the killing was so as to effect the stealing we are of the view that it was quite proper to infer malice aforethought.

Section 200(d) TPC

This section refers to any person who causes death when in the process of facilitating the escape of a person who is in custody who has committed any offence or has attempted to commit any offence.

Corpus Delict

This means the body of the crime, the fact which constitutes an offence. If there is no direct evidence, then, circumstantial evidence can be capable of holding someone guilty.

In **R. v. Amani Zephania Kimweri (1970) H.C.D No. 50**, the accused was charged with murder. The alleged victim had been unaccounted for and to the best of anybody's knowledge, absent from this world for the last three years. She was seen with the accused shortly before her disappearance. There was very strong circumstantial evidence that the accused had murdered his wife but the body was never found and he denied killing her.

The fact of death is probably by circumstantial evidence notwithstanding the fact that neither the body nor any trace thereof has ever been found, and that the accused has confessed to any wrongdoing.

Manslaughter

Section 195 of the Penal Code defines manslaughter as causing death of another by an unlawful act or omission. The difference between manslaughter and murder is the absence of malice aforethought in manslaughter and presence of it in murder.

The actual killing of murder and manslaughter consists of actus reus. Manslaughter can be voluntary or involuntary.

Voluntary—consists of those homicides which would have been murder but are in fact manslaughter because the accused was either provoked or was party to the killing in pursuance of a suicide pact.

Involuntary—what constitute involuntary manslaughter is not clear and it must be approached with caution e.g. negligence, recklessness etc.

If anyone commits an act or omission under sections 206 to 210 TPC is guilty of manslaughter. (Unlawful acts).

In the case of **Singh v. R. [1962] E.A 13**, Singh was convicted for the murder of his wife. The evidence was that, after an act of sexual intercourse Singh had strangled his wife and then tried to make it appear that she had been robbed and stabbed to death on her way to an outside toilet. Death was due to asphyxia. The defense argued that Singh killed his wife accidentally during sexual embrace and that the feigned robbery was an act of panic.

There was a real doubt as to whether Singh intended to cause grievous harm or knew that he was causing grievous harm. ---Manslaughter.

Provocation

Sections 201 and 202 TPC for the defense of provocation to be accepted:

- i) The provocative act or insult must be wrongful,
- ii) The provocative act must be of such gravity as would deprive a reasonable man his power of self-control.
- iii) The murder must be done in a heat of passion,
- iv) The means of retaliation adopted must be proportionate to the degree of provocation committed.

The test that is used in provocation is objective test—the test is that of the 'community' i.e. you have to judge a person according to the community he belongs.

In **Bedder v. R. [1954] 2 All E.R. 801**, the accused who was sexual impotent, attempted in vain to have intercourse with a prostitute, who jeered at him and hit and kicked him. He lost his head, stabbed her with a knife and killed her. On his trial he pleaded provocation.

Conviction for murder. The jury found out that a reasonable man would not have been provoked under the circumstances and they were probably directed not to take special regard of the fact that the defendant was sexual impotent.

A good case, which clearly defines “heat of passion”, is that of **Yovan v. Uganda [1970] E.A 405**, the appellant suspected the deceased, his stepmother of having killed his children by witchcraft or poison. On his blaming her, she replied that he would die before he could bury his children. He then cut her about the head causing her death. It appeared from the statement made by him that he armed himself intending to kill her for killing his children. The trial court rejected the defense of provocation and sentenced the appellant to death.

- i) *A threat to cause the death of the accused may amount to provocation depending on the circumstances.*
- ii) *Provocation must be judged by the standard of an ordinary person of the community to which the accused belongs.*
- iii) *The heat of passion required but to any emotional state caused by provocation and which is such as to deprive ordinary person self-control.*
- iv) *The judge’s finding that there was no legal provocation was correct on the facts.*

Provocative act must refer to “person” and not to “things”. E.g. one cannot be provoked because his dog has been beaten.

In general “mere words” do not amount to provocation but they may in certain circumstances. In the case of **R. v. Mohamudu Kibwana (1968) H.C.D No.186**, the accused only defense to murder charge was that shortly before the killing he heard the deceased saying to someone else that he (the deceased) had signed a paper authorizing the police to beat the accused.

As a general rule, spoken words alone cannot be the basis of provocation. Where words are accepted in customary view as constituting provocation, the words must be of so devastating a character, of such over bearing force as to shatter the self-control of a normal person in the community. Accused guilty of murder.

In **Benjamin Mwansi v. R. [1992] T.L.R 85**, the appellant confessed killing his fiancé. In his defense he said he was provoked by the words of the accused that he found in bed of her new lover. Upon being asked she replied “*wewe bwana achana na mimi. Sina habari na wewe*” (literally translated “*please leave me alone. I have no business with you*”). The court considered whether these seemingly innocent words could provoke a person to killing.

The appellant and the deceased had agreed to marry. The deceased was also dishing out favour to one Iddi Kazimoto. The appellant had intelligence of that affair but was satisfied by the assurance of Iddi that he, Iddi that is, was not aware that he was trespassing on the appellant’s garden and promised to desist further encroachments.

Now, those words in themselves appeared innocent. But if they are looked at with the hindsight of what transpired they are powerful dynamite sufficient to blow off the faculty of reasoning of the appellant. Not only that the appellant’s hope of marrying with her was kindled by her deceit but also that very day she made him to part with his Tshs.20/-. As if that was not enough and to add salt to injury, she turned him into a sentry and made him kick about his heels, eagerly waiting for her when she knew just too well that she was not going to come back to him. The appellant was provoked by these words.

Provocation and Witchcraft

Attitude of courts to witchcraft is that it is unreasonable belief, unless it is proved to be reasonable.

In the case of **Eria Galikuwa v. R. (1951) 18 E.A.C.A 175**, the appellant was convicted for killing a witchdoctor. The appellant was threatened with death unless he paid 1000/- that he was unable to pay. The appellant imagined that he heard the witchdoctor’s spirit voice repeat a demand for a

ransom with a threat to kill “by sucking your blood”. Terrified the accused killed the witchdoctor in order to save his life.

- i) *The act of causing death must be proved to be done in a heat of passion i.e. anger and not fear of immediate death.*
- ii) *If the fact establish that the deceased was performing some acts in the presence of the accused which he believed, and an ordinary person of his community would genuinely believe was an act of witchcraft against him and the accused was so angered as to be deprived of self-control, the defense of grave and sudden provocation was open to the accused.*
- iii) *A belief in witchcraft per se did not constitute a circumstance of excuse or mitigation for killing a person believed to be a wizard or witch when there is no immediate provocative act.*

Without there being time for that passion to cool fear of witchcraft alone cannot amount to provocation unless the accused has been put in such a fear of immediate danger to his own life that the defense of grave and sudden provocation was held proved.

In the case of **R. v. Kumwaka Wa Kulumbi 14 K.L.R 137**, the deceased was believed to be a witch. The accused genuinely believed to be a witch and to have bewitched the wife of the first accused. So as to make her ill and unable to speak. The first accused summoned the rest of the accused and brought them to the vicinity of the hut in which was his wife, the woman believed to have been bewitched.

The deceased was seized and brought to the sick woman’s hut and ordered to remove the spell. The accused alleged that she removed half of the spell during the night. Early in the morning the witch was detected running away. All the accused run after and beat her with sticks. As a result of the beating the witch was killed.

There was malice aforethought and that self-defense was a tenable plea. The belief in witchcraft is of course widely spread and is deeply engraved in the native character, for courts to adopt any other attitude to such cases would be to encourage the belief that an aggrieved may take the law into his own hands since the government does not tolerate the killing of witches.

In **John Ndunguru Rudowik v. R. [1991] T.L.R 102**, the appellant is a grandson of the deceased man. He (the appellant) has a brother called Dustan who was mentally sick. Both were staying together at the appellant’s home. On a number of occasions the appellant had consulted witchdoctors who told him that the deceased had killed a number of people in the family and had caused temporary sterility to his own daughter through witchcraft and on being asked the accused confirmed this.

On the day of incident the accused visited the appellant’s home to see Dustan, the sick grandson. There was an exchange of words between them in the course of which the deceased threatened to kill the appellant by witchcraft, following which the appellant picked up an axe and brutally attacked the deceased with it causing his death instantly.

In a trial for murder, the trial judge held that as the appellant had previously heard confessions by the deceased of having killed his victims by witchcraft, the threats by the deceased to cause death of the appellant by witchcraft did not come as a shock and never put the appellant in fear of any danger to his life or that of his brother when he killed the deceased.

Although mere belief in witchcraft is no defense to a charge of murder, a threat to kill by witchcraft may in certain circumstances constitute legal defense to that charge.

Justices of appeal found that on previous occasions when the deceased admitted to have killed people by witchcraft he had made no threats to the appellant and thus on the day of incident the deceased’s threat to kill him was sudden and must have come to him as a shock. Such a sudden threats has to be viewed in the context of deceased’s previous admissions in the appellant’s

presence to have caused death and misfortune to some family members and the appellant's honest belief in his having power to do so. At page 105.

"In killing the deceased the appellant did not follow the deceased; rather it was the deceased who had gone to the appellant's home, and that we would be inclined more to the view that the killing was in circumstances of provocation rather than premeditation." Per Kisanga, J.A. at page 105.

Provocation and Adultery

When talking of adultery, here it means spouses or people who are married. Killing in adultery generally is not sudden but takes a long time.

In the case of **Gabriel v. R. (1971) H.C.D No. 299**, the accused found his wife getting out of the house of the man with whom she was having an affair and stabbed her to death. The trial judge found that there was no provocation or insanity because the accused had waited for sometime for his passion to cool.

The appellant went to the deceased's house with intent to kill or inflict grievous harm and the defense of provocation by sudden knowledge of the deceased's adultery not open to him.

In another case of **R. v. Ally Said Kiubatyo [1990] T.L.R 137**, the accused was charged with murder of his wife. After killing the wife he dumped her body into an abandoned latrine, buried her and made a false report to his own father and mother in law about the whereabouts of the wife. The killing took place after the accused had suspected that his wife had committed adultery, failed to arrest the suspect after chase and the wife uttered words which made the accused to lose temper and hit the deceased with a billhook which was near by. Words uttered by the deceased were *"sijui na umemkimbiza na umeshindwa mwenyewe kumkamata sasa unamwuliza nani na mtu mwenewe umemwona?"* Literal translated *"I do not know. You have seen the person and failed to arrest him. Whom do you ask then?"*

During the trial two issues were raised by the trial court.

- a. Whether suspicion of adultery can afford a defense of provocation in murder.
- b. Whether or not the statement by the deceased can afford a defense of provocation in the circumstances.
 - i) *Prior knowledge of a husband of the adultery of his wife with a paramour does not bar him from raising the plea of provocation if the killing was upon finding the wife and her paramour in the act of adultery i.e. in flagrante delicto. In the present case the accused alleges that the deceased had committed adultery in similar circumstances three times but he had never seen the deceased committing adultery, so the defense of provocation is not open to the accused.*
 - ii) *The statement alleged to have been uttered by the deceased was provocative in law and the accused killed the deceased as a result of such provocation. The killing was not intentional.*

"I have considered the alleged statement by the deceased quoted above to see whether it could not have provoked the accused. Looking at it in a superficial manner the statement is innocent. But considered in the circumstances in which the statement was uttered could have provoked the accused. The accused had come home from hacking coconuts. He knocked at the door expecting the deceased to open the door for him. Then he pushed the door open only to find his child sleeping alone in the bed. The deceased was nowhere to be seen. The accused went out and as he was searching around he heard footsteps of a person running. He chased the person and he failed. He did not know who the person was. He turned inside and saw the wife sitting on bed. The accused asked who was the person he saw running. Instead of being civil she uttered the words she was alleged to have said. The reply could have infuriated the accused, as it actually happened and took the billhook and caused the death of the deceased. In my view those words uttered to an ordinary

man in the circumstances which accused had would have provoked him to assault the deceased...it is true that he used a lethal weapon but it is not suggested that the accused had time to look for it.” Per Kazimoto, J. at page 141.

Confession Leading to Provocation

In the case of **R. v. Juma Legeza (1969) H.C.D No. 244**, the accused was told his wife having an adulterous association with another man. He questioned her after having taken drink slapped her several times. When she confessed, he beat her with a stick, told her to go and followed her to her supposed lover’s house where he took away her clothes and left her naked on the bed. The accused later returned and found her dead due to head injuries suffered during the beating. He attempted to revive her with buckets of water but failed. Her reported the matter and confessed his actions to the elders and subsequently to the administrative secretary.

The sudden discovery of wife’s adultery even if not finding her in fragrant delicto in Tanzania is sufficient provocation. Circumstances of the killing influenced by drink and made him unable to make a careful choice of action.

Provocation on Concubines

Here there must be a strong relationship even though not legal married. Accused must act in the heat of passion.

