LECTURE 1

EVIDENCE, RELEVANCY AND ADMISSIBILITY

1.0 Introduction

This lecture is intended to elaborate the meaning of the terms "evidence", "relevancy" and "admissibility". At the end of the lecture you will:

- Be able to define the term "evidence",
- Understand what is meant by relevancy, and;
- Know the meaning and usage of the term "admissibility" in the law of Evidence.

These terms are very important in the understanding of the subject. You are encouraged to know exactly what the terms mean and their usage in the subject you are currently studying.

1.1. The Meaning of Evidence.

The question as to what is evidence may be approached in different ways. In the original sense the word "evidence" signifies the state of being evident i.e. plain, apparent or notorious. However in this subject it is applied to "that which tends to render evident" or "to generate proof." In other words it is the means which tend to prove or disprove any matter of fact the truth of which is submitted for judicial investigation. Tanzania inherited the adversarial system of dispute settlement where the court stands as an uninterested and neutral umpire and the parties are expected to show, by presenting evidence, that what they are asserting is true. That is why the court itself cannot undertake a search for relevant evidence but must reach its decision solely on the basis of such evidence as is presented by the parties. In practice evidence is first tendered in court by the witnesses with a view of supporting the cases of the parties. The court would then decide on their admissibility and thereby admitting those pieces of evidence that are admissible under the law of evidence. Best, W.M., in his book, the **Principles of the Law of Evidence** defines the term generally to mean:

"..Any matter of fact, the effect, tendency or design of which is, to produce in mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact.."

The Evidence Act No. 6 of 1967 defines the term "evidence" as being;

"…the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and without prejudice to the proceeding generality, includes statements and admissions by the accused person…"

From the foregoing it is clear that the term evidence may be understood in two main senses:

(i) that which is received in court to prove or disprove an alleged matter of fact which is inquired in court, and,
(ii) Those rules of law used in judicial proceedings which lay down as to what matter is or is not admissible.

First, evidence that is received in court to prove or disprove an alleged matter of fact is of various kinds. Herein below is an un-classified list of some of the main types of evidence:

- **Oral Evidence**. Oral evidence is evidence given by a witness viva voce before a court/tribunal. It refers to statements made by witnesses in court/tribunal. They are verbal utterances witnesses make with a view of proving or disproving an alleged matter of fact.

- **Direct evidence**. This is evidence of a fact in issue given by a witness who comes to it through his own senses, or evidence from a document or item produced before the court.

- **Circumstantial evidence**. This is the opposite of direct evidence i.e. indirect (sometimes also referred to as presumptive evidence) or circumstantial evidence of a fact in issue. Evidence is circumstantial where it only rests on a greater or less degree of probability.

Normally, in circumstantial evidence, the tribunal logically infers certain facts from other proven facts e.g. where a person accused of murder is proved to have in his possession the instrument with which the deceased was killed immediately after the killing he is taken as the culprit.

- **Real evidence**. This is evidence of material objects, other than documents, produced for the inspection of the court e. g. clothing and fibers, weapons, blood samples, tape recordings, film and video cassettes etc. Real evidence does not exclude oral evidence. Usually real evidence is required to connect and make relevant oral evidence.

- **Intrinsic and Extrinsic Evidence**. Intrinsic evidence is that which is derived from a document without anything to explain it i.e. without going beyond the four corners of a document. Extrinsic or Parol evidence is evidence given to explain, vary or contradict a document, being derived from other source than the document itself.

- **Hearsay Evidence**. This is evidence, usually testimony, which refers to statements made other than by a witness giving evidence in court.

- **Original Evidence**. Original evidence is that which comes from its source without passing through any intermediate channel e.g. where a witness deposes to a fact within his own knowledge or where a thing or original document is produced before the court. Original oral evidence is sometimes called immediate real evidence and original documentary evidence is called primary evidence.

- **Conclusive Evidence**. This is evidence that cannot be disputed and which, as a matter of law, must be taken to establish some fact in issue. Normally evidence is conclusive when the existence of the fact in issue follows either by necessary consequence of the law of nature or from a rule of law.

- **Derivative Evidence.** This type of evidence is sometimes referred to as **unoriginal or transmitted** evidence**.** Derivative evidence is that which is brought from its source through an intermediate channel e.g. where a witness offers to prove a fact on the basis of information obtained from another person or describes the condition of a thing or

contents of a document not produced. In fact a copy of a document is derivative evidence of the contents of the original. Normally, derivative evidence is called hearsay evidence when a particular witness makes a statement on the authority of another person. It is called secondary or parol evidence when the contents of a document are brought before the court either orally or by means of a copy. Finally, it is called reported evidence when the original source is real e.g. where a witness describes the nature or appearance of a particular thing that forms part of evidence such as a knife or a gun.

- **Documentary Evidence: Primary and Secondary**. This is evidence in written form. In other words it is that evidence derived from conventional symbols, such as letters, by which ideas are represented on material substances. It normally refers to documents produced for the purpose of proving or disproving anything in court. It is primary documentary evidence where the original document on which ideas were written is produced before the court. However a copy of such original document is secondary documentary evidence.

  Other minor types of evidence include personal evidence, substantive evidence etc. In practice one of the common ways of classifying these types of evidence is the following:

  i) Direct, circumstantial and real evidence,
  ii) Original and hearsay evidence, and
  iii) Primary and secondary evidence.

  You are urged to study these and on your own.

It must be kept in mind that it is the law that determines whether or not a certain piece of evidence is admissible. This is the second sense in which the term evidence is used i.e. the rules that lay down what piece of evidence is admissible and what is not. In mainland Tanzania the Evidence Act No. 6 of 1967, hereinafter referred as the TEA, lays down what is or is not admissible i.e. acceptable. In Primary Courts the Primary Court Evidence Regulations of 1964 are applicable. In Zanzibar there is the Zanzibar Evidence Decree. For other East African countries there is the Kenya Evidence Act (Kenya), and the Uganda Evidence Act (Uganda). This work is, however, focused specifically on the Evidence Act, No

6 of 1967. However, except for minor variations, the legislation governing matters of evidence in East Africa is similar.

1.2 Relevancy and Admissibility

What is relevancy? It may not be easy to comprehend the term "relevancy" without understanding the concepts: "fact" and "fact in issue". Normally a court is concerned almost exclusively with the facts of a case before it and the means of proving the same. The Evidence Act does not have an exhaustive definition of what is a fact. It, however, has an inclusive definition. The Act provides that a fact includes: (1) anything, state of things or relation of things capable of being perceived by senses and, (ii) any mental condition of which any person is conscious (Sect. 3(1)). A "thing" may refer to any material object or a fact e.g. X stabbed Y. The term "state of things" refers to a state of affairs and "relation of things" connotes the relation facts bear to each other e.g. Priska is the daughter of John.

A seasoned scholar, one, Bentham classifies facts into two categories:

(i) **Physical/external facts**: these may be certain objects, in certain order in a certain place; hearing or seeing something and certain words.

(ii) **Psychological/internal facts**: these include holding a certain opinion or a certain intention, acting in good faith or fraudulently, consciously using words in a particular fact situation and sensations of a particular fact, reputation, motive, knowledge etc.

A fact in issue is sometimes referred to as a "principal fact" or "factum probandum." These are those facts that the plaintiff/prosecutor must prove in order to succeed in a case together with those facts which the defendant/accused must prove in order to succeed in his defense. The nature and number of facts in issue in a case is determined not by law of evidence but partly by reference to the substantive law and partly by reference to what the parties allege, admit and deny. The Evidence Act defines the term "fact in issue" to mean:

"…any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit

or proceeding, necessarily follows.."

In short "facts in issue" are facts out of which some legal rights, liability or disability involved in the enquiry, necessarily arises, and upon which, accordingly a decision must be made. As indicated above what facts are in issue in particular cases is a question to be determined by substantive law or in some cases by that branch of the law of procedure, which regulates the law of pleadings, civil or criminal. In civil proceedings, the facts in issue are usually identifiable by reference to the pleadings, their very purpose being to ascertain the factual and legal issues on which the parties agree and disagree so that they and the court know in advance exactly what matters are left in dispute and what facts have to be proved or disproved at the trial. In criminal cases in which the accused pleads not guilty, the facts in issue are all those facts which the prosecution must prove in order to succeed, including the identity of the accused, the commission by him of the cuts reus, and the existence of any necessary knowledge or intent on his part together with any further facts that the accused must prove in order to establish any defense other than a simple denial of the prosecution case. However under section 192 of the CPA any fact admitted in a memorandum of matters not in dispute is deemed to be fully proved unless the court holds a view that in the interest of justice the particular matter must be formerly proved. In other words a fact, which is formerly accepted as not in dispute is not open to contradictory proof and in effect, it ceases to be a fact in issue. In short facts in issue are:

- In civil cases, those facts which are alleged by one party and denied by the other in a proceeding.
- In criminal cases, those facts alleged in the charge or information and denied by the accused by a plea of not guilty.

In both cases it is the duty of the court to frame the facts in issue.

The next important question is: What facts are relevant? A relevant fact, sometimes called "facts relevant to the issue" or "factum probans" is a fact from which the existence or non-existence of a fact in issue may be inferred. In simple words relevancy determines whether one fact is related to another and a fact is relevant to a case when it is related to the facts in

issue. Lord Simon attempted to define the term relevancy; in the case of **DPP V Kilbourne [1973] A.C. 729** at p. 756 as follows:

"…evidence is relevant if it is logically probative or disprobative of some matter which requires proof …evidence which makes the matter which requires proof more or less probable…"

However a classic definition of relevance is contained in Article 1 of Stephen's **Digest of the Law of Evidence** according to which the term relevance means:

"…any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past present or future existence or non-existence of the other…"

It is in this context that our section 3 of the TEA provides that a fact is relevant when the one is so connected with the other in any of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts. This means a fact is only relevant if it is so linked to another in the ways provided in the Evidence Act.

Another important concept is "admissibility". Evidence must be sufficiently relevant to be admissible but sufficiently relevant evidence is only admissible in so far as it is not excluded by any rule of law of evidence. Admissibility presupposes relevancy and is founded on the law and not logic. The consequence of this is that some evidence, however relevant it may be, is excluded. It is the law that determines whether or not a particular fact can be admitted or accepted in evidence. For this reason:

- Many facts having no logical bearing on the issue are admissible e.g. the proof of some preliminary facts which are necessary for the admissibility of other evidence are admissible.
- Facts may be logically relevant but inadmissible e.g. evidence of bad character

For example evidence of accused's bad character may be thought to be relevant as it makes it more likely that he committed the offence charged but there is a risk that the court would attach to it greater probative value than it has so that, as it is put, its prejudicial effect would outweigh its probative value. That is why, except under strict restrictions provided in section 56 of TEA, evidence of bad character is not admissible.

It is important to note that the term "admissible" is wider in scope than the term "relevant" because in certain situations it may cover actual facts in issue as well as facts declared by the Evidence Act to be relevant to the facts in issue. The basic law governing matters of evidence in mainland Tanzania is found in the Evidence Act, 1967.The general rule on admissibility is covered under section 7 of the TEA. A close reading of section 7 of the TEA shows four important things. First, the section begins by the phrase "Subject to the provisions of any other law…" A simple interpretation of this portion shows that the rules of evidence are not found in the TEA only. There are other laws that also furnish rules of evidence. For example sections 45-55 of the Economic and Organized Crime Control Act No 13 of 1984 provide for rules of evidence to be used when enforcing the Act. Second, section 7 allows the admissibility of evidence on the existence or non-existence of any fact in issue. This means that a party to any proceeding can lead evidence on any fact in issue. What is a fact or fact in issue is defined in section 3(i) of the TEA. Thirdly, section 7 of the TEA allows the giving of evidence on any other facts as declared relevant by sections 8-180. It is important to understand that the decision on admissibility of evidence rests with the court (section 145 of TEA) and questions concerning admissibility should be decided as they arise in the court process. It is for this reason a judge/magistrate may, under the section may ask in what manner a fact, which is proposed to be proved, would be relevant. The court would admit the evidence only if it is found that the alleged fact is relevant and admissible. Finally, the TEA forbids the giving of any other evidence i.e. that which is not covered in the above three options.

1.3 Conclusion

It is important to understand therefore that section 7 of the TEA is pivotal in the understanding of the law of Evidence in mainland Tanzania. It shows not only what type of

evidence that may be accepted in proceedings, criminal or civil, conducted in the mainland but also indicates that the TEA is not the only source of rules of evidence. It is, however, conceded that the TEA is the basic legislation providing for the law of evidence.

LECTURE 2.

RELEVANCY OF CERTAIN GENERAL FACTS

2.0 Introduction

In this lecture you are going to study the relevancy and admissibility of certain general facts in specific situations. In the preceding lecture you were taught that the law determines the admissibility of facts. The Evidence Act has provided for facts, which are relevant and admissible in any suit or proceeding. These are covered in sections 7-57. This lecture is focussed on certain general facts, which are provided in sections 8 – 18 of the Evidence Act.

At the end of this lecture you should be able:

- To understand general facts admissible under sections 8-18 of the Evidence Act.
- To know the relationship of these facts in any particular case.

2.1 General Facts that are Relevant under Sections 8 – 18.

Under Section 8 – 18 of the TEA there are certain general facts that the court is allowed to admit in evidence. These can be summarized as follows:

(i) facts which form part of the same transaction (section 8);

(ii) facts which are the occasion, cause or effect of relevant facts or facts in issue or which constitute the state of things under which they happened or which offered an opportunity for their occurrence (section 9).

(iii) Facts relating to motive, preparation or conduct with reference to facts in issue or relevant facts (Section 10);

(iv) Explanatory or introductory facts (section 11).

(v) Statements or actions referring to common intention (Section 12);

(vi) Facts inconsistent with, or effecting the probability of facts in issue or relevant facts (Section 13);

(vii) Facts affecting the quantum of damages (section 14);

(viii) Facts affecting the existence of any right or custom in question (section 15);

(ix) Facts showing any state of mind or feeling when the existence of such state of mind or feeling is in issue or is relevant (Section 16);

(x) Facts showing system (section 17);

(xi) Facts showing a course of business (section 18);

2.2 **Facts Forming Part of the Same transaction or Res Gestae (Sect. 8).**

These are those facts, which are so closely and inseparably connected with the facts in issue that they may be said to form part of the same transaction. A transaction is a group of facts so connected together as to be referred to by a single legal term, such as a 'crime', a 'contract' a 'wrong' or any subject of enquiry that may be in issue. In practice a transaction may constitute a single incident occupying a few moments or it may be spread over a variety of acts, declarations etc occupying a much longer time and occurring on different occasions e.g. when some person engages in a long correspondence and personal negotiations with another person to constitute a contract after which each party goes on to fulfill his part of the contract. Such facts are sometimes referred to as RES GESTAE. This term does not appear in the Evidenced Act but the principle underlying the English law relating to this phrase has been incorporated in sections 8-11 and 16 of the TEA. The term res gestae means "facts forming party of the same transaction".

For example X is accused of the murder of Y by beating him. Whatever was said or done by X or Y or bystanders at the time of beating or shortly before or after it as to form part of the transaction is a relevant fact under section 8.

The question is: What facts form part of the same transaction? In order to determine whether a fact forms part of the same transaction the following aspects must be taken into account:

(i) proximity of time

(ii) unity of place

(iii) community of purpose or design

(iv) Continuity of action.

Facts or statements considered part of the same transaction should, as a rule, must fulfill two conditions. First, the facts or statement(s) must be contemporaneous to the transaction i.e. the interval should not be such as to give time or opportunity for fabrication and should not amount to a mere narration of a past occurrence. Second, they must be spontaneous as to exclude the possibility of being in the nature of an afterthought or so as to afford no time for reflection or improvement. A transaction may constitute a single incident occupying a few moments or it may be spread over a variety of acts, declarations and occupying a much longer time and occurring on different occasions. Such incidents may occur at one place or at different places. When the transaction consist also of declarations accompanying particular acts they are subject to three qualifications: (i) they must be contemporaneous or almost contemporaneous with the fact in issue; (ii) they must relate to and explain the act they accompany; and (iii) though admissible to explain the particular incident they are not always taken as a proof of the truth of the matters stated.

Any fact that occurs after the transaction is complete is something different and, therefore, not part of res gestae. In addition on matters relating to res gestae the issue of time is very crucial. In **Ramadhan Ismail v. The Crown 7 Z.L.R. 36** a young girl was raped. Soon thereafter she went home crying and told her parents what had happened. Their house was only two or three houses away from where the crime was committed. The girl led her father to the place where she had been assaulted. On arrival at the accused's house she said: "this is the Bwana." Reacting on this type of evidence the court held that this utterance could not be considered as part of **res gestae** and added that:

"..When it comes to a matter of res gestae minutes are a matter of utmost importance…"

A similar incident occurred in the case of **R.v. Bedingfield (1879) 14 Cox C.C. 341.** In this case Bedingfield was charged with the murder of a woman. The deceased, her throat cut, came out of her room where she had been with the accused and immediately exclaimed: "Oh dear Aunt, see what Bedingfield has done to me !" Cockburn CJ. held that although statements made while the act is being done, such as " Don't hurry" are admissible , the victim's statement could not be received in evidence because it was something stated by her

after it was all over, whatever it was, and after the act was completed. This statement could, in Tanzania, be admitted as a dying declaration. However, that is not possible in common law because there was nothing to show that the victim was under a sense of impending death. Other cases dealing with the concept res gestae include **Chamba v. R. [1970] EA 280; R.v. Premji Kurji (1940) 7 EACA 58**; and **R v. Boyle and Merchant (1914) 2 KV 339.**

2.3 **Facts that are the occasion, cause or effect of facts in issue or which constitute a state of things (section 9)**

Facts of this nature are provided in section 9 of the TEA. Under the provision facts that are the occasion, cause or effect immediate or otherwise of relevant facts or facts in issue or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence are relevant. The section, therefore, makes admissible all facts that are linked to the facts in issue or relevant facts in the following way:

- **As being the occasion of relevant facts in issue**. These are facts that tend to point out the occasion in which the particular incident took place. According to Sarkar one of the examples showing occasion or opportunity is where the issue is whether A robbed B. The fact that shortly before the robbery, B went to the fair with money in his possession and that he showed it or mentioned the fact that he had it to third persons is relevant.

•**As being their cause or effect**. Such facts are those that relate to the cause of the incident in question or its effect. Sarkar, for example, gives the following hypothetical case to illustrate the point: the question is whether A murdered B. Marks on the ground, produced by the struggle at or near the place where the murder took place are relevant facts showing the "effect" of the event. The struggle is relevant to show that the murder was the result/effect of violence which the victim resisted.

- **As constituting the "state of things" under which the facts happened**. These are facts explaining the situation in which the particular incident occurred or what was going on at the time. Sarkar says where the question is whether A poisoned B, the state of B's health before the symptoms ascribed to poison and habits of B known to A, which afforded an

opportunity for the administration of poison, are relevant facts. Read the case of **James Clifford Brabin [1947] 14 EACA 80.**

- **As affording opportunity for their occurrence**. Such facts show the opportunity afforded by the situation in which the event occurred. Therefore if the question is whether A stole from B's house and there is no evidence of breaking. The fact that A is the only other person having a duplicate key of B's house shows opportunity on the part of A in the theft. Read the case of **R V Mgomboi [1973] LRT n. 90.**

The most problematic part is in regard to facts constituting a state of things. On this aspect the most important question is: under what circumstances evidence is admissible of similar acts that have taken place on a previous occasion. In the case of John **Makindi v. R. (1961) EA 327** the accused was a watchman of a certain garage. He was living with one young boy. He used to beat him up regularly. On one occasion, as result of the beating, the boy's arm was fractured. The accused was charged, convicted and fined. Later the accused beat him again and, as a result, he died. At his trial for the homicide, the prosecution adduced evidence of previous beatings. The court held that: (1) evidence of previous beatings was admissible under section 9 in the explanation and substantiation of the cause of death which had been the blows in question acting on top of old blood clots caused by previous hemorrhages; (ii) previous beatings were also to show the state of mind or feeling of the accused i.e. his ill will towards the boy.

In another case of **James Clifford Brabin and Another v. R.** (1947) **14 EACA 80** the appellants were convicted of corrupt practices and the particulars alleged that the appellants who were employees of a Commodity Board, obtained Shs. 1000/= from, one, Kara for forbearing to show disfavour to him in relation to the affairs of the board. At the trial evidence was admitted of a previous corrupt transaction (that fact place five months earlier) by the appellant with Kara. The court held that evidence of previous transactions was rightly admitted as constituting part of the "state of things". Read also the case of **R.v. Mgomboi (1973) LRT** n. 90.

Take note that the defence of **alibi** is based on the lack of "opportunity" i.e. the accused was not at the scene of the event. However its admissibility (of alibi) is based on section 13 of the TEA.

The most celebrated case in England is that of **Makin V A.G. for New South Wales [1894] A.C. 57**. In this case the accused was convicted of the murder of an infant found buried in the backyard of the house he occupied. The child was adopted after the payment of a very small sum of money. The question before the Privy Council concerned the admissibility of evidence of the following facts: the remains of three other babies were also found in the backyard of the house in which the accused lived; the remains of seven other babies were found in the yard of another house occupied by the accused, and other remains of two babies were also found in yet another house occupied by the same accused. The Privy Council held that all these pieces of evidence were admissible to counter the argument by the accused that babies died by accident or from natural causes. It was further elaborated that the evidence was important in determining the question whether the offence charged was designed or accidental.

2.4 **Facts relating to Motive, Preparation or Conduct (Section 10)**

Facts made relevant under section 10 of the TEA are the following:

First, facts showing or constituting a motive or preparation for any fact in issue or relevant facts. Motive is what moves or induces someone to do a certain act or to act in a certain way. It is the reason which induces a person to do an act. For example Mtumwa is tried for the murder of Kingo. The facts that Mtumwa murdered Katoto, that Kingo knew that Mtumwa had murdered Katoto, and that Kingo had tried to extort money from Mtumwa by threatening to make his knowledge public are relevant to show the "motive" of Mtumwa for murdering Kingo.

In the case of **John Makindi v. R.,** cited above, the appellant was once quoted as saying:

> *"…As you have made me imprisoned I will beat you, till you die..."*

This Statement was admitted to indicate the motive of the accused for killing the boy. Another case elaborating on the question of motive is that of **Kalume and Others v. R. (1968) HCD n. 348.**

Preparation consists in arranging the means or measures necessary to the commission of a crime e.g. A is tried for the murder of B by poison. The fact that before the death of B, A procured poison similar to that which was administered to B is relevant to show preparation. However where the acts done by the accused are innocent it is not proper to implicate him.

The second aspect admissible under section 10 is the conduct of a party. According to section 10(2) of the TEA the conduct of a party must have reference to the suit or proceeding or facts in issue. It may be previous or subsequent conduct of a party or his agent relating to a proceeding or the conduct of an accused person in a criminal case and where such conduct influences or is influenced by the facts in issue or relevant facts. In summary it may involve anyone or more of the following: (i) preparation and previous attempts to commit the offence; (ii) fabricating false evidence; or, (iii) absconding of the accused immediately after the commission of the offence. Read **Lobo's case [1926] 10 KLR 55**.

Section 10(3) & (4) elaborates further situations where the conduct of any person is relevant. The provision declares relevant and makes admissible any statement made by a party or in his presence and hearing that affects such conduct. The word "conduct" does not include statements except where such statements accompany and explain acts other than statements. The types of facts admissible under this provision include: first, accused conduct before or after the commission of an offence which influenced or is influenced by the crime; second, statements made by him explaining or accompanying such conduct; or statements made to him or in his presence and hearing which affect his conduct. For example:

(i) The victim says: "John assaulted me" reaction: the accused keeps silent or absconds immediately.

(ii) The question is whether Kambi robbed Mapesa. The fact that after Mapesa was robbed Kintu said in Kambi's presence: "the police are coming to look for the man who robbed Mapesa" and then, immediately afterwards, Kambi runs away. In this

case the statement by Kintu and the conduct of Kambi are relevant and admissible under section 10 of the TEA.

Read the following cases that cover the operation of Section 10 of the Evidence Act: **R.V. Mattony (1884) Cox 456; R.V. Dalip Singh (1943) 10 EACA 121; Alikanjelo V.R. (1951) 18 EACA 201; Difasi Ojur V.R. (1954) 21 EACA 352 and Sewa Sing Mandia V.R. (1966) EA 315.**

2.5 **Explanatory or Introductory facts (Section 11)**

Section 11 provides for the relevancy of facts necessary to explain or introduce relevant facts. These facts are intended to introduce or explain the relevant facts. They help in understanding the real nature of transactions, in supplying missing links, in leading up to the main facts or establishing some connection throwing light on the facts in issue. Five important facts are covered under the section:

- Facts necessary to explain or introduce facts in issue or relevant facts;
- Facts that suggest, support or rebut any inference on the fact in issue;
- Identity of a person or thing ;
- Facts which fix time and place;
- Facts showing the relationship of the parties.

(i) Introductory and explanatory facts

In practice when you are dealing with any case you can't jump to the middle of the story (=Media res). A case must be properly introduced but such introduction must be linked to the facts in issue or relevant facts. The introduction of such facts is also covered in section 151(2) of the TEA under which the court has power to permit leading questions on matters which are introductory.

Under section 11 names, dates, places and other introductory descriptions, though not in issue, are admissible. There are other facts that go to explain the facts in issue or relevant facts. These are admissible under section 11. It is important to note that explanatory matters

illustrate the evidence already given not as res gestae but in connection with it. For example A is accused of a crime. The fact that soon after the commission of crime A absconded from his house is relevant under section 10 as conduct subsequent to the incident. However the fact that when he left home, he went to attend a very sick relative, is relevant, as tending to explain the fact that he left home suddenly.

(ii) Facts supporting or rebutting something

Certain facts tend to support or rebut an inference suggested by a fact in issue or relevant fact. For a example where the question is whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will may be relevant facts. This shows how facts that support or rebut an inference suggested by the facts in issue are relevant. Another example is that X says in the presence of Y : "the police are coming to find a person who killed Z". Upon hearing this statement Y leaves hastily. The fact that Y had a previous engagement is relevant to rebut the inference raised by his conduct i.e. that he left because he had killed Z.

In the case of **R.v. Briggs (1839) 2 M & Robb 199** in which the accused was charged with highway robbery, the complainant was allowed to rebut the defence of alibi (raised by the accused) by proving that shortly before the attack upon him and near the same spot the accused had robbed another person. Read also the case of Bhambir **s/o Versi V.R. (1969) HCD** n. 243.

(iii) Identity of a person or thing

Facts that establish the identity of anything or person whose identity is relevant, are relevant facts. Such identity may be established in various ways and some of these include: identifications by photographs, identification parade, identification by foot or boot notes, identification by fingers, thumb or palm impressions, identification by comparison of hand writing, marks of blood, hair, fibre of clothes etc.

(iv) Facts which fix time and place

All facts which could assist in fixing time and place of some fact in issue or relevant facts are also relevant e.g. suppose that John is murdered in a Dar es Salaam bound train and his body is found in wagon at the Dar es Salaam railway station. The fact that the ticket found in his pocket was bought by him at Morogoro proves that the murder was committed between Morogoro and Dar es Salaam. This is a relevant fact.

