

(IJA)
INSTITUTE OF JUDICIAL ADMINISTRATION
LUSHOTO



(DLW 109): CRIMINAL PROCEDURE LAW
LECTURE CRIMINAL PROCEDURE LAW

MADUKWA MICHAEL.

DLW 109: CRIMINAL PROCEDURE

INTRODUCTION

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

Criminal procedure laws are the safeguards against the indiscriminate of the application of criminal laws and unjust treatment of the criminals.

Criminal procedure laws are there to ensure that “**Rule of Law**” which is important for the health society is observed. The need of observing the rule of law was when explained by the words of Justice Katiti in the case of

JOSEPH MASUNZU V REPUBLIC CRIMINAL APPEAL NO. 3 OF 1991.

According to him he said as follows

“....We can’t peaceful make our journey through life without the law telling us the light direction to follow, and sometimes even the time to follow and when to start our journey and through which route....”

Thus by adhering to “Rule of Law” which ensure justice that is why in the case of **KAMUNDI V REPUBLIC [1957] EA 540**. In this case it was held that the all purpose and intention of criminal procedure is to laid down provisions and procedures to see that justice is done.

Generally law is categorized into two braches that is **Substantive law** and **Procedural law**.

DIFFERENCES BETWEEN SUBSTANTIVE AND PROCEDURAL LAW

Substantive laws refer to the written laws or statutory laws which govern the relationship between people or between people and state. For example the Law of Contract Act, The Penal Code, The Land Act.

Procedural laws on the other hand entails body of laws establishing the methods or procedures of enforcing rights or obtaining redress for the invasion of rights provided in the substantive law. For example Criminal Procedure Act, Civil Procedure Act, The Law of Limitation Act.

When there is an ongoing trial substantive law is a branch of legal industry which will define the crime and punishments to which the accused will be subjected. It is also the branch of law which defines rights and responsibilities of an individual.

Procedural on the other hand is the law which provide a state with the machinery to enforce right and duties as defined in substantive law. It is the step by step process that the case will go through that is from Arrest-Investigation-Trial-Conviction.

DIFFERENCES BETWEEN CIVIL PROCEDURE AND CRIMINAL PROCEDURE

Civil procedure is the written set of rules that sets out the process that the court will follow when hearing cases of civil nature. Criminal procedure on the other hand entails the frame work of laws that govern the administration of justice in cases involving an individual who has been accused of a crime.

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

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

SOURCES OF CRIMINAL PROCEDURE

I. CONSTITUTION

Constitution is a document or scheme that establish a country's government, defines powers and limits of three arms of the state that is the Parliament, Judiciary, and Executive, and the necessary checks and balances in the manner the three arms are suppose to function. It also defines the relationship between the state and its citizen in terms of rights and obligations. Constitution is the fundamental law of any country, In Tanzania we have two written constitution namely:

1. The Constitution of the United Republic of Tanzania of 1977 as amended time to time.
2. The Zanzibar Constitution of 1984.

Constitution is said to be the source of criminal procedure because principally the validity of any written law is determined against what is contained in the constitution. No law is valid if it is contravenes any of the provisions of constitution in terms of sprit or procedure or otherwise. On the premise or basis no criminal procedure law is valid if it contravenes any provisions contained in the constitution. Article 13 of the Constitution of the United Republic of Tanzania of 1977 provides for the right to fair hearing. Therefore if there is any law of criminal procedure that is against what is contain in article 13 then that law would be illegal. The constitution contain also the fundamental rules of criminal justice, one of them is the presumption of innocence that is the person is presumed to be innocent unless otherwise is proved beyond reasonable doubt as provided under article 13(6) of the Constitution of the United Republic of Tanzania.

Therefore no law of criminal procedure is valid if it creates the presumption of guilty before the same been proved. Again no person is to be punished for an offence which does not exist as per article 13(6)c of the Constitution of the United Republic of Tanzania. Therefore they can never be a criminal procedure which allows a punishment of a person for a non existent offence as that rule would be illegal.

II. STATUTES

Statutes can simply defined as a piece of legislation enacted by or under the authority of the parliament. Those which are enacted by the parliament are called **PRINCIPAL OR PARENT LEGISLATION** for example The Criminal Procedure Act, The Law of Limitation Act, National Security Act. On the other hand those statutes which are made under the authority of parliament are commonly known as **SUBSIDIARY LEGISLATION**.

They are normally enacted by the Minister, Principal Secretaries or Commissioners under a specific authority given by to them by the Principle legislations. One of the example of subsidiary legislation is Accelerated Trial and Disposal of Cases Rules of 1988 made as a GN NO. 192 of 1988. This law was made under section 192 of the Criminal Procedure Act. Therefore reading of those statutes reveal a procedural provisions relating the intended subject matter for example section 4(1) of the Criminal Procedure Act provides that all offences under the Penal Code shall be inquired into, tried and otherwise dealt with according to the provisions of this Act. Section 4(2) provides that all offences under any other law shall be inquired into, tried and otherwise dealt with according to the provisions of this Act, except where that other law provides differently for the regulation of the manner or place of investigation into, trial or dealing in any other way with those offences. What can be observed from section 4 is that once an offence is committed under the Penal Code procedures to be followed are those contained in the Criminal Procedure Act.

Further there are some other laws of criminal nature which may require different procedures in relation to crimes committed against the provisions of those Laws for instance in Tanzania we have an Economic and Organized Crimes Control Act Cap 200 Revised Edition 2002. Therefore if no other procedures in required by the other laws than the procedures to be followed are those provided by the Criminal Procedure Act.

III. INTERNATIONAL LAW

International law entails a total of norms accepted by the international community to regulate relation between state and also between states and their subjects. International

law is also one of the source of criminal procedure especially in the areas of human right promotion and protection. There a number of international conventions which have a direct bearing to the administration of criminal justice. One of the convention of this nature is the convention of the right of the child of 1990. This convention protects the child under the age of 18 years against capital punishments or life imprisonment and calls for a separate detention facilities from adults.

IV. PRECEDENTS

These are judgments or decisions of courts of law sighted as authority for deciding similar sets of facts because of legal principles contained in them. As a rule courts are expected to be bound by their previous decision as guidance for deciding matters at issue.

V. BILATERAL AGREEMENT

The mutual assistance in criminal matters Act empowers the Attorney General on behalf of the government to enter bilateral agreement for the enforcement of the criminal law and procedure. One of such agreement have been entered in Tanzania is **EXTRADITION TREAT** that exist between Tanzania and Kenya and many other countries. This treat has got some procedural aspects relevant to the criminal law.

COURT SYSTEM

In so far as the court system in Tanzania as concern there is at the bottom the Primary Court headed by the Primary Court Magistrates. The Primary Court is established under section 3 of the Magistrates' Court Act [CAP 11 R.E 2002]. Then there is a District Court which as the name suggest as the court of District with jurisdiction all over the district. The court is headed by the District Magistrate which terms also includes Resident Magistrate.

The court is established under section 4 of the Magistrates' Court Act [CAP 11 R.E 2002]. On more or the same level there is a Resident Magistrates' Court which has jurisdiction all over the region in which it has been established and is headed y a Resident

Magistrate. The establishing section of Resident Magistrate Court is section 5 of the Magistrates' Court Act [CAP 11 R.E 2002].

The next in ladder is a High Court where the judges sit to conduct trial, the High Court is established under Article 108 of the Constitution of the United Republic of Tanzania of 1977 as amended time to time. At the apex, it is a court of Appeal where the judges of Appeal sits. The Court of Appeal is established under Article 117 of the Constitution of the United Republic of Tanzania of 1977 as amended time to time.

Sets of Criminal Appeal is as follows:

- ✓ Appeal from the Primary Court go to the District Court.
- ✓ Appeals from the District go to the High Court, Similarly appeal from Resident Magistrates Court go to the High Court also.
- ✓ Appeals from the High Court go to the Court of Appeal

The law applicable in criminal matters is mainly the Criminal Procedure Act, there however other laws with their procedure implementing and supplementing the Criminal Procedure Act. One of those laws is the Economic and Organized Crimes Control Act. However, the Criminal Procedure Act is not applicable in Primary Court but the applicable procedures are contained in Primary Court Criminal Procedure Rules.

OTHER CRIMINAL COURTS

There are other Criminal Courts apart from other courts found in Tanzania, this court are namely as follows:

I. Court of Martial or Court of Martial Appeal Courts.

This court is established under the National Defence Act [CAP 192 R.E 2002]

II. Economic Crimes Court.

This court is established under The Economic and Organised Control Act [CAP 200 R.E. 2002]

III. Juvenile Court.

This is established under The Law of Child Act No. 21 of 2009.

JURISDICTION

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

Read Part 1-3 of chapter 5 of the Constitution of the United Republic of Tanzania of 1977 as amended time to time.

Also Part III of Magistrates' Court Act [CAP 11 R.E 2002] together with Part III of the Criminal Procedure Act [CAP 20 R.E 2002].

CATEGORIES OF JURISDICTION

Jurisdiction may be classified into a number of categories as follows:

I. ORIGINAL JURISDICTION

Original jurisdiction refers to the power of a court to hear the case as a matter of a first instance. This requires that a particular type of case should only be commenced and tried in the lowest court in the ladder. Before moving to the next court in the hierarchy if need to be, A court with original jurisdiction may hear the case, make various findings and order, pass judgment and sentence the accused within the limit provided for by the law.

According to section 18, 40, 41 of the Magistrates' Court Act [CAP 11 R.E 2002] provides that Primary Court, District Court, Resident Magistrate Court have original jurisdiction in criminal matters as provided in the 1st and 2nd schedule of the Magistrate Court Act [CAP 11 R.E 2002]. The High Court of Tanzania has unlimited jurisdiction. Further guidance regarding jurisdiction of court in Tanzania may be found in other laws for instance the Criminal Procedure Act sets out offences in connection with the High Court and District Court may exercise original jurisdiction. These offences are provided for in the 1st schedule of the Criminal Procedure Act. Similarly original jurisdiction with

regard to **ECONOMIC OFFENCES** lies with the High Court. This is according to section 3 of the Economic and Organised Crime Control Act [CAP 200 R.E. 2000].