In **R. v. Shilinde Mathew (1970) H.C.D No.143**, the accused returned home on the night and knocked at the front door but there was no reply. Then he heard his wife say from the inside “today we are in for it”. Accused then heard some sound as if the rear door was being opened. He went around and saw a man coming out of the hut through the rear door. The man was running away. The accused chased the man and struck him three times on the head with a piece of wood, which he had picked up. The deceased was taken to the hospital where he died after a few hours due to wounds inflicted on him on the head.

The parties have lived together for long time though not legally married, so provocation can be raised as a defense.

The accused did not meet his wife and the other man in the act of adultery but they were inside his house in circumstances with suggests that adultery may have taken place or intercourse was about to take place.

In **Sukimanindo Mwamakosi v. R. [1958] E.A 776**, deceased who knew that the appellant was after his wife found after returning from a hunting trip the appellant sitting outside his house. He asked him what he wanted at his house and made no reply. Deceased assaulted him, as a result of the struggle between them the deceased died.

- i) *There is a very low degree of provocation, the appellant was assaulted and seized by the throat, which might constitute a threat to his life.*
- ii) *There was no question of a time for passion to cool; the appellant struck only one blow with a weapon from the deceased.*
- iii) *The appellant was acting lawful under section 202 TPC.*

In **Shabani Rashidi v. R. [1995] T.L.R 259**, Fatuma Hussein cohabited as man and wife from 1983 to 1986 when they formally ended their relationship. They even divided whatever they had earned together. Fatuma then lived as a single woman with her parents from 1986 to 1988 when the deceased started courting her. On 28/1/1988 at about 10.00pm as the two were seated in her bedroom, the appellant suddenly burst in and without much ado proceeded to stab the deceased. He stabbed him in the stomach. Both the deceased and his lover ran out of the house shouting for help. Neighbours came in answer to the alarm. The appellant told them that he had stabbed the deceased because he found him committing adultery with his wife. His main ground on appeal was that the trial court didn’t accept that the defense of provocation was available to the appellant. The court of Appeal considered this ground against the background to the appellant’s denial of killing the

deceased and that the relationship between the appellant and the woman who the appellant alleged to have caught committing adultery with the deceased had terminated.

- i. *For the defense of provocation to avail the appellant two factors must be present:*
 - a. *That the relationship between him and Fatuma still existed,*
 - b. *He must admit to killing the deceased.*
- ii. *There was ample evidence that the relationship between the appellant and Fatuma had effectively ended in 1986.*
- iii. *Once the appellant denied killing the deceased the defense of provocation disappear and the trial judge was right in rejecting the defense of provocation.*

The Last Straw Doctrine of Provocation

If one looks an act of killing itself (say act **E**) it would not amount to provocative act. But acts **A**, **B**, **C**, **D**, may amount to provocation.

In the case of **R. v. Johali Ismail 1974 L.R.T N.23**, the accused found the deceased on a path talking to his wife. The deceased started to run away but he was chased by the accused and caught them, he was brought before the elders. When the elders started to ask the deceased the allegations he denied but explained that the accused had requested him to assist him in chasing a thief. At this juncture the accused got up and stabbed the deceased (put in mind the cap in the pocket of the wife's undergarment incident.)

- i) *The discovery of the cap in the undergarment to the finding of the deceased with the accused's wife and his apprehension, these are series of provocative acts. These factors are enough to reduce this offence to manslaughter.*
- ii) *Provocation is a statutory defense created under sections 201 and 202 of the Penal Code.*
- iii) *When provocation is raised as a defense to the charge of murder:*
 - a) *The provocative act pleaded must be a wrongful act or insult.*
 - b) *The provocative act must be of such a gravity as would deprive a reasonable man of his power of self-control.*
 - c) *The murder must be done in a heat of passion.*
 - d) *The means of retaliation adopted must be proportionate to the degree of provocation committed.*
 - e) *Making an allowance for the "last straw" doctrine of cumulative provocation there was no wrongful act or insult and the accused's passion had time to cool. —Guilt of murder.*

Infanticide

Section 199TPC creates the offence of infanticide. The object of introducing into the criminal law the offence of infanticide was to reduce what would otherwise be an act of murder to a lesser offence where the killing was done by a mother at a time when her responsibility for the act may have been reduced by the disturbance of mind caused by the stress of the child birth. The commission of the act should have been done by a willful act or omission caused by effect of giving birth or lactation. In the case of **R. v. Esther Ikumboka (1967) H.C.D No. 447**, the accused was charged with infanticide. She killed her new-born child in circumstances would normally amount to murder, but that at the time of the incident the balance of her mind was disturbed as result of child birth. It is not disputed that the accused was pregnant and she delivered a child. There is considerable conflict as to whether or not this child was born dead or alive. The doctor, who performed post-mortem examination, though adequately qualified, was not himself a pathologist and he did not feel able fully to discuss matters, which demanded special expertise in the field.

The accused not guilty of infanticide but concealing the birth of a child.

In another case of **R. v. Evelyn Mathias (1969) H.C.D No. 245**, the accused was charged with infanticide contrary to section 199 of the Penal Code. She willful threw her newborn child into a latrine, while the balance of her mind disturbed. Apparently no one knew of the birth of the child, who was only discovered in the latrine when it was heard crying. The accused's parents, with whom she lived, denied any knowledge of her pregnancy or any childbirth. Medical evidence however, showed that the accused when examined shortly after the discovery of the child, had recently delivered a child and the placenta and membranes were still in her body.

- i) *The prosecution had to prove that the accused had caused the child's death by a willful act, which for the balance of her mind being disturbed would have been murder.*
- ii) *They have to prove that the accused had not only abandoned the child but also intended to cause its death.*
- iii) *Accused not caught in the latrine. She went there for the purpose of passing faces and involuntary gave birth to the child. —Acquitted.*

Concealing Birth

According to section 218 TPC the prosecution has to prove:

That the accused was delivered of a child as stated in the charge.

That the accused endeavoured to conceal its birth by secretly disposing off it.

That the child was dead at the time of such secret disposition.

On a charge of endeavouring to conceal the birth of a child it must appear that child had "arrived at the stage of maturity at the time of birth" that it might have been a living child.

It has been said that, in order to convict an accused of endeavouring to conceal the birth of a child, a dead body must be identified as that of the child the mother is said to have been delivered, or at least a confession should have been made by the accused.

Child Destruction

Since the common law requires to constitute a crime of murder that the victim be a "reasonable creature in being" it followed that it was no murder to kill a child in the womb or while in the process of being born.

- Prohibits attempts to procure a miscarriage at any time between conception and the birth of the child alive.
- Prohibits the killing of any child capable of being born alive.

Assaults

According to sections 240—243 TPC, assault is an act, which intentionally possibly recklessly caused another person to apprehend immediate and unlawful violence.

It is an assault to strike at another with a stick, to draw a knife at a person or to point a gun, or to throw a stone at another even if it misses.

Battery is the actual application of unlawful force, however slight to another, whether directly or indirectly. Kissing a woman without her consent is battery.

Battery is not unlawful:

- Where a person is being lawful chastised,
- Where a person is being operated,
- Where a person consents to the use of force in a game and is by law able so to consent,
- Where a person otherwise consents to and is able to consent to the use of force. —S.231 to 232 TPC.

An operation done without just cause and excuse is unlawful although a person consents. In the case of **R. v. Rev. Father John Rwechungura (1979) H.C.D No.168**, it was held that the act will

be said to be unlawful assault if it is done in an angry revengeful, rude, insolent or hostile manner, that is, the accused acted so with an evil mind. Therefore an assault is any act by which **D** intentionally or recklessly, caused **P** to apprehend immediate and unlawful personal violence. A battery is any act by **D** intentionally or recklessly which inflicts unlawful personal violence upon **P**. It is neither an assault nor battery for **D** to pull himself free from **P** who is detaining him, even though **D** uses force. An assault is often described as an attempt to commit a battery or other crime of personal violence, but this is too narrow, for an assault may be committed where **D** has no intention to carry out a battery.

Where a constable executes duties, the nature of the force used can amount to an assault also. In **Waterfield v. R. (1964) 1 QB 164**, at page 170 it was said that, if the police officer's conduct falls within the scope of the general "duty" to prevent crime and to bring offenders to justice, then it would seem to be within the protection of the state, if it was lawful. If in the course of carrying out his duty to prevent crime and to bring offenders to justice, the officer exceeds his powers, then he is no longer acting in the execution of his duty for this purpose.

Assault Causing Actual Bodily Harm

Section 241 **TPC** any person who commits an assault occasioning actual bodily harm is guilty of an offence and is liable to imprisonment for five years.

The expression harm mean any bodily hurt whether permanent or temporary, if the harm is such as to endanger life.

The term grievous harm means any harm which amounts to a maim or dangerous harm or which seriously or permanently injures health or is likely to do so or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ member or sense. Maim means the destruction or permanent disabling of any external or internal organ or sense or member.

Wound is any incision or puncture with device or pierces any exterior or membrane of the body. And any membrane is exterior for the purpose of this definition, which can be touched without dividing or piercing any other membrane. To constitute a wound within the code the continuity of the skin must be broken. Thus a kick which causes internal hemorrhage that breaks no skin is not a wound and so long as the skin is broken the nature of the instrument with which the skin is broken is immaterial.

The offence created by section 241 **TPC** in some aspects is similar to that of unlawful wounding under section 228**TPC**, thus creating difficulty in deciding whether to prefer a charge of unlawful wounding or assault causing actual bodily harm. There are some difficulties:

- In a charge of unlawful wounding, you have to prove that an exterior organ, membrane or sense of the body was incised or punctured.
- The offence of causing actual bodily harm is more general in the sense that the harm refers to any bodily hurt, disease or disorder whether permanent or temporary.
- The difference to a charge of assault causing actual bodily harm are similar to those of unlawful wounding, that is;
 - i) The essential evidence of identification of the accused be it direct or circumstantial that he sustained harm,
 - ii) That the accused intended to cause such harm,
 - iii) That harm was caused without lawful excuse.

Assault as a result of consent, accident or assault which are legally justifiable, do not amount to an offence.

It is also a defense to a charge of assault causing actual bodily harm that the accused did the act in self-defense, but such bodily harm must not be excessive. In **Said Abdallah v. R. (1969) H.C.D No.266**, where the complainant slapped the second accused who is his niece and an adult, hard enough that she fell down. There the niece picked up a large pestle (apparently the nearest thing at

hand which served as a weapon) and started hitting the complainant with it. The first accused immediately joined the fray on the side of the niece. The damage to the complainant was superficial, mainly a few lacerations and abrasions. Accused were convicted of assault and sentenced to eight months each.

i) *Even though this quarrels was initiated by the complainant accused were not just in retaliating as they did.*

ii) *Sentence reduced—suggested that fine and compensation would met the justice of the case.*

If the defense is that the complainant consented to the assault the defense will be rejected if the assault was of such a nature or with such degree of violence that bodily harm was a probable consequence.

Provocation is no defense to a charge of assault or related offences, but it would be a mitigating factor. In **Fidel V. R. (1968) H.C.D No.34**, where the accused was convicted of assault causing actual bodily harm. He alleged on appeal that he had been provoked and, under the circumstances, had been justified in committing the assault.

Provocation cannot justify an assault; it can only be “mitigation”

PROPERTY OFFENCES

Theft

Definition of theft:

According to section 258(1) TPC any person commits the offence of theft if:

- fraudulently
- without claim of right
- takes/converts
- anything capable of being stolen.

From the above definition we see that the actus reus of theft is the taking or asportation of property, which belongs to another person. The mens rea is dishonest or fraudulent intention to deprive permanently the other person of his property.

What are Things Capable of Being Stolen?

These are explained under section 257 TPC which include:

- 1) Inanimate things—which must be the property of another and which is movable. Even those which are immovable, but can be made movable are capable of being stolen so for a thing to be capable of being stolen it must be;
 - a) Inanimate
 - b) Movable
 - c) The property of another person.
- 2) Tame animals and wild animals which are the property of another person and which are kept in a state of confinement.
- 3) Wild animals in the enjoyment of their natural liberty are not capable of being stolen but their dead bodies are.
- 4) Everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen.

Nb: General intangible things are not capable of being stolen e.g. air, ideas etc. but things like water, gas, and electricity are capable of being stolen. In the case of **R.V. Ndesario [1969] E.A.267**, it was held that so long as fluids like water could be sufficiently be appropriated to the user, it could be stolen. Since the accused had no right to extract water except at the time

stipulated in his agreement with the complainant, the accused was therefore taking away a movable object which didn't belong to him with intent to deprive the owner permanently of it.

Section 283TPC expressly provides that electricity can be stolen.

The Value of the Thing Capable of Being Stolen:

To make a thing the subject of theft, it must be of some value, yet it need not be of any coin known to the law. In the case of **Kyewawula v. Uganda [1974] E.A. 293**, the accused was employed by the Currency board, counting old notes. She was convicted of stealing some of these notes, which were described in the charge as cash. In this case the court allowed the appeal on the ground that the notes were no longer money and thus could not be stolen. The judge said:

“To form a subject of larceny the thing stolen must have some value. Only economic value is taken into account. The value may be greater or smaller so long as it was actual money value for some person or persons.—in this case the stolen notes had no money value for any person including the government, they could not be described as money. They were nothing but waste paper”.