(v) Facts showing the relationship of the parties

All facts showing the relationship of the parties are admissible under section 11 of the TEA. Read the cases of **Stanislai V R. (1942) 1 TLR 258, Versi V R (1969) HCD n. 243 and Joram V R [1980] TLR 282.**

2.6 Statements or Actions Referring to Common Intention (Section 12).

Section 12 of the TEA is applicable where two or more people have a common intention to prosecute a particular purpose. It provides for the relevance of things said or done by conspirators in reference to a common design. In short the section is applicable in conspiracy cases. The term conspiracy is defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. The term unlawful has been held to include civil wrongs as well as acts punishable criminally if done by one person.

The provision is based on the principle of "agency" because in effect each of the conspirators is an agent of another. The rationale of the rule is that conspiracy is usually hatched and executed in secret. Therefore it may not be possible for the prosecution to connect each isolated act or statement of others unless there is a common bond linking all of them together. The principle is that where two or more persons conspire to commit an offence or an unlawful act, anything said or done or written by anyone of them in reference or in execution or furtherance of the common intention is relevant. For this section to be applied two things must exist:-

(i) Reasonable grounds for belief in the existence of conspiracy must be established (by independent evidence) i.e. there must be reasonable ground that two or more persons entered into an agreement to do an unlawful act and by unlawful means.

(ii) Evidence that there was a common intention to prosecute the particular an unlawful purpose. Such common intention may be found or inferred in what the conspirators said, did or had written in relation to it.

It is important to note that "common intention" signifies a common intention at the time when the thing was said, done or written by any one of them. Section 12 of the TEA is wider than English law because statements and actions need only be "in reference to" the common intention and need not be in the execution or furtherance of the common purpose. In addition under the same section an act or declaration of the conspirator even after the termination of the conspiracy is a relevant fact for the purpose of showing that such person was a party to it. This position was expounded in the case of **R V Gokaldas Kanji Karia and Alibhai Mawji (1949) 16 EACA 116**. The same position is true in similar provisions of Kenya and Uganda. Therefore facts, declarations and writings of each conspirator in reference to the common design or intention even after the time when such intention was entertained by any of the persons are admissible against each conspirator for proving the existence of the conspiracy and showing that the accused persons were parties to it. However, under English law, things said or done after the conspiracy had been carried into effect or abandoned and the common intention was no longer operating are not admissible against a co-conspirator. Read the case of **R**.v**. Blake (1844) 6 QB 126**.

In the case of **John Moody v.R (1957) EA 371** the court held that entries in one of the conspirator's cheque book indicating payment of sums to another of the conspirators are evidence not only against the owner of the cheque book but also against fellow conspirators as to the existence of the conspiracy and as to parties to it. Other cases elaborating section 12 of the TEA are: **R.v. Mulji (1946)13 EACA 147; Ongodia & Erima v. Uganda [1967] EA 137; R.v. Gokaldas Kanji (1949) 16 EACA 116 and Mattaka and Others [1971] EA 455.**

2.7 **Facts Inconsistent with or Affecting the Probability of facts in Issue or Relevant Facts (sect. 13)**

This section makes admissible only those facts that are of great significance in bringing the court to the conclusion either way as regards existence or non-existence of the fact in issue. It provides that all facts which are not relevant under other sections of the Act become relevant if:

(ii) they are inconsistent with any fact in issue or relevant fact or

(ii) By themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

For example where A is charged for the murder of D which is alleged to have taken place on January 21, 1999 in Moshi. Evidence by A that at the material date and time he was in Dar es Salaam is admissible. It is under section 13 that the evidence of **alibi** is admitted. In cases where the defense of alibi is pleaded the accused need not do more than raise a reasonable doubt. In the case of **Rashidi Ally v Republic [1987] TLR 97 (HC)** the appellant was convicted of the offences of personating a public officer and obtaining money by false pretences. The only description given by witnesses who saw the imposter at night was that the imposter wore a black suit. The appellant put forward a defense of alibi which the trial District Magistrate rejected as mere contrivance. On appeal, in relation to the defense of alibi, Chipeta,J., held that where the accused person puts forward the defense of alibi, he does not thereby assume the burden of proving such alibi. It is sufficient if such alibi introduces reasonable doubt in the prosecution's case. According to the case of **Anangiswe Masendo Ng'wang'wa v R [1993] TLR 202 (CA)** where the accused's defense of alibi does not raise any reasonable doubt on the prosecution case the same ought to be rejected.

Section 13 is very wide and some scholars say that it must be read subject to other sections in the Act. In the Indian case of **R.v. Pardhudal (1874) 11 Bom. 90** West J. said:

"…Section 11 [Section 13 in Tanzania] of the Evidence Act is, no doubt, expressed in terms so extensive that any fact which can by a chain of ratiocination, be brought into connection with another so as to have a bearing upon a point in issue may possibly be held to be

relevant within its meaning… such extensive meaning was not in the mind of the legislature…"

Read the following cases for further elaboration of Section 13 of the TEA: **Raja v. Kataria [1965] EA 362. Mbui v. Dyer [1967] EA 315 (4); Muwanga v. Jiwani [1964] EA 171 (U) and Peter Mtengo & 4 Others v R [1994] TLR 112 (CA)**

2.8 **Facts Affecting Quantum of Damages (section 14)**

Section 14 provides for the admissibility of facts that will enable the court to determine the amount of damages in civil suits. The kind of facts admissible in actions for damages vary according to the nature of the action e.g. for breach of contract, libel, trespass etc. and any such fact which would help in determining i.e. in increasing or diminishing the amount of damage is relevant. For example where a plaintiff in a civil case claims damages as compensation for injuries suffered in a car accident, the amount of damages that is demanded naturally becomes a fact in issue. In the case of **Muwanga V Jiwani [1964] EA 657** the deceased was a child and the court considered the amount of damages for the loss of service to the mother and grand parents (his father was already dead). Read the following cases that elaborate this rule: **Motor Mart & Exchange Finance LTD V Ghandi [1963] EA 657, Raja v. Kataria [1965] EA 362 and M'bui v. Dyer [1967] EA 315(K).**

2.9 **Facts Affecting the Existence of any Right or Custom in Question (Section 15).**

Section 15 provides for the admissibility of facts affecting the existence of any right or custom. It provides that where the existence of any right or custom is in question any transaction in which the right was created, claimed, modified, recognized, asserted, denied or which was inconsistent with its existence is relevant. It has to be noted that the term "transaction" means some general business or dealings which are carried on or transacted between two or more persons. The section also provides for the admissibility of particular incidents in which the right or custom was claimed, recognized or exercised or in which its exercise was disputed, asserted or departed from.

The rights or customs referred to in this section are not confined to public rights and customs but include all kinds of customs and rights. Sakkar in his **Sakkar's Law of Evidence** gives the following illustrations on this section:

(i) The question is whether B has a right to fishery. A deed conferring the fishery on A's ancestors; a mortgage of the fishery by A's father; subsequent grant of the fishery by A's father irreconcilable with the mortgage; particular instances in which the exercise of the right was stopped by A's neighbours are relevant facts.

(ii) A sues B for trespass upon land between A's farm and a high road which B claims is part of the highway. Evidence is admissible for A: that he and his tenants had habitually cut grass on the land; grazed their cattle thereon and turned off cattle of strangers. Evidence is admissible for B: that strangers had sometimes cut grass and grazed cattle there; that B's servants had not shown to have come to the knowledge of A and his servants.

2.10 Facts Showing any State of Mind or Feeling (section 16)

Section 16 provides for the relevancy of facts showing the existence of a person's state of mind, body or bodily feeling. The Section makes the following facts relevant:

(i) Facts showing the state of mind of someone i.e. intention, knowledge, rashness, ill will or good will towards any particular person. However the state of mind must relate to the particular matter in question and not a general one.

(ii) Facts showing the existence of any state of body or bodily feeling provided the existence of such state of mind or body or bodily feeling is in issue or relevant for deciding the case.

The section adds that where the commission of a previous offence is rendered relevant under Section 16(1) the previous conviction of such person is also relevant.

The principle in this section is that when the intention of the accused is a relevant fact, evidence of similar transactions both prior and subsequent to the alleged offence is

admissible as evidence of intention. In the case of **John Makindi V.R. (1961) EACA 327** evidence of previous beatings resulting in the accused's conviction for maltreatment of a boy and his threat:

"As you have made me to be imprisoned I will beat you until you die"

was admitted under section 16 and 17 of the TEA to show ill will towards the deceased. However the prosecution is not, under the provision, allowed to adduce evidence showing that the accused has been guilty of criminal acts other than that covered in the particular charge or information for the sake of showing the accused's tendency to commit offences. The purpose of giving evidence of similar character is to show knowledge and the state of mind of the accused. It is intended to prove that what was done by the accused was intentional and thereby rebut the defense of accident. In **Mohamed Saeed Akrabi V.R. (1956) 23 EACA 512** the appellant was convicted by the trial court on two counts of use of criminal force with intent to outrage modesty. There was no corroboration of their evidence. The prosecution called three other boys from the same class in the school as the complainants, who gave evidence that the defendant had on previous occasions done exactly the same to them as he was alleged to have done to the complainants. The magistrate admitted the evidence under sections 14 and 15 (sections 16 and 17 of the TEA) to show criminal intent. One of the grounds of appeal was that evidence of other offences of similar nature that were not charged should not have been admitted. The Court of Appeal quoted with approval the case of Makin **V. Attorney General for New South Wales [1894] A.C. 57** in the following words:

"..there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was acting criminally..."

The Court of Appeal then held that the evidence of similar offences was admissible under sections 14 and 15 of the Evidence ordinance of Aden (Section 16 and 17 of the TEA) to

show intention of the appellant and to rebut a defence of accident or mistake. Other cases dealing with section include **R V. Douglas (1942) 22 KLR 44; R V. Harold Whip (1955) 28 KLR 243; J.W. Kiwanuka (1956) 7 ULR 172 and R v. Hall [1951], All ER 702.**

2.11 Facts Showing a System (Section 17)

Section 17 provides that where there is an issue whether a particular act was intentional or accidental or done with a particular knowledge the fact that such act formed part of a series of similar occurrences which the same person was concerned is relevant. For this section to be applicable two things are necessary:

(i) There must be a question whether an act was intentional or accidental or was done with a particular knowledge;
(ii) There must be a need to prove that the act forms part of series of similar occurrences.

An important question is: when may the prosecution tender evidence of the commission of previous offences? This can be done once there are indications either before or during the course of the trial that the accused alleges the lack of intention or accident. If there is no indication that the accused will raise such defenses either from statements made prior to the commencement of the trial or cross-examination of the prosecution witnesses section 17 is not applicable and therefore no evidence of similar offences committed prior to the offence under enquiry is admissible. See the case of **John Makindi V R [1961] EA 327 (CA)**

It should be noted that section 17 is the application of the rule in section 16. It is not necessary under it to show that all the acts form one transaction but if they form part of a series of similar occurrences such acts may be proved. The two sections (16&17) must be read together. Section 16 deals with the relevancy of facts showing intention, knowledge etc when the existence of any state of mind or body or bodily feeling is in issue. Section 17 is applied when the act in question forms part of a series of similar occurrences. In such a case evidence of similar facts is admissible to prove intention or knowledge of the person and to rebut the defence of accident, mistake etc. For example Kajanja is accused of fraudulently delivering to Katitu a counterfeit 200 shillings note. The fact that soon before, or soon after

the delivery to Katitu, Kajanja delivered counterfeit notes to Kadogo, Kapepe and Kamkono are relevant as showing the delivery was not accidental.

The object of the section is not only to negative innocent intent but also to prove pre-existing plan or design and that the act charged is only one of a class or series designed to bring about a certain result with a certain object. The law as set out in section 17 can be summarized in four statements:

i) that the provision is intended to allow admissibility of evidence in order to rebut a defense of accident, mistake or other innocent intent or to show that an act was done with a particular knowledge or intention;
ii) that under section 17 it is not necessary that a specific line of defense should have been set out by the accused before such evidence is tendered;
iii) that the other acts sought to be introduced in evidence must be similar to those under enquiry; and,
iv) That one similar act is sufficient to prove knowledge and, or rebut accident or mistake but a single similar act is not necessarily adequate, without further evidence, to show a systematic course of conduct.

For example Kalimanzira, a newspaper proprietor, is charged with demanding money from Bwege by threats made through Kamkono, to attack a company of which Bwege was chairman in Kalimanzira's paper. Evidence that two weeks before, a similar threat had been made by Kamkono , and a sum of money obtained by Kamkono from Bwege to abstain from attacks in Kalimanzira's paper is admissible. See the case of **R V Boile (1914) 3 KB 339**. For further elaboration of the operation of sections 17 read the cases of **R.V. Hall [1952] All E.R. 702; John Makindi V.R [1961] EA 327; and Mohamed Akrabi v. R. (1965) 23 EACA 512.**

2.12 Facts Showing a Course of Business (Section 18)

Section 18 provides that when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is

a relevant fact. In ordinary life when the course of business usually followed is proved the probability is that there was no departure from the common course of business in the particular transaction. It is in this light that section 122 of the TEA allows courts to presume the existence of any facts which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Section 34(b) deals with statements made in the ordinary course of business. For example where the question is whether a particular letter reached K the fact that it was posted in due course and not returned to the sender by the post administration, are relevant and admissible under section 18 of the TEA.

2:13 Conclusion

The provisions of sections 8 –18 are very important in the determination of cases. Students are expected to understand the content and interpretation of each of these provisions because they are central in the admission of evidence when a witness is testifying in any case. What may be of assistance in comprehending how they operate is the study of cases that interpret them. Cases cited are more or less put in summary form students are encouraged to read the relevant judgments so that they appreciate how the rules of evidence are used I practice.

LEACTURE III

ADMISSIONS

(Section 19-26)

3.0 Introduction

In this lecture you are going to study the law relating to admissions. In practice admissions play a very important role both in criminal and civil proceedings. Knowledge of this topic will assist you to deal with materials falling under it in a more informed way. At the end of this lecture you should be able:

- to define the term 'admission',
- to understand how admissions are used in evidence, and
- to know the circumstances under which admissions are admissible in evidence.

3.1 The Meaning of the term 'Admission"

There is a general rule that oral evidence must in all cases be direct save where an exception lies. More on this is covered in topics on the hearsay rule. The Evidence Act makes provision, under certain circumstances, for the admissibility of evidence that is not direct. These are exceptions to the general rule. Such cases include admissions, confessions, statements of persons who cannot be called as witnesses and statements made in special circumstances. In Kenya such cases include statements in documents produced in civil proceedings. In principle, therefore, an admission is a type of hearsay evidence and is admissible because it falls in the exceptions given by the law.

The first important question one should ask is: What is an admission? The answer is found in section 19 of the TEA. An admission is:

"…a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances hereinafter mentioned..."

It should be understood that section 19 of the TEA defines admissions and gives general parameters of essentials of an admission. Admissions are evidence against the interests of the maker and, as noted above, they constitute an exception to the rule against hearsay. Reading all the relevant sections in the TEA one can say that an admission is a statement oral or documentary, which suggests any inference on the fact in issue or relevant facts and which is made by persons and in the circumstances specified in section 20, 21 and 22 of the Act. The word "hereinafter" in section 19 is used deliberately in the provision to lead to the elaboration of the definition of admissions and persons who can make admissions. This shall be discussed later.

What is important to emphasize is that an admission may be proved against the maker or his representative in interest but it cannot be proved by or on behalf of the person who makes it or by his representative in interest except in three cases:

(i) When the admission is of such a nature that if the person making it is dead, it would be relevant as between third persons under section 34(b) (section 23(a) of TEA). For example John is accused of killing Allan in Mwanza city at 8.00 am on 17th May 2002. In his defense he produces a business letter he wrote on the material day and time while he was in Tanga and bearing a post mark (stamp) of Tanga. The statement on the date of the letter is admissible, because if John were dead it would be admissible under section 34(b) of TEA.

(ii) When it consists of a statement of the existence of any state or mind of body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable (section 23 (b) of TEA). This exception focuses on a person's state of mind or body of a party when the same is in question. The existence of facts showing the state of mind or body is also admissible under section 16 of the TEA. All the same section 16 simply declares the relevancy of such facts but section 23(b) goes further to state that such facts or statements may be proved on behalf of the maker of an admission. However when such statement is sought to be proved in favor of the maker it must be accompanied by conduct rendering any falsehood improbable. For example, If X is accused of

receiving stolen goods knowing them to be stolen and he offers to prove that he refused to sell them below their value he may prove these statements though they are admissions in his favor because they are explanatory of conduct influenced by facts in issue.

(iii) If it is relevant otherwise than an admission (section 23(c) of the TEA). This sub-section envisages a situation where an admission is relevant under other provisions of Evidence Act. For example B is accused of knowingly being in unlawful possession counterfeit coin. He offers to prove that he asked a skilful person to examine the coin as he doubted whether it is counterfeit or not, and that that person did examine it and told him it is genuine. Here B is seeking to establish his innocence by adducing facts that are incompatible with his guilt i.e. he had no mens rea. This is relevant under section 16. In such a case B may prove this admission in his favor under section 23(c).

Apart from this there are situations when an admission is partly infavour and partly against the interest of the maker. What should the court do in such a case? In such circumstance it is prudent to tender the whole statement in evidence in order that its full meaning may be ascertained. This position is consonant the requirement of section 41 of the TEA. The point was elaborated in the case of the case of **Zarina Akbarali Shariff and Anor. V Noshir Pirosesha Sethna and Ors [1963] E. A. 239**

3.2 Making of Admissions and their Admissibility

Who can make admissions? According to the TEA admissions may be made by three categories of people.

a) Statements by parties to suits, agents or interested parties (section 20)

The first group of persons who can make admissions are parties to a suit or agents or any interested persons. An admission made by a party to any suit is admissible in evidence. Where a party used an agent in the relevant transaction then a statement of his agent can be proved against him. An agent is a person employed to act on behalf of another. All actions of agents that are done within the scope of their authority bind their principals. This means that

all admissions made by agents are binding on their principals and can be proved against them (the principals who are parties). However, before the admission can operate against a party the agency relationship must be established. In certain cases a party may sue or be sued in a representative capacity e. g. a trustee or any other representative character. It is pertinent to emphasize that statements made by parties to a suit made in a representative character are not admissions unless they were made while the party making them held that character (Section 20(2) of the TEA). For example a statement made by a trustee is not admissible against him when sued as a trustee if they were made before he became a trustee. This is also true for an agent or any other representative status.

In addition statements made by persons who have proprietary or pecuniary interest in the subject matter of the proceeding and persons from whom the parties to the suit have derived their interest in the subject matter of the suit are admissions if they are made during the continuance of the interest of the persons making the statements (section 20(3)). Persons having proprietary or pecuniary interest in the subject matter include such relationships as partners, co-sharers, joint-contractors, etc. An example of a party from whom the parties may derive their interest is where John, just one day before selling his car, says that his car intended for sale to James is very defective. However any statement made after the interest has ceased to exist is irrelevant. See the case of **Duncan V. Gibson (1968) HCD n. 474.**

b) Statements of persons whose position or liability must be proved as against a party to a suit (sect. 21 of TEA).

When liability of a party to a suit depends upon the liability of a third person, then a statement of the said third person regarding his liability amounts to an admission as well against the said party to the suit. For example Juma undertakes to collect rent for Alli. Alli sues Juma for not collecting rent due from Yusufu to Alli. Juma denies that rent was due from Yusufu to Alli. A statement by Yusufu that he owed Alli rent is an admission and is admissible as against Juma if he denies that Yusufu owed this rent.

c) Persons expressly referred to by a party to a suit (sect. 22 of the TEA).

This section deals with vicarious admissions. It stands on a general principle that when a party refers to another person for some information or opinion on a matter in dispute the statement made by the third person is receivable as admission against the person referring. The argument for this is that by referring to a third person the particular party indicates that he trusts that other person and approves his utterance in anticipation and adopts it as his own. However, before that statement is taken in evidence, as an admission, there has to be evidence that there was an express reference for information by the concerned party. For example the question is whether a generator sold by Jumbe to Kacheche is in good running condition or sound. In such a case if Jumbe says to Kacheche "go and ask Dogo because he knows all about it" then Dogo's statement on the issue is an admission. Read the case of **South India Corp.V. H. J. Stanley & Sons Ltd. (1967) HCD n. 168.**

In summary admissions may be made by:

- parties;
- agents of parties;
- parties suing in a representative character e.g. trustees, administrators etc'
- interested parties e.g. co-shares etc.
- persons from whom the parties have drawn interest
- persons expressly referred to by the parties to a suit.

There are three important things to note on the admissibility of admissions under the TEA. First, oral admissions on the contents of documents are not relevant unless the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document or the genuineness of the document is in question (section 24 of TEA). The rule laid down by this provision is that the contents of a document cannot be proved by oral admissions unless: the party proposing to give such evidence can show that he is entitled to give secondary evidence or the genuineness of the particular document is in question. Nevertheless, this section does not bar the reception of admissions which the parties or their agents agree to make at the hearing (section 60). This is different from the law is England

where oral admissions of a party on the contents of a document is admissible. This rule was laid down in the case of **Slattgerie v. Pooley (1840) 6 M & W 664.**

Second, in civil cases no admission may be proved if it is made on the express condition or in circumstances in which it can be inferred that the parties agreed that the evidence of it should not be given (Sect. 25 of the TEA). Parties in civil suits, for the sake of putting an end to litigation, may make admissions of liability under an express or implied condition that evidence of it should not be given. In such a case such admission is irrelevant and inadmissible in evidence. This rule is strictly confined to a case where there is a dispute or negotiation and proposals are made for an amicable settlement. In order that any admission is shut out under this provision there must be an express condition to that effect or in the absence of it there must exist circumstances that necessarily imply that the parties agreed that evidence of it should not be given. This provision does not, however, exempt an advocate to give evidence where he is required to do so under section 137 of the TEA. The rationale of this rule is that if parties were to be afterwards prejudiced by their efforts to compromise it would be difficult to convince parties to reach an amicable settlement of disputes. The essence of an offer to compromise is that the party making that offer is willing to submit to a sacrifice and to make a confession.

Third, admissions are not conclusive proof of the matter admitted but they may operate as estoppel (Section 26 of the TEA).

3:3 **CONCLUSION**

In this chapter you have studied the law relating to admission. It is abundantly clear that admissions are used both in criminal and civil cases. Understanding how the term admission in used and the extent of its use in the two branches of law is important. At times the concept has been mixed up in some situations which has led to miscarriage if justice. You are urged therefore to clearly distinguish its usage and grasp how the same is used in practice.

LECTURE 4
CONFESSIONS
(Section 27 – 33)

4.0 Introduction

Lecture 4 is focused on confessions. A confession is a species of an admission but since there are special rules governing its admissibility, it must be treated separately from other admissions. At the end of this lecture you should be able:

- To define a confession,
- To know the rules governing the admissibility of a confession,

4.1 Definition of a Confession

What is a confession? The term confession is defined in section 3(1) of the TEA to mean:

(a) Word or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with the other facts proved, inferences may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence; or

(b) a statement which admits in terms either an offence the person making the statement has committed an offence; or

(c) a statement containing an admission of all the ingredients of the offence with which its maker is charged; or

(d) a statement containing affirmative declarations in which incriminating facts are admitted from which, when taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making the statement has committed an offence."

In English law the term admission is usually applied to civil transactions and to those matters of fact, in criminal cases, which do not involve criminal intent. The term confession is generally restricted to acknowledgement of guilt. This position is also true in the TEA. For

example, if A, who is charged with house breaking and stealing, admits that he was found in possession of goods alleged to have been stolen but claims that he bought them on the open market the statement is an admission of possession which is against him. It is not a confession. In the case of **Mwiroma V.R. (1968) HCD n. 181** the court held that a statement admitting shortage of funds in a case of theft constitutes an admission not a confession. And in the case of **Songwe Ngedelele V.R. (1968) HCD n.** judge Seaton said:

"…A confession is a direct acknowledgement of guilt on the part of the accused…an admission… is a statement by the accused, direct or implied, of facts pertinent to the issue and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction..".

Read also the case of **Gopa s/o Gidomebaya V.R. (1953)20 EACA 318**.

4.2 **Admissibility of Confessions**

The admissibility of a confession depends on the circumstances in which it was made and to whom it was made. The TEA provides for situations in which a confession can lawfully be made:

(ii) a confession voluntarily made to a police officer (of or above the rank of a corporal) by a person accused of an offence may be proved against him (Sect. 27(1)).

(ii) A voluntary confession made to a person in authority is also admissible (section 27(3) of the TEA. In the case of **Shihobe Seni and Another v Republic [1992] TLR 330 (CA)**. The appellants were convicted of murder and sentenced to suffer death by hanging. They appealed against both conviction and sentence attacking the evidence on the basis of which they were convicted. The appellants were said to have made confessions that they later repudiated. Some of the confessions were made to the village chairman. The court held a view that a village chairman is a person in authority under section 27(3) of the Evidence Act and so a

confession made to him is involuntary if the Court believes that it was not induced by any threat, promise or other prejudice. There is not a thread of doubt that the confessions to the village chairman were not induced by threat, promise or other prejudice. Read also the case of **Thabiti Ngalile V R (1968) HCD n. 182.**

(iii) A confession voluntarily made by a person accused of an offence before a magistrate or justice of peace may be proved against him (sect. 28).

From the foregoing it is clear that only voluntary confessions made to proper authorities are admissible in evidence. Where the relevant confession is made to a police officer then the rank of the said officer must be that which is prescribed by the law. In the case **Gervas Kilongozi v Republic [1994]TLR 39 (CA)** the appellant was charged with and convicted of murder. The trial court based the conviction on a confession that the appellant made to a police officer whose rank was not shown on the evidence. On appeal the conviction was challenged as being based on inadmissible evidence. It was undisputed that there was nothing on record to show that the police officer to whom the appellant made the confession was of the rank required under s 3 of the Evidence Act, 1967. The court held that the confession was inadmissible in evidence and that the case was not proved beyond reasonable doubt. For these reasons the appeal was allowed.

However confessions may be made under various circumstances and these are very crucial in determining their admissibility.

Voluntariness of a confession is a key component in the admissibility of any confession. A confession is not voluntary if it was induced by any threat, promise or other prejudice held by the police or any other person in authority (sec. 27 (3) of TEA). An important question is: can a confession be said to be voluntary if it is elicited by means of questions put by a person in authority? It has been considered that statements made after arrest in answer to repeated questions by police whom the accused might feel bound to reply could hardly be considered to be voluntary (see **R. V Ikojot (1917) 2 U.L.R. 261**.) To a reasonable extent the accused, while making a confession, may be asked occasional question to keep the narrative clear. The

accused should, however, not be asked leading questions or cross-examined on what he is saying. On the importance of voluntariness of a confession the court in **Njuguna and Others V.R. (1952) 2 EACA 311** said that it was incumbent upon the prosecution to prove that the confession was voluntarily made and was not obtained by improper or unlawful questioning or other methods. It added that it was the duty of the court to examine with close care and attention all circumstances in which a confession was obtained. The onus of proving that a confession is voluntary is on the prosecution. This is also according to section 27(2) of the TEA.