II. GEOGRAPHICAL & TERRITORIAL JURISDICTION

Territorial jurisdiction is the second category of jurisdiction. By territorial jurisdiction means that the geographical area within which a court may exercise its powers for instance the District Court has jurisdiction within the District in which it is situated. The Resident Magistrate Courts has jurisdiction in the region in which it is situated.

This is according to section 4 and 5 of the MCA. On the other hand the High Court has jurisdiction within territorial limits of the state. This is according to article 108 of the Constitution of the United Republic of Tanzania as amended time to time. Therefore before the court begin to inquire into a particular offence it must be satisfied that such offence was committed within its territorial jurisdiction.

In the case of **SHARMA V REPUBLIC 20 EACA 310VOLUME 20**, In this case it was pointed out that prove of place of commission of offences is essential to the prosecution case and that although it is not always capable of exact proof evidence should be led on which the necessary inference can be drawn.

It is for reason that a charge must always state in the particulars where the alleged offence was committed and it is those particulars that the court know whether has jurisdiction or not. If the court discovered that on the reading the charge or in the cause of the trial that the offence was committed outside of its territorial jurisdiction it must immediately make an order for transferring the case to a court to whose jurisdiction the offence was committed.

III. SUBJECT MATTER JURISDICTION

Jurisdiction by subject matter which is sometimes called jurisdiction of categorization of offences is the type of jurisdiction expressly converts by a legislation that provides which offences are tried by which court for instance the 1st schedule of the Criminal

Procedure Act sets out what offences are tried by subordinate courts and what offences are tried by the High Court. Similarly the 1st Magistrates' Court Act provides offences which may be tried by the Primary Court.

Note: It is always important to check the law that gives jurisdiction before starting a trial or inquiring for instance the Economic and Organised Crimes Control Act provides under section 57 that Economic Crimes are to be tried in the High Court (In the 1st schedules of Economic Offences [CAP 200 R.E, 2002])

IV. EXTENDED JURISDICTION

When subordinate courts is given power to try offences not ordinarily tried by subordinate courts then that court is said to exercise extended jurisdiction for example the Resident Magistrate Court can be given power to entertain Economic Offences which is tried by the High Court and the decision which come from that court for the purpose of appeal lies to the Court of Appeal.

Indeed it is ought to be born in mind that extended jurisdiction is not for the Court but for the magistrate. A magistrate with extended jurisdiction has got powers to impose any sentence which may lawfully be imposed by the High Court. Therefore for the purpose of any appeal from or revision of his decision in the exercise of his or her jurisdiction such Resident magistrate is deemed to be a judge of the High Court and the court presided by him or her is deemed to be the High Court. Extended jurisdiction has been covered under section 173 of the Criminal Procedure Act.

V. SUMMARY JURISDICTION

All in criminal trials involving offences under which subordinate courts have jurisdiction to entertain are disposed of by way of summary trials. At common law cases may be disposed in two ways. This happens because the subordinate courts are vested with powers to try such offences and impose appropriate punishments.

Criminal offences tried in the subordinate courts are technically referred to as summary offences as such they may be said to be disposed of by way of summary trial and the subordinate court involved in disposing the case may rightly be said to exercise summary jurisdiction. The first schedule to the Criminal Procedure Act contains a list of offences which subordinate court may dispose of by way of summary trials. Where the offences not tried by a subordinate court are involved the subordinate has to hold committal proceedings. This is according to section 244 of the Criminal Procedure Act.

NB: The terms summary trial and summary jurisdiction, have by some authorities in criminal law been associated to and sometimes restricted to the provision of 213(1) of the Criminal Procedure Act. This subsection lays down procedures that may be followed by subordinate court in the case of minor offences detailed in section 213(2) which covers offences which may be tried without recording evidence.

VI. REVISIONAL JURISDICTION

Revisional jurisdiction is the power vested in a superior court to examine the records of an inferior court in order to satisfy itself as to the legality, correctness, or propriety of any decision or order made by such an inferior courts. Thus in terms of section 22 of the Magistrate Court Act a District Court may call for any examine a records of proceedings in a Primary Courts and revise them.

Again under section 372 of the Criminal Procedure Act the High Court has got power to call for records of a subordinate court for the purpose of examining those records and satisfy itself as to the legality, correctness or appropriate of any finding, sentence or order recorded or passed by that court. Finally under section 4 of the Appellate Jurisdiction Act [CAP 141 R.E 2002], The Court of Appeal of Tanzania has Revisional jurisdiction over the High Court.

VII. APPELLATE JURISDICTION

By appellate jurisdiction we mean the power of the court to hear to try the matter on appeal from another inferior court. For instance section 20 of the Magistrate Court Act empower the District court to hear appeal from decisions of Primary Court, Section 21 of the Magistrate Court Act stipulates what the District Court can do on the exercise of their appellate jurisdiction.

Further in terms of section 225 of the Magistrate Court Act provided that parties aggrieved by the decision of the District Court in the exercise of appellate jurisdiction may further appeal to the High Court. Finally in accordance with section 4 of the Appellate Jurisdiction Act [CAP 141 R.E. 2002], Provides that the

Court of Appeal of Tanzania has jurisdiction to hear and determine appeal from the High Court and subordinate Court with extended jurisdiction. Therefore a party aggrieved by the decision of the High Court or from Magistrates of subordinate Court with extended jurisdiction may appeal to the court of appeal as provided under section 4 of the Appellate Jurisdiction Act.

NOTE: Appeals from Resident Magistrate Court lies to the High Court.

VIII. SUPERVISION JURISDICTION

Supervision come from the word supervise. The High Court exercise the general powers of supervision of all subordinate Courts in the exercise of their jurisdiction and therefore it has got powers to do the following.

1. To call and inspect the records of any proceeding in any subordinate court.
2. To direct any District Court to call for and inspect the record of any proceedings in Primary Court established within local limits of district and examine its records and register in order to satisfy itself as to legality, correctness, propriety of any proceeding their in. This has been covered or explained under section 30(1) of the Magistrate Court Act.

IX. SENTENCING JURISDICTION

Sentencing jurisdiction is the limit described by the law within which the court may impose the sentence. The sentencing jurisdiction of subordinate Court other than Primary Court is contained under section 170-172 of the Criminal Procedure Act. On the other hand the 3rd schedule of the Magistrate Court Act provides for the sentencing jurisdiction of the Primary Court. The sentencing jurisdiction of the High Court is provided for under section 166 of the Criminal Procedure Act.

UNCERTAINTY OF JURISDICTION

This is provided under section 180-186

I. Section 180 of the Criminal Procedure Act provides uncertainty of jurisdiction as follows:

A. Where the offence was committed within the local locality of the court.

For example, Juma steals a car in Dar es salaam in Ilala District then the District Court of Ilala will have the jurisdiction to try the case and not otherwise.

B. Where the accused person were apprehended within the locality of the court.

For example, Although Juma stole the car in Ilala District but was apprehended in Temeke District then a District Court of Temeke will have territorial jurisdiction to try the case.

C. Where the accused is in custody within the locality of the court on a charge for the offence.

For example, Asha who stole the car in Ilala and was arrested in Temeke but remanded in Kibaha District because in Temeke has no prison facilities. The District Court in Kibaha will have territorial jurisdiction to deal with him.

D. Where the accused appears in such answer to a summons lawful issued charging him with the offence.

For example, Hussein committed an offence of cow stealing went at large and summons was issued for his appearance at a nearest court so if Hussein he submits himself to any court then such court will have territorial jurisdiction to hear or try the case.

2. Section 181 of the Criminal Procedure Act provides “Trials at a place where the act is done or where the effects occur”

For example, A poisoned chocolate is prepared by “B” and sold it to a passenger traveling to Dar es salaam, the passenger eats the chocolate somewhere between Morogoro and Dar es salaam, but doesn’t get sick immediately until on reaching to Dar es salaam where he seriously gets sick and is hospitalized. So either of the court in Morogoro or Dar es salaam will have territorial jurisdiction to try the case.

3. Section 182 of the Criminal Procedure Act provides an certainty in case of “Trials where is connected with another offence” If the act is an offence by the reason of its relation to any other act then can be done as follows:

For example, Theft and receiving or retaining property.

- ✓ The act of theft took place in Temeke District.
- ✓ The act of receiving property takes place in Ilala District.
- ✓ The act of retaining property takes place in Kinondoni District.

So either of the District Court of Ilala, Temeke and Kinondoni will have jurisdiction over that case or matter.

4. Section 183 of the Criminal Procedure Act provides as follows:

“..where an offence was committed in several local areas or when an offence is committed partly in one local area and partly in another or when it consists of several acts done in different local areas..” Then this can be solved as follows:

For example 1:

- A. Juma commits an offence of theft into different areas that partly in Temeke District and another in Kinondoni District. Therefore both of the two have the jurisdiction to entertain the matter.

B. Several acts as follows:

1. Kinondoni District., 2. Temeke District., 3. Lushoto District.

So both of them have jurisdiction to entertain the matter.

Example 2:

The offence of conspiracy that was committed by “A” “B” and “C” but a portion of it may be done in Ilala District, another portion in Temeke District and the final one in Arusha, So either courts within whose local jurisdiction of the portion of conspiracy was done will have jurisdiction on the matter.

5. Section 184 of The Criminal Procedure Act provides “offences committed in the course of journey”

For example 1:

An accused person traveling from Arusha to Dar es salaam and commits an offence between the two, So any court between the two will have jurisdiction to entertain the matter.

Example 2:

Traveling with a fake ticket on a bus from Dar es salaam to Arusha, so any court between will have jurisdiction to entertain the matter.

6. Section 185 of the Criminal Procedure Act provides that where jurisdiction is uncertain.

Where there is uncertainty of court’s jurisdiction the matter must be referred to the High Court for the directions and the decision of the High Court is final and conclusive on the point.

INSTITUTION OF CRIMINAL PROCEEDINGS

Generally there are two ways in which criminal proceedings are instituted in subordinate Court.

1. Laying a complaint in a court in terms of section 128(1) of the Criminal Procedure Act.
2. By bringing the accused person before magistrates in terms as per section 128(1) of the Criminal Procedure Act.

.

Meaning of complaint.

Section 2 of the Criminal Procedure Act defines "complaint" to mean an allegation that some person known or unknown, has committed an offence. In other words entails a statement of facts surrounding allegation that a crime has been committed.

WHO MAY MAKE A COMPLAINT?.