In the case of **R. v. Daniel Kambengwa (1968) H.C.D. No. 333**, the accused was charged with theft by public servant. A bonnet stand was missing from a motor vehicle and the accused was seen days later using it as a walking stick. When the charge was read over to him he said “I did not know that the bonnet stand was of any use”. The court held that:

There is no proposition of the law that there cannot be a larceny from an owner of a property which is of no value and of which he does not make further use.

Definitely, valueless things or abandoned articles like worn out clothes should not be the subject matter of theft. If the accused takes such valueless articles, the taking cannot be said to be fraudulent if at the time of taking it, he honestly believes that such a thing had been abandoned.

Where a person takes, say a bonnet as in the above case believing it to have been abandoned and in fact uses it as a walking stick (therefore not even concealing or hiding it) we can safely conclude that at the time of taking it he honestly believed that the bonnet stand was incapable of being stolen because it was valueless.

Ownership and Possession:

Ownership is one of the most important ingredients of the offence of theft. The subject matter of theft must be the property of some person. The taking can therefore be from the actual owner or “special owner”—section 258(2)(e) proviso.

Since ownership is very important, it follows; thus, in drafting a charge of theft it is always necessary to mention the owner or possessor. Possession should not be of a temporary nature, as where a guest sleeps for only one night in a house and thereby gets temporary possession of the relevant items in the bedroom or where a customer enters a shop and takes some items in order to examine them. In the case of **Selemeni Tilwizayo v. R. [1983] T.L.R.402**, by using a fictitious name of the payee, the appellant was able to steal government checks, deposited them in a bank account opened in a fictitious name of the payee, and withdraw cash from the bank, the trial court convicted him on eleven counts of stealing government money. On appeal it was considered whether the money withdrawn from the bank belonged to the government so as to constitute stealing government money.

- 1) *Bank customers, including the government do not own the money, which is deposited in the bank.*
- 2) *Stolen government checks deposited in the NBC become the bank's and not the government's money, thus a conviction of stealing government money cannot be sustained.*
- 3) *The evidence available shows that there was theft of government checks by the appellant.*

- 4) *On the analogy that a check can be imported into a charge by virtue of its being money within the meaning of that term in the Penal Code, the appellant was properly convicted as charged on the proven counts of theft.*

Fraudulent Taking

A person is said to take or convert anything capable of being stolen fraudulently under any of the circumstances explained under section 258(2) TPC. If a person is exercising a bona fide claim of right he cannot be convicted because he did not act fraudulently. In the case of **D.P.P v. Henry Rwegashamira 1973 L.R.T. No.15**, the respondent was a sub-agent of the agent in the state lottery system. He deducted from the revenue of the tickets sold sum in excess of the percentage to which he was due in the honest belief that he was entitled to reduce a balance owing to him from previous transactions. D.P.P. appealed against the acquittal.

The respondent had a claim of right and so was not guilty of theft, even if as a matter of law he was not entitled to make the deduction.

Once it is shown that a person is honestly asserting what he believes to be a lawful claim of right, he has a lawful claim of right under section 9TPC even though the claim asserted is unfounded in law and fact.

Doctrine of Implied Consent:

Implied consent sometimes negates fraudulent intention. Where for example a person uses money entrusted to him under an honest belief that consent would have been given by the owner he may be acquitted of theft for lack of a fraudulent intent. In the case of **Ally Iddi v. R. (1969) H.C.D.No.263**, the complainant gave the appellant Tshs.580/- in old notes to change them into new ones. Appellant returned Tshs.400/- new notes. Complainant wanted her money back, appellant agreed to repay her, but did not. He kept avoiding her. Appellant was charged and convicted of theft of Tshs.180/-. On appeal the court said:

It is quite clear that, there may be circumstances in which a person might use another's money entrusted to his custody without that other's consent where it is reasonable to assume that consent would have been given if asked. If in such circumstances the owner of the money treats the transaction as one of loan when it is reported to him that the money had been used, then he could not later seek to take criminal charges. On the other hand, if there was no reasonable grounds for believing that the owner would have given consent for the user and if on reporting it, the owner protests, the mere fact that he takes no immediate action and give the offender time to put the matter right by payment couldn't change the character of the original unauthorized user.

"In Tanzania a person who uses money entrusted to him by another at his will may be guilty of larceny even if he had the intention to repay.

Implied consent was said to exist in the case of **Yusuf Salim v. R (1969) H.C.D.No.264**. The appellant was TANU employee at Songea was entrusted with Tshs.695/- for the repair of the car. He received a message from TANU HQ that one member of his family was sick, and thus had to travel to Morogoro. He used the money for this purpose and reported to TANU HQ. He was told that the deductions would be made from his salary. He asked that deductions should not be made during his leave (three months) but after and not in installments but in one installment. The deduction were in fact made, but was later charged. He was convicted, the magistrate citing section 258 (2) (e) TPC that fraudulent intent is established in the case of money notwithstanding intent to pay the money afterwards to the owner. On appeal it was held that:

- 1) *In this case it seems clear that appellant felt that he could have obtained the permission to use the money in the circumstances, which had, arisen.*

- 2) *He reported to the HQ, no steps were taken against him; he was allowed to remain in the employment of TANU and was allowed to go on leave. Arrangements were made to*

have the money deducted from his pay at his convenience and the money was in fact deducted.

3) *It is impossible in these circumstances to hold that there was fraudulent taking.*

The law regarding to implied consent is not settled, as was held in the case Of **GEOFFREY BUYUMBO v. R. (1968) H.C.D.No.373**, where the accused was convicted of stealing of stealing by servant. He was a Divisional Secretary of **TAPA** and collected revenue on its behalf. He admitted appropriating part of it for himself, but alleged that this was partly because he had not been paid his salary by **TAPA** for eight months. Without considering whether this taking could be described as fraudulent or not, **MUISTAFI, J.** dismissed the appeal holding that

“Even if an employee has not been paid his salary he has no right to use money which he received for his employer, without authorization. There can be no claim of right in such a case.”

It is submitted that the mere absence of a claim of right does not automatically mean that the taking is fraudulent. It is important to consider whether the accused acted dishonestly or not. The courts should not confine themselves to legal technicalities since the question whether the taking is fraudulent one or not is both a question of law and fact.

Taking/Asportation:

For an offence of theft to be complete, there must be taking/asportation. The stolen thing must have been moved from its original place to another otherwise it may be assumed to be attempted theft. Section 258(5) **TPC** expressly provides that—a person shall not be deemed to take a thing unless he moved the thing or cause it to move. Thus according to this section, even slightest movement is sufficient to amount to theft. **Mazengo Nagala v. R. (1969) H.C.D. No.156**, the accused was charged with theft but was convicted of attempted cattle theft. The evidence showed that at about three o’clock in the morning two herdsmen employed by the complainant were awakened by the sound of cattle moving, and they found four herds of cattle outside the boma, which had been broken open. The accused attempted to escape by breaking through a hedge surrounding the compound but was apprehended. According to the magistrate, the act of driving out of the boma four cows, but without moving them away from the victim’s courtyard didn’t amount to “taking”. On appeal:

There was more than sufficient asportation in this case to constitute taking within the meaning of the definition of theft.

Another case, which is relevant, is that of **Samwel Msirangala v. R. [1981] T.L.R. 319**. In this case the appellant was convicted by a primary court of attempted cattle theft. His appeal to the District Court failed. The appellant had broken into another person’s kraal and driven a bull away from it. He was seen by two people. On its own the bull returned to its owner’s kraal. On a further appeal to the High Court the issue was whether the offence committed was one of attempted cattle theft or cattle theft. It was held:

Since the appellant drove the bull from where it was to another place, asportation was proved and therefore, the offence committed was one of cattle theft.

Conversion

Section 258 **TPC** defines theft in such a way that the offence is capable of being committed by two different ways, that is, by a fraudulent taking or by fraudulent conversion. For a conversion to amount to theft it must fall within the definition of “fraudulent conversion. Under section 258(2) **TPC** conversion not amounting to theft is not an offence except where the thing converted fall within section 284**TPC**.

In **R. v. Burns [1958] E.A. 142**, the accused a police officer, took a government vehicle, which was on charge to his police station with the driver and returned a day later. He had no authority to take the vehicle and would not have been give the authority to take the vehicle if he had asked for

it. He was charged with the unlawful use of the vehicle contrary to section 289 **KPC (S.284TPC)** and was convicted on his own plea. On revision the court said:

The use of the vehicle by the accused was unlawful and without claim of right; that he deprived his police station of the use of the vehicle for two days and his conduct was inconsistent with the owner's right and consisted conversion.

To be an offence under this section, it is not necessary that the person converting the thing should intend permanently to deprive the owner of the thing of it. If he had intent he would be guilty of stealing.

Conversion consists in dealing with goods in a manner inconsistent with the right of the true owner. Where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter.

In the case of **Lawrence Maliki v. R. 1973 L.R.T.N.12**, the court held that a person may be said to have converted a vehicle so as to be guilty of conversion not amounting to theft even though initial in lawful possession of the vehicle if he subsequently does any act in relation to it which is inconsistent with the owner's right, although without intent to deprive the owner permanently of the vehicle.

A typical case of conversion not amounting to theft is **Lexcon Oduntu v. R. (1970) H.C.D.No.32**; the appellant borrowed a bicycle from the complainant who was his brother in law, promising that he will return it on the same day. Some four months later the complainant recovered the bicycle after meeting the appellant near the latter's house. The trial magistrate convicted him of theft. On appeal:

Since the bicycle was loaned, the original taking was lawful, and there was no subsequent overt act showing an intention permanently to deprive the owner thereof. A conviction of conversion not amounting to theft was substituted.

Generally, a conversion is not fraudulent where the subject matter of the conversion is something that was lost by its owner and the person picking it believes on reasonable ground that the owner cannot be found. —S.258 (4) **TPC**.

On the position of husband and wife, the law is very clear on this matter. —S.264**TPC** in the case of **Kisese Mbugha v. Zainabu Swalehe [1991] T.L.R. 90**, the issue was whether a spouse could steal from another spouse. The respondent was charged with stealing from her husband. The primary court convicted her. The wife who after theft began to live in separation appealed to the District Court. The District Court quashed the conviction on the ground that the respondent had a defense of "honest claim of right". On appeal the High Court considered whether or not the respondent committed theft.

- 1)** *Under section 264 **TPC** a husband may be guilty of stealing from his wife or a wife from her husband.*
- 2)** *Under section 258**TPC** any one who takes away, anything under an honest claim of right is not guilty of the offence of theft. In the case at hand, the respondent had at no time honest claim of right.*

Aggravated Theft

Sections 266 to 275 **TPC** deal with various forms of aggravated thefts. These offences include:

- 1)** Section 266 **TPC** stealing wills
- 2)** Section 267**TPC** stealing postal matters
- 3)** Section 269**TPC** stealing from the person, goods in transit

- 4) Section 270TPC.....stealing by person in public service
- 5) Section 271TPC stealing by clerks and servants
- 6) Section 272TPC stealing by directors or officers of companies
- 7) Section 273TPC stealing by agent
- 8) Section 274TPC stealing by tenants or lodgers
- 9) Section 275TPC stealing after previous conviction

Nb: while the minimum penalty for ordinary theft covers seven years (section 265 TPC) aggravated theft covers seven to fourteen years.

The common form of theft amongst these categories is stealing by person in the public service. Let us consider this section in detail.

The aggravation of the offence is only in so far as the penalty is concerned. In charging the accused must be charged under the section creating the offence i.e. section 265TPC as well as the section aggravating it i.e. section 270TPC and no one of them only.

The biggest problem under this provision has been the interpretation of the part, which reads “*or came into the possession of the offender by virtue of his employment*”. In the case of **Rajabu Mbaruku v. R. [1962] E.A. 669**, the appellant was charged with two counts of stealing by person employed by the E.A. Railways and Harbours Administration as a bus driver. His job was to drive passengers from Morogoro to Tanga, but he had no instructions to pick up fresh passengers on the way. The appellant did however; pick up fresh passengers and collected fares from them, which he kept for himself.

The issue on appeal was whether the money he kept for himself came into his possession by virtue of his employment. The court held that, by picking up passengers without authority the appellant had deviated from his duty and therefore it could not be said that he had received the money by virtue of his employment. Thus the conviction quashed.

However, Biron, J. departed from the above decision in the case of **Yesaya Gweseko v. R. [1970] E.A. 667**. In this case the appellant was employed as a chief Prison Officer in charge of Kondoa prison. He made three **L.P.Os** for food for Arab remand prisoners in favour of one businessman. He requested the businessman to give him the money in the sum set out in the **L.P.Os** because the proprietors from whom he wished to buy the food were not prepared to accept the **L.P.Os**.

Later on it was discovered that no prisoners bearing the names given in the **L.P.Os** were ever detained in the Kondoa prison. The trial magistrate convicted him of forgery but acquitted him of stealing by a person employed in the public service.