The term inducement used in section 27(3) has two main meanings i.e. "fear of prejudice" or 'hope of advantage". This requires an inquiry into the actual state of the accused mind and other factors. In **DPP V. Ping Lin (1976) AC 574** the court stated that the test depends on the actual effect on the accused mind. Subjective considerations are also relevant where the inducement proceeds from a person who is in authority. However the inducement must not be too vague. It must point to some consequences.

On the meaning of "a person in authority" the court in **Deokinanan v. R. [1969], AC 20** the court said:

"…A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or prosecution against him. And the reason that it is a rule of law that confessions made as a result of inducement held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to passes may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe…."

Section 29 introduces, apart from **the general test of voluntariness**, an entirely new principle regarding admissibility of confessions resulting from inducement. Under section 29 of the TEA the fact that a confession has been obtained after an inducement is not in itself a sufficient reason to reject it. Such confession can only be rejected if it was made in such circumstances and is of such a nature as likely to cause an untrue admission. In other words

the principle in such situations is based on the question whether or not the inducement has affected the truth of the confession.

The logic of Section 29 of the TEA is that a confession obtained by inducement or threat is admissible if there is evidence that the confession is saying nothing but the truth. Some of the things which the court would take into consideration, in deciding this, include the nature of the promise or threat and the circumstances in which the confession was made. In addition where a confession is made after the impression caused by the inducement has been fully removed the confession is relevant and need not be rejected. (section 30 of TEA)

In the case of **Josephat Somisha Maziku v Republic [1992] TLR 227 (HC)** the facts were that the appellant, was at the material time, employed as a watchman by Tabora Region Co-operative Union. On 1/5/90, it was discovered that 18 louver glasses had been extracted from windows and one typewriter stolen. Through interrogation by Sungusungu, the appellant confessed to have stolen the louver glasses but not the typewriter. The appellant, in his cautioned statement to 7909 D/Cpl. Benjamin, further confessed to have stolen the louver glasses.

On the strength of this evidence, the trial Magistrate convicted the appellant on the charge of stealing by public servant c/s 270 and 265 of the Penal Code. In his memorandum of appeal, the appellant contended that his confession to Sungusungu was extracted by threats and with violence. The Court held that while it is trite law that the condition precedent for the admissibility of a confession is its voluntariness, a confession is not automatically inadmissible simply because it resulted from threats or promise, it is inadmissible only if the inducement or threat was of such a nature as was likely to cause an untrue admission of guilt. The court further elaborated that where you have threats and a confession far apart without a causal connection, and no chance of such threats inducing confession, such confession should be taken to be free of inducement, voluntary and admissible. Finally the court also recited a trite principle of evidence that where a confession is, by reason of threat, involuntarily made, and is therefore inadmissible, a subsequent voluntary confession by the same maker is admissible, if the effect of the original torture, or threat, has before such subsequent

confession, been dissipated and no longer the motive force behind such subsequent confession.

Another important issue is the status of evidence discovered in consequence of information received from the accused while in police custody. According to section 31 of the TEA when any fact is deposed as discovered in consequence of information received from a person accused of any offence in the custody of a police officer so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, is relevant. In **Nanyalika v. R. (1971) HCD n 314** the appellant was convicted on three charges of stealing, entering a dwelling house with intent to steal and stealing. The appellant made statements to a police officer leading to the discovery of several stolen articles. On appeal Biron J Said:

"…the appellant showed the police the spot where the complainant's stolen box was recovered, and also his leading the police to the laundryman from whom the complainant's stolen shirt was recovered is admissible…"

Read also the case of **Anyuma v. R. (1953) 20 EACA 218.** The above relates to be evidence lawfully obtained through an accused while in policed custody. What is the position if the evidence has been improperly obtained? The practice in Tanzania is that such evidence is admissible. The test employed to admit such evidence is whether the evidence is relevant to the facts in issue. This position was clearly articulated in he case of **Shila V R.** (1968) **HCD n. 39** where evidence obtained by an illegal search was admitted. The same position was held in **Amin V. R. (1968) HCD no. 302** where Georges C.J said that it is trite law that the fact that a search whether of premises or of the person was unlawful does not preclude the trial court from receiving articles found as a result of such search.

The TEA also deals with confessions made as a result of a promise of secrecy or deception. The mere fact that a confession was made under a promise of secrecy, as a result of deception practiced on the accused or when drunk or in answer to a question which the accused need not have answered or as a result of not having been warned that the statement may be used in

evidence against him does not render such confession inadmissible (Section 32). However the court may refuse to admit such confession if it is of the opinion that the statement was not voluntary or was made in circumstances that rendered it unreliable or unfair. This was elaborated in the case of **Nayinda v. [1959] EA 688**.

Finally, under section 33 of the TEA a confession of an accused implicating him and other accused persons may be considered against the other accused persons. However no person is, without corroboration, to be convicted solely on the basis of a confession of a co-accused person. In the case of **Saidi Hatibu v Republic [1984] TLR 280 (HC) the** appellant was convicted of cattle theft. The trial magistrate relied on two pieces of evidence to convict the appellant. He relied on a plea of guilty of a co-accused that implicated the appellant and an identification evidence of a witness who said that he saw the appellant and his co-accused in the bush from a distance of about one hundred yards driving some head of cattle. The High Court considered whether or not the two pieces of evidence could support conviction. The court held: (i) a plea of guilty is a confession of fact and may be made use of as provided for in s.33(1) of the Evidence Act, 1967 provided it is proved; (ii) the use of the word "proved" in s.33(1) of the Evidence Act would tend to suggest that evidence must be adduced to establish that the plea was made; (iii) in this case it was not permissible to invoke the provisions of s.33(1) of the Evidence Act against the appellant because the plea of guilty of the co-accused was not proved; (iv) it was unsafe for the trial magistrate to have accepted the identification evidence because the distance was quite long and the fact that the man was in a bush.

And in the case of **Asia Iddi v Republic [1989] TLR 174 (HC)** the appellant was convicted on the strength of a co-accused's confession together with independent testimony of witnesses who were in one way or another involved in the transaction. On appeal the High Court held that conviction cannot be based solely on a confession by a co-accused. There must be, in addition, other independent testimony to corroborate it. The court further stated that evidence of a person who has an interest to serve also needs corroboration and, as such, it cannot be used to corroborate other evidence. See also the case of **Mwidini v. R. (1967) HCD no. 386.**

4.3 Retracted and Repudiated Confessions

Where the prosecution applies to tender a confession then the accused must first be asked whether he disputes the admissibility of the confession. If the accused retracts or repudiates his confession or maintains that it was not voluntary the court must conduct a "trial within a trial" to determine its voluntariness or admissibility. If the trial is with assessors they must not be present during the "trial within the trial". They should be re-called later and informed of the court's decision on the statement. Where, inadvertently, the trial court has omitted to conduct 'trial within trial' the appellate court normally considers whether the irregularity had, in fact, prejudiced the accused. See also the case of **Lumambutu Makalya [1958] E.A. 706.**

What is a retracted confession? A retracted confession arises when an accused admits that he made a statement recorded but declares that he was forced to or induced to make the statement or that what is sought to be produced in court is not what he said. What, again, is a repudiated confession? A repudiated confession is a confession that an accused person contends that he never made any statement. There has, however, been a debate whether such distinction is substantive. In **Tuwamoi v. Uganda** [1967] **EA 84 Duffus** AG. V.P; questioned the validity of the basis of the distinction between these two types of confessions arguing that the distinction was first made in 1936 in the case of **R.v. Lobasha (1936) 3 EACA 48.** There is no need of getting into the intricacies of the debate.

In both cases the general principle is that except where the court is fully satisfied that in the circumstances of the case the confession is nothing but the truth a retracted or denied confession cannot support a conviction unless corroborated. In **Tuwamoi v. Uganda** court said:

"…a trial court should accept any confession which is retracted or repudiated…with caution, and must, before founding a conviction on such confession, be fully satisfied that in the circumstances of the case that the confession is true….corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied, after considering all the material points and surrounding circumstances, that the confession cannot but be true…"

The same reasoning was adopted in the case of **Hamisi Athumani and two Others V R [1993] TLR 110 (CA).** In this case the three appellants were jointly charged with and convicted of murder and were each sentenced to death. They appealed against both conviction and sentence complaining, **inter alia,** that the Trial Court admitted in evidence and convicted the appellants on the basis of the alleged confessions of the appellants which confessions had been repudiated or retracted. The Court of Appeal of Tanzania held that although the appellants in their defenses at the trial repudiated or retracted their confessions once the Trial Court found those confessions to be true it was entitled to base conviction on them.

And in the case of **Jackson s/o Mwakatoka & 2 Others v Republic [1990] TLR 17 (CA)** which was a trial for murder caused during a fight at night, the trial judge found the appellants guilty of murder on the evidence that the first appellant was identified as being present when the second and third appellant attacked the deceased on the fateful night and thus participated in the murder under the doctrine of common intention, that the second appellant was identified as one of the attackers, that the third appellant had confessed to have hit the deceased on the head with a stone, and that the third appellant's repudiation of the confession required no corroboration for his confession to support his conviction. The Court of Appeal of Tanzania allowed the first and second appellants' appeal on grounds of insufficiency of evidence against them and quashed the third appellant's conviction for murder and substituted conviction for manslaughter. In regard to the retracted confession the Court of appeal of Tanzania held that a repudiated confession though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted. As regards the accused's denial of the confession the court held the view that it was an afterthought and, on the basis of the evidence available, untenable.

In the case of **Hemed Abdallah V R [1995] TLR 172 (CA)** the danger of acting on an uncorroborated retracted confession and what is required to be done was examined. In this case the High Court convicted the appellant of murder on the basis of his retracted confession. Before convicting the court warned itself of the danger of basing the conviction

on an uncorroborated retracted confession. On appeal the appellant argued that the trial court's conviction should be faulted because the learned Trial Judge did not give reasons why he relied on the uncorroborated confession. Reacting on these issues the Court of Appeal of Tanzania held: (i) generally it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied that the confession must but be true; (ii) once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado; and (iii) that it is not a requirement of the law that reasons have to be given for the trial court's finding that there is no danger in accepting a retracted confession.
Read also the case of **Mukani Wankyo V.R. [1990] TLR 46.**

As stated above where the prosecution seeks to rely on a confession the burden of proving that the confession was voluntary lies on them. Read the case of **Ezekia V.R. (1972) HCD n. 240.**

4:4 Conclusion

Confessions play a key role in the administration of justice especially criminal justice. On this ground great care need to be taken to avoid using confessions that have been improperly made to get convictions. This would help to see to it that only the guilty parties face the wrath of the law but not the innocent.

LECTURE 5

STATEMENTS OF PERSONS WHO CANNOT BE CALLED AS WITNESSES (Section 34-35)

5.0 Introduction

In this lecture you are going to study how statements of people who cannot appear in court to testify are used in evidence. At the end of the lecture you should be able:

- To understand what type of statements of persons who cannot be called as witnesses can be admitted in evidence.
- To know the circumstances under which they are admitted in evidence.

5.1 The Rule Against Hearsay

This part concerns the meaning, application and scope of the rule against hearsay, which remains one of the most important of the exclusionary rules of evidence. The general rule is that oral evidence must be direct i.e. evidence referring to a fact which could be seen, heard or perceived by our senses. It must be evidence of a witness who saw, heard or otherwise perceived the fact in question (section 62 of TEA). Therefore no witness is allowed to give evidence on the basis of what he was informed by a third party. This will be regarded as hearsay and will not be admissible. The term hearsay does not appear in section 62 of the TEA although the courts refer to it as hearsay. However the rule concerning hearsay is embodied in section 62 of the Act. The term hearsay, in simple words, means that a witness says in court what he heard from a third person. For example a witness says: " I heard Juma saying that he (Juma) saw the accused stabbing the deceased to death." Such a statement is hearsay and not admissible as it conflicts with the requirements of section 62. The witness is required to give best evidence in court.

An example of what could amount to hearsay evidence in court can be seen in the case of **Njunga V R. [1965] EA 773**. In this case an informer revealed information to the police that led to the apprehension and charging of the accused person for the offence of being armed with intent to commit a felony. In the course of judgment the court stated:

"…the knowledge which the court below had of this felonious enterprise was derived from what a sergeant of police told the court an uncalled, unnamed and unsworn individual had told him. Without this hearsay evidence the court below very clearly would have found it difficult, if not impossible, to have determined whether the appellant had the intent to commit the felony and if so what felony."

On this ground this piece of evidence was rejected.

What is the rationale of the hearsay rule? Experts have advanced a number of reasons. Some of them are the following:

(i) Hearsay statements when related to the court emanate originally from persons neither under oath nor subject to cross-examination. Hence they are unreliable.

(ii) For the purpose of being fair and just to the parties it is proper that the best evidence be given i.e. direct evidence should be given instead of hearsay;

(iii) There is a danger of inaccuracy through repetition;

(iv) It is argued that if the rule were relaxed the courts would be swamped with a proliferation of evidence directed to establishing a particular fact i.e. both direct evidence and hearsay.

(v) There is a danger, in trials conducted with the aid of assessors, that assessors would attach much weight to hearsay evidence without realizing its weakness.

(vi) Similarly, the tribunal of fact would have no opportunity to observe the demeanor, attitude and tone of voice of the maker of the statement, at that time.

5.2 Exceptions of the Hearsay Rule in the TEA

The TEA makes provision that under certain circumstances hearsay evidence is admissible. These cover admissions and confessions, statements made by persons who cannot be called

as witnesses, statements made in special circumstances etc. This part is intended to elaborate on the admissibility of statements of persons who cannot be called as witnesses.

One of the main provisions is Section 34 of the TEA that deals with statements of persons who cannot be called as witness. The provision makes admissible statements of persons: who are dead or unknown; who cannot be found or who cannot be summoned owing to diplomatic immunity or other privilege; those who have become incapable of giving evidence or persons whose attendance cannot be procured without delay or expense which is unreasonable. These statements are admissible only in circumstances specified in section 34 and no others. Statements made by the mentioned people are admissible in the following circumstances;

(a) when the statement is made by a person as to the cause of his death or circumstances leading to death – dying declaration (section 34(e));

(b), when it is made in the ordinary course of business or duty (section 34(b);

(i) when the statement is against the pecuniary or proprietary interests of the maker (Sect. 34(c));

(ii) When it gives the opinion of such person on the existence of any public right or custom (section 34(d)).

(iii) when it relates to the existence of any relationship by blood, marriage or adoption between persons (Section 34(e));

(iv) when it relates to family affairs (Section 34(f));

(v) when it is contained in any deed or document relating to a transaction mentioned in Section 15 (a) (Section 34(g)); and

(vi) When it is made by a number of persons and expressing feelings or their part relevant to the matter in question (section 34 (h)).

Clearly section 34 restricts the admissibility of statements of persons who cannot come to court and give evidence. The purpose of the provision is to ensure the admission of the truthful information in the course of criminal and civil proceedings. The exceptions are allowed on the basis of necessity in that where the particular person is dead or cannot be found or easily summoned by the court there is no possibility of getting better evidence.
The first exception appearing in section 34(a) is what is commonly called a Dying Declaration. This is the subject of the next lecture and for this reason no discussion on it will be done here.

a) Statements and entries in the course of business

Statements of persons who are dead or unavailable as elaborated under section 34(b) are admissible if the particular statement or entry is made in the ordinary course of business. or duty. The basis of this position is that such statements are assumed to have been given without a particular motive other than the fulfillment of ordinary duty in human life. Such statements, therefore, can safely be assumed to be true. What is important to understand is that the particular statement or entry must be relevant to the facts of the case in question. In addition the particulars given in the provision are not exhaustive but fairly indicate the nature of statements made in the course of business.

One of the oldest cases elaborating the application of this principle is that of **Prince V Lord Torrington (1703) 1 Smith's LC 277, 290: 1 Salk 285**. This was an action for a price of beer sold and delivered. The plaintiff, in order to prove delivery, produced a book containing information on beer deliverance to customers and the signatures of the plaintiff's salesman who had duty to sign every after such delivery. At the time when the case was in court the salesman had already died. The signature and the death of the salesman, who personally knew of the items of delivery, were proved. The court held that the entries were good evidence for the plaintiff.

b) **When the statement is against pecuniary or proprietary interest of the maker**

Under section 34(c) statements of persons who are dead or unavailable that have been made against their own interests are admissible. Under this provision any statement against pecuniary, interest, proprietary interest (the term 'declaration against proprietary interest' means statements made by a party while in possession of an estate, asserting a limited interest in the same and in disparagement of some higher title to it) and any statement against personal liberty and property of the maker is admissible. A good example of a statement against the pecuniary interest of the maker is when Kiduchu writes in his accounts book that he has received a loan of shillings 100,000 from Dogo such entry will be evidence in case of the death or absence of Kiduchu. Under English law such statements are limited to those against the proprietary and pecuniary interest only. Under the TEA, in addition to statements against proprietary or pecuniary interest, any statement making the maker liable for criminal prosecution or payment of damages is admissible. However such declarations must have been against the interest of the maker at the time they were made. It is not enough that they might possibly turn out to be so later on. The reason for allowing such statements is that in the ordinary course of business a person is not likely to make a statement to his own detriment unless it is true. For better understanding of this provision see the case of **Dias V R (1927) 3 ULR 214.**

c) When it gives the opinion of a person on the existence of a public right or custom (section 34(d)

Declarations of opinion of deceased or those persons who cannot be found are admissible in proof of any public or general right or custom or a matter of public or general interest. Public rights concern all members of a particular community or country e.g. the right to collect road toll in a particular highway. However a general right affect a smaller portion of the community boundary between two villages. Such opinions are admissible if three tings are fulfilled: first, that the statement having such opinion must be on any matter of public or general interest, second, the declarant must be a person who would have been likely to be aware of the existence of the right in question and, third the declaration must have been made before the controversy to such right or custom arose.

According to section 34B in Criminal cases a written statement of a person whose evidence is relevant can be admitted in evidence as proof of the relevant facts contained in it if:-

(i) the maker who has not been called as a witness is dead or unfit to attend as a witness or cannot be, if he is overseas, procured or cannot be found or by operation of the law cannot attend;

(ii) (the statement is or purports to be signed by the maker;

(iii) it contains a declaration by the person that it is true to the best of his knowledge information and belief and that he made it knowing that if it is tendered in court he would be liable to prosecution for perjury if he willfully stated untrue information;

(iv) a copy is served to the opposite party before the statement is tendered in court;

(v) there is no objection from the opposite party within ten days from the service of the copy of the statement; and

(vi) where the statement is made by a person who cannot read it is read to him before he signs it and is accompanied by a declaration by the person who read it to the effect that it was so read.

It must be remembered that these conditions for admissibility are cumulative. All have to be fulfilled before the statement is tendered in evidence. In the case of **D.P.P. v. Ophant Manyancha [1985] TLR 127** the court had opportunity to examine the admissibility of statements made to the Police and tendered in court in the absence of their makers under section 34B(2) of the Evidence Act, 1967. In this case the respondent was charged with two offences of corruptly soliciting and receiving a bribe c/s 3 of the Prevention of Corruption Act 1971. The prosecution sought to rely on Police statements made by two witnesses but the two witnesses were not in court. The trial magistrate held that the statements were inadmissible in evidence. In the event the prosecution failed to prove its case beyond reasonable doubt and the respondent was accordingly acquitted. The Director of Public Prosecutions appealed to the High Court arguing that the trial magistrate erred in rejecting

the statements because the conditions for admitting them had been fulfilled according to s.34B (2)(a) of the Evidence Act, 1967. The High Court held that the correct interpretation of s.34B (2) of the Evidence Act, 1967, is that in order for a statement to be admissible under that section, all the conditions laid down in all the paragraphs, that is from (a) to (f), of the subsection must be met. As the conditions laid down in some of the paragraphs were not met in this case, the court added, the trial magistrate correctly rejected the admission of the two statements. The same reasoning was adopted in the case of **R. V Hassan Jumanne [1983] TLR 432 (HC).**

What is important to note is that what is allowed to be admitted under section 34B (2) are statements and not reports. In the case of **Mwananchi engineering and Construction Co LtD V. R [1985] TLR 243 (HC)** the appellant company was charged with and convicted of permitting a defective motor vehicle to be driven on the public road contrary to the Road Traffic Act, 1973. It was sentenced to a fine and ordered to pay Shs.8,000/= as compensation to the owner of another vehicle damaged as a result of the offending act. The conviction, inter alia, was based on a Motor Vehicles Inspection Report that was admitted under section 34B (2) of the TEA. On appeal the court stated clearly that the Motor Vehicles Inspection Report was improperly admitted in this case because the application of s. 34B(2) of the Evidence Act, 1967 under which it was purportedly admitted is in respect of the admission of written statements and not reports like this one.

As regards the admissibility and proof of such statements in civil proceedings you should read section 34 C of the TEA.

Section 35 covers the relevancy of evidence given in previous proceedings. In summary evidence given in a judicial proceeding is admissible for the purpose of proving, in a subsequent proceeding or at a later stage of the same proceeding, the facts it states when the witness who gave it is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the opposite party or if his presence cannot be obtained without delay or expense, which under the circumstances of the case the court considers unreasonable. Such evidence is only admissible in a subsequent proceeding if the proceeding is between the same

parties or their representative in interest, if the adverse party in the in the first proceeding had the right and opportunity to cross-examine and if the questions in issue were substantially the same in the first as in the second proceeding.

Sections 36-40 provide for the admissibility of statements under special circumstances. You are urged to read them and note how they are related to this topic.

5:3 Conclusion

The most important thing to remember in regard to hearsay evidence is that such evidence is admissible only where the law has allowed the same to be admitted. In all other cases such evidence is admissible. To do otherwise would surely open the doors for un-called for injustices.

LECTURE 6

DYING DECLARATIONS

(Section 34 (a))

6.0 Introduction

In the last lecture you studied generally the admissibility of statements by persons who cannot be called as witnesses. One type of such statements is a dying declaration provided for in Section 34(a) of the TEA. This lecture is intended to elaborate further the nature and admissibility of dying declarations. At the end of this lecture you should be able:-

- To know what is a dying declaration
- To understand the circumstances under which dying declarations are admitted in evidence.

6.1 Dying Declarations under the TEA

Section 34(a) of the TEA constitutes what is called "dying declaration" at common law. A dying declaration is defined in the Oxford Companion to Law to mean:

"A verbal or written statement made by a dying person, which although not made on oath or in the presence of the accused, is admissible in evidence on an indictment for murder or manslaughter of that person, provided the person making it had a belief, without hope of recovery, that he was about to die shortly."

Take note that this definition explains the English position of the law. In Tanzania a dying declaration is relevant if it is made by a person regarding the cause of his death or it relates to any of the circumstances of the transaction which resulted in his death where the question of death is in issue. In such circumstances the dying declaration is relevant and admissible whether or not the deceased was under the expectation of death. There are two main differences in the legal position in English and Tanzania law.

(i) In England such declarations are only admissible in homicide cases while in Tanzania dying declarations may also be used in civil cases where the cause of death of the person who made he statement comes into question.

(ii) In England a dying declaration is admissible only where the person making it was in actual expectation of death but in Tanzania whether or not the declarant was under expectation of death is immaterial.

It is emphasized, that for such a statement to be admissible the following conditions must be fulfilled:

(i) that the maker of the statement is, in fact dead, and

(ii) the statement relates to

(a) the cause of his death or

(b) the circumstances of the transaction which resulted in his death and,

(c) that the cause of that person's death is in question in the case.

The general principle is that a dying declaration, once believed to be true, free from falsehood, consistent, coherent and where no likelihood of prompting is present can be accepted and acted upon. It is not necessary that the same be corroborated. However there are only a few declarations of such good quality. In view of this where a dying declaration is accepted in evidence corroboration is highly desirable though not always necessary to support a conviction. Corroboration is thought necessary because the deceased may have been uncertain or mistaken on the identity of the assailant. In the case of **R.v. Muyovya Bin Msuma(1939) 6 EACA 128** the Court held:

(i) Mere repetition by the accused of a substantially identical statement on a number of different occasions that the accused was his assailant, while it is evidence of consistency of his belief that such was the case, is no guarantee of accuracy.

(ii) where there are circumstances which show that the deceased could not have mistaken in his identification then a conviction arising from an un-corroborated dying declaration may stand.

In the case of **Africa Mwambogo v R [1984] TLR 240 (CA)** the appellant was charged with and convicted of murder. In convicting, the trial judge relied on a dying declaration in which

the deceased persistently implicated the appellant as his assailant. He also relied on identification evidence that was not corroborated. The high court decision was attacked on appeal. The Court of Appeal held: (i) the deceased's persistence in implicating the appellant was mere evidence of consistency and honesty but not of correctness; (ii) in the circumstances of this case the deceased could have been honestly mistaken in his belief that it was the appellant who shot at him; (iii) since the conditions of identification were not ideal it was unsafe to convict in the absence of corroborative evidence. In the same way in the case of **R. v Mohamed Shedaffa and Three Others [1984] TLR 95 (HC)** the High Court court held: (i) It is possible for a conviction to proceed upon evidence consisting of a dying declaration only, although it is a rule of practice that a dying declaration requires corroboration before it can be acted upon; (ii) the mere fact that the deceased consistently made precise and substantially identical statements on several occasions is not evidence that such statements are accurate but only that the deceased was consistent in his belief that the accused had assaulted him.

In the case of **Pius Jasunga v. R (1954) 21 EACA 331** the Court of Appeal for East Africa stated clearly that a dying declaration must be corroborated unless there is evidence of circumstances showing that the deceased could not have been mistaken in his identification of the accused. This being the case the question, now, is what should be the type of corroboration required in such cases? In practice a dying declaration may be oral or written and in both cases evidence of its being made must be adduced first. The test for a dying declaration could, therefore, be based on two questions: (1) Whether the statement/declaration was made and (ii) whether it was accurately made.

There is no dogmatic rule on how a dying declaration should be corroborated. Such corroboration can either be circumstantial as was the case in **R V Saidi Abdallah (1945) 12 EACA 67** or through the conduct of the accused if the declaration is made in the presence of the accused or by direct evidence. It all depends on the circumstances of each case. Corroboration of a dying declaration, if it is made in the presence of an accused, may be found in the accused's conduct at the material time – read **Migezo Mibinga v Uganda [1965] EA 71.** In other cases corroborative evidence may be purely circumstantial as was the

case in **R.v. Saidi (1945) 12 EACA 67.** What is important to understand is that such circumstantial evidence sought to be used to corroborate a dying declaration must clearly point to the guilt of the accused.

In addition a declaration made while deceased was in fluctuating capacity to talk is not reliable and a conviction cannot be based upon it without corroboration. In the case of **Hamisi Said Mchana v R [1984] TLR 319 (CA)** the appellant was charged with and convicted of murder. The trial judge based the conviction on a dying declaration and corroborative circumstantial evidence. On appeal it was argued in favor of the appellant that the dying declaration was made in answer to leading questions and was therefore inadmissible in evidence. The trial judge's finding of corroborative evidence was also attacked. The Court of Appeal held: (i) the dying declaration was admissible because the questions put to the deceased were not of such a kind as to be likely to mislead him into making a false statement; (ii) since the declaration was made while the deceased was in a fluctuating capacity to talk it would be unsafe to base conviction upon it without corroboration; (iii) in this case there is importance in the circumstantial evidence such that it falls short of the standard required of corroborative circumstantial evidence.