A complaint may be made by any person provided that such person has reasonable and probable cause to believe that an offence has been committed. This is provided for under section 128(2) of the Criminal Procedure Act. In terms of section 128(2) of the Criminal Procedure Act the complaint must be made before the court of competent jurisdiction if a complaint is made before a magistrate who is not competent to take cognizance of the offence then the magistrate may return the complaint for the presentment to a or such magistrate may transfer the case in the court of competent jurisdiction as provided under section 189 of the Criminal Procedure Act.

Practically all complaint are to be in writing by a magistrate receiving the same. This is provided under section 128(4) of the Criminal Procedure Act. Once a complaint has been made a formal charge must be or cause to be drawn by the magistrate unless the complaint is rejected as provided under section 129 of the Criminal Procedure Act or the police who preferred the complaint had already drawn it and presented it with a complaint as provided under section 128(5) of the Criminal Procedure Act.

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

This way normally follows the arrest of a person who has committed an arrestable offence that is to say an offence which the law allows arrest without warrant for example section 2, 14, 16, 17, and 18 of the Criminal Procedure Act.

Under section 128(6) of the Criminal Procedure Act an accused person who has been arrested without a warrant is brought before a magistrate, a formal charge containing a

statement of the offence with which the accused is charged, shall be signed and presented by the police officer preferring the charge.

Immediately after that have been preferred the accused person must be cautioned as provided under section 131 of the Criminal Procedure Act, the court has got powers to reject the a complaint or a charge which doesn't disclose any offence as per section 129 of the Criminal Procedure Act.

However such rejection and the grounds must be recorded. If the complaint or a charge hasn't rejected then the case should commence in terms of section 130 of the Criminal Procedure Act. A magistrate upon receiving a complaint and signed the charge may issue either summons or a warrant to compel the attendance of the accused person before the court. However the point to note is that a warrant of arrest may be issued only when a complaint is made on oath. In Primary Court the 3rd schedules to the Magistrates Court Act is applicable in criminal matters.

Criminal proceeding in Primary Court magistrate who shall examine the same and if satisfied that there are sufficient grounds for so doing issue a summons or warrant of arrest compelling the appearance of the accused person before the court. This is provided under section 8(1) of the Primary Court Criminal Procedure Code where a magistrate considers a complaint in terms of it.

CHARGE

A charge means a formal complaint which is writing alleging that a particular person has committed an offence with the view of putting a criminal process or machinery in motion.

The charge must be duly signed by the complainant or public prosecutor or other authorized officer.

PURPOSES OF THE CHARGE

- ✓ To inform the accused and the court with sufficient clarity the allegations against the accused.

- ✓ The accused is entitled to know his allegations against him so as to avoid taking him by surprise. This enable him to prepare his defence.
- ✓ It enable the court to know whether or not it has jurisdiction to inquire into or try into the case.
- ✓ It enables the court to control proceedings by confining the evidence and arguments to what is alleged in the charge and what is distributed.

HOW TO DRAW A CHARGE

It must be satisfied that charge has contents and form. The charge has got three parts namely as follows:

I. Particulars of the accused person. This part contain the following things

- ✓ Name of the accused person.
- ✓ Age of the accused person.
- ✓ Nationality or tribe of the accused person.
- ✓ Occupation or Address of the accused person.

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

III. Particulars of the alleged offence.

That in brief but clear statement of the acts or omission alleged to have been done or omitted to have been done by the accused person. The particulars state the date, time and place the alleged offence was committed. Also state the acts or omission complained of, the name of the victim, if any, of the offence, the property and its value, if relevant and so on.

Generally this explanation on how to draw a charge has been explained under section 132 of the CPA which states as follows:

“.....Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is

charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged....”

Also for the case of drawing a charge under Primary Court the mandatory conditions has been provided under section 21(b) of the MCA (Third Schedule) as follows:

“.....Any person is brought before a court under arrest, the magistrate shall enter the fact in the registers of the court and, in the case of any offence in respect of which primary courts have jurisdiction, open a case file and, unless a written charge is signed and presented by a police officer, draw up and sign a charge with such particulars as are reasonably necessary to identify the offence or offences, including the law and the section, or other division thereof, under which the accused person is charged....”

**EXAMPLES ON HOW CHARGE CAN BE DRAWN
IN THE UNITED REPUBLIC OF TANZANIA
CHARGE SHEET**

Name of the accused person: Buberwa Baregu

Age: 25 years

Tribe/Nationality: Haya/ Tanzanian

Religion: Christian

Address: Kayanga Village, Karagwe District

Offence, Section and Law: Theft contrary to section 258 & 265 of the Penal Code
[CAP 16 R.E [2002]

Particulars of the Offence:

Buberwa s/o Baregu, On or about 22nd March 2012 at about 3.30 p.m at Kanyabureza, within the Township and District of Karagwe in Kagera region, did steal a bag valued at 45,000/=, the property of Ndyababo Roggers.

Sometimes a charge can be defects in form or contents but if it is sufficiently alleges the offence committed the magistrate would be required to advise the public prosecutor to polish it up. If, however the charge is so defective that no amount of correction can save it, such as where it states facts which do not constitute any offence known to law, you

will have no alternative except to reject it under powers conferred on you by the provisions of section 129 of the CPA. But it must be born in mind that in rejecting a charge under that section, be it noted that you must give reasons for doing so as explained as follows:

“.....Where the magistrate is of the opinion that any complaint or formal charge made or presented under section 128 does not disclose any offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for such order....”

NOTE:

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

JOINDER OF ACCUSED PERSON

This is the practice of joining more than one accused persons in one charge and try them together. The categories of persons who can be joined together have been explained under section 134(1) of the CPA as follows:

- ✓ Persons accused of the same offence committed in the course of the same transaction.
- ✓ Persons accused of an offence and persons accused of abetting or an attempt to commit such an offence.
- ✓ Persons accused of different offences committed in the course of the same transaction.
- ✓ Persons accused of any offence under Chapter XXV to XXXI of the Penal Code
- ✓ Persons accused of any offence relating to counterfeit coin under Chapter XXXVI of the Penal Code
- ✓ Persons accused of any economic offence under the Economic and Organised Crime Control Act .

JOINDER OF COUNTS

Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character as per section 133(1) of the CPA. Also it is provided under section 21(3) of the MCA (Third Schedule) which provides as follows:

“..A charge may contain more than one offence if the offences charged are founded on the same facts or form part of a series of offences of the same or similar character but where more than one offence is contained in the same charge it shall be separately stated...”

DEFECTS OF CHARGES

DUPLICITY

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

A simple example will clarify the point. It is alleged that Juma Bushiri broke into the house of Anna Simon at night and stole a radio there from. Your public prosecutor then brings before you a charge sheet which reads as follows.

IN THE UNITED REPUBLIC OF TANZANIA

CHARGE SHEET

Name of the accused person: Juma Bushiri

Age: 30 years

Tribe/Nationality: Chagga/ Tanzanian

Religion: Moslem

Address: House No. 234, Majengo, Shinyanga Township

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

Particulars of the Offence:

Juma s/o Bushiri On the night of 22nd March 2012 at about 3.00 a.m at Butwa Village in the District and Region of Tabora did break into the house of Anna d/o Simon and stole there from a radio valued at shs 1000000/= , the property of the said Anna d/o Simon.

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

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

Therefore you must satisfy your self that no one count in the charge sheet charges an accused with having committed two or more offences or in other word the counts must be separated but should be contained in one charge sheet.

****VARIANCE BETWEEN CHARGE AND EVIDENCE**

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

CHARGE ON A REPEALED SECTION

A charge on an repealed section or law is curable provided that

1. The offence is in every essential the same under the old and the now section or law.
2. No failure of justice may result from the alteration.
3. The charge and the particulars are clear.

The above conditions is verified through the case of **MAGESA s/o MJUNJA V THE REPUBLIC 1986 TLR 10** as follows:

“.....where the court held that a charge and conviction under a repealed law is an irregularity which is curable if the repealed section is re-enacted in identical words in the

current statute such that it cannot be said that the accused has in any way been prejudiced by the irregularity...”

However if the old and new section or law differ and do not repeat in a similar terms the language of the old section/law the defects can't be cured.

This has been explained also in the case of **PETER ZAKARIA V R [1969] HCD NO. 236**. In this case the appellant insulted and threatened a court broker with bloodshed if his car was attached. He was convicted of unlawfully obstructing a court officer c/s 119, Penal Code. The section had previously been repealed and replaced by s. 114A.

But the court held that on the facts of the case at hand, it is clear that the new section, s. 114A, is broader than the old section, s. 119, and does not repeat in similar terms the language of the old section. Moreover it is unclear from the particulars which part of the new section the offence would fall under. Therefore, in the circumstances, the charge cannot be cured, and the conviction null.

MISQUOTATION OF SECTION NUMBERS

It is the duty of the prosecutor before signing a charge sheet to make sure that section number are correctly cited in the statement of offence. However failure to quote a proper section number isn't fatal unless it is shown specifically that there was a miscarriage of justice that is the accused was prejudiced. This has been

explained in the case of **NYABILIMO ANDREA V R [1967] HCD NO. 345**. In this case the accused was charged and convicted of “robbery with violence c/s 286 of the Penal Code.” The charge correctly quoted the section of the Code appropriate to this offence, but gave wrong section number.

The court was held that “The number of the section was obviously quoted in error and I invoke the provisions of Crim. Proc. Code s. 346 as this error cannot occasion any

miscarriage of justice or prejudice to the appellant as the particulars of the offence are quite clear. He knew what he pleaded to and with what offence he was charged.”

NON QUOTATION OF SECTION NUMBER

It is important that the proper section must be quoted in the Charge. Non quotation of section number is a curable irregularity but it shouldn't be encouraged as it will cause incompetence and recklessness on the party of the prosecutors. Therefore this irregularity is curable if

1. The accused wasn't prejudiced.
2. It was just a slip of the pen.
3. It wasn't a result of mistake of law.

CHARGE IN THE ALTERNATIVE

Sometimes facts alleged in a case may be such as to indicate that one or two offences was committed. In such a case the way out of the problem is to prefer two counts in the **alternative**. For example, a cashier is alleged to have occasioned a loss of tshs 5,000/=in cash. The facts are such that he neither stole the money or lost it as the result of negligence or misconduct. In such a case two distinct counts may be preferred in the alternative, occasioning loss through negligence.