The magistrate reasoned that since the accused knew that there were no Arab prisoners at his prison, from the beginning he had no intention of paying the money he obtained from the businessman to the government, therefore money received from the businessman never become government property (**Mbaruku case**).

On appeal while noting that the magistrate correctly applied the existing law on the matter, Biron, J. thought that the interpretation of the expression “by virtue of his employment” given by Spry, J. in **Mbaruku case** was very narrow. He noted that even Spry, J. in the case cited “very reluctantly followed the English authorities on the interpretation of the above expression. He departed from the interpretation given under the English authorities particularly to the Privy Council have been abolished and English cases have no more than persuasive authority”. In the circumstances of the present case, he held that the appellant received the money by virtue of his employment.

The position adopted by Biron, J. in the above case has been consistently followed in the subsequent decisions in the High Court. In the case of **Donald William Ibrahim v. R. (1972) H.C.D No.59**, it was alleged that the accused stole Tshs. 100/- the property of the remand prisoner.

At the time the alleged offence was committed; the accused was employed as a prison officer in Isanga Prison and was in charge of the admission section of the prison. The trial magistrate convicted him of stealing the money holding that he stole the money by virtue of his employment. On appeal **Mnzava, J.** followed the Yesaya case holding that

“In the present case, there is no dispute whatsoever that the appellant was a person employed in the public service when he stole the 100/-. Equally there is no doubt at all that he received the said money by virtue of his employment as a prison officer that is a servant of the government”. Hence was rightly convicted.

In **Rashid v. R. [1972] E.A. 438**, the appellant a detective corporal of police was convicted of theft by public servant by stealing money, which he seized from the person (a suspect) whom he searched. The warrant under which he professed to act was invalid as it was unsigned. On appeal he argued that the money had not come into his employment, as the search was illegal. On appeal:

The property came into the appellant’s possession by virtue of his employment even though the act was outside his authority.

Where it is clear that the money does not belong to the government nor did it reach the accused by virtue of his employment, he cannot be convicted under the section. In the case **Mikidadi Abdullah v. R. (1970) H.C.D No. 225**, the appellant a former officer in charge of Tabora Prison, as such also ex-officio chairman of prison officers staff club, was convicted of stealing by public servant in that he stole 334/30/- from the prison staff club fund. On appeal:

As the money belonged to the prison staff club and not to the government the offence does not fall within section 270. ==He was convicted of simple theft.

In another case of **Christian Mbunda v. R. [1983] T.L.R. 340**, the appellant was charged with stealing by servant contrary to section 271 and 265TPC. Appellant was employed by village council as a cashier. He used to receive money from N.M.C. and other crops authorities on behalf of the village for the purpose of buying crops from the peasants. It is not in dispute that among the money received by him from the N.M.C. at the material time was 10.000/- for the purpose of buying millet. It was the prosecution’s case that the appellant didn’t use the money for buying millet nor did he account for the same.

Appellant’s explanation is that he used the money in various village projects after he was ordered to do so by the village authority. Appellant maintained that the village leadership sanctioned the use of this money in the alleged projects by authorizing the relevant payment vouchers. However the prosecution and the village council never produced these payment vouchers. The trial magistrate ordered the appellant to proceed with his defense without these vital documents. The magistrate convicted him of stealing by agent c/s 273(a) and 265TPC. On appeal:

It can’t be refuted as far as N.M.C. was concerned; the recipient of this money was the village council. Since it was not practicable for all the members of the council to keep the money jointly, they engaged the appellant for that purpose. But still the council retained overall control of how the money was to be used. As between the appellant and the council it was quite legitimate for the latter to direct the former on how the money should be used. After all the N.M.C. communicated with the village authority and not with the appellant in all matters pertaining the buying of crops.

Was there theft in this case?

In order to convict an accused of theft, the prosecution must prove the existence of actus reus, which is specifically termed as asportation and mens rea. In the instant case there was undoubtedly asportation but definitely appellant had not the requisite guilty mind when he used the money for the purpose other than buying the millet from the villagers.

Stealing by servant—whether covers situation where the thing stolen is not the property of the accused’s employer?

It is not necessary for one charged with stealing by servant contrary section 271 TPC that the property stolen should belong to the accused's employer, but the section covers a situation where, though the stolen property doesn't belong to the employer it came into possession of the employee or accused on account of his employer.

Doctrine of Recent Possession

Where it is proved that the property has been stolen and that very soon after the theft the defendant has been found in possession of the property, he may fairly be regarded as either the actual thief or else a guilty receiver.

Before the doctrine is invoked, proof must be given that:

- 1) The good in question has been stolen,
- 2) The theft should have taken place recently.

The doctrine of recent possession is a rebuttable presumption of fact based upon the finding of property recently stolen in possession of the receiver. See the case of **Michael Mhuto v. R. 1975 L.R.T. N.18**.

Therefore where recent stolen property is found in possession of a person, the possessor of such property is deemed to have stolen or unlawful obtained unless he can give a reasonable explanation of innocent possession. Such presumption raises also a presumption of guilty connection with any further crime that accompanied theft. Read **Manazo Mandundu & another v.R. [1990] T.L.R.92**.

In the case of **Said Mkuyu v. R.(1972) H.C.D. No.41**, the judge observed that where a person is found with a stolen radio two and a half hours after a house breaking, even if no direct evidence can be given on the breaking, in the absence of a probable explanation he can be convicted of house breaking and stealing.

In **D.P.P. v. Joachim Komba [1984] T.L.R. 213**, the doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or guilty receiver.

As to what time is near enough to be "recent" no general rule can be given for the period within which the presumption can operate will vary according to the article stolen. In the case of **Seif Ally v. R. 1976 L.R.T.N.55** in deciding whether the possession is recent or not, the nature of the property stolen must be taken into account, whether it be of a kind readily passes from hand to hand and the trade of occupation to which the accused belongs can all be taken into account. In **D.P.P. v. Joachim Komba [1984] T.L.R. 213**, the appellant was originally charged with burglary. He was found in possession of a radio cassette which had been stolen some eight months earlier together with some household goods from complainant's house which had been burgled. The trial court acquitted the accused on the charge of burglary but convicted him of stealing and subsequently discharged him conditionally under section 38(1) TPC. **D.P.P.** appealed.

There is no general principle for determining the period of time, which is recent enough to justify the application of the doctrine of recent possession. In the circumstances of this case, eight months after disappearance of the said stolen radio cassette is too long for the doctrine of recent possession to be invoked. Thus he is guilty of receiving stolen property.

In the case of **Naftal s/o Ngalya v. R. 1976 L.R.T. N.45**, the appellant was charged and convicted of cattle theft. On 7.3.73 two herds of cattle were stolen. One herd was found two days later already slaughtered. On 21.7.73 the second herd was found in possession of the appellant, as he was about to sell it at KIGWE cattle market. On appeal:

In deciding whether possession is recent the court must have regard to the nature and value of the property. The period of four and a half months between the stealing of the herd of cattle and the finding of it in the possession of the accused entitled the court to invoke the doctrine of recent possession.

In the case of **William Maziku v. R. (1972) H.C.D.No. 174**, the court held that the doctrine of recent possession could be invoked to convict the appellant of burglary where the appellant was found in possession of a stolen radio and clothes within three weeks after the burglary had been committed although he was arrested twenty-five months later.

However in the case of **James Malawi v. R.(1969) H.C.D.No.172**, it was held that four and a half months period is not recent where the accused was found with a stolen radio which is a common article which can easily exchange hands. In the case of **Ibrahim Ramadhani v. R.(1969) H.C.D.No.218**, the same court held that forty-three days were “recent” in a case of burglary where the accused was found with a stolen gun since a gun is not a thing, which can easily change hands.

The question of “recent possession” therefore, remains largely a question of fact where each case has to be decided on its own merits.

Receiving and Retaining Stolen Property or Unlawfully Obtained

The offences of receiving and retaining stolen property or unlawfully obtained are created under section 311 TPC. Receiving and retaining are different offences. In receiving it implies that at the time the accused received the property he knew that it had been stolen or otherwise unlawfully acquired. In retaining the implication is that at the time of the receipt the accused doesn't know that the property was stolen or otherwise unlawfully acquired but discover this fact at some later stage. If he continues to keep such property after such discovery, then he is deemed to retain the property, it is logical therefore, that a person can't be charged with both receiving and retaining the same property.

In the case of **Mopuyani Ole Ndotoo & Another v. R. (1970) H.C.D.No.74**, the six appellants were charged with receiving and retaining stolen cattle and were convicted of these offences. On appeal:

A charge of receiving stolen cattle is mutually distinct from a charge of retaining stolen cattle.

Receiving stolen cattle implies that at the time the property stolen was received the receiver did not know it was stolen property, but that sometime later he came to know that it was stolen property, and thus retain it in his possession. A person therefore can't be both a receiver and retainer at one and same time.

It is necessary for the prosecution to charge and prove that the receiver knew that the property had been obtained unlawfully. In **Masweda Adiga v. R. [1992] T.L.R. 140**, the court held that in order to prove a charge under section 311(1) TPC, it must be established that the accused received or retained the property in question and that he received or retained the same with guilty knowledge in the sense that he knew or had reason to believe that the same had been stolen or otherwise feloniously obtained or disposed off.

Furthermore, the prosecution must prove:

- 1) Theft or obtaining by unlawful means,
- 2) Receipt of the stolen property by the accused person,
- 3) The accused's guilty knowledge at the time of receipt.

It should be noted that on retaining, the same elements prevails, except that the guilty knowledge may exist after receipt.

In the case of **Mwangi Njoroge v. R. [1963] E.A.624**, the appellant was convicted of receiving or retaining stolen property. The evidence showed that when the appellant's house was searched a large number of M&B Tablets were found in tins placed under the bed. The appellant argued that the tablets were not stolen but that they belonged to someone else and that he had bought them. In convicting the appellant, the magistrate held that having regard to the circumstances of the appellant's purchase and possession of the tablets, they had been stolen and that the appellant knew that they had been stolen. In allowing the appeal:

Where there is no direct proof of theft or of receiving goods knowing them to have been stolen, the ordinary rule of circumstantial evidence must be applied, namely, that the circumstances must be such as to convince any reasonable person that no other conclusion was reasonably possible. Since it was possible that the tablets had been concealed because the appellant had committed the minor offence of contravening the pharmacy and poisons laws. Thus the magistrate was wrong in convicting the appellant of receiving stolen property.

In another case of **Iddi Waziri v. R. [1961] E.A. 246**, there was strong circumstantial evidence of stealing leading to a finding of receiving stolen property. The appellant was convicted of receiving stolen property, namely, four bags of coffee, but there was no direct evidence to prove conclusively the theft or ownership of the stolen goods. He was selling coffee at a price well below the market price, and the bags were hidden in a maize field. When he saw the police he ran away. In dismissing the appeal:

The resident magistrate was right in finding that the circumstances in which the appellant was found in possession of the goods and the circumstances in which he attempted clandestinely to sell them and his subsequent denial of knowledge or possession pointed irresistibly to the receipt of the goods by the appellant knowing them to have been stolen.

The person accused of receiving or retaining stolen property must be in actual possession of it. In **Said Kigozi v. R. [1958] E.A.1**, the appellant was convicted of receiving a bicycle knowing it to have been stolen. The bicycle had been taken to the appellant for repairs and was found in his possession in a dismantled condition. The appellant had removed the small part, which bears the number, and substituted another such part with a different number. It was argued on the appeal that the appellant didn't have possession of the bicycle of the nature that must be proved to establish a charge of receiving. In dismissing the appeal:

Although mere manual possession of a stolen article, without having control of it doesn't amount in possession in law, in this case the RM had considered this question and had rightly inferred from the evidence that the appellant had at least joint possession and had, at the least joint control over the article.

Conveying or Being in Possession of Suspected Stolen Property

For section 312 TPC to apply the person must have been detained by police officer under section 25 CPA. Thus if a person is found in possession of or conveying in any manner anything, which may reasonably be suspected to have been stolen or unlawful acquired he may be charged with the offence of being in possession or conveying or has control over the property suspected to have been stolen or unlawful acquired.

For the purpose of this section "unlawful acquired" means acquired in circumstances which constitute a criminal offence under any written law. Read sections 312(2)(a—b) and 312(3)(a—b) TPC which elaborate the unlawfulness of such property.

The first ingredient of this offence is the detention of the accused by a police officer under section 25 CPA. This section vests on a police officer of any rank the power to stop, search or detain any vessel, boat, aircraft or vehicle which he has reasons to suspect anything stolen or unlawfully obtained any person having in his possession or conveying in any manner anything stolen or unlawfully acquired. When the prosecution has established these ingredients, it will be for the accused to satisfy the court that he didn't steal the article or unlawfully acquired it.