6.2 Weight of Dying Declarations in Evidence

What should be the weight to be attached to a dying declaration? There are a number of factors that the court normally takes into account in determining the weight of a dying declaration. First, it is necessary to determine whether or not the declarant was really certain of the identity of the assailant. For further elaboration on this requirement see the case of **Mdiu Mande v. R. [1965] EA 193.** Second, the circumstances in which the declaration was made and finally, the effect of the wound on the intellectual power of the declarant. In the case of **Waugh v. R. (1950) AC 203,** for example, the court said that a statement made by a man who fell into a comma while making the statement and never recovered is inadmissible. In the case of **R. V Marwa (1971) HCD no. 473** the deceased was found lying on the floor of a house with a number of wounds, including a swollen wound on his head. He made a statement naming the accused as his attacker. He repeated the statement later when he was at a dispensary. He later died. The doctor’s report showed that his death was due to concussion

of the brain caused by blood that had formed on the inside of the skull beneath the bruise on the outside. The court refused to give weight to this statement because it doubted the soundness of the deceased mental condition at the time of making the statement. Read also the case of **R.** v**. Eligu (1943) 10 EACA 90.** In summary if the court is reasonably satisfied that the declaration reflects the transaction that led to the particular death then it can fully rely on it in reaching the decision of the case. If the situation is such that the reliability of the statement is doubtful then no weight is to be attached to such statement.

6:3 Conclusion

It is important to remember that basing a conviction on a dying declaration requires that such declaration must be sufficiently reliable. Where the circumstances in which the declaration was given make it unsafe to convict without further proof corroboration is necessary. Such corroboration, as indicated above, may either be by direct evidence or circumstantial evidence.

LECTURE 7

RELEVANCY OF JUDGMENTS

(Section 42-46)

7.0 Introduction

Judgments are public transactions of a solemn nature and for this reason they are presumed to be faithfully recorded. In addition every judgement is conclusive evidence for or against all persons of its own existence, date and legal effect as distinguished from the accuracy of the decision itself. Judgments have effect on later proceedings and such effects have variously been denoted e.g. res judicata, estoppel by judgment/record etc. Sections 42 – 46 of the TEA provides for situations in which a previous judgement may be relevant in a future case.

This lecture is intended to elaborate on the circumstances under which previous judgments may be admissible in evidence. At the end of this lecture you should be able:

- to understand the circumstances under which a previous judgment may be admitted in evidence
- to know the effects of a previous judgment to a future case.

7:1 **Judgments Barring Second Suits or Proceedings (Section 42)**

Section 42 of the TEA deals with the admissibility of judgements, orders or decrees that exclude jurisdiction i.e. judgements barring second suits or proceedings. Under this section the existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to hold such trial. The phrase "by law" appearing in section 42 of the TEA includes the pleas of "**res judicata**" found in section 9 of the Civil Procedure Code Act and "**outré fois acquit"** and "**ontre fois convict**" in criminal cases under section 137 of the CPA. The phrase res judicata is part of the longer phrase "**res judicata pro veritate occipitur**" which means a thing adjudicated is received as the truth. In terms of judgments we can say a judicial decision is conclusive until reversed [by a competent judicial authority] and its verity cannot be contradicted.

Under section 42 of the TEA, therefore, the existence of a judgment, order or decree having the specified effect is admissible in evidence. However the effect of such judgment, order or decree upon the power of the court to take cognizance of the suit or hold the trial is controlled by section 9 of the Civil procedure Code Act and Section 137 of the CPA. In other words the aspect of existence of the judgement, order or decree is relevant under section 42 of the TEA and its effect is governed by section 9 of the Civil Procedure Code Act and Section 137 of the CPA. This means that Section 42 of the TEA has nothing to do beyond the admissibility of the judgment, order or decree.

7:2 Judgments in Rem (Section 43 of TEA)

Under normal circumstances a judgment binds only parties to it. Such judgments are called judgments in **personam.** However there are also other judgments that bind all persons. These are called judgments in rem. Judgments in rem are judgements that are conclusive not only against the parties to them but also against the whole world. The term judgment in rem does not appear in section 43 of the TEA but its substance is covered in the section. In short it is adjudication upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Halsbury's Law of England (Hailshom edn) vol. 13 p. 405 defines a judgment in rem to be:

"A judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interests in it) of a party to a litigation"

Sakkar (13th edn) quoting a definition by Bower defines a judgment in rem at p. 48) as one:

"..which declares, defines or otherwise determines the status of a person, or of a thing that is to say the jural relations of the person or thing to the world generally"

However section 43 covers only few categories of judgments, orders or decrees i.e. the final judgments of the courts of probate, matrimony, admiralty and insolvency jurisdictions. It provides that a final judgment, order or decree of a competent court, in the exercise of

probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing, is relevant.

The principle is that in order to be a judgment, order or decree in rem and binding on the whole world there must be a finding of status which is not only the foundation of the judgment, order or decree but necessary for it. A judgment, order or decree in rem under section 43 will be conclusive proof in a criminal as well as civil proceedings.

Section 43 A covers specifically the relevancy of judgments in criminal matters. It provides that a find judgment in any criminal proceeding which declares a person guilty shall after the expiry of the time limited for appeal or the decision of any appeal shall be conclusive evidence that the person so convicted was guilty of an offence. This principle was adopted in the 1980 amendments of the TEA. It originated from a statement by Lord Denning in **Rondell v. W [1966] 3 All E.R. 657** who said that once a man has been convicted by the jury of a crime and his appeal has been rejected, he should not be permitted to challenge it again in a civil court.

7:3 Judgments Relating to Matters of Public Nature Between Strangers (Section 44 of TEA)

The general rule is that persons who are not parties or privies to a judgment, order or decree shall not be affected or prejudiced by any such judgment. Section 44 is an exception to this rule. The section covers the relevancy and effect of judgments, orders or decrees other than those mentioned in section 43. It provides that judgments, orders or decrees other than those mentioned in section 43 are relevant if they relate to matters of a public nature relevant to the enquiry but the same are not conclusive proof of what they state.

An important question is this: What are matters of public nature? These are those matters that in one way or another touch the public or part of it. They include public rights, customs,

trusts etc. In the context of Section 44 previous judgments, order or decrees of such matters whether between the same parties or other parties are admissible as evidence of reputation on matters of general interest or public rights. For example Juma sues Joshua for trespass on his land. Joshua alleges the existence of a public right of way over the land, which Juma denies. A judgment is entered infavour of Joshua. The existence of a decree infavour of Joshua is a suit by Kevin against Alli for trespass of the same land in which Alli alleges the same right of way, is admissible but it is not a conclusive proof that the right of way exists.

In summary the effect of such judgements will vary. If the parties are the same in both suits they will be bound by the judgment. However when the parties are different the judgment in the previous case though admissible will not be conclusive.

7.4 Judgments Relevant Under other Sections of the TEA (Section 45 of TEA)

Section 45 deals with the relevancy of judgments, order and decrees other than those covered by Sections 42-44. The section states the general rule that all judgments, orders or decrees apart from those mentioned in sections 42-44 are irrelevant. There are, however, two important exceptions to this general rule i.e. a judgment may be admissible if:

(i) the existence of such judgment, order or decree is a fact in issue or
(ii) it is relevant under the rules of relevancy contained in the provision of the TEA.

For example: Katitu is tried for the murder of Karefu. The fact that Karefu prosecuted Katitu for assault and that Katitu was convicted is relevant under section 10 of the TEA as showing the motive for the fact in issue. Read the cases of **Peter Mussa v. R (1973) LRT n. 68** and **Safari Juma v. Fabiano (1973) n. 74**, for further clarification on this point.

7.5 Challenge of Relevant Judgments Under Section 42-44 on the Basic of Incompetence, Fraud or Collusion (Section 46 of TEA)

Section 46 provides for situations in which a party may challenge a previous judgment, order or decree accepted under Sections 42-44. Where a party has proved the existence of a relevant judgment, order or decree under Sections 42 – 44 the adverse party may challenge

its legality on three grounds: a) the incompetency or want of jurisdiction of the court by which the decree was passed; b) that the judgment was obtained through fraud; or c) that it was obtained by collusion. In other words it is open to the party against whom it is offered to avoid its effect on the aforesaid grounds. The onus of proving incompetency, collusion or fraud is on the party who alleges it. This section applies to both criminal and civil proceedings.

7:6 Conclusion

In this chapter you studied the admissibility and use of previous judgments in subsequent proceedings. As indicated in the main lecture you need to understand exactly when is a previous judgment admissible in a future case, the extent of its use and its effect in the subsequent case. Another important element to note in this topic is that the opposite party on the basis of incompetence, fraud or collusion may challenge a previous judgment though admissible.

LECTURE 8

EVIDENCE OF OPINION

(Sections 47 – 53)

8.0 Introduction

In this lecture you are going to study how opinions of persons may be accepted in evidence. At the end of the lecture you should be able to:

- know the circumstances under which opinion evidence is admissible
- understand the rationale for accepting opinion evidence.

8.1 General Rule and Rationale

In the law of evidence opinion means any inference from observed facts. The treatment of evidence of opinion by the law in Tanzania, like in Britain, is based on the presumption that it is possible to draw a distinction between inferences and the facts on which they are based. The general rule is that opinion of witnesses, whether the parties themselves or third persons, as to the existence of facts in issue or relevant facts are inadmissible. This is commonly called the rule against hearsay. Several reasons have been put forward to justify the rule. These have already been discussed in lecture 5.

There are some exceptions to this general rule. In such exceptions the opinion and the grounds on which the opinion is held must be proved by direct oral evidence of the person who hold that opinion on those grounds. There are two broad spheres of evidence of opinion admissible under the TEA. The first category of admissible evidence is that of experts provided for under sections 47, 48 and 53. The second category is the opinion of non-experts. Sections 49-52 cover this. The TEA provides for four types of opinions where no special experties is required.

(a) opinion as to handwriting (s. 49 of TEA).

(b) opinion as to existence of right or custom (section 50 of TEA)

(c) opinion as to usage, tenets, etc (section 51 of the TEA)

(d) opinion on relationships (Section 52 of the TEA)

8.2 Expert Evidence

As long ago as 1553 Founders, J. Said:

"if matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation" (Burkley v. Rice-Thomas (1554), Plowd 118 at p. 124).

Lord President Cooper in **Davie v. Edinburgh Magistrates (1953) SC 34 at p. 40** succinctly stated the functions of expert witnesses when he said:

"Their duty is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence".

The important question is this: when is expert evidence admissible? In short opinion evidence of an expert is only admissible on a matter calling for expertise. According to Lawton L.J. in **R V Turner [1975] Q.B. 834** where triers of fact can form their own opinion without the assistance of an expert the matter in question being within their own experience and knowledge, the opinion evidence of an expert is inadmissible because it is unnecessary. Expert evidence is admissible when the court has to form an opinion upon a point of foreign law, or of science or art or as to the identity of handwriting or finger or other impressions. The opinions of persons skilled in such matters are admissible. Such persons are called experts (Sect. 47 of TEA). In English and American textbooks the words used are "Science, art, trade or skill." Aspects covered under this include the knowledge, evidence or skill of medical men, engineers, artists, surveyors, valuers, accountants, naturalists, mechanics, artisans, mansons, black smiths etc. The foregoing means that the phrase "science and art" should not be construed in a narrow sense.

Another important issue in this aspect is whether or not a witness is an expert within the scope of the section. Who, then, is an expert? In short an expert is a person who has devoted time to study a special branch of learning and therefore is specially skilled in those points on which he is asked to state his opinion. However such study need not have been done at school. In **Gethern s/o Njagwa v. R. (1954) EACA 384** the Court of Appeal stated:

"We think that such special skill is not confined to knowledge acquired academically, but would also include skill acquired by practical experience…"

That is the reason, in **Kimari s/o Mihindi v. R.** (1955) **22 EACA 4**72, where a police officer while testifying in court stated that he had one and a half years' experience on home made weapons and had seen about one hundred such guns his evidence was held to be that of an expert. The court is, however, not bound to accept the opinion of an expert if there is good reason for not doing so but to reject expert evidence without assigning reasons was held in, **de Souza C.D.v. Sharma (1953) 26 K.L.R. 41** to be unjudicial. This matter was also examined in the case of **Hilda Abel V R. [1993] TLR 246(CA)** The appellant was convicted of murder and sentenced to death. At her trial, she raised the defense of insanity. The doctor who examined her reported that she was insane at the time of the alleged murder as she was suffering from defective reasoning due to delusion of thought and imperative hallucination. After analyzing and evaluating the evidence and directing himself on the cautioned statement of the appellant in which she admitted killing the deceased and gave a detailed account of the incident, the Trial Judge held that though the appellant was mentally disturbed at the time, she was sane within the meaning of s 13 of the Penal Code. The appellant appealed. On this point the Court of Appeal of Tanzania stated clearly that courts are not bound to accept medical expert's evidence if there are good reasons for not doing so.

Before a witness gives expert evidence there is the need for the court to satisfy itself, first, that the particular witness is in fact an expert. See the case of **Omari Ahamed v. R [1984] TLR 52 (CA).**

Under normal circumstances the testimony of an expert is likely to carry more weight in so far as the same relates to the issues of the case than that of an ordinary witness. For this reason higher standards of accuracy and objectivity are required when an expert is testifying.

Another serious issue is whether the evidence of an expert amounts to legal proof. The trend in East Africa shows that this would depend on the material evidence involved. The answer is negative when such evidence is based on conjecture. It has been argued that a doctor's opinion as to age based on an examination of a person's height, weight and teeth does not. The courts have expressed a view that medical evidence as to age from its very nature is based upon conjectures and cannot be relied upon to determine with precision the exact age of a person- read the case of **Sayed Hussein v. R.** [1957] **EA 844.** The same position has been held in regard to a hard-writing expert's opinion – read **Hassan Salum v. R (1964) EA 126.** And where there is evidence showing that others also had an opportunity to commit the offence it is necessary, as was said in the case of **R. V. Raphael Alphonse (1957) H.C.D. n. 197,** that there should be some other evidence connecting the accused with the offence other than the testimony of a hand writing expert.

According to section 53 of the TEA whenever the opinion of any living person is relevant the ground on which such opinion is based is also relevant. This means that whenever an expert is giving his evidence in that capacity he should give reasons for holding the particular opinion. In addition the proviso to section 62 (1) of the TEA allows the admission of opinion of experts expressed in treatise commonly offered for sale and the grounds on which such opinion is held by producing such treatise if the author is dead or cannot be called as a witness without delay or unreasonable expense. This provision is different from the position in England. According to English law medical and other treatises are not evidence, whether the author be dead or alive. However the position of the law in Tanzania is the same as that in India (see section 60 of the Indian Evidence Act). In order to be admissible the treatise must be commonly offered for sale. The burden of proving that any particular treatise is commonly offered for sale is upon the person who desires to give such treatise in evidence. However in the case of **Shampal Singh V.,R. (1960) EA 762** the court noted that evidence of this nature must be treated with caution. Some of the reasons for this are the possibility of bias on the

part of the expert; the misunderstanding of the expert opinion and that such evidence is not infallible.

8.3 Non Expert Evidence

The existence of a particular issue and certain circumstances may necessitate the reception of evidence that is not from an expert. The TEA lists four circumstances when a non-expert opinion is admissible.

(i) Opinion on Handwriting (sect. 49)

When the court has to form an opinion as to the person by whom any document w as written or signed the opinion of any person acquainted with the handwriting of the person by whom it is supposed to have been written or signed just it was or was not written or signed by that person, is a relevant fact. Under Section 49(2) a person may be acquainted with the handwriting of a person in three ways:

(a) when he has seen that person write, or

(b) when he has received communication purporting to be written by that person in answer to documents purporting to be written by himself, although neither of them saw each other write, or

(c) when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him.

It is important to note that the testimony of a witness who speaks from his personal knowledge is more satisfactory and convincing than the testimony of another who speaks on matters that lie in opinion only. The value of such evidence depends not merely upon the fact that the witness has seen the party write; or has corresponded with him, but also upon the extent of the opportunities he has had of becoming familiar with the handwriting in question, and upon his own habits of accurate observation.

In the case of **Nicholas Alfred Kiyabo v Republic [1987] TLR 59 (HC)** for example the appellant, an office manager with the National Housing Corporation, reserved room No. 527 in New Africa Hotel for some expatriate officers who were to be accommodated and given

breakfast only, paid by the corporation. The appellant obtained drinks on various dates in January 1985 and signed for them in invoices debiting room No. 527. The waiters said they served the appellant with drinks. The appellant denied the allegation saying that he did not order or receive drinks, nor did he sign invoices. The trial court convicted and sentenced him to 5 years imprisonment. In regard to the signatures in the invoices that were tendered as exhibits the High court accepted their evidence on the ground that the witnesses saw the appellant signing on every occasion the drinks were supplied to him. The appeal was dismissed.

(ii) Opinion as to Right or Custom etc (Section 50 of TEA)

When the court has to form on opinion as to the existence of general custom or rights the opinion as to the existence of such custom or right of persons who would be likely to know of its existence if it existed is relevant. The expression 'general custom or right' has been explained in ss (2). Right or custom includes all kinds of rights or custom e.g. rights to pathway, watercourse, local custom, trade customs etc. The proper test under this section is whether the person giving the opinion was likely to have had reliable knowledge – which may be personal or otherwise. The ground on which such knowledge is based is ver important.

Section 50 (2) excludes private rights from the operation of the section. Opinion or reputation evidence is not admissible to prove such rights, they must be proved by facts.

(iii) Opinion as to usages, tenets etc. (Section 51 of TEA)

Section 51 provided that the opinions of persons having special means of knowledge are admissible as to the usages and tenets of any body of men or family; the constitution and government of any religious or charitable foundation; and the meaning of words or terms used in particular districts or particular classes of people. The admissible opinion must be that of persons having special means of knowledge i.e. experienced and competent persons. What is required is that the witness should have opportunities for acquiring knowledge of a usage or custom and that he acquired the necessary knowledge.

However section 51 must be read together with section 53 of the TEA. Section 53 refers to the opinion of living witness which may be based on the statements of dead persons or other source. The section includes cases to which section 34 (d) could not be applied.

(iv) Opinion on Relationships (Section 52 of TEA)

When the court has to form an opinion as to the relationship of one person to another the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise has special knowledge on the subject, is admissible. In order to admit evidence under this section three conditions must be fulfilled:-

(a) the person must be proved to have special knowledge;
(b) the opinion is to be expressed by conduct
(c) the opinion which is relevant must be the one as to the existence of relationship.

The proviso to section 52 applies only to cases under the Law of Marriage Act of 1971. The purpose of this is to require strict proof on matters related to marriage. In such a case mere opinion expressed by conduct will not be sufficient in any civil, matrimonial or criminal matters under the Law of Marriage Act. Strict proof by means of a witness who was present is necessary.

8:4 Conclusion

In this chapter you studied on the law relating to expert and non-expert evidence. As noted in the lecture this is opinion evidence. What is important to remember is the general rule that opinion evidence is not admissible. The admission of evidence opinion under sections 47 – 53 of the TEA is, therefore, an exception to this general rule. On that ground it is emphasized that only where the law allows opinion evidence should such evidence be admitted in any proceeding. Students should therefore strive to know situations in which opinion evidence is admissible. As indicated in the previous chapters case law is of great assistance to understand this topic.

LECTURE 9

EVIDENCE OF CHARACTER

(Sections 54 - 57 of TEA)

9.0 Introduction

Generally, evidence that the accused person is of bad character is inadmissible to prove a particular offence charged. However in certain situations bad character of the accused may be admitted in evidence. This lecture is intended to explore the evidence of character and how the same has been provided in the Tea. At the end of the lecture you should be able:

- To know what is evidence of character
- To understand circumstances under which evidence of character is admissible in evidence.

9.1 Character in General

The term character means the peculiar qualities impressed by nature or habit of a person which distinguish him from others. The term "character" is briefly explained in Section 57 of the TEA. The explanation is very short and not exhaustive. The word character includes "reputation" and "disposition" In England such evidence is confined to reputation only. The term "reputation" simply means the general credit that a man has obtained in public opinion but does not cover personal experience and observation or personal opinion. "Disposition" covers the inherent qualities of a person or the sum of his traits.

The qualities that a person is supposed to possess constitute his estimated character or reputation. It has to be born in mind that what the law admits as character evidence is not **real** character i.e. particular traits but **reputed** character i.e. the opinion formed by others of a person which is known as reputation. In any suit or proceeding the issue of character may touch a party or a witness. The relevance of the character of a witness is covered under section 155 of the TEA but it suffices here to note that the character of a witness is admissible only in so far as it affects the credibility of his testimony. In addition in a charge for rape and other sexual offences evidence of general immoral character of the prosecutrix is

admissible under section 164(1) (d) and section 56 of the TEA. In this lecture only the evidence of character of a party is discussed.

9.2 Character in Civil Cases

It is a general principle that evidence of character is irrelevant in civil suits except in two situations:

(i) where the character of a party appears from relevant facts e.g. where the character of a party is in issue (section 54(1) of TEA), and;

(ii) where the character of a party affects the amount of damages Section 54(2) of the TEA).

Practical examples include defamation cases, petitions for damages for adultery, seduction etc. In the case of Scott **v Sampson (1882) 8 QBD 491** the court held that the evidence which might be adduced in mitigation of damages for defamation must be confined to the plaintiff's reputation and might not consist of rumours or testimony concerning specific acts. The court added that the evidence of reputation must relate to the segment (conduct) of the plaintiff's life to which the defamation relates.

9.3 Character in Criminal Cases

(a) Good character of Accused

In criminal cases the fact that the accused is of good character is relevant (section 55) read **Yowano Settumba v. R. [1957] EA 35.** However the enquiry into the accused's good character must be confined, as a general rule, to his general character not on particular facts.

(b) Bad character of Accused

As a general rule the fact that the accused has bad character is irrelevant i.e. inadmissible. Where, for example, the accused is cross-examining a witness and in the course of this begins to bring his own bad character he should immediately be stopped by the court and warned of the danger of pursuing this line of cross-examination (see **Alli bin Hassan V.R. [1960] EA 71)**. The rationale for not accepting accused's bad character in criminal cases has been explained variably:

(i) the effect of such evidence may unduly prejudice the court;

(ii) it may raise many collateral issues which may be detracting and time consuming.

(iii) Such evidence may surprise the accused and deny him the opportunity to make a good defence.

(iv) In some cases it may encourage laxity on the part of the police investigators in that they may concentrate on the bad record of the accused instead of investigating the offence in question.

This general rule has its exceptions. Evidence of bad character of the accused may be admissible:

(i) where evidence has been given that the accused is of good character (section 56 (1) of TEA)

(ii) where the bad character of any person is itself a fact in issue (section 56(2) of the TEA)

Where the character of the accused is a fact in issue or relevant fact then such evidence may be admitted under sections 9, 10,11,13 16 and 17. The case of **John Makindi v.R. (1961) EA 327** is an example where evidence was admitted under Section 9 & 10 of the TEA showing previous and subsequent conduct. In this case the accused was convicted for manslaughter of a boy by beating and evidence of previous beatings was held to be admissible under Section 9 (TEA) in explanation and substantiation of the cause of death that had been blows acting on top of old blood clots caused by previous hemorrhages. The same evidence was used to show motive under Section 10 of TEA which the accused had far revenge on the deceased.

Another possibility is the admission of bad character to show the state of mind of the accused under sections 16 and 17 of the TEA. In this case intention, knowledge, good faith, ill-will, rashness are relevant when the existence of any such state of mind, body or feeling is in issue or relevant. In **Mohamed Saeed Akrabi v. R. (1956) 23 EACA 512** the accused was charged with the use of criminal force with intent to outrage modesty in respect of two boys.

Evidence that on previous occasions the accused had committed similar acts in respect of other boys was admitted under Sections 16 & 17 to show the intention of the accused and to rebut the defence of accident or mistake.

The position of the law in Zanzibar has been slightly modified – read Section 54 of the Zanzibar Evidence Decree.

Section 56(4) of the TEA provides for the questioning of the accused in criminal cases. Where the accused is giving evidence in his/her defense he /she shall not be asked and if asked shall not be required to answer any question tending to show:

(i) that he/she has committed or has been charged or has been convicted of any offence; or

(ii) that he is of bad character.

This general rule has its exceptions. In some cases the accused may be asked on previous offences, charges or convictions and, is compelled to answer, if:-

(a) such offences, charges or convictions are admissible as evidence to show that he/she is guilty of the offence charged; or

(b) the accused has questioned prosecution establishing his good character or the nature of his/her defense case challenges the good character of the complaint or his/her witnesses, or

(c) When the accused has given evidence against any of his co-accused in the case.

For further elaboration of this section especially sub-section 56(4)(b) read the cases of **Rivers Atherstone Royston V. R. (1953) 20 EACA 147** and **Abdallah Katwe V. Uganda [1964] EA 477.**

9.4 Previous Convictions

According to Section 56(3) a previous conviction is evidence of bad character. For this reason its admissibility, apart from the provisions of the proviso to Section 56(1), depends on the general rules relating to the admissibility of bad character. Under the said proviso

conviction becomes relevant after conviction for the purpose of affecting sentence. In the case of **R v. Kakimala (1967**) **HCD n. 127** accused was convicted of theft. After the close of the evidence, but before judgment was entered, the court investigated accused's character. The magistrate called accused's father who said the accused stole form time to time and had been in prison eight times. Accused denied this, but was not give a further opportunity for rebuttal or cross-examination. The father had sent his son away fro home more that thirty years earlier. On appeal the High Court held that an accused character must not be put into evidence until after a judgment of conviction has been entered. Such evidence is highly prejudicial and proves nothing as to the offence charged. Conviction was quashed.

9:5 Conclusion

Character evidence is somehow tricky to use. Sections 52-57 of the TEA elaborate situations when the character of a person may be admissible in evidence. Students have to carefully read the said provisions and case law interpreting the same in order to grasp how character evidence works.

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THE OPEN UNIVERSITY OF TANZANIA

FACULTY OF LAW

OLW 202

EVIDENCE

PART TWO

PRODUCTION, PROOF AND EFFECT OF EVIDENCE

(Sections 4-6 and 58-126)

INTRODUCTION

This is the second part in a series of lectures on the law of evidence. Part one, which had nine lectures, dealt basically on the relevancy of facts covered by s sections 7-57 of the TEA. This part is focused on the production, proof and effect of evidence. It contains about five lectures. These are intended to cover the following topics namely presumptions, facts requiring no proof, documentary evidence, burden of proof and estoppel. Sections 4-6 and 58-126 of the Evidence Act cover these topics. You will note that the lecture on documentary evidence is relatively long and could, for convenience, be split into two but for the purpose of clarity that was not done. Students will have to go into more details themselves. We hope that this part of the three volume series will further enrich your knowledge on the law of evidence.

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LECTURE I
PRESUMPTIONS

1.0. Introduction

In this lecture you are going to study the law relating to presumptions. Presumptions often accord with the preponderance of probability and are, thus simply, shorter ways of expressing conclusions that can be independently reached as a matter of common sense or at least the conclusion is likely to be true that it ought to be reached in favour of one party unless the other disproves it. As student you are expected to know how presumptions operate.

At the end of this lecture you should be able:

- To know the meaning and rationale of presumptions
- To understand how they are used in the law of evidence.