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

“In the alternative” and then will follow the count alleging the commission of the second offence. The omission of the words “In the alternative” will render the charge defective in that it will tend to prejudice the accused's defence.

A magistrate should note, however, that where counts are charged in the alternative, on conviction of the accused on one count, the magistrate mustn't enter any verdict or finding on the other count as explained in the case of **SEIFU S/O BAKARI V R [1960] E.A 388(C.A)**.

For example.

REMEDIES ON DEFECTS CHARGES, SECTION 288-436 OF THE CPA.

A. Amendment of a charge.

When the charge is defective, the magistrate may do the following things:

- ✓ May amend it.
- ✓ Substitute a new charge.
- ✓ Draw up an additional charge.

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

- ✓ The court must call upon the accused to plead afresh to the altered charge.
- ✓ The accused person has the right to request that any witnesses be called to give evidence again or to be cross examined.
- ✓ The prosecution may call and examine any witnesses who may have been examined.

NB:

Failure to follow this procedure will invite the court on appeal to declare the trial a nullity.

CASES REFERRED

THE REPUBLIC V JUMANNE MOHAMED 1986 TLR 232

The accused was charged with unlawful wounding. After the prosecution witnesses had testified the public prosecutor substituted a fresh charge of causing grievous harm. Without complying with the provisions of s.234 of the Criminal Procedure Act, 1984 the magistrate convicted the accused as charged and sentenced him to three years' imprisonment. When the matter reached the High Court the learned judge considered the effect of failure to comply with the provisions of s. 234 of the Criminal Procedure Act, 1984.

Held: Failure to comply with the provisions of s. 234(2)(a) of the Criminal Procedure Act was in the instant case, a serious error capable in law of vitiating the decision arrived at by the trial magistrate.

THUWAY AKONAAAY V REPUBLIC 1987 TLR 92

The appellant was originally charged with threatening violence, but the charge was withdrawn and a new charge alleging arson was substituted therefore. The appellant was not called to plead to the new charge, or first appeal the judge was satisfied that provisions of s. 234 of the Criminal Procedure Act were complied with because the appellant saw no need to recall previous witnesses immediately after the charge of arson had been substituted for that threatening violence and PW.I alone had testified.

Held: It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do that renders a trial a nullity.

B. Withdraw of a charge and Re-Institution as per section 98 of the CPA.

This is done by the Public Prosecutor at a stage of the proceeding before judgment is pronounced. A Public Prosecutor must obtain the consent of the court or may be instructed by the Director of Public Prosecutions.

The withdraw is done where the charge is defective with a view of instituting a proper charge.

Where the charge is withdrawn before the accused hasn't defended himself he may be discharged. This discharge will not operate as a bar to subsequent proceedings against him on account of the same facts.

This has been explained also in the case of **PAGI MSEMAKWELI V REPUBLIC 1997 TLR 331**. In this case the appellant was charged with cattle theft in a District Court. The appellant offered to repay PW 1 the stolen cattle, after which the charge was withdrawn under s 98(1) of the Criminal Procedure Act and the appellant was discharged. However, the cattle were seized from PW 1 by one M,

claiming that they had been paid to PW 1 unlawfully. This led to PW 1 making a fresh complaint which led to appellant being charged, convicted and sentenced. On appeal, it was contended that there had been no consistent description of the cattle and none were tendered; that the trial court had not held a preliminary hearing and that PW 1 had no more complaint after being paid and that the matter was concluded with the withdrawal of the initial charge.

The court held that the withdrawal of the charge under s 98(a) of the Criminal Procedure Act did not operate as a bar to subsequent proceedings being preferred against the appellant on the same facts - the payment. or phoney payment made to PW 1 did not undo a criminal act which was already complete and the offence of cattle theft was not capable of compromise.

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

Under this the prosecution stops the prosecutions by the DPP and the accused person is discharged. This discharge is not a bar to any subsequent proceedings against him based on the same facts should need arose. Withdraw of charge under section 91 of the CPA was discussed in the case of

REPUBLIC V NICOLAUS MAMUU 1996 TLR 154. In this case while police investigations were still under way, and after he had been charged with murder, the Accused escaped from custody. About a year later, and on application by the public prosecutor, the District Court of Rombo withdrew the charge against the Accused in terms of Section 98(a) of the Criminal Procedure Act. On revision to this Court, the Court restored the charge of murder against the Accused. It was held as follows:

(i) Section 98 speaks of the withdrawal of charges in respect of 'any trial before a subordinate court'; and given that the crime of murder is triable only before the High Court, the trial on the charge could only have been properly brought before the High Court and thus Section 98 could not have been used to withdraw the charge.

(ii) The withdrawal of the charge in question should have been brought in terms of Section 91(1).

(iii) The order of the District Court is quashed and set aside, and the charge of murder against the Accused is restored.

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

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

1. The court shall thereupon call upon the accused person to plead to the altered charge.
2. The accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.
3. The court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.

CASE REFERRED

ANDREA S/O KIMBULU V R [1968] HCD NO. 312

Accused was charged in Primary Court with housebreaking, theft, and assault. At the close of the prosecution case, the magistrate substituted a charge of robbery [P.C. s. 286], and accused was duly convicted of that offence. The record indicates that after the original charges were read and the accused was addressed in terms of section 41(2)(b) of the Magistrates Courts Act, he stated that he did not wish to be tried by the court. The record also indicates that after the charge

was altered and read to the accused, he denied guilt and was altered and read to the accused, he denied guilt and was put upon his defence. The court, it was held that “The alteration or substitution of the charge at the end of the case for the prosecution should

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

SEPHEN S/O MUNGA V R [1968] HCD NO. 225

Accused was initially charged with attempted murder, to which he pleaded not guilty. After the prosecution had presented its evidence, the magistrate, finding that the evidence did not show an intent to murder, altered the charge to one of causing grievous harm. The appellant was not required to plead to this charge, nor was he given the opportunity of recalling the prosecution witnesses for cross-examination.

After making his defence accused was convicted of causing grievous bodily harm and sentenced to 18 months imprisonment. The court, it was held that the trial was a nullity. “Until a charge is put and an accused’s plea recorded there can be no basis for a trial to proceed and the accused person is not properly before the court for trial and determination of his case.” The proper course for the court to have taken, upon altering the charge was to so inform him of its

action and have him plead to the new charge. Then it should inform him that he had the right to recall any or all of the prosecution witnesses for cross-examination. [Citing Crim. Proc. Code s. 227]. Conviction and sentence set aside; case remanded to trial court for re-trial.

NB: For another remedies available read section 288-346 of the CPA.

BAIL

Simply bail is an agreement entered into between an accused person and the court or police for releasing him from custody and entrusting him to the custody of surety (s).

PURPOSE OF BAIL

The primary purpose of remanding accused person in custody is not to punish him (for courts may only punish a person found guilty of an offence) but to ensure that he will

appear to take his trial and not seek to evade justice by leaving the jurisdiction of the court as explained in the case of **JAFFER V R [1972] HCD NO. 92** as follows:

“...The primary object of remanding an accused in custody is to ensure that he will appear to take his trial and not seek to evade justice by leaving the jurisdiction of the court...”

Remanding a man in custody necessarily involves the curtailment of his personal liberty. In a majority of cases such a course is considered to be undesirable, and so courts are empowered not to set accused persons free but to give them temporary release from custody while at the same ensuring that the accused person in question will appear to take his trial on the date to be fixed by the court.

POLICE BAIL

The reason for granting bail is the presumption that every person is innocent until proved guilty by a competent court as per article 13(6)b of the Constitution of the United Republic of Tanzania of 1977 as amended time to time. The freedom of any person should not be restricted unless there is a legal justifications for doing so. Thus we find that before conviction that is from the time of arrest and during trial one has the right to preserve his liberty, for bail is the right and not a privileges to the accused or suspect. Before going any far let us define some of the terms used in this topic as follows:

BOND

Bond is an agreement in a deed, by which an accused person binds himself to the court or police to pay a sum of money specified therein, In case he fail to perform a thing specified in the bond.

RECOGNISANCE

Recognisance is an obligation entered into and recorded before a court or magistrate by which a person engages himself to perform some act or observe some conditions such as to appear when called on r to pay a debt or to keep the peace. Usually a certain amount of

money is attached to it and may be forfeited if the person neglect to observe the conditions.

SURETIES

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

SECURITY

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

POLICE BAIL

I. Under section 32(1) of the CPA, A police officer in charge of a police station is required to grant bail to a person who has been arrested with or without warrant where that person;

- 1) Has been arrested for an offence other than an offence punishable with death.
- 2) Where it is impracticable to bring that person before an appropriate court within twenty-four hours after he was arrested.
- 3) After due inquire into the case and that offence appears to be of not serious nature.
 - The person will be released only after executing a bond with or without sureties.
 - The amount of bond should be reasonable .
 - The time and date for appearing before the court should be mentioned in the bond.

II. When a person is arrested by a police office on reasonable grounds or suspicious of having committed an offence that person has to be released immediately, on satisfaction of the following:

- 1) After the arresting officer believed that the person has actually committed no offence or there is no reasonable grounds on which to continue to hold that person in custody.
- 2) Where it is believed that the arresting officer has in fact arrested a wrong person.
- 3) Twenty four hours has passed and no formal charge has been laid down against that person unless he was arrested on a serious offence.

This has been provided under section 64(1) of the CPA.

III. Even where a formal charge has been preferred against any person under police custody, the police officer in charge of the station may release him upon executing a bond with or without sureties where:

- 1) That person was arrested without warrant.
- 2) The offence arrested for was not serious.
- 3) No insufficient evidence disclosed to proceed with the charge
- 4) Further inquiries must be carried out, and can't be completed with a short period of time.

This has been explained under section 64(2) of the CPA.

IV. If a person arrested is under the age of fifteen years, that person may be released after his parent, guardian, relative or any other reliable person has entered into a recognisance on his behalf. This has been explained under section 64(3) of the CPA.

V. Every person arrested has to be told of his right to bail by the arresting police officer as provided under section 64(5) of the CPA.

VI. No fee or duty shall be chargeable upon bail, bonds, recognisance to prosecute or to give evidence or recognisance for personal appearance or otherwise issued or taken by a police officer in respect of police bail. This has been provided under section 64(4) of the CPA.