In the case of **Ally Ramadhani v. R. (1968) H.C.D. No.430**, the accused was convicted of retaining stolen property contrary to section 311(1) TPC. He was first charged with being in possession of property suspected to have been stolen c/s 312 TPC but this charge was altered. Accused had been found in possession of a number of bicycle parts, some of which were usable. The serial number on a few of them appeared to have been erased. There was no evidence that the property was concealed. The accused's explanation was that he was a bicycle repair and that various customers would leave parts with him after repair had been effected. On appeal:

1) *Accused clearly could not have been convicted u/s 312TPC as original charged.
The pre-requisites for a conviction under this section are:*

- i)** *That the accused was detained in exercise of powers under section 24CPC (25 CPA)*
- ii) That he was detained while in the course of a journey, whether or not in a street, in private land or in a building,*
- iii) That he had in his possession, when detained a particular thing,*
- iv) That the thing may reasonably be suspected to have been stolen or unlawful obtained from its nature or from the circumstances,*
- v) that the accused refused to give an account to the court of how he came by the thing or gave an account which was so improbable as to be unreasonable, or which was rebutted by the prosecution.*

But there was no evidence that either pre-requisite (i) or (ii) above were satisfied. Therefore accused could not have been convicted under section 312TPC.

2) *accused was wrongly convicted u/s 311(1) TPC “where as u/s 311 all that needs to be done is to lead evidence to show that there was reasonable suspicion that the property was stolen /s 311TPC there must be satisfactory evidence that the property was in fact stolen or unlawfully obtained and that the appellant knew or had reason to believe that this was the case. This doesn’t necessarily mean that the owner of the property should be identified, or that there should be direct evidence of theft.*

The circumstances under which an accused received or possessed the goods may prove that they were stolen and that the accused knew it.

In order to rebut innocent possession the prosecution may adduce evidence of the conduct of the accused at the time he was found in possession of the article in question if each conduct is inconsistent with innocent possession.

E.g. Denial of possession of the goods,
Attempt to destroy the goods,
Attempt to run away.

In both situations, the accused has to satisfy the court that he did not or otherwise unlawfully acquired the property. He will have failed to satisfy the court if, for instance, he gives no account to the court as to how he came by the said property or if he gives an account which is so inherently improbable as to be unreasonable or which the prosecution gives an account which ought reasonably be true and which is consistent with innocent possession he will be entitled to an acquittal. However the section does not require him to prove that he came by the possession of the property honestly. Read the case of **George Lerai v. R. 1(1921—1952) T.L.R. (R) 366**. This principle was reiterated in the case of **Kiondo Hamisi [1963] E.A. 209**, where it was held that before a magistrate could convict on a charge u/s312TPC he must make finding as in the case of **Ally Ramadhani** (above). The burden on the accused person was something less than satisfying the court on a balance of probabilities.

In **Bakari v. R.[1962] E.A. 466**, it was held that the offence must be committed in the course of a journey, possession, therefore is not enough, conveying must also be proved. In **R. v. Njuguna 2 K.L.R. 50**, it was held that, the section doesn’t apply to possession at large, but only to such possession as a man has when he is conveying the object. The reason for this is because a conviction precedent to the offence is that the person charged must have been stopped, searched or detained by the police officer under the powers conferred by section 25CPA.

However, in **Njoroge v.R. [1965] E.A.585** whereby the appellant when surprised by a police patrol fled from a land rover, which was found to contain copper wire, reasonably suspected to have been stolen from a nearby transmitting station. The appellants were caught after a short chase. It was held that the evidence was sufficient to justify a finding that the appellants were “conveying” the copper wire.

Robbery

Robbery is defined under section 285 TPC. The elements of the offence are:

1. That the accused stole something.
2. That at or immediately before or immediately after such stealing he used or threatened to use actual violence to any person or property.
3. With intent either:
 - a) To obtain or retain the thing stolen, or
 - b) To prevent or overcome resistance to its being stolen or retained.

The punishment of robbery is twenty years imprisonment if it is simple robbery; if it is aggravated robbery the punishment is life imprisonment with or without corporal punishment.

1. It Must Be Proved That The Accused Stole Something

In this case it must be shown that there was taking. On top of that, the property must be handed over by the person threatened or at his request. In the case of **Nuru Ayubu v. R. (1968) H.C.D No. 279**, the accused were convicted of the offence of robbery. They threatened to shoot the complainant unless he gave them 600/-. The complainant's son without a request from the complainant got the money and handed to the accused persons. Conviction for demanding money with menaces was substituted because the money was not taken from complainant or at his request but was given by his son.

2. It Must Be Proved That The Accused Formed Intention To Steal At Or Before He Used Or Threatened To Use Violence

If the intention to steal is formed after the assault, that can't be held to be robbery. In the case of **Mkwepu v. R. 2 T.L.R (R) 108** is a good illustration. In that case the accused met the complainant, a woman, and overtures to her, she rejected them, whereupon he seized her by the wrists, and as she struggled, he snatched her basket of food and clothing away from her and ran a short way into bush. He then invited her to come after him under no illusion as to his intentions, declined and went off in search of help. The accused was arrested the next day, but the complainant's goods were not recovered.

It was held that, since at the time the accused took away the woman's basket he had no intention of stealing it and that he did so in the hope that she would be enticed to follow him and further that he formed the intention to steal the goods after his refuse to enticing her into the bush had failed, he could not be convicted of robbery because the intention to steal was not formed at the time he assaulted her. A conviction for theft was substituted.

Similarly, general belligerent behaviour in which theft is committed with no rational connection between the theft and belligerent behaviour is not robbery. In **Miderege Bemeye v. R (1968) HCD No. 74**, the accused was convicted of robbery with violence. There was the evidence that the accused while drunk, assaulted a number of persons in a pombe shop. After assaulting complainant, accused took complainant's coat and walked away with it. On appeal it was held that:

Penal Code section 258 provides that, any person who steals anything and uses violence to obtain or retain the thing stolen is guilty of robbery. Here the actions of accused were not in order to obtain or retain the coat, but rather were part of general belligerent behaviour which had no rational connection with the theft, conviction for simple theft substituted.

3) The Connection Between The Theft And The Violence Must Not Be Too Remote In Time Or Place In Relation To The Theft.

In the case of **Gathuri Njuguna v. R. [1965] E.A 583**, the complainant had left his house at 7.00 am and while returning at about 9.00pm the same day, saw the appellant proceeding from the

direction of his house carrying a bundle. On discovering that it was his house that has been broken into, alerted his neighbours and they set out after the accused that they found 500 yards away. The appellant resisted and hit the complainant with a club before being overpowered. On appeal the court said:

We think that the essence of the offence of robbery is an openly committed theft from or in the presence of someone or a theft where the offender is caught more or less in the act or immediately after the act. We do not think it extends to a case such as this where the offence was committed clandestinely without discovery or chase until after the offender had left the premises and had proceeded so far on his way as he had in this case without being discovered to be a thief. A conviction for burglary and theft was substituted.

In the case of **Mkwe Lakimoja v. R. (1967) H.C.D No.372**, Mkwe stole a tin of millet from a pombe club. The owner returned and searched for the tin but could not find the tin shortly after; the club watchman found the appellant carrying the tin outside the club. A struggle ensued in which the appellant assaulted the watchman before being overpowered.

The use of threat or violence must not only be for the purpose of

- Obtaining or
- Retaining the thing stolen,

But occur

- i. At
- ii. Immediately before or
- iii. Immediately after the time of theft.

In this case the search intervened between the theft and assault.

The conviction for robbery quashed –conviction for stealing and assault imposed.

In **Magati s/o Mchoya v. R. (1968) H.C.D No.375**, the accused was convicted of robbery with violence. The village chairman and others discovered his wife illegally brewing moshi when they arrested her; the accused seized a bicycle and a briefcase belonging to the headman and pulled out a knife saying that if the headman would take his wife he would take his bicycle. When the wife was taken away, the accused took away the articles into his house. The headman later recovered them. On appeal:

Conviction quashed “as to the detaining of the bicycle and the briefcase the appellant’s motive was to exert pressure to have his wife freed by detaining them temporarily”. He did not intend to deprive the headman permanently of them, so there could be rather theft nor robbery.

In **Sayala Seliani v. R. (1968) H.C.D No.243**, the three accused were convicted of robbery. They were in the process of beating complainant when his watch fell or was torn off his wrist, where upon one of the accused pocketed it. On appeal:

Section 285 TPC “...” The purpose must be to steal something; here the taking of the watch was incidental to the assault. Convicted of causing actual bodily harm.

The issue of an extent of violence used is immaterial; the fact that very little violence was used should be a factor in mitigation of sentence and not a defense to this offence. Even if little violence was used to overcome the complainant’s resistance to the theft that would amount to robbery. However merely snatching away property from a person unaware and running away with it does not amount to robbery.

On allegation that the accused threatened to use actual violence to any person or property, the threat need not to have to be uttered. General conduct may constitute threat of violence.

It is equally immaterial that the accused did not take but was given the property by the complainant, so long as it is proved that the complainant parted with his property through apprehension of immediate injury to him or some other person or property.

Aggravated Robbery

According to section 286 TPC robbery is aggravated if the offender;

- is armed with any dangerous offensive weapon or instrument
- is in company with one or more person(s)
- or at or immediately before or immediately after the time of stealing:
 - he wounds
 - beats
 - strikes
 - or uses any other personal violence to any person.

Offensive weapon is either;

- 1) An article made or adopted for use or suitable for causing injury to the person better known as an offensive weapon per se. E.g. revolvers, knuckledusters, rifles, spear, bow and arrow, sword, matchet, club, etc.
- 2) An article intended by the person having it with him such use—better known as “an offensive weapon sub modo. Offensive weapon sub modo are improvised instruments for use against the person. A razor for instance, is primarily meant for shaving but if brandished in a street brawl it becomes an offensive weapon sub modo. In some circumstances, a stone might become an offensive weapon sub modo.

Demanding Property With Menaces

According to section 292 TPC a person is guilty of the offence who:

- I) with intent to steal
- II) any valuable thing
- III) demands it
- IV) from any person
- V) with menaces of force.

The salient differences between demanding property by written threats and demanding property with menaces are:

- The former offence requires writing, it is not so in the latter.
- The former offence allows the defense of reasonable cause for the demand. Whether there is reasonable and probable cause, is a question of fact.
- The former requires proof of intent to extort or gain anything, whilst the latter requires proof of intent to steal any valuable thing.
- demanding property with menace requires proof of menaces, which include:
 - threats to injure a person
 - threats to injure a property
 - threats to disclose improper behaviour.

Vaz v. R. (1961) E.A 320, the appellant a poor man, discovered in the course of his employment that there was an established practice authorized by his employers, removing tops of bales of cotton originating from a certain ginnery and replacing them with tops marked to indicate that they originated from another ginnery. He collected all the evidence necessary to expose this practice. Having done so he demanded 20,000/- from his employers through their agents for keeping silent and restoring the evidence that he had collected. He was charged with and convicted of demanding money with menaces with intent to steal.

The menaces or threats need not be uttered explicitly; it is sufficient if the menace, though veiled, is implicitly in the circumstances in which the money is demanded, so that an ordinary reasonable man would read the menace into the demand.

Whilst the menace must be calculated to (i.e. be of such a nature as to be likely to) produce in the person menaced considered as an ordinary reasonable man, some degree of

fear and alarm such as would unsettle his mind, it is not necessary to show that it did in fact induce such fear or alarm in him.

In the event of menace proving unsuccessful, the test is whether, if it had been successful and the money been obtained in such circumstances that it could properly be said to have been stolen; with particular attention to the question whether it had been taken fraudulently and without claim of right.

Honest claim of right is a defense to a charge of demanding money with menaces with intent to steal. In the case of **R. v. Bernard (11938) 2 K.B 264**, the complainant a married man agreed to pay his Hungarian mistress twenty pounds a month for one year. He failed to maintain these payments and the woman threatened to expose him to his wife and the public by means of an announcement in a newspaper unless he paid her forthwith money for eight months. She stated in evidence that she had taken the advice of a Hungarian lawyer. In fact the woman had no legal claim to the money, she was charged for demanding money with menaces.

The woman had a defense if she honestly thought that she had a claim, even though she was wrong in so thinking.

Burglary and house breaking

House Breaking

Breaking is defined under section 293 of the Penal Code, that is:

- a) a person who breaks any part whether external or internal of a building or opens by unlocking, pulling, pushing, lifting or any other means whatsoever any door, window, shutter, cellar flap or other thing intended to cover or close an opening in a building or an opening giving passage from one part of the building to another is deemed to break the building.
- b) A person obtains entrance into a building by means of any threat of artifice for that purpose or by collusion with any person in the building, or who enters a chimney or other aperture of the building permanently left open for any necessary purpose, but not intended to be ordinarily used as means of entrance, deemed to have broken and entered the building.

A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

Thus to open a locked door with a key, or push it open or to pull or lift a latch of any door or window and so open it, constitutes breaking of the building. Indeed if one pushes open a door that is closed but not locked, he is said to break the building.

What Constitute House Breaking

In order to obtain a conviction, the prosecution must prove that:

- The accused broke the building, tent or vessel,
- Having so broken he entered there to,
- The building, tent or vessel is used as human dwelling,
- He did so with intent to commit an offence.