1.1. The Definition and Rationale of Presumptions

It is not simple to offer an accurate definition of the term "presumption." The term has been derived from Latin word "praesumere." which means to assume. Best W.M., in his book **The Principles of the Law of Evidence** (1911) defines the term 'presumption' to mean:

"an inference, affirmative or dis-affirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning form something proved or taken for granted."

He adds that the term "presumptive evidence" is used to designate an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. In other words a presumption is a legal devise by which the courts are entitled to pronounce on an issue notwithstanding that there is no evidence or sufficient evidence on it. Put differently a presumption is a rule of law, statutory or judicial, by which a finding of a basic fact gives rise to the existence of

presumed fact until the presumption is rebutted. Where a presumption operates a certain conclusion may or must be drawn by the court in the absence of evidence in rebuttal. The effect of this is to assist a party bearing a burden of proof in the particular case. The degree of assistance, however, varies from presumption to presumption.

Normally, presumptions are drawn form the course of nature, for example: that day follows night, death ensues from a mortal wound etc, and from the course of human affairs e.g. from familiarity with ordinary course of human action, from usages in society, transactions of business, etc.

The basic question is this: what is the rationale of having presumptions? A number of reasons have been put forward. Some of the suggested reasons include the following:

- To shorten or save time at the trial;
- At times it is easier for one party to prove a fact than his opponent to prove the contrary e.g. where the knowledge of the fact is wholly with one party;
- Presumptions are useful in settling a problem where the ordinary rules of evidence lead to an impasse;
- Pressure of society has moulded some presumptions e.g. legitimacy of children born in wedlock;
- Presumptions often operate to promote convenience e.g. presumption of genuineness of laws and reports of judgments.

1. 2 Types of Presumptions

Presumptions are used in evidence. It is "presumption evidence" and for this reason it has a restricted legal significance. The TEA (Sections 4, 5 and 6) provides for three types of presumptions. The TEA provides for "permissible inferences" in section 4, which refer to presumptions of fact [**praesumptiones hominis**]. Section 5 provides for rebuttable presumptions of law [**praesumptiones iuris sed non de iure**] and finally section 6 provides for irrebutable presumptions or conclusive presumptions [**praesumptiones iuris et de iure**].

1.3 P**resumptions of Fact/Natural Presumptions/Provisional Presumptions (sect. 4 of tea)**

What are presumptions of fact? These are inferences, which may be drawn from facts. They are inferences that are naturally and logically drawn from experience and observation of the course of nature, the conceptions of a human mind, the usages and habits of the society. Section 4 of the TEA states that wherever it is provided by this act or any other law that the court may presume a fact, it may either regard such fact as proved unless and until it is disproved or may call for proof of it. In such a case a party against whom they operate bears the provisional or tactical burden of disproving the presumed fact. At this juncture it is important to note four things:

(i) Presumptions of fact may be provided in the TEA or any other written law;

(ii) The court has the discretion to make a particular inference and to regard such inferred fact as proved unless and until disproved or may call for proof of it;

(iii) The consequence of drawing presumptions is to cast on the opponent or opposite party the duty of producing contrary evidence; and,

(iv) A party to a suit or proceeding may rebut any such inference i.e. such presumptions are rebuttable.

Under Section 4 of TEA, for example, it is open to the court, upon proof of a marriage on a certain date, either to regard as proved the subsistence of the marriage on a subsequent date unless and until it is disproved or else to call for proof of it.

An important question, to be asked at this juncture, is: What are the sources of presumptions? There are a number of major sources of presumptions.

(a) General presumptions of fact. Section 122 of the TEA allows the court to make certain presumptions is regard to:
    (i) the common course of natural events;
    (ii) common course of human conduct and

(iii) common course of public and private business.

The most important rule to remember in this section is that the presumptions must be based upon facts and not upon inferences or upon other presumptions. The fact presumed should have direct relation with the fact from which the presumption is drawn. Under section 122 of the TEA courts of justice are expected to use their own common sense and experience in judging the effect of particular facts and they are not bound by any technical rules.

(b) Presumptions on certified copies of foreign judicial records (Sect.95 TEA). Under this provision a court may presume the genuineness and accuracy of any document purporting to be a certified copy of any judicial record of any foreign country if such copy is duly certified in the manner and according to the rules in use in the country for the certification of copies of judicial records.

(c) Presumptions on books, maps and charts (Sect. 96 of TEA). The presumption in this section concerns the publication, authorship, date of publication etc. of such books, maps or charts but not accuracy. In addition the section is applicable where information on matters of public or general interest is sought.

(d) Presumptions relating to tele-communication messages (Sect.97 TEA). The presumption under this section is based on another presumption of regularity of acts in ordinary life. A fact may be presumed from the regular course of business (see section 122 of the TEA). However the presumption under this section is only with regard to the message transmitted i.e. that a message forwarded to the addressee from the telegram office by the relevant postal officers correspond exactly with the massage handed to them for transmission. It has to be remembered that the court is not allowed to make any presumption on the identity of the sender.

(e) Presumptions as to documents twenty years old (s. 99 of TEA). Under this section a document that is not less than twenty years is presumed genuine. However the presumption does not extend to content. The court simply presumes that it was written and signed by the person whose signature the document purports to bear or in whose handwriting the document purports to be or that it has been duly attested and executed as it purports to be. The provision does away with strict rules of proof

required in documents when such documents reach an age of twenty years. In Uganda and India the time set in this presumption is thirty years. The duration in Kenya is the same as in Tanzania. In the case of **Saleh V Hussein [1957] E.A. 55 (CA)** public records over thirty years old produced from proper custody were admitted in evidence under this rule although section 90 of the Indian Evidence Act [section 99 of TEA] was not referred to.

(f) Presumptions on the genuineness of the report and signature of a government analyst (see section 203 of the Criminal Procedure Act (CPA)); a finger print expert (see Sect. 204 of CPA); a handwriting expert (see Sect.205 of CPA) and a medical witness (see sections 240 and 291 of the CPA).

(g) Presumption of guilt knowledge

Where an accused is found in possession of goods which have been recently stolen, an explanation is called for and if none is forthcoming the court is entitled, but not compelled, to infer guilty knowledge and to find the accused guilty of theft or receiving stolen property. In addition where an explanation is given which the court is convinced is untrue then the court is, as well, entitled to convict. This presumption is closely linked with the doctrine of recent possession in criminal law. Mnzavas J in **Thomas Mwanjoka V. R [1975] LRT n. 30** laid down the following rules on the operation of the doctrine of recent possession: (i) In the application of the doctrine of recent possession there is no rule as to what period of time is sufficient. The period varies according to the nature of the article stolen. (ii) When the doctrine of recent possession is applied the onus on the accused is to give an explanation as to how he came to be in possession of the stolen goods. However, the explanation need not be reasonable and convincing.

A practical example is found in the case of **Bugi Rioba V R and Mtatiro Waiyaga V R (1967) HCD no. 68.** In this case the accused named Bugi was convicted of burglary and theft and Mtatiro of receiving of receiving stolen property. The testimony of an accomplice was admitted as against both of the accused. Also admitted into evidence was the testimony of a policeman that Bugi's wife had told him that part of the stolen property had been brought to the house by her husband. The magistrate also considered, as against Bugi, the

plea of guilty of a co-accused in which he admitted committing the crime together with Bugi. The accused Mtatiro testified that the stolen property found at his home had been brought to him by friends for safekeeping and he denied knowing that it was stolen property. Apart from doubting the evidence of the accomplice for lack of corroboration the court also refused to admit evidence relating to what Bugi's wife stated on account of being hearsay. In addition, the statement of the co-accused was rejected for failure to call him to testify. On the presumption arising from the possession of recently stolen property the court stated that the same was rebutted by exculpatory testimony of the accused which was reasonably true.

1.4 Rebuttable Presumptions of Law/Evidential Presumptions/ Persuasive Presumptions/ Artificial Presumptions

Rebuttable presumptions of law, variably referred to as above mentioned, are inferences which the law requires to be drawn from given facts and which are conclusive until disproved by evidence to the contrary e.g. the presumption of innocence of an accused person which makes it necessary for the prosecutor to prove his guilt. Section 5 of the TEA provides, broadly, for rebuttable presumptions of law. It says that wherever it is directed by this Act or any other written law that the court shall presume a fact it shall regard such fact as proved, unless and until it is disproved. You need to remember three key things in respect to rebuttable presumptions of law:

- Such presumptions must be directed by the TEA or any other written law;
- Once there is such provision the court is bound to make the presumption;
- The court is required to regard such presumption as proved unless and until the contrary is proved.

Rebuttable presumptions of law differ from presumptions of fact in the following respects:

- that rebuttable presumptions of law derive their force from law while presumptions of fact derive their force from common sense and logic;
- that rebuttable presumptions of law apply to a class the conditions of which are fixed and uniform while presumptions of fact apply to individual cases the conditions of which are fluctuating;

Where a rebuttable presumption of law applies, on a proof or admission of a fact, referred to as primary or basic fact, and in the absence of further evidence, another fact, referred to as presumed fact must be presumed. It must be clear that a party relying on the presumption bears the burden of establishing the basic fact. In case such party has adduced sufficient evidence on the basic fact the opposite party has the obligation to disprove it.

In the case of Felix **Rutazengelera v Co-operative and Rural Development Bank [1996] TLR 382 (CA)** the appellant had instituted suit against the respondent bank in the High Court at Dar-es-Salaam claiming damages as a result of negligence by the respondent bank in opening a deposit account as instructed by the appellant. The High Court dismissed the suit and the appellant accordingly filed an appeal contending that the trial Judge had erred in holding that the respondent was not negligent in failing to open the deposit account. It appeared from the evidence that the appellant was a customer of the respondent bank and had deposited with the bank a personal cheque in an amount of Sh. 14 million drawn on his current account with another bank. The money was part of a decretal sum paid to him by the High Court as a result of a suit in another matter. One of the judgment debtors in that matter appealed to the Court of Appeal against the decision and on 29 December 1987, on the very day on which the appellant deposited the amount into his current account, an application for stay of execution was filed in respect of the pending appeal in that matter. The appellant instructed the respondent bank to transfer the amount into a deposit account durable for a month but the respondent failed to comply with this instruction. On 20 January 1988 the High Court made an order that pending the application for stay of execution, monies were to remain where they were and the status quo was to be maintained. The respondent bank relied in part on a ledger card that made reference to a block on the funds in terms of a court order dated 6 January 1988. Counsel for the appellant submitted that the presumption under section 77 of the Evidence Act, 1967, applied only to matters in the ordinary course of banking business and that in the present case the presumption did not arise because it was not part of a banker's business to receive court orders. In respect of the issue on presumptions the Court of Appeal held that while it was true that it was not part of a banker's business to receive any court orders, it was certainly the law that the account of a bank's customer was

liable to court attachment by garnishee order and the law in Tanzania was similar to that applicable in England. The presumption concerning the relevant entries was rebutted by two important factors, viz the court record produced at the trial disclosed no court order prior to that of 20 January. Neither was there any trace of either the office file or the purported order mentioned in the bank's ledger card. In the light of the available evidence there could be no other conclusion than that the respondent bank received no court order prior to the order made on 20 January.

Whenever reliance is placed on a rebuttable presumption of law two legal rules are involved: First, there is what may be called the "rule of presumption" according to which the presumed fact must be found to exist until evidence tending to disprove it is adduced. Second, there is a rule that prescribes the amount of rebutting evidence required. Such evidence varies from presumption to presumption. For example proof "beyond reasonable doubt" is required, at common law, to rebut a presumption of legitimacy of a child who is born during the continuance of a valid marriage or within two hundred and eighty days after the dissolution of such marriage (Sect. 121 of TEA). The standard of "balance of probabilities" is required for a person who has been absent or not heard of for five years by those who would be likely to hear from him (Section 117 of TEA). These standards are, however, established in case law. Some examples of such presumptions include the following:

(a) Presumptions in the TEA

(1) Presumption of Continuance of Life and Death

These are provided under sections 116 and 117 of the TEA. Under section 116 where the issue is whether someone is alive or dead but was alive within thirty years and nothing whatsoever appears to suggest the probability of his being dead the court is bound to regard the fact of his still being alive as proved. However under section 117 if a person has not been heard of for seven years there is a presumption of law that he is dead, and the burden of proving that he is alive is shifted to the one so affirming. This presumption does not extend to the date of death. In the case of **Re Phene's Trusts (1870) 5 Ch. App. 139** Giffard L.J. said that the law presumes a person who has not been heard of for seven years to be dead,

but in the absence of special circumstances it draws no presumption from the fact as to the particular period at which he died. See also the cases of **Chard V Chard [1955] 3 All. E. R. 721 and Butler V. Mutual life Insurance Co. 225 N. Y. 197, 203 N E 758.**

(2) The Presumption of Legitimacy of a Child on Proof of Birth in Wedlock (Sect. 121 of TEA).

On the proof or admission of the basic fact that a child was born or conceived during lawful wedlock it is presumed, in the absence of sufficient evidence to the contrary, that the child is legitimate. The presumption may be rebutted, for example, by direct evidence showing that the parties to the marriage had no access to each other at any time when the child could have been begotten or that the husband was impotent, or any other scenario showing the impossibility for the parties begetting a child. Alternatively, it may be rebutted by presenting circumstantial evidence such as the wife's cohabitation with another man in the relevant period of time before the birth of the child etc. See the cases of **Banbury Peerage case (1811) 1 Sim & St 153; Legge V Edmonds (1855) 25 L J Ch. 125; Cope V Cope (1833) 1 Mood & R 269** and **Masuka V Sigonjwe [1971] HCD n. 92.**

(3) Presumptions as to Documents

The presumptions as to documents provided for in the sections mentioned below are not of course exhaustive and in appropriate cases other presumptions may be raised under general provisions of sections 122 the terms of which are permissive.

(i) Presumptions as to genuineness of certified copies (s.88 TEA). It is important to remember that the section does not apply to original documents but only to certificates, certified copies or other documents that meet the requirements set forth in the provision. The presumption set out in this section has two parts: first, there is a presumption of the genuineness of the document itself and second, the officer who purportedly signed the document or certified it held the official character that he claims in the document

(ii) Presumptions as to documents produced as record of evidence (Sect. 89 TEA). Under this provision the court is required to presume that the document is genuine, that any

statement as to the circumstances in which it was taken, purporting to be made by the person signing it, are true and that such evidence was duly taken. However it has to be born in mind that this presumption does not deal with the questions of admissibility and relevancy. See the opinion of the Court of Appeal of East Africa on this point in **Antoine Ernesta V R [1962] E.A. 505 (CA) and Magoti Matofali V R (1953) 20 EACA 232.**

(iii) Presumptions as to gazettes, newspapers, private Acts of the National Assembly and other documents (Section 90 TEA). This section declares government gazettes or newspapers or journals or copies of private acts of parliament printed by the Government Printer to be prima facie proof of their genuineness. The document must be produced from proper custody i.e. it must come from custody which is natural and reasonable under the circumstances.

(iv) Presumptions as to accuracy of maps or plans made by authority of the government (Section 91 TEA). This provision has to be read together with section 38 of the TEA. The general ground of the presumption is that the maps or plan contain the results of enquiries made by competent officers with publicity concerning matters in which the public are interested. The 'accuracy' aspect is focussed on the accuracy as to drawing and correctness of the, say, measurements but does not refer to the laying down of boundaries between estates according to the rights of the parties, names of proprietors etc. The cases of **Mohamed Rashidi V R (1951) 18 EACA 298 and Magoti Matofali V R (1953) 20 EACA 232** amply elaborate this point.

(v) Presumption as to the genuineness of collections of laws and reports of decision (Section 92 TEA). This provision has to be read together with section 40 of the TEA. It applies to both statutes and judicial decisions. The section dispenses with the need to prove the genuineness of officially printed books of any country containing laws and reports of judicial decisions.

(vi) Presumption as to proper execution and authentication of private documents executed outside the United Republic (Section 93 of TEA).

(vii) Presumption as to due execution and authentication of a power of attorney (Section 94 of TEA).

(viii) Presumption as to due execution of documents not produced after notice to produce (Sect. 98 of TEA).

(ix) Presumption on the genuineness of documents that are 20 years old (sect. 99 of the TEA)

(b) <u>Presumptions in the Penal Code</u>

(i) Presumption of sanity (s.12 of the Penal Code).Everybody is presumed to be sane until the contrary is proved. This presumption refers to the rule that the accused bears the burden of proving insanity when he raises it as a defence.

(ii) Presumption that a male person under the age of 12 years is incapable of having sexual intercourse (Section 15(2) of the Penal Code).

(iii) A person under the age of 12 years is presumed to have no means rea (section 15(2) of the PC).

(c) **<u>Presumptions in the Law of Marriage Act</u>**

The Presumption of Marriage Arising From Cohabitation (section 160(1) of the Law of Marriage Act of 1971)

When it is proved that a man and woman have lived together for over two years or upwards in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.

In the Case of **John Kirakwe V Iddi Siko [1989] TLR 215 (HC)** Justice Mwalusanya elaborated the conditions for the application of this presumption. He said the fact that the respondent's son (in this case) and the appellant's daughter had lived together for over two years as husband and wife raised the presumption of marriage which the respondent had failed to rebut. He added that in order to constitute a presumption of marriage three elements are necessary: first, that the parties must have cohabited for over two years; second, that the

parties have acquired the reputation of husband and wife; and finally, that there was no formal marriage ceremony between said couple.

(d) Presumptions under the Constitution

Presumption of Innocence (Art. 13(6) (b)

Everybody is presumed innocent until he is proved guilty. The presumption of innocence is a convenient abbreviation of the rule that the prosecution bears the legal burden of proving any fact essential to their case.

There are other presumptions that are found in other legislation. You are encouraged to find them out and study how they are used in law.

1.5 Irrebuttable Presumptions/Conclusive Presumptions

The Concise Law Dictionary by Osborn defines irrebuttable presumptions to be:
"… absolute inferences established by law and evidence is not admissible to contradict them… irrebutable presumptions are more properly called rules of law…"

As Osborn has hinted, some authorities argue that it is a misnomer to call them 'presumptions' because they are rules of substantive law expressed in presumptive form. As the definition indicates such presumptions are established by law and the court has duty to take them as established law.

Where irrebuttable presumption of law applies, on the proof or admission of a basic fact, another fact must be presumed and the party against whom the presumption operates is barred from adducing any evidence in rebuttal. In fact such presumptions amount to no more than rules of substantive law expressed in a language pertaining to presumptions.
Examples of such presumptions include the following:

(i) A final judgement, order or decree of any court after the expiry of the time limited for appeal or decision of the appeal is conclusive proof of what it has decided, declared order [based on sections 43 and 44A of the TEA.]

(ii) Presumption of incapacity to commit an offence for a person who is under ten years - see section 15(1) of the Penal Code.

(iii) The presumption that every man knows the law except where knowledge of the law is on element of the offence – see section 8 of the Penal Code.

There are other examples of irrebuttable presumptions of law and students are encouraged to identify and study them.

1.6 Conclusion

As mentioned above presumptions are very important devices in the law of evidence. Had they not existed then parties to suits or proceeding would have had to prove everything in the case. Clearly this would have led not only to very long and cumbersome proceedings but also increased the duty, on the parties, to prove every aspect of the case. The use of presumptions has simplified the work of such parties and the court. Presumptions, therefore, play a very key role in the administration of justice in court.

LECTURE TWO

FACTS REQUIRING NO PROOF

2.0 Introduction

It is normally not practicable to prove everything in any one case. If that were to be the requirement then each case would have involved too many issues and would, in addition, have needed a very long time to be disposed. In view of this the law takes certain matters for granted and, as such, therefore no evidence is required to prove them. In such cases the court is permitted to take judicial notice of such matters.

This lecture is intended to explore facts that require no specific proof. At the end of the lecture you should be able:

- To explain what facts need no specific proof.
- To know how such facts are used in evidence.

2.1. The Meaning of Judicial Notice

The general rule is that all facts in issue or relevant facts in a given case must be proved by evidence i.e. by testimony, documents and things. In consequence the court cannot act on material which the parties have not had the opportunity of rebutting or qualifying whether or not that material is obtained privately, see **Reynolds v Llanelly Associated Tinplace Co. Ltd. [1948] All E.R. 140.** However certain facts are beyond serious dispute, so notorious or of such common knowledge that they require no proof and are open to no evidence in rebuttal. Examples include the fact that the gestation period of human beings is nine months, that Mount Kilimanjaro is in Tanzania etc. It is in this context that common law has developed certain exceptions to the general rule. The main exception was stated by Isaacs, J., in the case of **Holland v. Jones (1917) 23 C.L.R. 149** at p.153 in the following words:

"Whenever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court "notices" it, either simpliciter or if it is at once satisfied of the fact without more or after such information and investigation as it considers

reliable and necessary in order to eliminate any reasonable doubt."

In short judicial notice is the cognisance taken by the court itself of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary. In common law a wide variety of facts are taken into consideration without proof:

- The court may take for granted the English language so far as the ordinary meaning of generally used words is concerned but not technical ones.
- The ordinary process of simple mathematical and syllogistic reasoning and may draw inferences as to the causes and effects of established facts;
- Facts which have been formerly been admitted;
- Where the basic facts of presumptions are proved;
- The operation of estoppels;
- The court may take into account ordinary data of day to day living and experience in ordinary course of events and the habit of mankind.

The important question is this: what is the purpose of taking judicial notice in such cases? Experts have advanced three reasons for accepting this rule. First, it is intended to save time in the hearing of cases. Second, it saves costs in the proof of facts which could often be difficult without it. Third, it avoids a diversity of judicial findings of fact.

2.2. Judicial Notice in the TEA

The TEA has two main exceptions to the general rule that all facts in issue or relevant facts must be proved by evidence.

(i) facts judicially noticeable section – Sections 58 and 59 of the TEA.

(ii) Facts admitted by the parties to the proceedings – sect. 60 of the TEA.

(a) Facts Judicially Noticeable (Sect. 58 and 59 of the TEA)

Section 58 of the TEA clearly states that no fact of which the court shall take judicial notice need to be proved. This rule is based on the ground that there are many facts of public and universal nature that are so well known that the courts have to take judicial notice of them

without any further proof. Generally matters directed by the statute to be judicially noticed or which have been so noticed by a well established practice or precedents of the courts must be recognized by the judges but beyond this they have a wide discretion and may notice much which they cannot be required to notice. For example, laws passed by the parliament, official seals and signatures, the meaning of ordinary words, division of time, weights and measures, facts regularly recurring in ordinary course of nature of business etc. fall within this rule. The matters noticeable may include facts which are in issue or relevant to the issue as well as contents of documents and their methods of proof. However the fact that judicial notice is taken of a fact merely dispenses with proof but it is not conclusive and a party is not prevented form disputing its correctness by offering evidence.

The list of facts, which the court is permitted to take judicial notice, is given in section 59 of the TEA. However the list provided in the section, as already hinted above, is not exhaustive but inclusive i.e. courts are not prohibited form taking such notice on matters not contained in the section. For example in the case of **Amiri Rashidi V R [1968] HCD n. 302** the accused was convicted of selling native liquor without a permit [Local Liquor Ordinance, Cap 77 ss 32 & 51]. Some of his customers testified that he sold them some 'pombe'. The accused himself testified that the pombe was preserved in a barrel to be sold but denied that he had sold any of it. Accused contended, **inter alia**, that there was no certainty as to what was sold since the charge sheet referred to 'mbege'. In this case the court was satisfied that evidence available in court was sufficient to identify what was being sold and the court took judicial notice of the fact that 'mbege' is pombe brewed from bananas. See also the case of **R.v. Saleh Mohamed (1953) 20 EACA 144.** In each case the most important point is that such facts must be sufficiently notorious to warrant recognition. The list of facts that the court is required to take judicial notice under Section 59(1) of TEA includes following:

(a) all written laws, rules, regulations, proclamations, orders or notices having force of law now or heretofore in force or hereafter to be in force, in any part of the United Republic. For example in the case of **Phurman Singh V. R. [1951] 1 T.L. R. (R) 345** the court took judicial notice of a Government Notice issued under the Defence (Controlled Produce) Regulations of 1946. In **Saleh Mohamed V. R. (1953) 20**

EACA 141 the court added that the correct interpretation of section 57(i) of the Indian Evidence Act [section 59(i) of the TEA] is that the court must take judicial notice of all Ordinances and Regulations in the country. See also the case of **Haji bin Khamisi v R [1969] HCD n. 119.**

(b) the existence and title of societies or other bodies the registration of which has been notified in the gazette. Read the case of **Anage Temu V R [1967] HCD n. 404.**

(c) the course of the proceedings of the Parliament.

(d) all seals of the courts of the United Republic duly established and notaries public and all seals which any person is authorized to sue by any written law.

(e) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of the United Republic, if the fact of their appointment to such office is noticed in the gazette.

(f) The existence, title and national flag of every state or sovereign recognized by the United Republic.

(g) The division of time, the geographical divisions of the world, and public festivals, feasts and holidays notified in the Gazette. In the case of **Commissioner of Customs V S. K Panachand [1961] E.A. 303** the court took judicial notice of the distance between Nairobi and the Hague.

(h) The commencement, continuance and termination of hostilities between the United Republic and any state or body of persons. In an English case of **R V Botrill ex p. Keuchenmeinster [1947] 1 K. B. 41** the question was whether an applicant for a writ of **habeus corpus** was an alien enemy, the Court of Appeal of Britain took judicial notice of the fact that the country was still at war with Germany accepting as conclusive a certificate of the Foreign Secretary to this effect.

(i) The names of members and offices of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of this process, and of all advocates and other persons authorized by law to appear or act before it.

The reference of Section 59(1)(a) on all "written laws or rules… having the force of law…" has been a subject of discussion in East Africa. It has been argued that the subsection deals with the law in force in Tanzania and does not cover general foreign law proof of which is

necessary – see **Land Officer v. Motor Mart Exchange [1956] 2 TLR 295.** In addition the term "law" includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in Tanzania.

Subsection (2) of section 59 gives the court the discretion, in matters of public nature, literature, and science or art to resort for its aid to appropriate books or documents of reference. The issue that may arise in this provision is whether the court should take judicial notice of all facts mentioned in all such books or documents. The scope of the sub-section was considered in the case of **Sharmpal Singh v. R [1960] EA 762** where the court adopted Sarkar's statement saying:

"…But obviously, it cannot be meant that the court is to take judicial notice of all facts mentioned in books of public history, literature etc. only books of accepted or recognized authority may be resorted to and for obtaining information regarding only undisputed and notorious facts..."

What is important to understand is that Section 59 is not intended to make books and documents of reference themselves evidence. The meaning, in this provision, is that the court may use books of reference in appraising the evidence before it. The court can dispense with evidence only of what may be regarded as notorious facts of public history.

Apart from this section 59 of the TEA does not justify the court in treating the opinions or deductions of authors of such books as evidence for the purpose of supplementing or rebutting evidence that has already been given. These should only assist the court in understanding the evidence brought before it. For a better elaboration on the working this read the following cases: **Karumuna V. R (1955) 22 EACA 369; R.V. Kiswaga Luguna (1940) 15 EACA 50; R.v Mutwira (1935) 2 EACA 66 and DPP v. Henry [1973] LRT 15.**

Section 59(3) of the TEA provides:

"…If the court is called upon by any person to take judicial notice of any fact, it may refuse

to do so unless and until such person produces such book or document as it may consider necessary to enable it to do so…"

In summary the sub-section gives the court the discretion to refuse to take judicial notice of a fact if the relevant books or documents are not produced in support of the fact. It must be remembered that though the court may refuse, it is not imperative that it should refuse.