CRITERIA FOR GRANTING POLICE BAIL, SECTION 65 OF THE CPA

Before granting police bail the following matters has to be taken into considerations:

1. The police officer concerned has to consider the probability of the person appearing in court in respect before the court to answer the charge. In doing so the officer will have to look at the followings:

- 1) The background and community ties or the residence, employment and family situation and his police record, if known.
- 2) The circumstances in which the offence was committed.
- 3) The strength of the evidence against the person and other information relevant to the likelihood of his absconding.
- 4) The seriousness of the offence charged.

2. The police office has also to consider matters related to the interests of the person, that is to say:

- 1) The period that he will spend in custody if he is not granted bail.
- 2) The condition under which he will be held in custody.
- 3) The needs for that person to be free to prepare his defence that is to obtain legal advice.
- 4) The need of the person for physical protection, whether the need arises because he is incapacitated by intoxication, injury or the use of drugs.

3. The protection of the community, that is to say:

- 1) The likelihood of the person interfering with evidence.
- 2) Intimidating witnesses.
- 3) Hindering police inquiries in any other way.

CONDITIONS OF POLICE BAIL, SECTION 66 OF THE CPA

Before a person arrested by a police officer is granted bail has to fulfill the followings:

- 1) Has to agree in writing to appear before a specified court at a specified time and place, or at such other time and place as is notified to him by a police officer.
- 2) Has to agree in writing to observe specified requirements as to his conduct while released on bail.

- 3) If another person acceptable to the police officer acknowledges in writing, that he is acquainted with the person charged and regards him as a responsible person who is likely to appear in court to answer the charge.
- 4) Either the person charged, or another person acceptable to the police officer, enters into an agreement, with or without security, to forfeit a specified sum of money if the person charged fails to appear in court to answer the charge.
- 5) The person charged, or another person acceptable to the police officer, deposits with the police officer, a specified sum of money to be forfeited if the person charged fails to appear in court to answer the charge.

REFUSAL TO GRANT POLICE BAIL, SECTION 67 OF THE CPA

A police officer can refuse to grant police bail where;

- 1) The person arrested is unable or unwilling to comply, with any of the conditions subject to which bail was granted.
- 2) The person is unable or unwilling to arrange for another person to comply, with the conditions of bail.

Where a police officer refuses to grant bail to a person in custody, such person shall be brought before a magistrate to be dealt with according to law as soon as it is practicable to do so. If a person who is waiting in custody to be brought before a magistrate at any time, may request a police officer for facilities to make an application to a magistrate for bail.

And, if he does so, the police officer shall, within twenty four hours, or within such reasonable time as it is practicable after he makes the request, bring him before a magistrate. Where a police officer refuses to grant bail he shall record in writing the reasons for so refusing. If a person is refused bail while in police custody he can't apply bail to the magistrate.

REVOCATION OF POLICE BAIL, SECTION 68 OF THE CPA

The police officer in charge of a police station may revoke the bail granted to a suspect under the following circumstances:

- 1) When police officer in charge of a police station believes on reasonable grounds that is absconding.
- 2) Has failed to comply with, or is about or likely to fail to comply with an undertaking given by him as a condition of his release.

When bail is revoked and such person may be arrested.

BREACHES OF CONDITIONS OF POLICE BAIL, SECTION 69 OF THE CPA

- 1) It is an offence to fail to comply with the condition of the bail.
- 2) Where a person released on bail willfully and unreasonably fails to comply with the conditions of bail is guilty of an offence.
- 3) On conviction, he shall be liable to a penalty not exceeding the maximum penalty that could be imposed on him upon conviction for the offence in respect of which he was arrested and then released on bail.

STATUTORY RESTRICTIONS FOR GRANTING BAIL

There are circumstances in which the court has the power on whether or not to grant bail to the accused person. These conditions have been provided under the CPA and can be discussed as follows:

NON-BAILABLE OFFENCES

The repealed CPA which has been replaced by the current CPA provided that a person arrested without warrant or appeared before a court of law could be granted bail except where such person was charged with the offence of murder or treason. However the High Court was empowered to grant bail even to the accused person charged with murder or treason. This is clear from section 123(3) of the CPA which states as follows:

“...Notwithstanding anything contained in subsection (1) of this section the High Court may in any case direct that any person be admitted to bail or that the bail required by subordinate court or police officer be reduced...”

This was interpretation of the subsection given by the High Court of Tanzania in the case of **REPUBLIC V LOMANDA OBEI** in which Georges, C.J. Said:

“....Section 123(3) of the criminal procedure code does empower the High Court to direct a person to be admitted to bail even though he has been charged with murder or treason...”

In other words as far as the High Court was concerned there were in theory , no non-bailable offences. Murder and treason were only non-bailable where the accused person appeared before a subordinate court. However, it was held in many cases including in OBEI’S case that in cases of murder, bail could only be granted “In exceptional circumstances”

With the coming into effects of the Criminal Procedure Act, 1985, the law on this point has considerably changed. Section 148(5)(a) of the Act provides as follows:

*“...(5) A police officer in charge of a police station, or a court before whom an accused person is brought or appears shall not be admit that person to bail;
(a) If that person is accused of murder or treason....”*

The Act contains no provisions equivalent to the provisions of subsection (3) of section 123 of the repealed criminal procedure code cap 20. In other words the prohibition of granting bail to accused persons charged with murder or treason, in whatever court is now absolute. To put it differently murder and treason are now non-bailable offences without any qualification in whatever circumstances. As a magistrate therefore you have no option but to remand the accused in custody in such cases.

BAILABLE OFFENCES

Subject to a certain statutory restrictions to be discussed previously all offences other than murder and treason are generally bailable.

But some of the statutory restrictions are such that they appear to create other categories of non-bailable offences.

For bailable offences section 148(1) of the criminal procedure act , 1985 provides that “

Where a person appears or is brought before

A court and such person is prepared before that court to give bail the court may subject to a certain restrictions, admit that person to bail or release him on his executing a bond with or without sureties for his appearance at his trial or resumption of the trial at a given time and place.

RESTRICTIONS ON BAILABLE OFFENCES

I. CERTIFICATE BY THE DIRECTOR PUBLIC PROSECUTIONS (D.P.P.)

Under section 148(4) of the CPA provides that notwithstanding anything in this section contained, no person shall , for such period as the court shall consider necessary to the circumstances of the case concerned , be admitted to bail either pending trial or appeal, If the D.P.P. certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced.

What those provision mean is that even where the offence is otherwise bailable and the court is inclined to exercise its discretion in favour of the accused person, the court may not admit that person to bail if the D.P.P. has certified in writing as aforesaid. The only discretion of the court has in such a situation is that of determining the period during which the accused person should be denied bail on the basis of the certificate.

These are very wide powers on the party of the D.P.P., for the provisions doesn't require him to state reasons for so certifying. In other words the wrong hands, those powers could be abused

II. PREVIOUS CONVICTION

Our law of Evidence provides that as the general rule in criminal proceedings that , evidence of the accused's bad character is inadmissible. Such evidence is only admissible where evidence has been given that the accused has a good character or where the accused's bad character is itself a fact in issue; or where it is given after conviction has been entered, in which case it is admissible for the purpose of assisting the court in

assessing the sentence to be awarded. This explanation as been provided also under section 56(1) of the Law of Evidence Act as follows:

“...In criminal proceedings the fact that the accused person is of bad character is irrelevant, unless evidence has been given that he has a good character in which case it becomes relevant: Provided that a previous conviction for any offence becomes relevant, after conviction in the case under trial, for the purpose of affecting the sentence to be awarded by the court...”

The CPA would appear to have introduced yet another exception to the general rule. Under section 148(5)b of the CPA provides that a police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years.

These provision then licence the reception of evidence of bad character of an accused person for the purpose of bail. So should it appear that the accused person has previously been sentenced to imprisonment for a term exceeding three years, then such person is disqualified from being granted bail whatever may be the accused's other merit. Also this situation agree with section 56(3) of the Law of Evidence Act which provides as follows:

“...A previous conviction is relevant as evidence of bad character...”

In view of the fact that the law now specifically permits reception of evidence of bad character for the purposes of bail, I would my self go further and submit that evidence of previous conviction of the accused person, even if the sentence (s) be of less than three years imprisonment, should be taken into account as mitigating factor against the granting bail, they are given the liberty which they are likely to abuse by continuing with their criminal acts to the detriment of the innocent public. Iam fortified in this view by the dictum of Lord Justice General Clyde in the case of **MACLEOD V WRIGHT**. He there stated as follows:

“.....One material factor which ought always to be taken into account ..in determining whether or not to grant bail is the previous record of the accused...It is in my opinion, contrary to public interest that a man with substantial criminal record should be given the opportunity pending his trial of enlarging and extending his criminal activities. Experience has shown that all too often that opportunity is taken if it is available. A criminal record accordingly is an important factor against bail. That would be particularly so where the list of previous convictions is substantial or the latest conviction is of recent date. Such factor emphasize the risk that the man may revert to his course of crime if released, and it appears to me that the public interest in such circumstances demands that opportunity shouldn't be given to him. (As quoted in (1968) Criminal Law Review, at page 77)......”

It may be argued with some force that admitting evidence of bad character at such an early stage in criminal proceedings may be prejudicial to the accused in that a court would start off with bias against the accused. Undoubtedly, such a risk is not too remote. But since the interest of the freedom of the individual have to be weighed against the interest of society, the risk of bias in such cases is worth taking.

III. FAIRULE TO COMPLY WITH PREVIOUS BAIL CONDITIONS IMPOSED BY A COURT

Prior to the enactment of CPA courts usually took into account the accused's previous conduct with regard to bail conditions imposed on him earlier. If, for instance an accused person jumped bail and was later re-arrested courts were most reluctant to release him on bail. That rule of practice has now found statutory recognition in section 148(5)c of the CPA which prohibits a court from granting bail to an accused person if;

“.....it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded.....”

Despite the vagueness of the language, these provision would appear to be based on sound common sense. After all in the words of A.A.F Massawe in his book “ The Law of Criminal Procedure defines bail as follows:

“.....Bail is an agreement entered into between the accused...and the court...”

That being so, the failure to comply with previous bail conditions is the breach of that “agreement”, a breach which must surely render him unworthy of the trust of the court whose duty is not only to safeguard the accused person’s freedom but also to protect the interests of society.