That there was breaking:

It is necessary to prove that the door, window or other aperture was closed before the breaking.

In **Lenderito s/o Laidosoli V. R. (1972) H.C.D No. 169**, the appellant was convicted of burglary, stealing and unlawful wounding c/ss.294, 265, and 228(1) of the Penal Code. The facts are that **PW3** who was a tenant of the appellant left without paying rent and rented another house. On 10th may 1971 the appellant told him that he could see the consequences in the evening. At about 10.30 that evening while **PW3** had gone out, **PW1** heard a bang on his door and saw people coming from his room, the appellant was standing near the door and attacked **PW1** when he raised an alarm. He sustained lacerated wounds on his head. On return **PW3** found two suitcases and a bed sheet missing.

“With reference to the charge of burglary, **PW3** did not say that he left his door closed when he went out nor did any of the witnesses see it closed. **PW1** came to the conclusion that there was a breaking into the room in question because he heard a bang on the door. This was not conclusive evidence of breaking for the purpose of the offence charged.”

That the accused entered the building:

There must be evidence to prove that having broken the building, vessel or tent, the accused entered the same.

In the case of **Said s/o Ally v. R. (1973) H.C.D No.66**, the appellant was charged with burglary c/s 294(1) of the Penal Code but he was convicted of attempting to commit the offence. The complainant was awakened by noises downstairs in the small hours of the material night. As he climbed down the stairs he heard someone running away from the house. On flashing a torch he found that the door glass had been broken. He called in the police and took photographs of finger impressions. The appellant was later arrested on suspicion and according to the report submitted by the fingerprint expert, the impression found on the piece of glass were identical with the appellant's fingerprints. On appeal the judge said,

“I am in agreement with the trial court that the facts did not constitute the offence charged as there had been no entering. Having regard to the time the offence was committed there was an irresistible conclusion that the appellant was attempting to break into the house in order to commit a felony and I have no reason to differ from the finding of the lower court that the appellant attempted to commit the offence of burglary”.

To constitute the offence of burglary c/s 294(1) PC there must be entering. What then constitute “entering?” A person is deemed to enter a building as soon as any part of his body or part of instrument used by him is within the building. If for instance, the accused forces open a window and then pushes his hand or a stick through the window into the building, he is said to have entered the building because part of his body i.e. his hand or the instrument held by him that is, the stick, is within the building. If he pushes the stick into the building, it is immaterial that the whole of his body remained outside the building. The least degree of entering with any part of the body or instrument used by him will suffice.

In another case of **Paul v. R. (1971) H.C.D No.135**, the appellant was charged with two other men for burglary and stealing c/ss 294(1) and 265 of the Penal Code. In respect of the charge against the first accused the magistrate held that fishing the clothes out of a broken window did not constitute entering.

*It is pointed out for the benefit of the magistrate that breaking the window during the night and pole fishing the clothes through the broken window constitute the offence of burglary and stealing. It is sufficient to quote passage from **Archbold, 35th ed. Para 1805**. “There must be entering as well as a breaking, to constitute burglary although we have seen that the entry need not be on the same night as the breaking.... the least degree of entry, however, with any part of the body, or with any instrument held in the hand is sufficient, as for instance, after breaking the door or window etc. to step over a threshold. To put a hand or a finger or a hook or other in a window to draw a finger or a hook or other instrument a window to draw out goods. Appeal dismissed.*

If a person enters a building through a chimney or other aperture of the building permanently left open for any necessary purpose but not intended to be ordinarily used as a means of entrance or he obtains entrance into the building by means of any threat or artifice used for that purpose or by collusion with any person in the building, he is deemed to have broken and entered a building. — **S.393 TPC**.

In the case of **Peter Musa v. R 1973 L.R.T N.68**, the appellant was convicted for entering and stealing. There was evidence that the appellant could only have entered either by undoing the

padlock on the door or by jumping over the wall into the complainant's room as there was evidence that the house had no ceiling board. It was held that

If the appellant employed the first method he "actually" broke into the room. If he used the later method he "constructively" broke into the room, and of course the fact that he was already legally in another part of the house is immaterial.

This case **Peter Mussa** has realistically taken into account the prevailing conditions in our society and hence, held that an opening between the top of a wall and the roof was "by actual necessary permanently left open".

That It Was Used As A Human Dwelling

The third element of the offence of house breaking is that the building, tent or vessel, which the accused broke, was used as a human dwelling. Section 5 **PC** defines a "dwelling house" to include any building or structure or part of a building or structure which is for the time being kept by the owner or occupier for the residence there in of himself his family or servants or any of them and it is immaterial that it is from time to time un-inhabited. A building or structure adjacent to or occupied with a dwelling house is deemed to be part of the dwelling house if there is a communication between such building or structure and the dwelling house either immediate or by means of a covered and enclosed passage leading from the one to the another the important thing to remember is that the building or structure should be used or kept for dwelling by the owner or occupier or by his family or servants. If the building or structure has been abandoned as a result of the owner having shifted to some other places such building, structure will not strictly speaking, come within the definition of a "dwelling house".

That the breaking was with intent to commit an offence

It is not enough to prove that the accused broke and entered a building, tent, or vessel used as a human dwelling. The prosecution must go further and prove that the accused did so with intent to commit an offence. In the case of **R. v. Ntibilanti (1972) H.C.D No.106**, the accused was medically certified as being twelve years old was charged and convicted of house breaking under section 294(1) **TPC** and given a conditional discharge. The charge didn't specify the offence that the accused intended to commit.

"Time and time again this court has stressed that a charge of house breaking should specify the felony that was intended. It is a cardinal principle that a complaint should be couched in words which sufficiently inform the accused of the nature of the offence with which he stands charged."

Proceedings declared a nullity but retrial not ordered conviction quashed and the order of conditional discharge set aside.

Burglary

The offence of burglary is provided under section 294 **TPC**. The only difference between the offence of housebreaking and that of burglary is that burglary refers to a breaking and entering into a dwelling house at night with intent to commit an offence. In simple term burglary is housebreaking at night. Moreover, housebreaking is punishable with fourteen years imprisonment whereas burglary is twenty years imprisonment.

What must be remembered with regard to a charge of burglary is that the charge must allege that the offence was committed at night, and evidence must be adduced to prove that the offence was in fact committed at night.

Nighttime is defined under section 5 **TPC**.

In **R. v. Damas [1961] E.A 591** the respondent was convicted by a District Court on two counts of housebreaking and stealing respectively. On appeal the High Court quashed the conviction of housebreaking holding in effect that the offences of burglary and housebreaking under section 294 **IPC** were distinct offences, one being committed only at night the other only during the day and

that since there was no evidence of the time of day or night when the premises were broken and entered, the conviction was bad in law.

- i. *Under section 294 PC burglary is not a completely different offence from but an aggravated form of housebreaking which carries an enhanced sentence if the additional element, commission in the night is both charged in the count and proved at the trial.*
- ii. *If the additional element is either not charged or if so charged, is not proved, the offence is nevertheless housebreaking, no matter what time it may be committed.*

Conviction and sentence restored.

Entering A Dwelling House With Intent To Commit An Offence

According to section 295 TPC

- Entering must be through an opening normally used for ingress.
- That entrance/opening should not be locked or closed.

The elements of this offence are similar to those of housebreaking except that it does not include the element of breaking.

If however, the accused has a free access to the building by the nature of his duties or by virtue of his close relationship with the occupier, it is not easy to prove that he entered the building with intent to commit an offence.

In the case of **Paskale Stepheno v. R. (1968) H.C.D No. 196**, the accused, a servant of the complainant, was convicted, inter alia of entering a dwelling house with intent to commit an offence namely stealing. On appeal:

Since the accused had free access to the house of his employer, it could not be inferred from the theft of goods alone that the accused entered the house with intent to commit a felony.

The conviction for entering a dwelling house with intent to commit a felony was quashed, and that of stealing was upheld.

Breaking Into A Building And Committing An Offence

In order to obtain conviction for this offence then according to section 296 TPC the prosecution must be able to prove:

- That there was a breaking of a building by the accused
- That the building was a schoolhouse, garage, office, or counting house, shop store etc.
- That he entered the building and
- That he committed an offence therein.

In **Masemu Butili v. R. (1971) H.C.D No. 81**, the accused broke a garage door but before he could enter the building he was frightened away. He was convicted under section 296(1) TPC.

To establish the offence under this section the prosecution must prove:

- a) *The commission of the felony therein it does not seem that a garage was within the specified types of building.*
- b) *A breaking and entering, and*
- c) *Into one of the building specified in the statute.*

Moreover, there was neither an entering of the building nor a commission of a felony therein.

Thus it is not enough to prove merely that the accused broke and entered one of the structures aforesaid. You must go further and prove that having broken and entered the building, he actually committed a felony therein. If at the time of arrest the accused had already broken and entered the building but had not yet committed any felony therein, he may in a proper case be charged with breaking into building with intent to commit an offence therein.

A mistake often made by the prosecutors in respect of the offence of breaking into a building and committing an offence therein is that they prefer two counts in respect of the same offence. That is wrong.

Breaking Into A Building With Intent To Commit An Offence

The elements of this offence are the same as those of breaking into a building and committing an offence therein. This offence is provided under section 197 TPC.

In **Muniko v. R. (1972) H.C.D No.34** the accused was charged and convicted of shop breaking c/s 297 and c/s 265 TPC. On appeal:

Section 297 TPC applies to situation where there has been a breaking into one of the specified structures with intent to commit a felony, but the intended felony has not, in fact, been committed.

The accused should have been charged with the offence of breaking into a building and committing a felony therein under section 296 TPC which section comprises both the breaking with intent and the actual commission of the felony intended.

Person Found Armed etc With Intent To Commit An Offence

The difficulty in proving any of these offences lies in proving the intent to commit a particular offence. This of course, will depend on the circumstances in which the accused was found;

- That the accused was a stranger to the place.
- That the instrument or weapon was not such that a person could carry it if he was going about a lawful business.
- That he was found squatting near the premises.
- That he attempted to escape when discovered.

All these may show that the accused was there for some unlawful purpose and, in a proper case, that he was there with intent to commit an offence.

For the prosecutor to prove that accused had the intention of breaking into or entering some particular building under section 298 TPC proof of a general intent to break into a house is apparently insufficient.

In **R. v. Bailey (1853) 6 COX.CC 241**, it was held that “unlawful possession of implements of house breaking is sufficiently dangerous to society, although it may be unaccompanied with any immediate act of committing a felony.

Criminal Trespass

For the purpose of conviction according to section 299 TPC the prosecution must prove:

- 1) that the property in question belonged to another
- 2) that the accused's entry in or upon such property was unlawful in the sense that it was without the consent of the owner or without some other lawful excuse
- 3) that the intention of the accused in doing so was to commit an offence or to intimidate, insult or annoy the person in possession of such property.

If it is shown that the accused reasonably believed the property to be his own, that will be a good defense. Equally a charge of criminal trespass will not lay where the accused enters the premises or remains there with the consent of the owner, or where he does so upon other lawful authorization.

In the case of **Said Juma v. R. (1968) H.C.D No.158**, the accused was convicted of criminal trespass on the land of complainant, but the conviction was quashed on appeal to the District Court on the ground that the land did not belong to either party.

When in a case of criminal trespass, dispute arises as to the ownership of the land; the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership.

In another case of **Paul Kajuna v. R. (1967) H.C.D No.318**, the accused was convicted of criminal trespass despite the defense that he thought the land belonged to him. The land upon which the accused trespassed had been the subject of previous litigation, in which the accused had been claimed ownership of the land and lost.

In view of earlier adjudication of ownership, it can't be argued by accused that in good faith believed the land to be his.

Malicious Damage to Property

The word malice in common acceptance means ill will against a person, but in its legal sense, it means a wrongful act done intentionally and without just cause or excuse. According to section 326TPC a man act maliciously when he willful and without lawful excuse does that act which he knows will injure another person or his property. The term "maliciously" denotes wicked, perverse and incorrigible disposition. It means and implies an intention to do an act, which is wrongful to the detriment of another.

When an assault takes place which damage property worn by or in possession of the complainant, such damage is incidental to the assault rather than a separate offence. See the case of **Leo Pigangoma v. R. (1967) H.C.D No.137**.

Arson

According to section 319 TPC arson is the willful and unlawful setting fire to any building, structure or any vessel whatever, ether complete or not or to any stack of cultivated vegetable fuel, or to a mine, or the working, fitting or appliances of a mine.

To constitute arson:

- The accused set fire to any of the things aforesaid,
- He did so willfully and unlawfully.

That He Did So Willfully

It must be shown that the act was willful. It must be shown that it was by the conscious act of the accused. Burning a house through negligence or accident is not arson.

In the case of **Sixtus Amin v. R. (1967) H.C.D No. 6**, the accused set fire and burnt the complainant's house. The court held that where the evidence establish an accused careless or negligent conduct but does not establish willful and unlawful behaviour as here arson conviction can't stand.