For further clarification on the operation of section 59 read the following cases: **R.v Joshua Daniel [1939] TLR 60; Phurman Singh v. Ren [1951] TLR 345; Commissioner of Customs V S.K. Panachand [1961] EA 303; Nizar Ahmed v. R. [1962] EA 345 and Bushell and another [1967] EA 817(CA).**

(b) **Facts Admitted by Parties (Section 60).**

Section 60 of the TEA relates to civil suits. This section deals with admissions of the parties, oral or documentary, during trial in civil suits i.e. at or before the hearing. Proof of such facts is dispensed with on the ground that the facts admitted need no further proof. They are commonly known as judicial admissions or stipulations dispensing with proof. Such admissions may be made on the records that are actual i.e. either on the pleadings or in answer to interrogatories or implied from the pleadings. In addition they may be made between the parties e.g. by agreement in writing before hearing, and at the hearing by a party or his lawyer. In short the section lays a rule that proof need not be given of facts which the parties or their agents agree to admit at or before the hearing in writing or which by any rule of pleading they are deemed to have admitted by their pleadings.

The proviso to section 60 gives power to the court to require a fact admitted by the parties to be proved in court. This is intended to guard against un-authentic or fictitious admissions. Therefore the court cannot be compelled to accept an admission and it may require any fact to be proved by evidence in the ordinary way as laid down in the proviso.

2:3 Conclusion

Like presumptions the presences of the rules ousting the necessity of proof in matters judicially noticeable also help to facilitate court proceedings. Under this, for example, the court takes judicial notice of all the laws of Tanzania. Were this rule not existing parties would have been required to prove every law on which they base their prayer for a judgment in their favour.

LECTURER 3

DOCUMENTRY EVIDENCE

3.0. Introduction

Documents are important source of evidence in courts. Documents that are often produced in courts are those of handwriting, printing, Photostat, photograph, and typewriting etc. Documentary evidence may range from a simple friendly letter to a complicated conveyance or a survey map. In addition if a document is proved the original will often have to be tendered and the document tendered will have to be authenticated. Even where such requirements are satisfied admissibility of statements in the document will depend on other rules of evidence.

This lecture is intended to introduce you on the law relating to documentary evidence. At the end of the lecture you should be able:

- To understand what is documentary evidence,
- To explain the conditions necessary for the admissibility of documentary evidence,
- To know the rules governing the interpretation of documents admitted in court.

3.1. The Meaning and Classification of Documents

(a) Definition of a document

As long ago as 1908 one English Judge named Darling defined the term "document" to mean:

"…any written thing or printing capable of being evidence is properly described as a document and …it is immaterial on what material the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, or clay and it might be, and often was on metal." in ***R.V. Daye [1908] 2 KB 333.***

In Tanzania the term "document" is defined in section 3(1) of the TEA to mean:

"….. any writing, handwriting, typewriting, printing, Photostat, photograph and every recording upon tangible thing, any form of communication or representation by letters figures, marks or symbols or by more than one of these means, which may be used for the purpose of recording any matter provided that such recording is reasonably permanent and readable by sight.."

.

There is no doubt that the definition of the word document nowadays has much wider scope that what is said in Daye's case above. There is no question that the current meaning of the term document covers a disc, tape or film and conveys information by symbols, diagrams and pictures as well as by words and numbers. That is why in Britain a wider definition has been adopted. The word document has been defined to mean any writing or printing capable of being made evidence, no matter on what material it may be inscribed. It is on the same basis that Walton J in the case of **Grant v Southern and County Properties [1975] CH 185** asserted that "a document is primarily something that instructs."

(b) Classification Documents

Documents are classified in two major categories: (i) public documents (s.83 of TEA) and (ii) private documents (s.84 TEA). This distinction is important owing to the different rules governing their admissibility. Read the case of **Manji V R.S. Patel [1960] EA 125.**

(1) Public Documents

The term public document was defined in the case of **Sturla v. Freccia (1880) 5 A.C. 623** at p.541 as:

"…a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to enquire…"

The test of publicity is that the public is interested in it and entitled to see it so that if there is anything wrong in it they would be entitled to protest. In that sense it becomes a statement

that could be open to the public to challenge or dispute and therefore it has a certain amount of authority.

In the TEA public documents are listed in section 83. The section provides:
"The following documents are public documents:

(a) Documents forming the acts or records of the acts.
    (i) of the President of the United Republic
    (ii) of official bodies and tribunals; and
    (iii) of public officers, legislative, judicial and executive;

(b) Public records kept in the United Republic of private documents."

An important question in respect of public documents is: How are public documents proved in evidence? Before getting the answer to this question it must be made clear that as a general rule a party relying on the words used in a document for any purpose other than identifying it, must adduce original primary evidence of its contents i.e. the original document must be produced. However in some public documents the usual method of proof is by producing certified copy i.e. secondary evidence or in certain instances by authentication and the contents being evidence of facts stated in it (Sect.86 of TEA).

Under Section 85 (1) a public officer having custody of a public document which "any person has the right to inspect" may issue a copy of such document together with a certificate written at the foot of such copy that it is the copy of such document or part thereof, and where the law requires, seal the same.

It pertinent to note that to be admissible in evidence under such circumstances the document must fall under Section 83 of the TEA listing public documents and fulfil the rules of admissibility relating to public documents. In addition such a document must be that in which the public has the right to inspect (sect. 85(1)). That means a document may be a public document but if the right to be inspected by the public does not exist it cannot be proved in the aforesaid manner.

For example in the case of **Total Broad Host Lee and Co. v. Allimohamed Haji Ahmed (1954) 24 KLR (2) 31** claims were made for damages or equitable relief for infringement of design registered in Britain. The plaintiff relied on a document bearing the seal of the patents office in Britain, purporting to be a copy of the certificate of registration of the design, together with a certificate bearing the seal of the patent office of Britain. The first issue before the court was whether the document was in fact a public document so that the rules regarding admission of certified copies applied. The court ruled that the certificate of registration being a document issued by the authority of the law by a public officer was a public document. After answering this question the second issue was whether this document qualified to be admitted in evidence in the light of sections 83-86 of the TEA (the relevant sections in the particular case were sections 74-77 of the Indian Evidence Act). In reply to this issue the court said:

"It is not, however, all public document that can be proved by means of certified copies but only those ***which any person has the right to inspect****… therefore, the document on which the plaintiffs rely to prove their ownership of designs are not admissible under Section 74 to 77 of the Indian Evidence Act" (Ss.83-86 of the TEA).*

For further elaboration on this read the cases of **Shirin Jessa v. Alipio Zorillan [1973] LRT No.84 and MS Ladha v.R. [1960] EA 38).** In short, for a document to be proved in the manner provided for in Sections 83-86 of the TEA i.e. by producing a certified copy, it must:

(a) be a public document; and
(b) be of such a character that any person has the right to inspect and raise protest if any.

Any other public documents not having the aforesaid quality must be proved in the manner specified in section 87 of the TEA. This Section contains a list of specific public documents and prescribes special methods of proving its contents. You are urged, on your own, to read the provision and analysis given by other experts.

2. Private Documents

Section 84 of the TEA provides that all documents other than public documents are private. That means all documents beside those mentioned in Section 83 are private documents. As a general rule private documents must be proved y production of original primary evidence [This is according to the 'best evidence' rule that is based on an very old presumption that if inferior evidence is produced where better might be given this would operate against the withholder]. The only exceptions to this are cases mentioned in section 66 and 67 of the TEA.

It must be emphasized that before a document is tendered in court it must be proved to be genuine and a party tendering it must offer best evidence of the document i.e. primary evidence. The issue of genuineness is very important. Mere production of a signed document is not evidence of genuineness. On this ground before a document is relied on as evidence the source and history of the document must be carefully ascertained. See the case of **D. Hussein V R. [1975] LRT n. 45.** No writing can be received in evidence as a genuine writing until it has been shown to be genuine unless there is a specific presumption on the same. Read the case of **Stamper v. Griffen (1856) 20 GA 312.**

Apart from this, there are certain documents such as wills, mortgages etc., which are required by law to be attested. The word to "attest" means to witness any act or event e.g. the signature or execution of a document. Where a document is required by law to be attested section 70 demands that at least one attesting witness should give evidence in regard to the document. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence (Sect. 73). If the witness is not available or is not subject to the process of the court it must be proved that the attestation of, at least, one attesting witness is in his/her handwriting and that the signature of the person executing the document is in his/her handwriting (s.71). However, an attested document not required by law to be attested may be proved as if it were not attested (s.74).

The general rule/principle found in section 70 of the TEA is that all documents required by law to be attested must be proved as having been duly executed. This principle has a number

of exceptions. That means there are situations, for documents required by law to be attested, where proof of execution may be dispensed with. Such cases are the following:

i) When the executing party admits execution for the purpose of the trial (Section 72 of TEA).

ii) When one party, by his/her prior conduct is stopped from denying execution (Section 123 of TEA).

iii) When the document is in the possession of the adverse party who refuses to produce it after notice (Section 98 of the TEA).

iv) When the opposite party produces the document and claims interest in it – in such a case genuineness of the document is implied, and,

v) When the document is 20 years old (Section 99 of TEA).

3.2.1. Proof of Contents of Documents (Section 63-67 TEA).

Evidence, be it oral, documentary or real is either primary or secondary. The contents of documents may be proved by primary or secondary evidence (Sect. 63 TEA). Read the case of **D. Hussein v. R. [1975] LRT 45.**

(a) Primary Evidence

It is an ancient rule of the common law that a party who wishes to rely on the contents of a private document as direct evidence must adduce primary evidence of the contents of that document. This is normally referred to as the best evidence rule. What is primary evidence? The usual meaning of the term primary evidence is the production of the original document. It is not easy, however, to determine what an original document is. It is so stated because sometimes the same document is primary for one purpose and secondary for another. For example where each document is fully executed by one party only – such documents are termed counterparts. In such a case each document is primary evidence against the executing party and his privies but secondary evidence only against the non-executing party or his privies.

As already mentioned above primary evidence means the document itself produced for the inspection of court. Primary evidence is best evidence. The general rule is that documents

must be proved by primary evidence except where an exception lies. Such exceptions are mentioned in Section 67 of the TEA (Sect. 66 of TEA). In the case of **Lucas v. Williams (1892) 2 QB 116** Lord Esher Said:

"…Primary evidence is evidence which the law requires to be given first; secondary evidence may be given in the absence of that better evidence, when a proper explanation of this absence has been given…"

In the case of **Sugden v. St. Leonard's [1876] 1 P.D. 154,** Jessel, MR. Said:

"…The whole theory of secondary evidence depends upon this, that the primary evidence is lost and that it is against justice that the accident of the loss should deprive a man of the rights to which he could otherwise be entitled..."

That means a party relaying on the words used in a document for any purpose other than for identifying it must, as a general rule, adduce primary evidence. In addition before a document is relied on as evidence the source and history of the document must be carefully ascertained. Read the case of **D. Hussein V R [1975] LRT n. 45.**

In view of the foregoing it is important to note the following:

(i) the rule applies to cases in which direct reliance is placed on the words used in a document;
(ii) the rule does not prevent reference being made to the terms of the document for the purpose of identifying it; and
(iii) if the bare fact of existence of the document is in issue it may be proved without recourse to the original, but the rule applies the moment reliance is placed upon the contents of the document.

As said earlier, primary evidence means the document itself produced for the inspection of the court and where the document is executed in several parts each part its primary evidence

of the document (Section 64(2) of the TEA). Where the document is executed in counterpart each counter-part being executed by one or more or some of the parties only, each counterpart is primary evidence as against the party executing it. The meaning of "counterpart" is that it is a "duplicate". Therefore when, say, a deed is prepared in two or more identical forms, the part signed by the guarantor is the original and the other parts are counter-parts. Where the instruments is executed by all the parties in duplicate or triplicate and each keeps one, each instrument is treated as an original and each is primary evidence of all the others (S.64(3). Finally, where a number of documents are all made by one uniform process e.g. printing etc each is primary evidence of the contents of the rest but where they are copies of the common original they are not primary evidence of the contents of the original (Section 64(4) of TEA).

In some situations a document may be lost in court after the same has been tendered in evidence. In the case of **R. V. Raphael Mbaga [1967] HCD n. 387** the court held that once a document has been produced in court, examined by the court admitted by the accused person and properly noted on record the fact that such document is lost later would not justify an acquittal. A similar situation occurred in the case of Athumani **Madenge V R. [1974] LRT n. 62** where a documentary exhibit was lost after the prosecution case had closed and defence case opened. The issue that arose on appeal was whether absence of the documentary exhibit made it impossible for the appellate court to evaluate the evidence adduced and form its own decision thereon. The court held that the answer to the question depended on the nature, import and the content of such exhibit and whether their contents had been established ***aliunde*** at the trial to the satisfaction of the appellate court.

(b) Secondary Evidence

A party who wishes to rely upon the contents of a private document must, as we have seen above, adduce primary evidence of the contents. Only in the exceptional cases examined below will secondary (i.e. non-primary) evidence be admissible. In the TEA such exceptions are found in section 67. The section provides for circumstances in which secondary evidence is admissible.

What is secondary evidence? The law does not directly and exhaustively define secondary evidence but gives an inclusive list of the same. Secondary evidence, it provides, includes the following:

(i) certified copies;
(ii) copies made from the original by a mechanical process;
(iii) copies made form or compared with the original;
(iv) counter-part of documents as against the parties who did not execute them;
(v) oral accounts of the contents of a document given by one who has seen it (Sect. 65 TEA).

Under what circumstances can secondary evidence be admitted? Section 67 of the TEA mentions seven cases in which secondary evidence of a document is admissible namely:-

a) when the original is in the power or possession (i) of the opposite party (see **Lakman Ramji V Jessa and Sons [1965] E.A 125 (K)**); or (ii) of a person who is out of reach of or not subject to, the process of the court or (iii) a person legally bound to produce it, and when, after the notice to produce is given such person does not produce it.
b) When the existence, condition or contents of the original are admitted in writing by the person against whom it is proved, or by his representative in interest. See the case of **Henry Mike V R [1975] LRT n. 67.**
c) When the original is lost or destroyed. In **Jasson Rwebangira V R. [1975] LRT n. 26** the court said before section 67(1) (c) can be operative the party seeking to produce secondary evidence is generally expected to show that the original document existed and that a search has been made unsuccessfully and must either prove its destruction positively or at least presumptively. A mere causal report or information that the document had disappeared is insufficient.
d) When the original is of such a nature as not to be easily movable – read **Owner v. bee [1914] 1 KB 105.**
e) When the original is a public document within the meaning of section 83 of the TEA;
f) When the original is a document of which a certified copy is permitted by this act or any other written law.

g) When the original consist of numerous accounts or other documents which cannot be conveniently examined by the court - read the cases of **J.B.M.D' Sa v. R [1957] EA 627 (U)** and **Edward V.R. [1987] TLR 122.**

Section 67(2)-(4) provides for the kinds of secondary evidence admissible in cases specified in section 67(I)(a)-(g). It is important to understand that there are no degrees as to admissibility in cases (a) to (g) in the various kinds of secondary evidence. All are equally admissible. The only restriction is put in item (e) and (f) where the only mode of proof presented is a certified copy. In cases covered by clause (a), (c) and (d) any secondary evidence is admissible. If there is no objection raised to the admissibility of secondary evidenced the party failing to object waives his right to object and cannot later object to the document after having admitted the same. See **Govidji v. Nathao [1962] EA 372 (PC).**

Section 68 further expounds situations when secondary evidence is admissible under Section 67(1)(a). The rule is that no secondary evidence can be produced under section 67(1) (a) unless a notice to produce the particular document has been served on the opposite party. This would mean that the requirement of giving prior notice for producing secondary documentary evidence is confined to the cases enumerated under section 67(1) (a) of the TEA. This rule, however, has the following exceptions:

(i) When the document to be proved is itself a notice;

(ii) When the adverse party knows that he will be required to produce it;

(iii) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(iv) When the adverse party or his agent has the original in court;

(v) When the adverse party/agent has admitted the loss of the document;

(vi) When the person possessing the document is out of reach of or subject to the process of the court;

(vii) In any other case in which the court has dispensed with the requirement (Section 68(a)-(g)).

Section 68 has two main objectives: First, to give the opposing party an opportunity to produce it if he wishes and second, if the document is not produced to allow the party giving notice to present secondary evidence. Giving notice to produce a document has a number of related consequences. First, if the document is, in fact, produced after notice has been given, the party calling for its production is bound to use it in evidence (Section 174 of TEA). Second, non-production of the document may raise the presumption that the document, if produced, would prove to be unfavourable to the person who fails to produce it (Sect. 122 of TEA). Third, if a party refuses to produce a document which he has notice to produce, he cannot afterwards use the document in evidence without the consent of the party who called for its production or by order of the court (Section 175 of TEA). Finally, if the document is not produced there is a presumption of due execution (Section 98 of TEA).

Production of Certain Documents Without Proof

In some cases documentary evidence may be admissible without the need of a witness or formal proof. There is no specific provision in the TEA for this but such a possibility is found in other written laws. For example in sections 203, 204 and 205 of the CPA which allow without formal proof the production of the reports of a government analyst report, finger print expert report and handwriting expert report. These cases fall under the rules relating to presumptions. Read the case of **Kapoor v. R. (1957) 18 EACA 283.**

Apart from these sections 37-40 of the TEA provide for the admissibility of statements in documents when made under certain circumstances. These include entries in books of accounts; entries in public records; statements in maps, charts and plans; statements of fact contained in laws and official gazettes and statements of law contained in books. Read the following cases on these aspects; **Manji Suleman v. R.G. Patel [1960] EA 38; Chandria v R. [1968] EA 246 and R.v. Shaha Hirji Popat (1947) 22 KLR (2) 38.**

Presumptions on the Genuineness of Certain Documents

In some situations the TEA allows the courts to presume that certain documents are genuine being in fact what they presume to be but such presumptions may be rebutted. The TEA gives a long list of such documents namely sections 88-99. Students are urged to refer to part 1:4 of lecture 1 and other relevant materials and case law with a view to understanding how the same works. Read the case of **R.v. Allibhai Mitha (1945)12 EACA 54.**to obtain further insight on this.

New Complexities in the Concept 'Document'

Another important question in regard to the issue of admissibility of documents is whether a tape or wire recording is a document. The issue was the subject for decision before the court in **R.V. R.G. Patel (1956) 29 KLR 112**. In this case the court stated that a tape or wire recording is not a document within the restricted meaning of that term used in the Evidence Act. However, the court added, the recording is evidentiary in the sense that it is a matter of fact the tendency of which is to produce in the mind a persuasion of the existence of some other matter of fact. Further in the English cases of cases of **Grant v. South Western ltd [1975] Ch. 185 and Senior v. Holdsworth [1976] QB 23** the court held the view that a tape recording is a document for the purpose of the law.

In England due to advances in science and technology this issue has been refined further. In **The Statute of Liberty [1968] 1 W.L.R. 739** where there was an action concerning a collision between ships the plaintiff sought to admit in evidence a cinematograph film of radar echoes recorded by a shore radar station. The defendants argued that the evidence having been produced mechanically without human intervention was inadmissible hearsay. Rejecting this submission Sir J. Simon P said if tape recordings are admissible it seems that a photograph of radar reception is equally admissible or indeed any other type of photograph. He added that the law is now bound to take cognisance of the fact that increasingly mechanical means replace human effort.

3.3. **Exclusion of Oral by Documentary Evidence**

Sections 100-109 deal with exclusion of oral by documentary evidence. You have learned that the contents of all documents must be proved by primary evidence which means the document itself in original except in those cases where secondary evidence is admissible. This principle, as noted above, is based on the best evidence rule.

Section 100 of TEA, therefore, lays down that when the terms and conditions of a contract, or of a grant or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced in writing no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself or secondary evidence thereof when such evidence is admissible. Section 100 therefore applies to two kinds of documents: (1) Documents reducing to writing the terms of a contract or a grant or of any other disposition of property and (ii) all documents required by law to be in writing. In these cases no oral evidence is allowed to prove the terms of such document.

For example in **R & F Binti Abdulla v. Sharifu Binti Mohamed [1958] EA 1035** a settler by a written instrument declared a wakf of certain property stating therein that the income was to be divided between her two adopted daughters. In this case extraneous evidence to show that the settler intended her disposition to be limited to the maintenance and support of children was held to be inadmissible. Read also the case of **Domodar v. Noor Mohamed Valji [1961] EA 615** and **Juthelal Velji Ltd v. The THB Estates Co. Ltd [1983] TLR 391.**

The general rule in section 100 of the TEA has two main exceptions:

a) that wills admitted to probate may be proved by probate (Sect. 100(3) and

b) that when the law requires that a public officer be appointed in writing, and it is shown that the person has been acting as a public officer, the writing by which he has been appointed need not be proved (section 100(2)). Read the case of **Mukasa Saleh v R.**

[1953] 7 ULR 26. This exception is based on the principle embodied in the English rule on the presumption of due appointment of a public officer.

Section 101 of the TEA further elaborates the rule in section 100 in that it precludes, after a document has been produced, (under section 100) the admission, as between the parties or their representative in interest, of any evidence of an oral agreement for the purpose of contradicting varying, adding to or subtracting form, its terms. The rule embodied in section 101 is a logical sequence of the rule in section 100. If the intention is that no substitution of the terms of a voluntary and deliberate transaction should be allowed, it follows that no variation of the terms should be allowed. The reason is, first, that the parties are presumed to have put into writing all that they considered necessary to give full expression to their meaning and intention and, secondly, allowing the reception of oral testimony would create mischief and open the door to fraud.

There are three things that must be noted in regard to the operation of Section 101. First, that section 101 applies only to parties and their representatives in interest. Second, persons other than parties to the instrument are not precluded from giving oral evidence to contradict, vary, add to or subtract from the terms of the writing. Such persons are at liberty to prove a contemporaneous oral agreement varying the terms of the document - See section 108 of the Tea and read also the case of **Wladyslaw Bilons v. Vera Bilons [1957] EA 96.** For that reason persons other than parties to the instrument are allowed to give oral evidence to contradict, vary, add to or subtract from the terms of the writing. **.** Third, despite the provisions of section 100, evidence is admissible to show that a party who signed a contract is, in fact, acting as an agent of another – read the case of **Ghela v. Mohamed [1962] EA 769.**

Section 101 of the TEA provides six important exceptions to the general rule. The first is provided in section 101 (a) saying that any fact may be proved which would invalidate the document or would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality etc. From its wording the proviso is clearly illustrative and not

exhaustive. The facts which may be proved must be such as to show either that the legal requisites for a valid agreement did not exist at all, or that one of the parties did not give his/her free consent to it or that the document does not express what was really intended to be embodied. Read the case of **Cheleta Coffee Plantation Ltd v. Eric Mehlsen [1966] EA 203 (CA)** for further elaboration on this point.

Second the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms may be proved – the court having regard to the degree of formality of the document (sect. 101(b). The phrase "separate oral agreement" refers to contemporaneous or prior oral agreement. (Subsequent oral agreements have been dealt with in section 101(d). The law is well settled that when a document in writing does not contain the entire agreement but embodies only some of the conditions, oral evidence to prove some other terms agreed upon and not inconsistent with the written instrument is admissible. However the proviso requires that the separate agreement made relate only to matters on which the document is silent and that the same should not be inconsistent with its terms. Read the case of **Hansen v. Jetha Ltd [1959] EA 563.**

Third, the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract/transaction, grant or disposition of property may be proved [section 101(c)]. This proviso means that where there is a separate oral agreement (either contemporaneous or as a preliminary measure) that the terms of the written contract will not take effect or will be of no force until a condition precedent has been fulfilled or a certain event happened, oral evidence is admissible to show that the conditions not having been performed the contract did not mature so there is no written agreement at all. Read the case of **Pindi v. Ved Parkash Mandal (1948) 23 KLR 9.**

Fourth, the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved except in cases in which such contract is by law required to be in writing or has been registered according to the law in

force for the time being as to the registration of such documents (Section 101(d) of TEA). This proviso deals with three situations:

(i) In cases where a transaction has been reduced in writing by agreement (not by law)-parole evidence of a distinct subsequent oral agreement modifying or rescinding it altogether is admissible.

(ii) However where the matter has been reduced in writing as a requirement of the law for its validity no oral evidence can be given of any subsequent agreement rescinding or modifying it.

(iii) This rule is applicable to all registered instruments, whether or not registration is compulsory under the law.

For further elaboration on the operation of this proviso read the case of **Jama Noor v. Hassan Ahmed [1965] EA 241.**

Fifth, any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to the contracts of that description may be proved, if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract (Section 101(e) of TEA). Take note that in commercial transactions extrinsic evidence of customs and usages are admissible to annex incidents to written contracts in matters with respect to which they are silent. This rule also applies to other transactions in which established usages prevail. This proviso, however, comes into play when there is a latent ambiguity in the document. Where there is no dispute as to how the contents of the document are related to existing facts, it is well settled that no evidence is admissible on a question of constitution of the document.

Sixth, any fact may be proved which shows in what manner the language at a document is related to existing facts (Section 101(f). This proviso relates only where the document is not perfectly plain and its terms require explanation. In case of ambiguity or doubt as to its

meaning extrinsic evidence of intimately connected facts or surrounding circumstances may be given in order to find out the real nature of the transaction in the document. Apparently section 101(f) comes to play where there is a latent ambiguity in the document i.e. when there is a conflict between the plain meaning of the language used and the facts existing or when put together they lead to ambiguity.

For example in the case **Mohamed Rasham v. Santa Singh [1959] EA 717 (CA)** a contract was entered into for certain excavations to be done at the rate of Shs. 15 per 100 cubic feet. At some stage the figure 17 was substituted for 15 in the applicant's copy of the agreement and the alteration was signed by the respondent. In fact, the work was done in two stages, the appellant undertaking to carry out the second stage on similar terms, but at the higher rate of payment. At the trial evidence was given without objection as to the circumstances in which the alteration was made but was claimed to be inadmissible by counsel during summing up. On appeal it was sought to prove that the altered figure in the agreement applied only to the second stage. The court held that under proviso (6) of s.101 (f) of TEA evidence was admissible to show how the language of the altered document related to the existing facts.

Finally, it is important to remember that provisions dealing with the exclusion of oral by documentary evidence do not affect the law regarding the interpretation and construction of wills (Section 109 TEA).

3.4. Language Used in a Document (Section 102-108)

The provisions of section 101(f) are closely linked with section 102-109. These should be read together. If the language employed in a document is ambiguous the question of the admissibility or otherwise of extraneous evidence would be regulated by the said sections 102-109 of the TEA.

(a) Exclusion of Evidence to Explain Patent Ambiguity

Section 102 of the TEA provides that when the language used in a document is, on its face, ambiguous or defective evidence should not be given of facts which would show its meaning or supply its defects. Sarkar gives two illustrations on this;

a) A agrees, in writing, to sell a house to b for shillings 10,000 or 15,000. Evidence cannot be given to show which price was given.

b) A deed contains blanks. Evidence cannot be given of facts which would show how they meant to be filled.