IV. COMMISSION OF ANOTHER OFFENCE WHILE ON BAIL

Under section 148(5)d of the CPA specifically prohibits granting of bail to an accused person who is charged with an offence “alleged to have been committed” while he was released on bail by a court of law.

These provisions are really codifications of judicial decisions of the High Court in this point. The High court had on many occasions held that the like hood of an applicant for bail committing other offences or offences of a similar nature while on bail was a factor to be taken into account. For that reason this statutory restriction can hardly in principle, provide serious controversy. What must be born in mind is that for the restriction to apply, it is not enough to say that if released on bail the applicant is likely to commit other offences.

What the statute mean is that the person should be charged with an offence which is alleged to have been committed while he was on bail. One criticism which can perhaps be justly levelled against this statutory restriction is that it appears to be too wide: It is too wide in the sense that it merely requires an allegation to be made. It does not say that it should appear to the court. This restriction therefore could easily be abused by public prosecutors.

V. SERIOUS ASSAULT OR THREAT OF VIOLENCE

Section 148(5)e of the CPA as amended by Act no. 12 of 1987. introduces a somewhat new and serious restriction. Indeed it is so serious that it appears to create another set of non-bailable offences. These provisions state that a court may not grant bail to an accused person if;

“....The act or the acts constituting the offence with which a person is charged consists of a serious assault causing grievous harm on or threat of violence to another person or of having or possessing a firearm or explosive....”

Offences that easily leap to mind as being non-bailable by virtue of these provisions are robbery, causing grievous bodily harm and attempted murder. Take robbery, In our Penal Code robbery is defined as follows:

“.....Stealing with the actual use of or threat of violence to any person or property at or immediately before or immediately after such stealing , with actual violence or threat of it for the purpose of obtaining or retaining the thing stolen or for preventing or overcoming resistance to its being stolen or retained....”

Now since the statutory restriction speaks of “ an act or acts constituting the offence...consists of a serious assault causing grievous harm or threat of violence” to another person, it follows that the offence of robbery will generally be non-bailable where the violence causes grievous bodily harm.

VI. ACCUSED’S OWN PROTECTION AND SAFETY

Under section 148(5)d of the CPA it is thereby provided that an accused person shall not be released on bail if it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety. This statutory restriction is merely a codification of case-law on this point.

Our courts have always taken the protection and safety of an accused person to be a material consideration in a bail application. A magistrate, however should judiciously apply his mind to the circumstances of the case before refusing bail on this ground.

JUDICIAL CONSIDERATIONS

The granting or refusing to grant bail by a court of law in respect of bailable offences is the matter in the discretion of the judge or magistrate. But since this is the judicial

discretion it must be judicially exercised. The term “discretion” and the expression of “judicial discretion” don’t always yield to precise definitions. It is perhaps, this fact which led **Lord Camden** to say of this discretion as follows;

“...The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice, in the worst it is very vice, folly and passion to which human nature can be liable...”
*This has been explained in the case of **STATE V CUMMING (1865) 36 No. 163 on page 2787.***

Coke gave the following definition of the term “discretion” as follows:

“...Discretion is a science of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affection...” This has also been explained under **Jowitts’s Dictionary of English Law.**

Lord Mansfield defined “Judicial discretion” thus as follows:

“... It means sound discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague and fanciful, but legal and regular...” (This has been explained in the case of **R V WILKES, 4 BURR 2527**).

For my part and with respect I would prefer the last two definitions to that of Lord Camden, and so I would define “discretion” or “Judicial discretion” to mean the process of arriving at a decision through a dispassionate and regular consideration of all the available options in a given situation.

In bail applications, therefore a magistrate must use that process in arriving at his discretion on the competing claims, namely the individual’s right to his freedom and the need to protect the interest of society within legal, social, economic and political environment of that society.

CONSIDERATIONS

In addition to the statutory considerations as discussed previously, there is a host of other considerations which should be taken into account in bail applications, depending of course on the facts and circumstances of each given case. What should be born in mind, however is that all those considerations are for the purpose of enabling the court to be satisfied that the case in point meets the test applications.

And what is the test?. It is now well settled that the true test in a bail application is whether the granting of the application “will be detrimental to the interests of justice and good order” and the keeping of public peace as explained in the case of **BHAGWANJI KAKUBHAI V. REPUBLIC. 1 TLR 9R0 144.**

The interests of justice demand that an accused person should have a fair trial, that his freedom shouldn't be unduly curtailed and that the accused person will not abscond or interfere with the investigations, and so on. The interests of peace and good order demand that the accused person doesn't commit other offences or cause terror or jeopardize peace and tranquility and that by reason of his age, he isn't put in moral danger by mixing with hard-core criminals.

So generally the following are the considerations which a court must take into account in bail applications but not limited to:

I. Is the accused likely to interfere with investigations?.

A fair trial can't be had if investigation or witnesses are interfered with, either by the accused person or by third parties. So the court must consider this in a bail application. If the court should be satisfied that an accused person would so interfere or has already started to interfere, the application for bail may be refused.

However any allegation as to such interference or possible interference must be satisfactorily proved by the prosecution. In the words of Wilson, Ag. C.J. in Kakubhai's case as follows;

“... I held that the same principle was properly applicable here but I wish to point out that I was far suggesting that any vague fear or suspicion by the police that the accused person might temper with witnesses and thereby obstruct the course of justice would be sufficient to justify a

refusal of bail....There should be a definite allegation of tempering or attempted facts showing reasonable cause for the belief that such interference with the course of justice was likely to occur if the accused was released..."

II. Will he abscond?.

Perhaps the most important consideration in bail application is whether, if released on bail the applicant will be there to take his trial and not to seek to evade justice by leaving the jurisdiction of the court. But again objection based on an allegation that the accused person would abscond has to be substantial. As Wilson , Ag. C.J. pointed out as follows:

"... The primary object of remanding a man in custody is to ensure that he will be there to take his trial, and it is certainly no party of our system of criminal justice to keep a man in gaol because, to put it colloquially the police don't like the look of his face. There must be some more substantial objection than that to his being at liberty..."

III. Is likely to commit other offences if released on bail?.

Law enforcing agencies (the courts among them) are charged with the duty, inter alia of preventing or discouraging the commission or repetition of commission of crimes. To that end a court faced with a bail applications should among other matters, take into considerations whether if released on bail the applicant would probably commit other or similar offences. This is by no means a minor consideration. As I had occasion once to point out :

"...In spite of all society's hopes and our efficient police and prisons administration it must be conceded that there are human beings who can not help committing offences, either because they have an incurable instinct to commit offences and committing offences has become second nature to them, or they are driven to committing crimes because circumstances drive them into doing so...", This has been explained also in the book of Handbook For Public Prosecutor.

IV. Would release adversely affect peace and good order?.

There are instances where the release of an accused person on bail could jeopardize public peace and good order and as stated earlier the test in a bail application is whether

the granting of bail would be detrimental to the interest of justice and good order and the keeping of public peace. This, then is an important consideration in a bail application in a proper case.

In the case of **ABDUL NASSOR V REPUBLIC, (1 T.L.R. ® 144**, the prosecution resisted the application for bail of the accused person who was charged with the offence of assault, on the ground inter alia that if he was released on bail there would be unrest or further breach of peace among Somalis and Baluchis in the Nzega area in which the offence was alleged to have been committed. Although the High Court granted the application for bail stating that it thought

law-enforcement authorities could cope with such a situation if it arose, the court nevertheless took heed of the allegation, for one condition it attached to the immediate environs (some seventy-five miles from Nzega) until it became necessary for him to go to Nzega to take his trial.

V. How serious is the offence?.

It is , I think in line with common sense that the more serious the offence and the greater the punishment it attracts, the greater will be the accused's temptation to flee and so evade justice. This, then is also important consideration in a bail application. It was this consideration that used to defeat many bail applications under the Criminal Procedure Act in cases where the applicants were charged with murder.

VI. How reliable are the sureties?.

Since bail is the delivering of a party accused of a crime into the hands of his sureties and so party is accounted by law to be in the custody of such sureties who bind themselves, on the pain of forfeiting their bonds, to produce the party before the court on an appointed day, it is only logical that sureties should satisfy the court that they are reliable members of the society and are able to ensure that

the accused will be there to take his trial. It is for this reason that the court must inquire into the reliability or substantiality of the proposed sureties. It would for instance, be making a mockery of justice if a known criminal or one who is himself facing a criminal charge, were to be allowed to stand surety for another accused. However such inquiry must be done judicially and not perfunctorily so as to avoid an abuse of the discretion conferred on the courts.

VII. Applicant's residence or domicile.

It is necessary that the accused's residential address be clearly identified so that, should need arise the accused can be traced with the minimum effort. It would be a judicial exercise of discretion to release on bail a person who has no fixed abode. Yet another consideration in proper cases is the accused's domicile.

Courts are often reluctant to release a foreigner on bail except where circumstances are such that the court is satisfied that he would appear to take his trial. In the case of **ASOKA V REPUBLIC**, the applicant was a Kenyan citizen with substantial business in Uganda. He had been charged with the offence of stealing a large sum of money. In refusing the application for bail, Mnzavas J as he was stated as follows:

"...There can be no doubt that the offence with which the accused is charged is a serious one. Equally it is not at all in dispute that the accused is a stranger to this country. He is a native of Kenya with substantial business in Uganda. In these circumstances, it is my view that it would be unsafe, indeed most unrealistic, to grant bail pending the hearing of the case. Granting of the application would be detrimental to the interests of justice..."

VIII. How long has he been in custody?.

The length of the period an accused person has been in custody should be taken into consideration, particularly where the investigations are expected to be complicated and take a long time before they are finalized. As Makame, J (as then he was pointed out in **SHABEL'S case (1976) LRT No. 4**) as follows:

“... The time the accused person has already been in custodial confinement, when presumably investigation were being carried on, ought reasonably to be taken into account while deciding whether or not to release on bail. If accused persons are necessarily to be in custody indefinitely because investigations are allegedly incomplete we shall opening the flood gates...”

IX. Nature of evidence in support of the charge.

In some cases, a bail application may be made when the hearing of the case is already underway. In such a situation, a court is perfectly entitled to take into account the strength of the evidence so far received. If the evidence on record suggests that there is a strong case against the applicant, it would be not wise to grant the application, particularly where the offence is ordinarily punishable by a custodial sentence.