That He Did So Unlawful

It must be shown that he had no lawful excuse for doing so. In other words, it must be shown that he acted with an evil mind or maliciously. But where a person sets fire in his own house without endangering life or adjacent buildings such act is not per se unlawful. But there may be circumstances in which a person who sets fire to his own house could be guilt of arson. It all depends on the circumstances of the case. In **Mwakarifur v. R. (1967) H.C.D No. 185**, the accused set fire to his house in order to end relationship with his wife. The court held that it would have been unlawful for him to set fire to his own property if a person was in the premises or other buildings belonging to other people were endangered.

Setting Fire To Crops And Growing Plants

The main elements of this offence according to section 321TPC are:

- That the act was both willful and unlawful
- That the crops, grass, trees etc was under cultivation or was cultivated.

Mere accident or negligence will not suffice.

Injuring Animals

According to section 325TPC the act of the accused must be willful and unlawful. The damage must not be incidental to another offence. It is important also to note what animals are capable of being stolen under section 257TPC.

False Pretences

s.v. MSHANA

False pretences is defined under section 301 TPC. The law concerning to false pretences prior to 1980 did not apply to future representations. According to section 301 prior to 1980 if a person made a representation either by words, writing or conduct of a matter of fact either past or present which in fact is false, and which the person making it knows it to be false or does not believe it to be true is a false pretence.

Since the definition under section 301 PC didn't include future instances, the East African Courts were reluctant to apply future representation to constitute the offence of false pretences.

In the case of **Esmail v. R [1965] EA 1**, the Court of Appeal ventured to say that if a man gives a check on May 1st post dated to June 1st there would be necessarily be a false representation on May 1st that the drawer on that date had power and authority to draw the sum endorsed on the check. However the appellant was convicted on the ground that the check he handed over was due to be paid the next day morning, this he made to the existing fact, because he represented it after banking hours and he knew perfectly well that the representation was false.

The case which the courts in East Africa used to reach such decision was that of **R. v. Barnad (1837) C&P 784** where it was said that: in the case of post dated check there is no representation that the drawer then and there had available funds, but the drawer does represent that he has power and authority to draw on the bank concerned.

In the case of **Burrows (1869) 20 LT 499** it was held that where a man obtained goods by falsely pretending that he intended to pay for them that evening, he is not guilty of an offence. So this being the trend, the courts in Tanzania found it difficult to handle the mushrooming cases involving checks of future promises.

In 1980 by virtue of Act No.14/80 the words past or present were removed from the definition. The relevant section now reads:

Any representation made by words, writing or conduct of a matter of fact or of intention which representation is false and the person making it knows to be false or does not believe it to be true is false pretence.

From the above definition, false pretence may be made by words, writing or conduct. The words, conduct or writing must be capable of conveying the false meaning and must have been intended to convey such meaning. E.g. where **A** tells **B** that he has been sent by **C** to collect 10.000/- from **B** while **A** knows what he is saying is false, this is false pretence.

In the case of **Jumanne Ramadhani v. R. [1992] T.L.R 40**, the accused was collecting money for Mwenge festivals from Asians. He pretended that he was sent by the Government while he knew perfectly well to be false *he was convicted of false pretence.*

The pretence must relate to matter of fact and not to a statement of opinion. So if a seller of say soft a drink in untrue praises of MIRINDA says "it is as good as a FANTA" that is an opinion and not a fact.

Proving false pretence:

The prosecution must be able to establish that:

- 1) There was representation by words, writing or conduct by the accused person
- 2) Such representation was about a matter of fact or intention.
- 3) The accused person or the person who made such a representation knew that it was false or did not believe it to be true.

Promise as to performance of future services must be coupled with present fact in order to amount to false pretences. It will be noted that a phrase "...a matter of fact..." In section 301 for the purpose of obtaining by false pretences must be PRESENT and PAST but not FUTURE. Thus if representation refers to a future it must be coupled with a present fact which is false in order to be false pretence.

Example: a person who is childless asks another person to give him Tshs.100.000 on the pretext that he will ask his twelve years old daughter to marry that other person's son. When she attains eighteen years.

Explanation: this will amount to false pretence because the false statement (that he has a daughter) will negative the future (promise of marriage).

Obtaining Goods by False Pretences

This offence is established under section 302 of the Penal Code. This section should be read together with section 301 of the Penal Code.

To constitute this offence the accused must:

- 1) Make a false pretence
- 2) With intent to defraud
- 3) Obtained from that other person something capable of being stolen.
- 4) Induces that other person to deliver to another person something capable of being stolen.

In **Yusufu Omari & Another v. R. [1964] E.A 162**, the court stated that the offence under section 302 is committed;

- 1) *By a person who by false pretence and with intent to defraud, obtains from any other person anything capable of being stolen.*
- 2) *By a person who in similar circumstances induces any other person to deliver to any other person any such thing.*

Obtaining by false pretences to some extent has been confused with stealing;

In **Mansuku Mohan Manji v. R. (1968) H.C.D No. 51**, the accused altered a check so that it read 400/-. He was convicted of stealing government property. The court held that "this is a case of obtaining money by false pretences, not of theft."

For The Offence to Be Committed the Possession Must Not Be Custodial, Should Be Ownership or Possession with Authority to Pass Ownership or Title

In **Tom Abraham Salama Mandara v. R. (1968) H.C.D No. 75**, the accused Area Secretary went to one Shabani a Divisional Executive officer who was storing in his house two elephant tusks which has been shot by the game officer in the course of his duties. Accused brought two smaller tusks to Shabani and told him that he had been authorized by the game officer to exchange them for the larger ones. Exchange was effected.

The court held that the possession of the tusks by Shabani was merely custodial, therefore the taking of them by the accused constituted theft and not obtaining by false pretences.

In order for the offence to be committed, the complainant is duty bound to show that he was made to part with the goods as a result of the accused's false pretence that operated on him at the time.

In **Augustino Brown Chanafi v. R. (1968) H.C.D No.73**, the accused was convicted of forgery and obtaining money from the complainant upon a note which he represented to be a valid interim insurance cover note, evidently with the intention of using part of the money to obtain a genuine insurance cover for the complainant's vehicle.

It was held that the evidence supports a finding of "intent to defraud."

In the case of **Hussein T. Kabeke and Another v. R. [1980] T.L.R 267**, the Court of Appeal held that in making payment by check the necessary ingredient of false pretence under section 302 is established if at the time of issuing a check on reasonable grounds of business the check reaches his bank of payment.

For the offence to be committed the complainant must intend to part with ownership of the thing or else it will be mere theft. Here voluntary transfer of possession from one person to another is necessary.

The word “deliver” as it appears under section 302 refers to voluntary transfer of possession from one person to another. That means that the aspect of voluntariness on the part of the complainant has a role to play in order to effect the offence of obtaining goods by false pretences.

In the case of **Safiani Shabani v. R. (1968) H.C.D No. 281**, the accused was convicted of stealing postal matters. The facts were that the accused obtained Tshs. 30/- by presenting a stolen post office saving book. The High Court held that the money was not stolen but was obtained by false pretences since the postmaster voluntarily paid the money thinking that the accused was the owner of the saving book.

In **Paulo Kulola v. R. (1968) H.C.D No.332**, the accused met two persons at a bust station and convinced them that they should hide the money they were carrying lest it be taken by custom officials. He persuaded them to give him Tshs.20/- and Tshs.50/- respectively, whereupon he purchased envelopes in which he suggested he would put the money. He instead put paper in the envelopes and proceeded to show them how to hide the envelopes on their persons. Accused was convicted of obtaining money by false pretences.

The High Court held that since the victims at no time intended to part with more than temporary possession of their money, the offence committed was not obtaining money by false pretences but larceny by trick.

In **Issa Ntaka v. R. (1968) H.C.D No.374**, it was stated that the most intelligent distinction between larceny by trick and obtaining by false pretences is that in the former the person parting with the property intends to part with the possession only, not with the property, while in the later, he intended to part with both.

Obtaining Credit by False Pretences

According to section 305TPC the prosecution must prove:

- 1) the incurring of debt or liability
- 2) by false pretences
- 3) an intent to defraud

E.g. when a man goes to a pub and orders a drink and then fails to pay the offence committed is obtaining credit by false pretences.

In **T.C. Harby v. R. (1968) H.C.D No.156**, the accused was convicted on four counts of obtaining credit by false pretences c/s 305(1)TPC 1) appellant had his private automobile repaired on two occasions 3) had chartered an air plane 4) had purchased two bottles of perfumes. In all cases signing invoices made out to his employer—New Arusha Hotel. He had no authority from the hotel.

In order to obtain a conviction under section 305(1) PC three elements of the offence must be proved:

- 1) *The incurring of debt or liability*
- 2) *By false pretences*
- 3) *Intent to defraud.*

Cheating

This offence is created under section 304TPC. The offence of cheating is committed where:

- 1) Any person who by means of any fraudulent trick or fraudulent device obtains from any other person anything capable of being stolen.
- 2) Any person who by means of any fraudulent trick or device induces any other person to deliver to any person anything capable of being stolen
- 3) Any person who by any fraudulent trick or device induces any person to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device.

To establish this offence the prosecution must prove:

- That the accused used a fraudulent trick or device,

- That as a result of that trick or device he obtained something capable of being stolen from someone.

There are however some difficult in drawing a distinction between this offence of cheating and other offences like obtaining goods by false pretences.

Cheating is perpetrated by trick or device while obtaining goods by false pretences depends on false statement of existing fact. It is apparent that the words, which appear in the offence of cheating which in fact differentiate this offence from obtaining goods by false pretences, are ***fraudulent trick or device***. In false pretence, inducement is perpetrated by the strength of false representation by words, writing or conduct. In cheating inducement is perpetrated by a trick or device.

All the same, case law has shown that it is not easy to tell the difference between the offences of cheating and obtaining goods by false pretences.

In the case of **Paulo Mwaniti v. R. (1967) H.C.D No.187**, the accused was convicted on two counts of robbery, posing as a police officer; he relieved two persons of Tsh. 304/10 after “arresting” them. He took the money as a “bail” and told them to appear at the local police station the next day.

Conviction quashed because robbery as defined in the Penal Code section 285 involves stealing plus the use of threats or violence by the accused. Here the evidence discloses no use of threats or violence so the conviction of robbery could not be maintained. The evidence was however, sufficient to support a charge of cheating contrary to section 304 PC.

This case shows how this offence is delicate. Here the accused is posed as a police officer and induced the complainants to give him the money a thing which is capable of being stolen.

In another case of **Ali Simba v. R. (1968) H.C.D No. 240**, the appellant was convicted of cheating. He had persuaded complainant to write out a receipt in a book produced by the accused, gave the complainant a copy and then ran away with the book containing the duplicate.

The accused may have enabled himself to put complainant in some difficulties at a later date, by producing the receipt showing a payment by him to complainant. However, the receipt book was his own, and there was no showing that by his trick he had obtained anything capable of being stolen.

In **Mohamed Salum Mzaramo v. R. (1969) H.C.D No. 127**, the accused sold a tin of sand to the complainant pretending to be sugar, a layer of sugar having been spread over the sand inside.

The facts disclosed the offence of cheating.

In another case of **John Joseph v. R. (1969) H.C.D No.171**, the court was confronted with a problem of putting a demarcation line between obtaining by false pretences and cheating. In this case the appellant had sealed a tin of water and on top of it spread some groundnuts oil. He convinced the complainant it was groundnuts oil and that he was in a problem, in fact he demanded Tshs.30 whereas a tin of groundnuts oil was Tshs.60. He was arrested by a police detective who has been watching the game. He was convicted of cheating. On appeal Platt, J. (as he then was) said the following:

“.... In the instance case the appellant said his tin contained groundnuts oil. It appeared from the facts that some groundnuts oil was on the top of the tin that was stated to be the content was true. While the manufacture of the tin with water in it might be seen as a trick or device, never the less it can hardly be doubted that it was the appellant’s statement that was the main deception, no doubt in deed to some extent by the stare of the tin. Had the appellant merely produced the tin that would not have been sufficient to deceive the complainant”.

The court was inclined to the view that where money is obtained on the strength of a statement as to the contents or quality of some object, it is the false statement concerning the content of the thing is material. For this reason, the court preferred to base the appellant's conviction on section 302PC.

The judge in reaching his decision added: *"But in saying so I accept that it might be that either section can be employed according to circumstances of the particular case. Even in the present case the distinction is narrow indeed"*.

Another case is **Blasius v. R. [1973] E.A 510 or 1973 L.R.T N.85**; in this case the appellant was convicted of cheating. It was alleged that he had fish to sell. On receiving Tshs. 943/- he entered a building and disappeared. On appeal:

The charge should have been one of obtaining money by false pretences.

The High Court however noted that there were no material differences between obtaining money by false pretences and cheating. **MFALILA, Ag. J.** (As he then was):

"The appellant, if he did obtained this money by falsely pretending that he had fish to sell. In saying so, he did not use any trick strategies or device. He simply made a false statement of an existing fact. The charge under section 304 PC in these circumstances was therefore misconceived."