Section 102 deals with patent ambiguities as distinguished from latent ambiguities. A patent ambiguity is an ambiguity inherent in the words and as such incapable of being dispelled either by any legal rules of construction applied to the instrument itself, or by evidence showing that the terms are capable of receiving a known conventional meaning.

The important question in this: why is extrinsic evidence not allowed in circumstances specified in section 102? The principle is that courts must interpret documents and no mere. If the court admits such evidence it will be making a document or improving the same which is the duty of the parties themselves. Read the case of **Visram v. Bhatt [1965] EA 789 (CA)** for further elaboration on this point. Normally when the question is entirely one of construction of a particular agreement, it can only be properly answered after considering all surrounding circumstances; the position of the parties to the agreement; its subject matter and the apparent purpose and the object thereof, and in particular the provisions to be construed.

(b) **Exclusion of Evidence Against Application of a Document to Existing Facts (section 103)**

Section 103 provides that when the language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not

meant to apply to such facts. The meaning of this provision is that when the language is crystal clear and it applies correctly to existing facts no evidence can be allowed to show that the parties intended to mean something else. The rule embodied in this section is based on plain common sense. The duty of the court is not to delve deep to ascertain one's undisclosed intention, but only to take the ordinary meaning of the words used. Read the case of **Choitram v. Lazar [1959] EA 157.**

(c) **Evidence as to Latent Ambiguity (section 104 TEA)**

When the language used in a document is plain in itself but is un-meaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. For example Juma sells to Alli by deed "my white house" in Arusha. However Juma has no house in Arusha but there is evidence that he has a house in Tanga of which Alli has been in possession since execution of the deed. These facts may be proved to show that the deed related to the house in Tanga. Read the case of **Cheleta Coffee v. Mehlsen [1966] EA 203 CA.**

(d) **Language Applicable to Only One of the Several Persons (sect. 105)**

Section 105 provides that when the facts are such that the language used might have been meant to apply to only one, and could not have been meant to apply to more than one, of the several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to. For example John agrees to sell to James his blue car. It transpires that John has two blue cars. Evidence may be given of facts that show which of them was meant. Read the case of **Visram v Bhat [1965] EA 789.**

(e) **Language Applicable to Two Sets of Facts (Sect. 106)**

Section 106 provides that when the language used in a document applies partly to ones set of facts, and partly to another set of facts but the whole of it does not apply correctly to either, evidence may be given to show which of the two it was meant to apply. Sarkar gives the following illustration this section: A agrees to sell B "my Land at X in the occupation of Y"

A has land at X. but not in the occupation of Y, and he has Land in the occupation of Y but not at X. Evidence may be given of facts showing which piece of a land he meant to sell.

(g) **Evidence of Variation Given by Third Parties (S.108)**

Under Section 108 persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show contemporaneous agreement varying the terms of the document. Sarkar gives the following example to illustrate the operation of the section: A and B make a contract in writing that B shall sell certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three month's credit shall be given to A. This could not be shown as between A and B but it might be shown by C, if it affected his interest.

3:5 Conclusion

Documentary evidence is one of the most important types of evidence used in court. In appropriate situations once the legal requirements for its tendering are fulfilled a document may be accepted by the court. For that reason it is very important to know rules that govern the admissibility of documents. What has been presented in this lecture is just a short summary of the vast materials pertaining to documentary evidence. In view of this students are urged to read all the main textbooks of the law of evidence for a better understanding of the topic.

LECTURE 4
BURDEN OF PROOF

4.0. Introduction

When a party has brought a case before a court of law he/she has the duty to prove whatever he/she asserts. No court would give judgement in favour of a party in any suit or proceeding without being convinced of the truthfulness of any allegations brought before it. In line with this the law has developed methods and standards of proving cases in courts. This lecture is intended to give you the main points relating to burden and standard of proof. At the end of this lecture you should be able to:

- Explain what is burden and standard of proof,
- Know the law relating to burden and standard of proof in criminal and civil proceedings.

4.1 What is "Burden of Proof"?

In its simplest sense the term burden of proof can be defined as the duty which rests upon one of the parties to an action to persuade the trier of facts that the proposition he asserts is true. The term "burden of proof" originates form a Latin phrase "onus probandi" and for this reason there is a practice of using the terms "burden of proof" and "onus of proof" interchangeably.

The term burden of proof has two senses to which a variety of different names are given. In the first sense, in **Phipson's Manual of Evidence** (8^{th} edn), at p.184, it is noted that:

"…One meaning is the obligation on party to convince the tribunal of facts (whether by preponderance of evidence or beyond reasonable doubt) on the truth of some proposition of fact which is in issue and which is vital to his case…"

Murphy P, in his book **Murphy on Evidence** defines legal burden of proof to mean:

"…the burden of persuading the tribunal of fact, to the required standard of proof, and on the whole of the evidence, of the truth or sufficient probability of every essential fact in issue…" (Second Indian reprint 2000 at p.86).

This type of burden is expressed in various terms namely, "the legal burden;" "the burden of proof on the pleading;" "the fixed burden of proof;" "the risk of non-production;" and "the probative burden." For the purpose of understanding the framework of the principle read the case of **DPP v. Morgan [1976] AC 182.**

This legal burden of proof is provided for in section 110(1) of the TEA in the following words:

"…Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts; he must prove that those facts exist…"

The legal burden of proof never shifts. In criminal cases it lies on the persecution to show that the accused committed the specific offence beyond reasonable doubt. In civil matters it lies on the party who could lose the case if no evidence at all were to be produced i.e. in order to win he must establish his case by preponderance of probability (See section 2 of the TEA.). That is the reason why Section 111 of the TEA provides:

"…The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side…"

The second sense of "burden of proof" refers to one party's duty of producing sufficient evidence for the court to call on the other party to answer. It is an obligation to adduce sufficient evidence on a particular fact to justify a finding of fact in favour of a party who is under obligation to do so. This type of burden may be termed as the "burden of adducing evidence" or the "evidential burden." Others refer to it as the duty of "passing the judge." It is in this context that section 112 of the TEA provides:

"…the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that proof of that fact shall lie on any particular person…"

This burden also relates to the duty of proving admissibility of certain [specific] evidence (s.113 of TEA). Read the case of the **Commissioner of Customs v. Penachand, [1961] EA 30.**

There are, however, three exceptions to these rules:

- When a rebuttable presumption of law exists in favour of a party the onus is on the other party to rebut it;
- When any fact is expressly within the knowledge of any person, the burden of proving it is on him;
- In some cases the burden of proof is cast by statute on particular parties (Sections 112 and 114 of TEA).

4.2. Standard of Proof

The term standard of proof refers to the extent or degree to which the burden of proof must be discharged. It is the standard to which the tribunal of fact must be convinced by the evidence before the party bearing the burden of proof becomes entitled to succeed in the particular case. In criminal cases, except where any statute or other law provides otherwise, the standard of proof is 'beyond reasonable doubt' (Section 2(a) of the TEA). What then is "reasonable doubt"? This has been clearly elaborated in the American case of **Holt v. United States 218 U.S. 245, 254, 54L, Ed. 1021, 31 ct. 2 6-7** where the Supreme Court said:

"…A reasonable doubt is an actual doubt that you are conscious of after going over your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and if you believe that you are acting in a reasonable manner and if you believe that a reasonable man in any

matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt of which the defendant (accused) is entitled to have benefit…"

A more practical situation where the issue of burden of proof was examined is found in the case of **Woolmington v. DPP [1935] AC 462.** In this case the accused was convicted of murder. His defence was accident. In summing up to the jury Swift J said that once it is shown to the jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes death can satisfy the jury that what happened was something less; something which might be alleviated; something which might be reduced to a charge of manslaughter or something which was accidental or something which could be justified. The accused appealed unsuccessfully to the Court of Appeal but successfully to the House of Lords. In allowing the appeal Lord Viscount Sankey L.C. stated:

"….there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise doubts as to his guilt; he is not bound to satisfy the jury of his innocence…"

Other cases on this issue are: **Francis Mwenda V.R. [1980] TLR 26; R.V. Agnes Linda [1980] TLR 38; and Joseph John V.R.[1986] TLR 44.**

In civil cases including matrimonial causes and matters, the standard is proof on preponderance of probability or balance of probabilities (section 2(b) of the TEA). If the evidence on both sides is balanced then the judgment will be given against the person or party on whom the burden lies. Read the case of **Joseph Constantine V. Imperial Smelting Corporation Ltd. [1942] AC 154.**

4.3. Prima Facie Case

The phrase "prima facie case" has mostly been used, in some case law, at the close of the prosecution case. Normally, in criminal procedure, at the close of the prosecution case the court is required to consider whether or not a case has been made out against the accused sufficiently to require him to make his defence (Sections 230 and 293 of the CPA). If the court is satisfied that a case has been made out against the accused sufficiently to require him to make his defence, there is said to be a prima facie case.

The term "prima facie" originates from Latin meaning "of first appearance" or "at first sight" Sarkar says:

"…Prima facie evidence is evidence which, if accepted, appears to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary. It is not conclusive..."

And in the case of **Romanlal V.R. [1957] EA 332 (CA)** the court stated:

"…It may not be easy to define what is meant by "prima facie case" but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence…"

The establishment of a prima facie case at the close of the prosecution case, therefore, does not necessarily mean that the prosecution has proved the case beyond reasonable doubt. For this reason a case proved "beyond reasonable doubt" should not be confused with prima facie case.

The question whether there is a prima facie case, therefore, necessarily involves some evaluation of the evidence and consideration of the principles of law relevant to the case. Where it appears, at the close of the prosecution case that a case has not been made out the court is required to dismiss the charge and acquit the accused. In such a situation the accused is said to have no case to answer (Sections 230 and 293 of the CPA). If the court comes to

the conclusion that the accused can be convicted, if no explanation is given by the accused, then there is a prima facie case.

Other cases elaborating the concept 'prima facie case' include the following: **R V. Kakengele Msagikwa (1968) H.C.D no. 43, Wibiro v. R. [1960] EA 184; Murimi V.R., [1967] EA 542 and Bhatt v. R. [1967] EA 332.**

4.4. **Burden of Proof in Criminal Cases**

The constitution of Tanzania, as is the case is in other countries, provides for the presumption of innocence until the contrary is proved. In law the accused has no duty to prove his innocence. It is for the prosecution to satisfy the court beyond reasonable doubt that the accused committed the offence with which he is changed. The prosecution has duty to prove:

(i) that a crime has been committed

(ii) that the accused is a person or one of the persons who committed the offence.

The duty of the accused is to raise doubts. In the case of **Woolmington V. DPP [1935] AC 462** the House of Lords said:

"… just as there is evidence on behalf of the prosecution so there it may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to this guilt; he is not bound to satisfy the jury (court) of his innocence..."

The reasoning in this English case was confirmed and adopted in the cases of **Kongoro V.R. (1956) 23 EACA 532; and Festo V.R. (1955) 22 EACA 454.** Read also the case of **Jeremiah V.R. [1985] TLR 228.**

Section 114 of the TEA provides for situations where the accused pleads certain defences or exceptions or qualifications. This section by placing the onus of proving any exceptions in the penal statutes on the accused forms on exception to ordinary rule in criminal cases. It relieves the prosecution of the necessity of proving the absence of facts which might bring the case within a general or special exception or exemption or proviso under any penal provision. The section involves both a presumption and a rule as to the burden of proof following it. The duty of the accused is to introduce such evidence as will displace the presumption of the absence of circumstances bringing his case within an exception and will suffice to satisfy the court that such circumstances may have existed.

The section also places the burden of proving any fact especially within the knowledge of a party on such party i.e. the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue. It is, therefore, limited to parties to a proceeding. In either case such burden shall be deemed to be discharged if the court is satisfied that such circumstances exist. In addition where the evidence tendered by the persecution or defence creates reasonable doubts the accused shall be entitled to acquittal i.e. the accused is entitled to any benefit of doubt created thereon.

(a) **Intoxication**

If the accused pleads the defence of intoxication the burden is on him to prove the defence. Intoxication is not a general defence but intoxication can be a defence to any criminal charge if it amounts to insanity or it negatives mens rea. That means the placing of the burden on the accused to prove intoxication applies only to section 14(2) of the Penal Code i.e. where he pleads temporary insanity due to intoxication. Take note that while the accused has the burden of proving the defence under section 14(2) of the Penal Code the burden of proving intention remains on the prosecution (Section 114(2)(c) of the TEA. In the case of **Kongoro Elias V.R. (1956) 23 EACA 532** the court said:

"… that the burden of proving intention remains on the prosecution in clear from the provisions of sub-section 2(c) of Section 105 (Sect. 114(2)(c) of TEA) of the Evidence Act..."

As regards the standard of proof expected from the accused, in the circumstances, Section 114(1) of the TEA provides in part:

"… the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence…"

In addition in the case of **Nyameru V.R. (1953) 20 EACA 192** the Court of Appeal stated that the accused has merely to raise a reasonable probability that the facts on which the defence rests exist.

(b) **The Defence of Insanity**

One of the defences that the accused may plead is insanity (Section 114(2)(c) of the TEA). The defence is provided for in section 13 of the Penal Code. In law there is a rebuttable presumption that every person is of sound mind. For this reason it is an important issue in relation to burden of proof when the defences of intoxication and insanity are pleaded. In such cases the standard of proof is the same namely raising a reasonable doubt. In **R.V. Shanyinga [1971] HCD n.369** the court said:

"…While it is for the accused person to establish the defence of insanity it is enough if he raises a reasonable doubt only, that at the time he was insane… the accused has to be pronounced insane if on the evidence the greater possibility is that he was insane than he was sane…"

(c) **Where the Burden is Placed Upon the Accused by a Statute**

Apart from pleading particular defences a statute may specifically place the burden of proof on the accused person. Among such statutes are sections 9 and 10(2) of the prevention of

Corruption act of 1971; section 10 of the Protected Places and Areas Act of 1969 etc. Where the law casts the burden of proof on the accused the application of section 114 of the TEA is normally excluded and the general principles of English law become applicable. In such cases the standard or proof expected form the accused will be "raising a reasonable doubt."

A good example of this is the case of **R V Dewji Pragji Metha (19460) 13 EACA 80**. In this case the accused was charged under a section 3(1) of a Tanganyika Diamond Industry Protection Act (CAP 129) which provided that 'if any diamond is found in the possession, power or control of any person, that person shall, unless he proves that he obtained it lawfully, be guilty of an offence.' The Court of Appeal for Eastern Africa considered various English decisions and stated the position in the following words:

"In the present case the accused's contention is not that he came by the diamonds lawfully but that they were planted on him. If the accused raises a reasonable doubt of this being the case our opinion is that he is entitled to be acquitted…"

For more elaboration on this point read also the cases of **Alli V,.R. [1959] EA 654;** and **Njugumo V.R. [1954] 21 EACA 196.**

(c) **The Defence of Alibi**

Alibi is a plea that when an alleged act took place the accused was somewhere else. As indicated in part one of this series the defence of alibi is admissible under section 13 of the TEA. The amount of proof expected from an accused in this defence is to raise doubts. That means where the accused pleads alibi the burden on the prosecution to prove the specific charge does not shift. It remains on the prosecution. As far as the accused is concerned it is sufficient if he raises doubts in the mind of the court that what he is saying might be true. The accused does not assume the duty of proving his defence.

It is the duty of the prosecution to show that the alibi is false. In the case of **Salum v R. (1968) H.C.D. No. 142** the accused was convicted of shop breaking and stealing. At the trial

the accused denied having been at the scene of crime but did not say where he had been. The trial magistrate, in his judgement, stated: "as the accused was raising the defence of alibi, it is required of him to raise some evidence which could satisfy the court that his alibi is reasonably true." On appeal to the High Court Georges C.J clearly stated:

"…The accused does not have to establish that his alibi is true. All he has to do is create doubts as to the strength of the case for the prosecution. It follows therefore that where the evidence for the prosecution is itself thin, an alibi which is not in itself particularly strong may very well serve the purpose of raising doubt as to the guilt of the accused…"

In this case the conviction was quashed by the High Court. For more clarification on the application of this defence vis-à-vis the prosecution's duty to prove a case beyond reasonable doubt read also the case of **Leonard Aniseth V.R. [1963] EACA 206.**

4.5. Burden of Proof in Civil Cases

As stated earlier the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side (section 111 of the TEA). On this ground the burden of proof in civil matters lies on the plaintiff. In order to win his case he has to establish the truth of what he asserts on the balance of probabilities (Section 3(2)(b) of the TEA).

However this standard of proof is not uniform in all civil cases. In a few cases there is a variation. In some cases the standard is a bit higher. In cases where something akin to a crime is alleged such as fraud or forcible taking of property, something more than mere balance of probabilities will be required. In addition, in case of proof of certain grounds for divorce such as adultery and desertions, for example, the burden is more akin to that in criminal than in civil cases-read the case of **Henry Hidaya V. Manyema Manyaka [1961] EA 705.**

In the course of time case law has established standards of proof in some specific cases:

(a) **Election Petitions**: In such cases the standard of proof is beyond reasonable doubt. In the case of **Chabanga H. Dyamwale V. Alhaji Musa Masomo & AG [1982] TLR.69.**Sisya J stated clearly: "the standard of proof required for avoidance of an election is proof beyond reasonable doubt. Any other measure below that will not suffice." (at. p. 72) Read also the cases of **Mbowe V Eliufoo [1967] EA 240, Ng'wesheni v. AG [1971] HCD no. 251** and **Charles Izengo V.R. [1982] TLR 237.**

(b) **Desertion cases:** The standard of proof, in desertion cases, is beyond reasonable doubt. See **Oscar V. Guildermie (1955) 28 KLR 183; Baler v. Baler (1950) 2 ALL.E.R.458 and Harnal V. Neuberger products ltd. [1956] 3 ALL E.R.973**.

(c) **Matrimonial Causes:** The standard of proof, in such cases, is the preponderance of probabilities. See for example the case of **Julius v. Denis [1971] HCD n.264.**

(d) **Professional Misconduct Cases:** In such cases the standard of proof beyond reasonable doubt – read the case of **Akena Adoko V. The Advocates Committee [982] TLR 291.**

Finally section 116-122 of the TEA provides for certain specific fact situations and presumptions both of law and fact which affect the burden of proof. These provisions are very important because they show how burden of proof operates in the stated cases. You are urged to read these on your own in the light of what has been discussed in this lecture.

4:6 Conclusion

Understanding the nature of burden and standard of proof in criminal and civil matters is very important in the process of presenting evidence in court. The importance of this lies not only in knowing the levels of proof needed in particular cases but also ensuring that the rights of the parties are given on the basis of sufficient evidence and not weightless allegations. Apart from this, these rules also help in ensuring certainty of justice to the parties as each one of them would be aware of the duties relating to proof and relevant standards needed for getting justice in any particular case.

LECTURER 5

ESTOPPEL

5.0. Introduction

This lecture deals with the important subject of estoppel. Estoppel is regarded as part of the law of evidence to the extent that it precludes a party from denying the existence of some state of facts which he had previously asserted. In addition, estoppel is a rule of evidence that is capable of having a big effect on substantive rights of parties in a case. However, the term 'estoppel' does not appear in the TEA but its substance is found in some of its provisions. At the end of this lecture you should be able:

- To define what is an estoppel.
- To know how estoppels are applicable in the law of evidence.

5.1. Definition of Estoppel

Various attempts have been made to define the term estoppel. One such attempt has been made by one, Sarkar who defines the term estoppel to mean:

"… a rule by which a person in some cases will not be allowed to plead the contrary of a fact or state of things which he has formerly asserted by words or conduct..."

Apart from this there are also attempted definitions in case law. For example in the case of **Nurdin Bandali v Lombank Tanganyika Ltd [1983] EA 304** Newbold, J.A; elaborated the concept by saying that estoppel is:

"… primarily a rule of evidence whereby a party to a litigation is, in certain circumstances, prevented from denying something which he had previously asserted to be true…"

It is important to emphasize that estoppels extend not only to man's declarations and acts, but also to all persons through whom he claims. That means estoppels bind both parties and privies. The principle in estoppel is that it would promote fraud and litigation if a man is allowed to speak against his own act or representation on the faith of which another person was induced to take a certain course of action. It is on this ground that section 123 of the TEA provides:

"…When a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act all upon such belief, neither he nor his representative in interest shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that things…"

The rule of estoppel is based on equity and good conscience. The object of estoppel is to prevent fraud and secure justice between parties by promotion of honesty and good faith. However, it has to be born in mind that estoppels of all kinds are subject to one general rule: they cannot override the law of the land. Therefore where a particular formality is required by statute no estoppel can, generally at any rate, operate against it. For further understanding of the slight variations of this main principle read the cases of **Western Fish Products Ltd V Penwish D. C. [1981] 2 All E. R. 204 (CA).**and **Maharaj V Chard [1986] A.C. 898 (P.C.)**

5.2. Classification and Operation of Estoppels

It is not easy to clearly classify estoppels. In the past the courts have distinguished between legal estoppels and equitable estoppels but it has not been easy to draw a clear line of distinction between the two. Of late there have been many terminologies used to refer to estoppels including estoppel in **pais**, estoppel by conduct, estoppel by negligence, by representation, by agreement, by acquiescence, by deed and by convention. In other situations these have generally been referred to as promissory estoppels and proprietary estoppels. All the same it has not been easy to clearly distinguish them and that there are overlaps among some of these categories.

Despite the aforesaid problems we shall, for the purpose of this study, classify estoppels in three main groups:

(i) Estoppel by record;

(ii) Estoppel by deed; and

(iii) Estoppel by conduct

(i) Estoppel by record/Judgment

It is a matter of policy that, subject to appeal rights, the judgment of a valid court of law acting within its cope of jurisdiction should be final and conclusive as between the parties concerned. These matters belong to the law of procedure but the conclusive effect of judgments on the whole world (judgments in rem) as well as the parties as the parties (judgments in personal) to civil litigation have some bearing on the law of evidence. This is the reason why the doctrine of **res judicata** under section 9 of the Civil Procedure Code Act is relevant. The operation of the principle of **res judicata** prevents a litigant from re-opening a suit which has already been adjudicated upon. The matter in question in the subsequent action must, however, have been 'directly and substantially' in issue in the former suit.

An issue on the operation of estoppel by judgment could, however, arise in cases where the previous judgment had been given in default of appearance. This issue was a subject in the case of **Musa bin Khamis bin Juma el Nofti V. Kaporo bin Kasibu Mnyamwezi [1957] E.A. 189**. In his considered judgment Wyndham C.J stated, after consulting the relevant authorities, that an earlier judgment did not constitute **res judicata** where this judgement was by default and not on its merits, since a judge dismissing the plaintiff's suit in default could not be said to have "heard and finally determined" the matter in dispute for the purpose of constituting **res judicata** under the law.

In criminal cases it relates to the pleas of **outrefois acquit** and **outrefois convict** under Section 137 of the Criminal Procedure Act. For more details on the effect of judgements under sections 42 and 43 of the TEA read lecture 7 of Unit one. The records in the aforesaid situations are conclusive and any party is stopped from re-opening the cases in future times on the same facts. For the further elaboration on how estoppel by judgement operates read the following cases: **Abdullahi Jiwani V.J.V. Pandya [1958] EA 521; New Brunswick Railway Co., V. British and French Trust Cooperation [1939] AC 1; and R.V. Allan (1930) 12 KLR 90.**

(b) **Estoppel by Deed**

The Evidence Act does not expressly mention estoppel by deed. Estoppel by deed is based on the principle that when a person has entered into a solemn engagement by deed under seal with another party he or the person claiming through or under him shall not be allowed to set up the contrary of his assertion in the deed.

The scope of this rule is very limited. In the first place, it only applies between parties to a deed and those claiming through them. Secondly, it only applies in actions on the deed. Thirdly, the doctrine only applies to clear and un-ambiguous statements. Finally, it does not prevent a party form setting up a plea of illegality or fraud or from availing himself of any fact which would have given rise to a right to rescind the deed in equity. Read the cases of **Jenabai v. Shamso [1957] EA 227** and **Bowman V. Tailor (1834) 2 A & E 278; Bateman V. Hunt [1904] 2 K.B. 530** for the application of estoppel by deed.

(c) **Estoppel by Conduct/Estoppel in *Pais*.**

Under common law estoppel by conduct embraces all acts or statements of a party upon the faith of which another reasonable party has been led to act and to change his position and which it would be unfair to permit the first party to deny. The rule was authoritatively stated in the case of Pickard **V Sears (1837) 6 A & E. 469 at p. 474** in the following words:

"…Where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the later a different state of things as existing at the same time…"

There is a slight variation on the application of the principle in East Africa in respect to equitable estoppel, as opposed to ordinary [legal] estoppel. The position is that it is not, as in the case of common law estoppel, necessary for the person to whom the representation, in the form of a promise, is made to have altered his position on the strength of the promise. In the case of **Income Tax Commissioner V. A.K [1964] EA 648.**Madam J clarified the position in the following words:

"…I find myself unable to accept counsel for plaintiff's submission that a necessary ingredient of equitable estoppel is the promise should have led to alter his position on the faith of the promise. I do not think so, for I consider it enough if the promisee acted on it, as the defendant did in the present case. I think counsel for the plaintiff's argument has overlooked the difference between what I would call ordinary and promissory estoppel…"

Students may wish to note that the statement of Madam J correctly reflects the wording in section 123 of the TEA which does not contain the phrase "to alter his own previous position" in its framework. What is key under the provision is believing the truthfulness of the representation /act / omission and acting upon such belief. It is apparent that the altering of one's previous position, as indicated above, in an important component in estoppels under English law.

Conduct by an act or omission amounting to representation has been placed on the same footing as an express representation. Estoppel by representation may arise from:

- Contract or agreement or
- It may also arise apart from contract, e.g. misrepresentation, negligence etc.

Section 124 of the TEA deals with one class of estoppel by conduct namely estoppel by contract i.e. estoppel arising out of the relationship of landlord and tenant. The rule embodied in this section means that a tenant during his possession of the premise is stopped from denying that the landlord who let him into possession had a title at the time of his entry.

Sections 125 and 126 of the TEA are instances of estoppel by agreement. The sections deal with the estoppel arising out of the position or contract entered by the drawing, acceptance or endorsement of a bill of exchange or notes. The acceptance of a bill of exchange implies an admission of the existence of a drawer and his capacity and authority to draw the bill. This also amounts to an undertaking by the acceptor to pay the amount specified in the instrument.

The provisions in sections 125 and 126 are subject to two qualifications:

(i) the acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn e.g. the acceptor may dispute the signature of the drawer;

(ii) When a bailee is sued by a bailor in respect of goods delivered by the bailee to a person other than the bailor, the bailee may prove that such other person has a right to the goods against the bailor.

It must be emphasized that Sections 124-126 are not exhaustive on the doctrine of estoppel by agreement. H.T. Morris in his book **Evidence in East Africa** mentions other examples of estoppel by conduct.