X. Age of applicant.

In proper cases the age of the applicant may be taken into account. It is felt that as far as possible, young children ought not to be kept in custody where their character is likely to be soiled by rubbing shoulders with hard-core criminals. Besides, in most cases it is hardly in the interests of such children nor those of the society to remand them in custody.

The case of **ARIF KASSIM AND OTHERS V REPUBLIC**, (Tabora Registry **Misciminal cause No. 27 of 1984**) is a good example. There the applicants had been charged with the offence of murder (which charge was subsequently reduced to that of manslaughter). The accused persons were aged between 8 and 11 years. In granting their application for bail, I had this to say:

“...In the present case, the applicants are children or younger persons. So in the event of their being convicted of any offence, they are unlikely to receive custodial sentence. Besides it must be very tough on the part of such younger children to be kept in prison. It can hardly be in the interests of justice to keep these children in remand custody...”

That case was before the CPA came into force. Under the Act these children would have had to kept in custody. This case perhaps goes to illustrate the hardship that would be caused to such children if charged with murder under the current law.

Despite these generally accepted considerations in bail applications, it must be conceded that the courts' discretion has been severely curtailed by the provisions of the CPA. This curtailment of the courts' discretion has attracted severe and sustained circumstances in legal circle. As a magistrate, however it is your duty to apply the law as you find it.

SENTENCE

According to Black Law Dictionary "Sentence is defined to mean punishment imposed on a criminal wrongdoer. Or in other word sentence is a punishment given by the court to the accused person after being found guilty. Sentence is an important component of criminal procedures. Normally the court having determined the case and decides that an accused is guilty it must determine what sentence fits the offence and the accused person.

PURPOSES OF SENTENCE

In order to appreciate the principles relating to the assessment of sentences, it is necessary to bear in mind the purpose of punishment. To state the common place, the purpose of criminal justice is to punish the guilty. That is why almost all penal statutes also prescribe penalties for offences which such a statute creates. What is then, are the purpose of punishment. We all know them: as stated in Salmond on Jurisprudence on page 115:

"....The ends of criminal justice are four in number, and in respect of the purposes so served by it , punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these the first is the essential and all-important one, the others being merely accessory...."

DETERRENT

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

PREVENTING

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

Incarceration means putting somebody in imprisonment.

REFORMATIVE

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

RETRIBUTIVE

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

MATTERS TO BE CONSIDERED IN ASSESSING SENTENCE

In principle, the question of sentencing must not be approached mechanically or perfunctorily. It involves a careful balancing of many considerations. One of the most important considerations is that the sentence must serve the public interest. However, these paramount considerations must go hand in hand with a number of other considerations. These considerations include but are not limited to the followings:

I. GRAVITY OF THE OFFENCE

The gravity of an offence is one of the important considerations in assessing sentences. The gravity of an offence is usually indicated by the penalty provisions of the particular offence. So statutes usually provide for the maximum punishment for a give offence and so the courts can impose punishment only to such maximum. Where the legislature has prescribed stiff penalties for an offence, that is in itself an indication that the legislature considers the offence to be serious, and so the sentence to be imposed on an accused person found guilty of such offence must bear reasonable relationship, all things being equal to the gravity of the offence.

Apart from the statutory penalty provided by statute for an offence, gravity of an offence sometimes has regard t the harm which results from the commission of the particular offence, either to an individual or to the society generally.

II. PREVALENCE OF THE OFFENCE

Another obvious factor to be taken into consideration in assessing sentence of the prevalence of the offence within the jurisdiction of the court or the country generally. Where the is evidence that the particular type of offence is very prevalent within the court's jurisdiction, and all things being equal, a court would be justified in imposing stiff sentences for such offences. This is done in the hope that such sentences will have a deterrent effect. On the other hand if the offence is one rare occurrence and no other aggravating circumstances, a severe sentences would hardly be justified.

However this is far from suggesting that that once it is found that a particular type of offence is prevalent a severe sentence must be automatically be imposed on the offender; nor is the mere fact that it is an offence of rare occurrence a licence for automatically imposing a light sentence. The prevalent of an offence is only one of the factors to be taken into consideration. Its gravity, the offender's antecedents, his blameworthiness, are all to be taken into consideration and careful weighed.

As was pointed out in the case of **REPUBLIC V GEORGE, (1963) R & N. 921**, quoted by Slattery in his book *A Handbook On Sentencing*:

"...An exemplary sentence isn't more than an especially severe sentence imposed as a special deterrent to prevalent recurrences of crimes which are becoming extremely

prevalent. It is, of course, proper to impose exemplary sentences in special cases, but sentences shouldn't be unduly severe simply because the offence is prevalent. The "moral blameworthiness" of the accused in each individual case is the most important element to take into account in assessing sentence.... The prevalence of an offence and difficulty of its detection are objective elements which may be taken into account, but which are not generally as important as the subjective elements peculiar to the offender and the peculiar offence for which he is being tried, as opposed to the general run of such a sentences.."

Also this has been explained in the case of **NGURUWE V REPUBLIC (1981)**

III. HOW MUCH DAMAGE WAS CAUSED?

The damage caused (or in the a case of attempt or inchoate crimes, which would have been caused) by commission of the offence, often has a direct relevance to the gravity of the offence. The term "damage" here is used in its wide sense: It means and includes bodily injury, damage to property, mental suffering, damage to an individual's reputation, damage to the moral standards of the community and etcetera.

All factors must be taken into account in assessing sentences. So the seriousness of bodily injury incases of assault or robbery. Rape and other sexual offences, the nature of the weapon used, the value of property lost or damaged, the stigma to a victim of a sexual offence, the community's stigma in cases such as corruption, must be taken into account as far as possible.

IV. THE OFFENDER'S ATECENDENTS

Of great relevance to assessment of sentences is the offender's antecedents, that is his background prior to committing the offence of which he has just been convicted. A sentencing magistrate must look into offender's antecedents. He must find out whether the accused has had a stable or turbulent upbringing, whether he is a first offender or has a previous criminal history.

If the accused person has previous conviction or as we sometimes say a criminal record, such previous record must be produced in writing or narrated by a public prosecutor. If

they are admitted by the accused, you should then consider how many such convictions are, of what duration each substantive sentence was and when the last of the sentence was served by the accused before committing the offence then under consideration.

In general, an offender with previous convictions for relevant offences should be treated more severely than one who is a first offender. The rationale of this approach is that in general a first offender is more likely to react positively to reformatory influences and so should, where possible be spared the danger of mixing with hard-core criminals for too long, while a long period of previous convictions of an offender is generally a strong indication that he isn't penitent, and one who is beyond the reach of reformatory treatment, and so is a menace to the community. As pointed out in *Salmond On Jurisprudence*, on page 117 of the 11th Edition:

"...The most sanguine advocate of the curative treatment of criminals must admit that there are in world men who are incurably bad, men who by some vice of nature are even in their youth beyond the reach of reformatory influences, and with whom crime isn't so much a bad habit as an ineradicable instinct..."

Where you faced with such an offender, and all things being equal you would be justified in imposing on him a severe sentence, for his record clearly indicated that he is a recidivist and a menace to the community. In the words of the late Sir Philip Biron in the case of **SAJILE SALEMULU V RPUBLIC, (1964) E.A. 341, on page 344.**

"...True, in the case of an old confirmed offender and recidivist, the court imposes a very stiff sentence on account of his record; it doesn't however do so as extra punishment on account of the previous convictions, but because such record establishes that the offender is a confirmed criminal and menace to society, so he must be put away for a long time in the interests of, and as a protection to society..."

This consideration, however mustn't blind you. You must still take into consideration other factors such as in the words of the court George's case (*supra*), "The subjective elements peculiar to the offenders and the peculiar offence for which he is being tried."

V. AGE OF ACCUSED AND CLEAN RECORD

The generally accepted view is that young first offenders, all things being equal, should be treated relatively leniently. The rationale for this is that youthful first offenders are usually susceptible to reformatory influence. In the case of **HATTAN V REPUBLIC, [1969] HCD NO 234, George, C.J.**, (as then he was) made this point when he said as follows:

“...Whenever a first offender is concerned the emphasis should always be on the reformatory aspect of punishment unless the offence is one of such a serious nature that an exemplary punishment is required, or unless the offence is so wide spread that severe punishment is needed as a shock of deterrent...”

Similarly, where an accused is an old man and the first offender,, this is too should be taken as a mitigating factor as explained in the case of (**REPUBLIC V MITIMINGI KAGANDA, [1973] LRT NO 17**)

VI. ACCUSED’S ATTITUDE TO THE COMMISSION OF THE CRIME AND PUNISHMENT.

The accused’s attitude to the commission of the offence and towards the imminent punishment can be a pointer to what chances there are of his reforming. Some accused persons show obvious remorse, there by showing that they are likely to react positively to reformatory influences. Others are so absolutely indifferent to the consequences that are to flow from a conviction that immediately becomes obvious to the sentencing magistrate that the reformatory aspect of punishment is unsuitable for them. Accused persons have been known to tell the magistrate as follows:

“ Pass any sentence you want, I am a jailbird”

A things being equal, such remarks by an accused person indicate complete lack of remorse on his party and indicates that leniency with him would be nothing short of a face. There is other accused persons who directly or indirectly, show genuine contrition

for what they have done. One way in which the accused's remorse or contrition may be revealed is by plea "guilty". Where an accused person pleads guilty, especially to a serious crime, that is usually an indication that he regrets what he did. All things being equal, such altitude entitles an accused person to leniency. As the late **Sir Philip Biron, J**., pointed in the case of **F. CHILEMBA V. REPUBLIC, [1968] HCD NO. 510**

"...It is generally, if not universally, recognized that an accused pleading guilty to an offence with which he is charged, qualifies him for the exercise of mercy from the court. The reason is, I think, obvious, in that one of the main objects of punishment is the reformation, and a confession of a crime, as opposed to brazening it out, is an indication of contrition. Therefore, in such a case, a court can and does impose a milder sentence than it would otherwise have done..."