Forgery

Forgery is the making of a false document with intent to defraud or deceive—section 333 TPC

A person is guilty of the offence if he makes a false instrument, and for this purpose instrument is defined as:

- 1) Any document, whether of formal or informal character,
- 2) Any stamp used or sold by the post office,
- 3) Any disc, tape, sound track or other device on or in which information is recorded or stated by mechanical, electrical or other means.

An instrument will normally be written on any material and the writings may consist in letters, figures, or any other symbols used for conveying information.

The essence of forgery is the making of a false document intending that it be used to induce a reasonable person to accept and act upon the message containing in it as if it were contained in a genuine document.

A document usually contains messages of two distinct kinds.

- 1) A message about the document itself=such as the message that the document is a check or a bill.
- 2) A message to be found in the words of the document that is to be accepted and acted upon=such as the message that a banker is to pay a specified sum or that property is to be distributed in a particular way.

According to section 334TPC the term document does not include a trademark or any sign used in connection with articles of commerce, though they may be written or printed.

In the case of **Smith v. R (1858) Dear & B 566D** where **Smith** sold baking powder in wrappers substantially resembled the wrappers of one **George Borowick**, a well-known manufacturer of baking powder. It was held that the wrappers were not forgeries since they were not document. The wrappers conveyed only one message that they were **George Borowick** wrappers and conveyed no further message concerning the genuineness of the document. There was no message that the wrappers were to be accepted and acted upon.

To constitute an instrument for the purpose of forgery the document must do more than merely conveying information. It must be of such a nature that the information contained in it as a document is intended to be acted upon and thereby affected the rights or interests of some person(s).

A document will be considered forged if: (section 335 PC)

It purports to have been made in the form in which it is made by a person who in fact did not make it in that form;

It purports to have been made in the form in which it is made in the authority of a person who did not in fact authorize its making in that form;

It purports to have been made in terms in which it is made by a person who did not in fact make it in those terms;

It purports to have been made on the authority of a person who did not in fact authorize its making in those terms;

It purports to have been altered in any respect by a person who did not in fact alter it in that respect;

It purports to have been altered on the authority of a person who did not in fact authorize the alteration in that respect;

It purports to have been made or altered on a date on which or at a place at which or otherwise in circumstances in which it was not in fact made or altered;

It purports to have been made or altered by an existing person but he did not in fact exist.

False

The document must not only tell a lie, it must also tell a lie about itself. Telling a lie does not become a forgery because it is reduced into writing, it is the document, which must be false, and not merely the information.

In its ordinary application the distinction is easy enough to grasp. If an applicant for job falsely states his qualifications the letter is not forgery but if he writes a reference which purports to come from his employer the reference is a forgery.

In the case of **Hopkins & Collins (1957) 41 Cr.App. R. 231**, Hopkins was a secretary and Collins a treasure of a football supporters club, received monies raised by members who made disbursement on behalf of the club. Over a period of time:

- i) entered in the books amounts less than they were paid,
- ii) entered amount in excess of what was paid out,
- iii) altered certain entries.

It is clear that the accounts were inaccurate, but to keep in accurate account is not forgery

To be false they must tell a lie about themselves. As far as (i) and (ii) are concerned, the accounts merely told a lie by purporting to be accurate accounts of Hopkins and Collins while they were inaccurate account.

As for alterations, a document is not false merely because it has been altered, the alteration is forgery only if it purports to be made or authorized by one who made or authorized it. This is so long as the alterations were made or authorized by Hopkins and Collins they were not forgery. Suppose however that only Hopkins, the secretary had been acting dishonestly and suppose further that Collins, the treasure authorized to keep the accounts, if Hopkins without Collins' authority altered entries so that the alterations appeared to have been made or authorized by Collins, the accounts would be forgery.

In the case of **George Walter and Two Others v. R. [1980] T.L.R 313**, the first and second accuseds were both employed by Oyster Bay Hotel, the former as a store keeper and the latter as a cook. The third accused was a fishmonger who used to supply the hotel with fish. On the 18th December 1976, General Manager, whilst looking out of a window of his room in the hotel, noticed that the accused were taking a long time in weighing a basket of lobsters brought by the third accused. The weighing was taking place outside the store, which was visible from his point of observation. He went to the spot to investigate and found that the weighing of the lobsters shown on the scale was eight and a half kilos, whereas a receipt voucher, so termed by the witness written and signed by the first accused and countersigned by the second accused gave the weight of the

lobsters as twenty five kilos. The lobsters were weighed again in his presence and that of his wife and it was confirmed that they weighed only eight and a half kilos. By the time the lobsters were weighed again, the third accused had already taken the receipt voucher to the cashier and was told to come for money on the morrow.

The magistrate convicted the first and second accused of the first count and acquitted them of the second. The third accused was convicted of the second count and acquitted of the first count.

First count was forgery

Second count was false pretences.

The issue raised on appeal was whether the making or signing of the false voucher constituted forgery?

Forgery is the false making of an instrument purporting to be that which is not, it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become forgery, because it is reduced into writing.

A false document will not constitute forgery unless it tells a lie about itself.

The voucher although containing a false statement, that the lobsters weighed 25kg. When in fact they weighed only eighteen and a half KG the making of the voucher does not constitute forgery.

In **Zakayo Pwere v. R. [1981] T.L.R 182**, the appellant was working for the Mbeya Co-operative Union and was assigned the duties of accountant to the Distribution Department of that Union. When the transporters carried goods for the Union his duty was to process payment to such transporters. In this connection he would prepare a payment voucher in the name of a particular transporter which voucher must be supported by such documents as an invoice and goods received note. In doing this job the appellant was assisted by one **Michael Majaliwa (PW8)** an accountant clerk who worked directly under him. After the payment voucher was prepared, the appellant submitted it for authorization to the Distribution Manager one **Yusuf Lasenga**. After authorization the appellant makes out checks payable to the particular transporters. Signatories of the checks were Chief Accountant, the General Manager and the Regional Co-operative Officer. The check after signed is returned to the appellant who hands it to the particular transporter.

During December 1973 both **PW8** and **PW9** were away on leave and so the appellant performed their duties as well as that of his own. However when **PW8** and **PW9** resumed work in January 1974 the appellant declined to hand over to them their respective duties. He locked up the books in his drawers thus making it impossible, for instance, for **PW8** to prepare vouchers. The drawers were broken and a day or two later the appellant disappeared from the office and never came back.

The investigation revealed that six checks of varying amounts were issued in favour of a transporter by the name of **A.A. Ally**.

The seventh check was drawn in favour of another transporter one **H.N. Shah** but was endorsed in favour of **A.A. Ally**. **H.N. Shah** denied to have endorsed the check in favour of the said **A.A. Ally** or to have received the check at all.

The Union had duly paid all the seven checks amounting to 25,907/- to **A.A. Ally** but no one, even the appellant knew who this **A.A. Ally** was. Some of the checks were written by the appellant and some by **Damas** who was employed temporarily to assist the appellant when **PW8** and **PW9** were away.

Police searched the bank and found a bank account belonging to one **Abdu Ally** was opened on 26.10.73. The account holder had two addresses: **P.o.Box 154, Mbeya and P.o.Box 243 Musoma**. All the checks mentioned above were deposited in this account except one for Tshs.2, 955/- which was made payable to the distribution department because the department took it in exchange for hard cash. There were also withdrawals from this account on divers dates.

The police went to search the appellant's house. The appellant was absent according to his wife; he was on safari to Musoma. In the course of the search, the police came to a locked cupboard and the wife said that she did not have the key to it. The police decided to force it open. In it they found among other things, a bank pass book in the name of **Abdu Anthony Ally** of box 254 Mbeya and some money to the tune of 800/-. The entries and withdrawals in the passbook correspond with those found in the account of **Abdu Anthony Ally** at the bank.

In December 1973 the appellant bought a motorcycle for Tshs. 7,007/50 and paid it off by three installments only in a matter of just one week, telling the dealer that he got a loan from the Union (his gross salary was 840/- p.m).

Two of these installments corresponds the withdrawals as shown in the bank account and the bank passbook of **A.A. Ally**. Thus on 11.12.73 both the account and bank passbook show a withdrawal of Tshs.1000/- as initial deposits for his motorcycle. On 17.12.73 there was a withdrawal of Tshs.4,000/- while the appellant on the same day paid 3,400/- as a second installment for the motorcycle. The final installment was made on 18.12.73 for Tshs. 2,207/50 and this was the money from the distribution department for Tshs.2,955/- on 17.12.73. On appeal:

Once it is established that the passbook was found in the appellant's possession, it follows that it was the appellant who was operating the bank account in the name of A.A. Ally using the passbook.

That is the only reasonable conclusion to be drawn because otherwise it is not apparent for what purpose he was keeping that book. Indeed this conclusion is supported by the fact that withdrawals on 11.12.73 and 17.12.73 as shown in the passbook corresponds with the date on which the appellant paid installments for the purchase of his motorcycle.

Once it is established that the appellant was operating the bank account in the name of A.A. Ally it matters not whether he was using his own hand or some one else's' hand to do the writing.

Since the appellant cashed or deposited the checks into the account (**A.A. Ally**) operated by himself then he must know those checks and the relevant payment vouchers were processed until the check eventually reached him. He was himself one of the persons concerned with the processing of payments in the distribution department, and in such circumstances it is, in my opinion, impossible to see how the checks could find their way into his possession without himself knowing how they were processed.

The writing on the payment vouchers and the checks relating to a fictitious were forgeries.

The act of taking and receiving monies under the fictitious name amounted to theft.

To constitute a forgery the hand of Jacob must purport to be the hand of Esau.

Document

For the purpose of the law of forgery, a document is a writing in any form, on any material, which communicates to some person(s) a human statement whether of fact or fiction.—S.334 TPC.

In the case of **Wachira v. R. [1957] E.A 808**, the accused in order to make it appear that he had come by a bicycle lawfully, altered a cash sale receipt from a cycle mart. He erased a pencil entry on the receipt referring to cycle bell and wrote in ink a non-existent sale of the bicycle in its place.

The cash receipt was held to be a false document.

Where a man authorized to fill in a blank check for a certain amount intentionally fills in an amount in excess of that amount authorized, he makes a false document.

Similarly, where a person puts a false date for execution of a document, and the date is material, he makes a false document.

In the case of **Naurang Singh s/o Hukam Singh v. R. [1957] E.A 433**, the appellant with intent to defraud forged a judicial document. The written statement of Defense (WSD) was supposed to be

filed on 22nd march 1957 or it would be out of time. The WSD was not filed on March 22 but the appellant took it to the general office of the court early on the morning of 23rd March and then in the absence of the clerks stamped the document 22nd march 1957 with the official stamp of the court and left the document lying on the table of the court clerk. He later informed the advocate of the plaintiff that the WSD had been filed on 22nd March.

The application of the official date stamp to a WSD is an alteration which had if, been authorized would have the effect of indicating that the WSD had been duly delivered at the court to a person authorized to accept it on the date shown by the stamp. Therefore the document with the official stamp upon it was a false document.

But in the case of an illiterate, who is unable to write, he can't be said to sign a document merely because he impresses his thumbprint thereon. It is necessary to show that such impression was intended to affect or signify the authenticity of the document.

In the case of **Magazi v. R. (1971) H.C.D No. 399**, the appellant was a revenue collector employed by District Council. One of his duties was to receive local rates. He was issued with receipt book for the year 1969 rate. Each receipt had a space for inserting the receipt numbers on which local rate of the previous two years had been paid. He collected sums from taxpayers for both 1968 and 1969. He issued receipts inserting a receipt a number in receipt of 1969. He also inserted on the receipts, a receipt number for 1968 that was intended to give the impression to the authorities that the tax for 1968 had been collected and handed in some time before, and receipts had been issued. The receipts numbers for 1968 were false in that the receipts corresponding to those numbers had been issued to persons other than the complainant. He pocketed the money.

Conviction of forgery could not stand except that of fraudulently false accounting.

Writing is not forgery when it merely contains statements, which are false, but only when it falsely purports to be itself what it is not. In **Ramadhani Athumani v. R. (1968) HCD No. 110**, where a village executive officer retained a receipt book unlawfully and used to collect the money and pocketed.

That the receipt, which he issued, were unequivocally, what the purported to be, therefore they were not false documents.

In **Edward Mpozi v. R. (1968) H.C.D No.438**, the accused was convicted of forgery as a clerk with the E.A.P. & T. in Arusha. He failed properly to change or properly account for a number of telegrams. In some cases he had altered duplicate receipt, so that they showed a lesser charge than that shown in the original, in others he had made false entries in summary sheets to indicate that he had received less money than he had. On appeal:

- 1) Merely to tell a lie in writing is not forgery, the writing must tell a lie about itself=must purports to be something which is not.
- 2) The alteration of the duplicate receipts was forgery for the duplicate receipts purported to show that a different transaction had taken place.
- 3) However, the making of false entries in the summary sheets purporting to show that accused had received less money than he had actually received, was not forgery as defined in section 333 PC but fraudulent false accounting-section 317 PC.