It is, however necessary to point out here that in spite of the understandable temptation for magistrates to impose stiff sentences on an accused person who pleads "not guilty", particularly when the evidence has been overwhelming, a magistrate must not over-react and impose a severe sentence in every case in which an accused person pleads "not guilty". The law insists that a sentence in each case must be appropriate to the offence and the circumstances attending it and the accused. This warning was sounded in the case of **REX V. GAUDENZIO KIHWELE AND ANOTHER, 1T.L.R (R) 81**, in which **Wilson, Ag. C.J.**, said as follows:

"...It occurs to me that the magistrate may have differentiated between the two accused because one pleaded guilty and the other didn't. It is a moot point whether an accused person should be penalized for doing what the law allows him to do-have his case heard. If any discrimination is made between two accused on that ground it should be, I think by showing some leniency to the one who pleads guilty, not by being ultra-severe to one who doesn't..."

An accused person may also show remorse by offering to compensate the victim of the crime. In the case of **PETER LUGAYULA V REPUBLIC, [1969] HCD No. 69**, The appellant pleaded guilty to stealing by clerks and servants and to two other counts and

offered to refund the money. **Georges, C.J.**, (as then he was) was there of the view that the appellant's offer to refund the money was a relevant mitigating factor.

VII. CO-OPERATION OF ACCUSED WITH THE AUTHORITIES

There are some accused persons who willingly, and without any arm-twisting, co-operate with law-enforcement agencies. In some cases, their co-operation may simplify the task of bringing to justice other miscreants involved in the crime. Courts usually treat such offenders with leniency, not only for their assistance in detecting other offenders but also, I think, because it is morally good to reward honesty.

A typical example of such offenders being rewarded for their co-operation is the English case of **ARTHUR JAMES & OTHERS V REPUBLIC [1913] Cr. App. R. 200**. In reducing Arthur James's sentence, the court stated as follows:

"...He deserves the term of seven years imposed, but the court reduces it to three, for he betrayed the thieves; it is expedient that they should be persuaded not to trust one another, that there shouldn't be "honour among thieves". He is now rewarded for informing against his accomplices..."

VIII FOR HOW LONG HAS HE BEEN IN CUSTODY?

To remand a man in custody is, of course not the same thing as sentencing him to imprisonment. However remanding a man in custody involves some curtailment of his liberty to do whatever he likes. It is, therefore only proper that such period as an offender has spent in remand custody be taken into account in assessing his sentence. In his book *A Handbook On Sentencing*, Slaterry advises, on page 91:

"...Clearly, to ignore the fact that an accused person has spent, say, six months in custody awaiting trial, and to treat him on the same basis as an offender who was out on bail, would be in effect to discriminate against him..."

IX. THE ROLE OF THE OFFENDER IN COMMITTING THE CRIME

Some offenders commit offences for reasons outside their control. Traffic offences are ready example of cases in this category. The case of **REPUBLIC V ALBERT**

MWANDENUKA [1969] HCD No. 48, affords a good illustration. In that case, the accused, who was a mere driver and not owner of the motor vehicle, was sentenced to pay a fine of shs 70/= for the offence of driving a motor vehicle with defects. Reducing the sentence to shs 20/=, the late Sir Philip Biron, J., observed:

“...As is abundantly clear from the proceedings, the accused was a driver employed by the Tukuyu Agencies. He could, therefore,...hardly be held responsible for the state of disrepair of the vehicle owned by his employers. The responsibility for maintaining a vehicle in good order and road-worthy condition is that of the owner, although a driver may sometimes share such responsibility if, for example, he fails to report defects to his employer, though he certainly can't be held responsible for the state of the vehicle, and should he refuse to drive it, he may well suffer the loss of his job...”

In cases where two or more people participated in the commission of the crime, there may be evidence to show as to who among the accused persons was the real architect of the crime and that the others or one of them played the least party. In such cases it is permissible to treat the ringleader more severely than the one who played the least role. As was pointed out in English case of **REPUBLIC V. BOAL AND ANOTHER, [1964] 3 ALL E.R. 269, on page 276:**

“...However in any given case the court must look at the part played in the conspiracy by the particular person, bearing in mind that, in a large undertaking of this kind, there may be many different shades of guilty between those who played different parts in the conspiracy...”

The court then considered the part played by one of the appellants-Cordrey-in the commission of the crimes and added as follows:

“...We think, having again considered this matter with considerable care, that a significant difference in sentence is justified between that passed on the appellant Cordrey for his part in the conspiracy and that passed on the conspirators in the inner party...”

X.TEMPTATION

Court sometimes takes into consideration the circumstances in which the offender found himself in committing a particular crime, and temptation has sometimes been taken as a mitigating factor. In the words of the Court of Appeal for Eastern Africa in the case of **HOPLEY V REPUBLIC.., [1964] 16 E.AC.A. 110, on page 111:**

“...There is a different in the decree of criminality between a person who his own volition commits an offence and one who, in the face of great temptation which he hasn't himself brought about, succumbs to it...”

Another good example of illustration is the case of **REPUBLIC V AMIRI S/O ALI, [1969] HCD NO. 41**. In that case the fact were that, the accused was convicted on his own plea of guilty to a charge of defilement and was sentenced to two years imprisonment and to six strokes of corporal punishment. The accused, who was sleeping in the same room with the complainant, in the middle of the night went to her bed, and without even awakening her, undressed her and had sexual intercourse with her. She however awakened, raised an alarm, and the accused was apprehended on the spot. Reducing the sentence to a term that would result in the prisoner's immediate release from custody, the late **Biron, J.**, said:

“...I full agree with the learned magistrate that the offence is serious, although unfortunately rather prevalent, and must be discouraged and stamped out. Even so, every case must be considered in its own particular context and surrounding circumstances...In this case the accused has temptation thrust upon him, in that, sleeping together in the same room, he was doubtless affected by the proximity and tempted by the sight and presence of the sleeping girl so near him...”

SENTENCING PROCEDURE AND CHOICE OF PUNISHMENT

I. PROCEDURE IN SENTENCING

A. In Mitigation

When the trial has resulted into a conviction and the judgment has been duly delivered in open court, the magistrate will ask the public prosecutor if the accused has any previous record, he is said to be a first offender. If that is the case, the magistrate will ask the

accused to say anything in mitigation of sentence, that is to say something which the court may consider as justifying leniency.

In mitigation, the accused is expected to tell the court such matters as his family commitments, how long (if at all) he has been in custody, his poor health, (if he is honest enough) what drove him to commit offence, his age, his education, his occupation, etcetera.

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

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

The High Court of Tanzania stressed this point in the case of **R. V. SULEIMAINI SAID & ANOTHER, [1977] LRT No. 29**, in which **Kisanga. J.** (as then he was) said, on page 112:

"...Allocutus is an important right of an accused person and magistrates should always ensure that the accused person is given opportunity to exercise it because he may have something to say which could influence the magistrate to exercise direction in his favour..."

B. Proof of previous conviction

If the prosecution says that the accused has a record of previous convictions, the prosecutor may either state orally the particulars of such convictions, that is the offences, sentences, the sentencing courts, and dates. But usually the public prosecutor will produce a copy of such previous convictions.

Thereafter the accused will be asked if he admits such a record. If he admits the record, the record will be taken to be true and correct. If however the accused denies such record, then it is the duty of prosecution to adduce evidence to prove its authenticity or correctness on oath or affirmation. This was stressed in the Court of Appeal for Eastern Africa in the case of **GULAM HUSSEIN V. R., E.A.C.A. 167**, in which the Court stated, on page 168:

“...It is improper for a prosecutor after conviction and before sentence to make any statement to the court against the convict which-if challenged-he would be unable to prove by legally admissible evidence...It seems to us that on a controversy as to the facts upon which sentence is to be based the same rules as to legal proof as in the substantive trial of the offence must apply...”

In other words, the accused must be given an opportunity to contradict such evidence. When such evidence has been received, it is the duty of the magistrate to make a finding as to whether or not he finds such record of previous convictions proved. If he finds it proved, he is entitled to take it into account in assessing the sentence. If he finds that it hasn't been proved, he will ignore it. In the words of **Georges, C. J.**, in the case of **RASHIDI S/O ALLY V. R., [1967] HCD No. 215**:

“... When the accused person denies a conviction appearing on his record, it is necessary to call someone who has present at the conviction. Entries may be made in files in error, and since previous convictions affect the severity of sentence...they must be strictly proved. Where they aren't strictly proved they can't be taken into account in sentencing...”

Also this has been explained again under section 278 of the CPA.

II. TYPES OF SENTENCES

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

- 1) Death Penalty as per section 25(1) of the Penal Code.
- 2) Imprisonment as per section 25(2) of the Penal Code.
- 3) Corporal punishment as per section 25(3) of the Penal Code.
- 4) Fine as per section 25(4) of the Penal Code.
- 5) Absolute discharge as per section 38 of the Penal Code.
- 6) Costs as per section 32 of the Penal Code.
- 7) Conditional discharge as per section 38 of the Penal Code.
- 8) Probation under the Probation Offenders Act.
- 9) Police supervision as per section 341 of the CPA.
- 10) Restitution as per section 357 of the CPA.

CONCURRENT & CONSECUTIVE SENTENCES

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

- I. Concurrently.
- II. Consecutively.

1. CONCURRENTLY SENTENCE

Concurrently, simply means the same cause of action. Concurrently sentences run where the offences charged are founded on the same facts or from series of offences of the same or similar character. This has been explained in the case of

JOHN NGARAMA V. R. [1967] HCD No. 264, Accused was convicted on two counts of stealing, both arising out of the same transaction (taking money belonging to two people from a single purse.) The Magistrate's judgment stated that he was convicted "as charged" and sentenced to 9 months' imprisonment.

Held: Where an accused is convicted on two or more counts, the sentence given must be allocated among the various counts, or to a particular count, sentence of 9 months on each count imposed to run concurrently.

2. CONSECUTIVE SENTENCE (CUMULATIVE SENTENCE)

This happens when the offence doesn't run concurrently. This occurs to an offence which doesn't fall under the same transaction. This has been explained in the case of

R. V. LUCAS KATINGISHA [1967] HCD No. 263, Accused was charged in two separate counts of using a bicycle without a licence and of using a bicycle without effective brakes. He pleaded guilty and was fined Shs. 10/-

Held: When there is more than one count, each must be dealt with separately by the court, rather than passing one omnibus sentence. Sentence was altered to a fine of Shs. 5/- on each of the two counts.

NOTE:

Normally sentence for fine are imposed consecutively even if they have occurred in the same transaction.