(i) Estoppel arising out of misrepresentation - see the case of **Iddi v. B.E.A. Corporation and Rukiya (1909) EAPLR.19;**

(ii) Implied representation - see the case of **Clifton V. Hawley [1966] EA 44;**

(iii) Where there is a duty to speak silence may constitute representation – see the case of **V.H. Kapadia v. Thakarsey [1964] EA 376.**

Morris further clarifies that for a representation to operate as an estoppel it must also be clearly one of fact not law – see **Tallock Singh v. Starling Insurance Co. Ltd [1963] EA 304.**

In addition, at common law, where the conduct is negligent or consist wholly of omission, there must be a duty to the person misled. This principle seems to be a bit different from the rest of the law of estoppel. The explanation is that this aspect of estoppel is properly to be considered a part of the law relating to negligent misrepresentation, rather than estoppel properly so called. For further elaboration on this read the cases of **Mercantile Bank V Central Bank [1938] A.C 287 and Moorgate Mercantile Co. Ltd V Twitchings [1977] A.C. 890 (H.L)**

5:3 Conclusion

The doctrine of estoppel is very important in the law of evidence for without it people would have faced problems for acting, in trust, on actions/words/statements etc of other people. Students may note that the doctrine is wide and what has been presented in this lecture is just a brief summary but not an exhaustive examination of the subject. It is prudent that students take time to get into the details of the doctrine to facilitate understanding what it entails.

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OPEN UNIVERSITY OF TANZANIA

FACULTY OF LAW

OLW 202

EVIDENCE PART III

WITNESSES

EVIDENCE PART III

WITNESSES

By Dr. B. T.Mapunda

INTRODUCTION

Any trial in court is intended to get the truth of controversial facts and give rights to the parties. In the adversarial system of justice, which Tanzania is using, the court stands as an uninterested umpire and the parties are required to convince the court of the truthfulness of the facts they allege. Law determines the standards for such proof. In most cases, if not all, a party in a civil or criminal proceeding would require the assistance of other people conversant with the material facts in convincing the court on the truth of his/her version of the facts. It is under these circumstances that witnesses are required.

Part three in our study series is devoted to the examination of the law relating to witnesses. This part is divided into five main lectures. The first lecture looks at the issue of competency, compellability and privilege of witnesses. The lecture is intended to teach students persons who are competent to testify and situations in which they can be compelled to testify in court. You will also study on persons who are competent to testify but for some reason they cannot testify. The second lecture examines the law relating to the credibility of witnesses and weight of evidence. In this topic you will study situations in which a witness is said to be credible and the effect of such witness in the decision of the case. In addition the lecture also explores how courts weigh evidence given in court in the course of determining the rights of the parties in any case. The third lecture is on the examination of witnesses. Sections 144-147 of the TEA lay down the procedures on the examination of witnesses. The lecture, therefore, explores these procedures in some detail. Lecture four, is devoted to the issue of refreshing memory and production of documents. There are situations where a witness may have forgotten some important information that may be found in a document that he/she is conversant with. The law lays down rules on how such a witness can refresh his/her memory and produce the document where the same is important for the just decision of the case. In the last lecture you will study, in brief, on the issue of proof.

Dr. B.T. Mapunda

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LECTURE 1

COMPETENCY, COPELLABILITY AND PRIVILLEGE OF WITNESSES

1:1 **Introduction**

A person cannot give evidence in court unless he/she is competent to testify. In some situations a competent person may be compelled to give evidence but in others this is not possible. Incompetent people are not allowed to testify in court. In this lecture you will be introduced to the law on competency, compellability and privilege of witnesses. At the end of this lecture you will be able to explain the types of persons that are competent and compellable and under what conditions therein.

1:2 **General Competence to Testify**

Witnesses play a very important role in the administration of criminal and civil justice. The term witness, here, must be taken to include parties to proceedings. Judgments are normally made on the basis of evidence given by witnesses. However not every witness is allowed to testify. Law compels other witnesses, to testify. The general question covered in this lecture concerns the determination of who may give evidence generally, who may be compelled to give evidence, and the circumstances under which a competent witness may be relieved from giving evidence.

Witnesses, generally, can be classified in three groups: (i) witnesses who are competent and compellable to testify; (ii) witnesses who are competent but not compellable; and (iii) witnesses who are competent, but for some reason or another, the court will not allow them to testify. This brings us to the three important notions used in the law relating to witnesses namely, "competency", "compellability" and "privilege".

A witness is competent if he may lawfully be called to give evidence. This means those people who can testify. Such person is expected to be conversant with the facts of the case. More precisely a witness is competent to give evidence if his testimony is admissible. The competency of a person to testify is a condition precedent to the taking of a witnesses'

testimony. Competency being a condition precedent to the administration of an oath or affirmation, a determination of competency must be made before the oath or affirmation is administered. The responsibility for determining competency lies with the court. Where the court, for some reason, suspects that a potential witness may not be able to understand questions posed and give rational answers to the same it should ascertain whether or not the witness is in fact competent.

A witness is compellable if, being competent, he can lawfully be compelled to give evidence. Generally, except for the accused and his/her spouse, all competent witnesses are compellable. In other words a witness is compellable if he can be obliged to go into a witness box and to answer questions put to him or else sanctioned for contempt of court if he refuses to do so. However a witness may refuse to testify on the ground of privilege. The rules of privilege shall be considered later.

The last category of witnesses are those who are competent but incapable of giving evidence for one reason or another. These are incompetent witnesses.

The general rule is may be reduced to two simple propositions: (i) any person is a competent witness in any proceedings; and (ii) all competent witnesses are compellable unless an exception lies. Under section 127(1) of the TEA all persons are competent to testify, unless the court considers that by reason of tender years, extreme old age, disease or infirmity they are incapable of understanding the questions put to them and of giving rational answers. It is clear from the foregoing that competency of a witness in the rule and in-competency is the exception. The court having the conduct of the case has the duty to determine the question whether a particular witness is competent to testify in court. If the court suspects, for any reason, a potential witness may not be able to understand the questions put to him or give rational answers in the best way possible it has duty to ascertain whether or not the witness is in fact competent. The manner of such ascertainment would depend on the nature of weakness noted. However the fact that a person is a lunatic or suffering from mental disorder does not in itself make him incompetent or prevent him from giving rational answers on matters in issue. (see section 127(6)).

1:2:1 Competency in Special Cases

In certain situations some persons are allowed to give evidence only if certain requirements are met. Some of such situations are discussed below.

i) Children of Tender Age

The general rule is that a child is a competent witness unless the court considers that he is prevented from understanding the questions put to him or from giving rational answers to those questions by reason of tender age (sect. 127 (1) of TEA). A child of tender years is a child of or below the apparent age of fourteen years (sect.127 (5) of TEA). Where in any criminal matter a child of tender age does not, in the opinion of the court, understand the nature and value of an oath, his evidence may be received though not on oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth (sect. 127(2) of TEA). That means understanding the nature and duties attached to an oath is not a mandatory condition, although the same is desirable, before a child is allowed to give evidence. The minimum condition needed to allow a child to give evidence in court is possession of sufficient intelligence and the understanding of the duty of speaking the truth. The term 'duty of speaking the truth' means the duty to tell the truth, which is an ordinary duty of normal social conduct.

The manner in which this provision is to be applied has clearly been laid down in the cases of **Nyasai Bichana v R [1958] EA 190 and Kibangeny Arap Kolil v R [1959] EA 92**. In case a child of tender years appears in court as a witness the court has the duty to ascertain whether he understands the nature of an oath and the obligations thereof. Where the court is satisfied that the child understands the nature of an oath it may proceed to swear/affirm him for the purpose of giving testimony. The ordinary procedure on this was laid down in the case of **Kibangeny Arap Kalil v R** cited above. In this case the court said that the court should ask questions to the child as to his age, religion, if any and such other questions as will assist it in determining whether the child understands the nature of an oath or affirmation and its obligations. Such examination of the intelligence of a child of tender age is called

Voire Dire examination. The examination need not be a lengthy one but it must be made and where it is done the trial court must record the same.

The basic criterion in such situations is the capacity of the child to understand the questions and give rational answers to what is asked. The court has the discretion to form its own opinion whether the child witness has sufficient understanding to be qualified to be a witness. However in order to find this out **voire dire** examination must be conducted. It is pertinent to emphasize that failure of the trial court to follow the procedure prescribed might result in the quashing of the conviction in the case where the remaining evidence is insufficient to sustain it. See **Nyasai Bichana v R** cited above.

If the court is satisfied that the child understands the nature of an oath it may proceed to swear or affirm him for the purpose of giving evidence. It has to be made clear that the competence of a child of tender years to give sworn evidence in either criminal or civil proceedings depends upon whether the child understands the nature of an oath. As a matter of law such evidence need no corroboration. In the case of **Shozi Andrew V R [1987] TLR 68** the court held that in terms of section 127(2) of the TEA sworn testimony of a child of tender years does not need corroboration. The court added that such evidence can be treated as any other sworn testimony and it can form the basis of a conviction. However, in practice, courts normally do not convict on such evidence without a warning themselves on the dangers of convicting on the basis of uncorroborated evidence of a child. In **Kibangeny's** case (supra) the court stated as follows:

"…But even where the evidence of a child of tender years is sworn (or affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it, if uncorroborated, without warning itself and the assessors (if any) of the danger of doing so…" (P.95).

If the court makes a finding that the child possesses sufficient intelligence to warrant the reception of his evidence it may proceed to take his evidence without any oath. As a general rule where un-sworn evidence of a child is received corroboration is necessary. However

where the court is satisfied that the child is saying nothing but the truth it may proceed to convict after warning itself of the dangers of doing so (sect. 127(2) and (3) of the TEA.). In sexual offences evidence of a child of tender years may be acted upon if, for reasons to be recorded, the court is satisfied that the child is telling nothing but the truth (sect. 127 (7) of the TEA). Take note that in sexual offences the court has no duty to warn itself as the case is in other offences. It needs only to satisfy itself of the truth of the evidence given. However it is required to record its reasons for such satisfaction.

ii) Persons With Decease of Mind/ Unsound Mind

The term disease of mind applies to idiocy and lunacy. An idiot is a person who was born irrational and a lunatic is a person who was born rational but subsequently became irrational. Under normal circumstances an idiot can never become rational but a lunatic can entirely recover or have some lucid moments. According to the TEA a person of unsound mind is competent to testify unless prevented by his condition from understanding the questions put to him and giving rational answers (Section 127(6) of TEA). In summary a mentally disordered person or a lunatic is a competent witness if he: (i) can understand the questions put to him; and (ii) is capable of giving rational answers to such questions. From the foregoing one can say that in lucid moments a mentally disordered person or a lunatic may testify before a court of law. It follows logically, therefore, that such person must also be capable of understanding the nature and obligations of an oath. This means that such a person can testify and it is upon the court to determine the weight to be attached to such evidence. For example In the case of **R v Hill (1851) 2 Den. 254** a patient of a lunatic asylum, who was laboring under a delusion that he had a number of spirits about him which were continually talking to him, but with clear understanding of the obligation of an oath, was held competent to give evidence for the crown on a charge of murder.

iii) Dumb Witnesses

A person is not necessarily incompetent to testify because he is dumb. A dumb person may give evidence in any other manner in which he can make it intelligible such as by writing or signs provided that such writing is recorded and the sign are made in the open court. Evidence given in this way is deemed to be oral evidence (sect. 128(i) &(2) of the TEA). In

such cases the court should satisfy itself that the witness has the requisite amount of intelligence and that he understands the obligations of an oath. Section 128 of the TEA, however, does not mention those witnesses who are both dumb and deaf. This situation was discussed in the case of **Salum V R. (1951) 18 EACA 217**. The general position in the case is that such evidence may be admitted at the discretion of the court. In this case the court stated that a person having both infirmities could testify if he can be made to understand the nature of an oath and if his intelligence can be conveyed to and from him by means of signs. If the court is satisfied that the witness is fit to testify he may be sworn or affirmed and allowed to give evidence by means of an interpreter. What is important, the court added, is the fact that the interpreter must be competent and sworn before assisting the witness. Moreover there must be a record of the signs and not the interpretation of the signs. In the above case the court excluded the evidence of a person having both infirmities because the method of interpretation was found to be crude and unreliable.

iv) Parties to Civil Cases

In civil proceedings the parties to a suit and the husband and wife or wives of any party to a suit are competent and compellable witnesses (sect. 131 of the TEA.)

v) Husband and Wife in Criminal Matters

The competency of a spouse as a witness can be examined at two levels. First, when the husband or wife, as the case may be, is an accused person. In such a case such a husband or wife who is accused of an offence, is a competent witness for the defense i.e. in his/her case, but such person cannot be compelled to give evidence. He is at liberty to do so. See section 231 and 293 of the CPA.

Second, where the spouse is needed to give evidence either for the prosecution or the defense. For the purpose of the prosecution case the general rule is that a spouse is a competent but not compellable witness for the prosecution. (Sect.130 (1) of TEA.). In other words such spouse is privileged. This privilege extends to all spouses whether or not the marriage is monogamous. A problem may, however, arise where concubinage is involved. The issue is whether concubine is covered by the privilege. This matter had a day in court in

the case of **R v Siwajibu Kibaya [1989] TLR 12**. In this case Mapigano J held that where the line between a valid marriage and concubinage is obscure and where cohabitation takes on the typical feature of a durable establishment a spouse of such cohabitation is not under duty to testify for the prosecution.

The privilege stated in section 130(1) of the TEA has two exceptions. A husband or a wife is a competent and compellable witness in the following cases:

- Where the charge is under chapter xv of the Penal Code or under the Law of Marriage Act, and;
- In any case where the person charged is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them.

The second exception was, clearly, intended to protect personal and property interests of spouses. In situations where a spouse is needed to give evidence for the prosecution the court should make sure that the particular spouse is dully informed that he/she is under no duty to testify against his/her partner before giving such testimony, otherwise such evidence would not be admissible (sect. 130(3) of TEA). The choice of a spouse whether or not to give evidence, being a competent but not compellable witness for the prosecution, is not lost because he/she makes a statement with the police. The spouse retains the right of refusal to testify up to the point when he/she takes an oath in the witness box after having, voluntarily and with full knowledge of relevant rights, accepted to give evidence.

The other option is where a spouse is required to give evidence for the defense. In such a case the husband or a wife of a person charged with an offence is a competent witness for the defense at any stage of the proceedings, provided that he or she is called as a witness on the application of the accused spouse (Sect.130 (4) of TEA). It is interesting to note that the provision contains nothing concerning the compellability of a spouse as a witness for the defense. In the circumstances it seems that a spouse cannot be compelled to give evidence on behalf of the accused. However where, upon an application by the accused, a spouse fails or

refuses to give evidence the court and the prosecution may comment upon such failure or refusal to give evidence for the other spouse (sect. 130(5) of the TEA).

vi) Accomplices

An accomplice is a competent witness against an accused (sect. 142 of the TEA)

1:2:2 Compellability of Witnesses

Compellability means that a witness is required by law to attend the court after being summoned to give evidence and answer questions on any matter relevant to the facts of the suit or proceeding. In civil as well as in criminal cases a witness may feel that if he answers a particular question or questions he will incriminate himself or expose himself to a civil action, directly or indirectly. Such fear is not a sufficient excuse for answering questions in a witness box. A compellable witness must answer relevant questions whether or not the answers incriminates him/her or may directly or indirectly expose him to a penalty or forfeiture of any kind but such answers which the witness is compelled to give shall not subject him to any arrest or prosecution save for giving false evidence by such answer. This position is provided in sect. 141 of the TEA. Read also the case of **Ernest Joseph v R [1983] TLR 170**. Here the law differs from that in England where a witness may refuse to answer a question on the ground that the answer may incriminate him.

1:4 Privilege of Witnesses

The attendance of a witness in court can be enforced under the pain of penalty for non-compliance. As noted above a witness is not excused from answering questions on the ground that the answer will incriminate him or expose him to a penalty or forfeiture of any kind. There are, however, certain situations where a witness cannot be compelled to give answers to questions asked. The categories of such people include (a) judges, magistrates, and police officers; (b) advocates, and (c) public officers with knowledge of official communication.

Section 129 of the TEA deals with privilege of judges and magistrates. It is against public policy to allow disclosures of matters in which judges or magistrates have been judicially

engaged. The basis of this rule appears to be that cross-examination or comment on judicial conduct may be incompatible with the prestige of office. Under this section a judge or magistrate cannot be compelled to answer questions: (a) as to his own conduct in court as a judicial officer and, (b) as to anything that came to his knowledge in court unless ordered by a superior court. This judicial privilege extends only to the court's own conduct while in court, and anything which came into his knowledge while he/she was acting as a magistrate, and this again in court. The privilege does not extend to other collateral matters or incidents occurring in his presence while acting as a judicial officer. In other words, if the matters about which the judge or magistrate is to be examined concern occurrences in his presence while acting as a judge or magistrate, there is no privilege. For example where in the course of trial the accused assaults the prosecuting officer the trial judge or magistrate may be examined on the incident.

Section 133 deals with privilege relating to information on the commission of an offence. The provision protects judges, magistrates, police officers and revenue officers from disclosing information as to where information relying to the commission of an offence was obtained. The rationale of this rule is that the names of persons who assist in the detection of crimes through giving information should not unnecessarily be disclosed. In Normal circumstances if this practice is allowed no one would volunteer to give information on commission of offences. It has to be understood that this privilege applies only to the identity of the informant and not the contents of the information given.

Sections 134-137 of the TEA deal with the law relating to professional communications between clients their legal advisors and their clerks. Communications between a lawyer and his client made in confidence for the purpose of a pending litigation or for the purpose of obtaining professional advise cannot be disclosed without the client's consent. This applies whether the client or lawyer is a party to a litigation in which the question arises or a mere witness and it applies as much to the production of documents containing such communications as to oral evidence about them. In the case of **Minter v Priest [1930] AC 558** the court held that the communication must have been confidential and if not actually made in the course of a relationship of lawyer and client it must at least have been made with

a view to the establishment of that relationship. The rule is established for the protection of the clients not the lawyer. The essence of the privilege is that the client may avoid disclosure of his instructions to his lawyer and of his lawyer's advice to him. It is found in the impossibility of conducting legal business without professional assistance and on necessity in order to render that assistance effectual and securing full and unreserved intercourse between the two.

This privilege, however, does not cover a number of cases. First, it does not cover any communication made in the furtherance of any illegal purpose. In the case of **Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd [1972] Ch. 553** the first defendant conveyed land to the second defendant in breach of the plaintiff's contractual right of pre-redemption. The plaintiff sought damages for breach of contract, interference with contract and conspiracy and sought discovery of an opinion prepared by the first defendant's counsel concerning the conveyance, which the first defendant had given to the second defendant's)

Second, it does not cover any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to such fact by or on behalf of his client. In **Butler v Board of Trade [1971] Ch. 680** a solicitor sent her client a warning that his conduct, if persisted in, could result in serious consequences. The court held that the letter was privileged because it could not be regarded as being in preparation for or in furtherance or as part of any criminal design on the part of the client. Third, proceedings in which the professional conduct of the advocate himself is or might be in issue.

This privilege extends to communications between a lawyer and the client, interpreters, clerks and servants of the advocate (sect. 135 of the TEA). This matter was discussed in the case of **Wheeler V Le Merchant (1881) 17 Ch. D. 675.** In this case the court said the following:

"…the actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client; and whether it is made to the solicitor in person or to a clerk or a subordinate of the solicitor who acts in his place and under his direction… it is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety…"

For more information on this read also the case of **O'Rourke v Darbishire [1920] AC 581.**

Sections 134-136, as aforesaid, prevent a legal advisor or his clerk or servant from disclosing professional communication made in the course of professional employment. Section 137 elaborates further such protection by providing that no one shall be compelled to disclose confidential communications which has taken place between himself and his legal advisor unless he offers himself as a witness in which case he can be compelled to disclose any such communication which the court thinks necessary to explain the evidence which he /she has given but no others. This privilege extends to all communications, oral or written, whether they were made before or after the commencement of the litigation.

The obligations stated herein above continue even after the employment has ceased (sect. 134(2) of TEA).

Section 132 of the TEA takes care of privilege relating to official records and communications. Under the section no public officer can be compelled to disclose any unpublished official record or communication made to him in the course of his duty when a Minister or Secretary General of the Community has stated that such disclosure would be against public policy or public interest. It has to be noted, however, that for this privilege to be effective there must be an official statement on oath by the Minister or the Secretary General of the Community that the production of such communication would be prejudicial to public interest. You may wish to note that this provision was made at the time when the defunct EAC was still operating. It is hoped the revival of the community would maintain the relevancy of the rule.

Finally, sections 138-140 of the TEA offer a measure of protection to witnesses who are not parties to suits and other persons possessing documents. Sections 138-139 provides that a witness who is not a party to a suit shall not be compelled to produce: (i) his title deeds or documents in the nature of title deeds, or (ii) any document the production of which might tend to incriminate him, unless he has agreed in writing to produce them. These two sections relate to cases where the document is the title deed of the witness. The reason for the rule is the protection from the mischief and inconveniences that might result from compulsory disclosure of title. Section 139 refers to documents of another person in the possession of the witness. The provision is intended to protect persons whose title deeds and other documents happen to be in the possession of other persons such as attorneys, agents or servants, trustees, mortgages etc.

1:5 Conclusion

In this chapter you have studied the law relating competence, compellability and privilege. Subject to certain exceptions, the general principle is that any person is a competent witness in any judicial proceedings. It is also true to say that every compellable witness is a competent witness. However not every competent witness is compellable. The main reason for this is privilege. A witness may be privileged and therefore under no obligation to testify. Where no such protection is available the court may compel, under the pain of punishment, any person to testify.

LECTURE 2

CREDIBILITY OF WITNESSES AND WEIGHT OF EVIDENCE

2:1 Introduction

When a person presents a witness he expects the court to believe him and so decide the particular case or issue(s) in his/her favor. One of the important things to a witness is his trustworthiness. In order to win the trust of the court a party is required to present witnesses who are trustworthy. In practice the court will not normally trust witnesses without checking their credibility. Other important things linked with this are the number of witnesses required to prove a case and gagging the weight of evidence. This lecture is intended to examine these items. At the end of the lecture you will be able to know the various ways of testing the credit of a witnesses, the number of witnesses required to prove a case and weight of evidence.

2:2 Testing the Credibility of Witnesses

There are no hard and fast rules to determine the credibility of witnesses, the weight of their evidence and the sufficiency of the same. In **R v Madhub Chunder (1874) 21 W.R. cr. 13, 19** (India) Birch, J., stated that:

"…For weighting evidence, and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each, common sense and shrewdness must be brought to bear upon the facts solicited…"

Credibility of a witness depends on a number of factors namely:

(i) knowledge of the facts, (ii) disinterestedness and independence in relation to the issues in the case and the results, (iii) intelligence, (iv) integrity and (v) veracity of the witness. The TEA provides for two main ways of testing the credibility of a witness:

a) By impeaching the credit of the witness, and;

b) By observing his/her demeanor in court.

2:2:1 Impeaching the Credit of a Witness

In order to know that a witness is credit worthy he/she is normally tested. As indicated above one of such tests is impeaching the credit of the witness. Such credit may be impeached in four main ways:

- By cross-examination. This is done by cross-examining the witness on his knowledge of facts deposed to: opportunities of observation; powers of memory and perception; dis-interestedness (section 147 TEA); his veracity, position in life; injuring his character by incriminating questions (sections 155, 156, and 141 of the TEA); examining his errors, omissions, mode of life etc, (sections 155 and 158 of the TEA).
- By discrediting the witness using independent evidence i.e. by evidence of persons who testify that they, from their knowledge of the witness, believe to be unworthy of credit (section 164(1) (a) of the TEA) or by proof that the witness has received a bribe or an offer of a bribe to give evidence (section 164 (1) (b) of the TEA).
- By confronting the witness with his/her previous conflicting statement, written (section 154) or oral (164 (1) (c). See also **Kella v. R. [1967] EA 809 (CA)** and **Katar v. R. (1953) 20 EACA 134.**
- By contradicting him/her on relevant matters i.e. by calling witnesses or offering evidence to contradict the witness on all relevant matters. (section 154 and 164(1) (3) of the TEA).

On the following part we shall examine the manner in which a witness may be impeached in more detail.

i) By Cross-examination

One of the basic methods of impeaching the credit of a witness is by cross-examining him/her on the following matters/areas:

First, his/her knowledge of facts deposed to; opportunities of observation; powers of memory and perception and dis-interestedness in the subject matter. This procedure can be done under the authority of section 147 of the TEA. Cross-examination is an important tool of testing the truth of the witness's evidence. On this aspect three matters can be examined: (i) the credibility of the witness; (ii) the facts to which he has deposed in examination –in-chief including the cross-examiner's version of the subject, and (iii) facts to which the witness has not deposed but to which the cross-examiner things the witness is able to depose. Cross-examination is easily used to impeach the credit of the witness because it is not confined to facts narrated by the witness in examination-in-chief. Leading questions may be put in cross-examination (section 152 TEA). In addition irrelevant questions but tending to impeach the whiteness's credit are allowed in cross-examination.

A party is normally not permitted to cross-examine his own witness with a view to discredit him. However when the witness turns hostile, the party calling him may be permitted by the court to cross-examine him (section 164 of TEA).

Second, a party may impeach the credit of a witness by inquiring on his/her character (section 149 of TEA). A party, with a view of impeaching the character of a witness may ask in cross-examination, though he/she is not always compelled to answer (Section 158(1) of TEA), questions relating to his/her character. For example, questions may be asked with regard to alleged crimes or other improper conduct. Alternatively, a party may bring evidence, of an independent witness, on the character of the witness in question (section 149 of the TEA). A witness of character may be cross-examined and re-examined. Under normal circumstances, however, it is not usual, except under special circumstances, to cross-examine witnesses simply called to testify on the character of a party.

Third, a witness may be impeached by testing his veracity, inquiring on his/her position in life and injuring his/her character by incriminating questions (sections 141,155 and 156 of

the TEA). Section155 is the central provision on matters related to testing the veracity and credit of a witness. This section goes beyond the strict limitations in section 147 of TEA on order or direction of examinations because it allows the questioning of witnesses to determine their trustworthiness. Under this section a witness may be cross examined not only on the facts of the case but also on irrelevant matters with a view to impugn his credibility and shake his whole testimony. Under section 155(1) questions may be asked in cross-examination to test the witnesses' truthfulness/veracity. Cross-examination to credit is directed to discredit the witness with a view to showing that this/her evidence for or against the relevant issue is untrustworthy. As a general rule whenever it is intended to impeach the witnesses' credit his/her attention must first be called to the discrediting facts so that he may have an opportunity of explaining them.

If the questions relate to a matter relevant to the suit or proceedings the provisions of section 141 of the TEA regarding the compellability of witnesses applies. If they are irrelevant to the facts in issue exception so far as they affect the credit of the witness the court has the discretion of deciding whether or not the witness is compelled to answer and may warn him/her that he/she is not obliged to answer the same (section 158(1) of the TEA). In exercising this discretion the court has to take into account the following considerations:

- Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;

- Such questions are improper if the imputation that they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies;

- Such questions are improper if there is great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence (section 158(2) of the TEA).

Where the witness refuses to answer (optional) questions the court may, at its discretion, draw an inference that the answer, if given, would be unfavorable.

As a matter of principle questions permissible under section 158 ought not to be asked unless the person asking them has reasonable ground for thinking that the imputation is well founded (section 159 of TEA). Other questions that may be disallowed by the court are those which are indecent or scandalous even though they have some bearing on the questions before the court, unless they relate to the facts in issue or matters necessary to be known in order to determine whether or not the facts in issue existed (section 160 TEA). It has to be noted that questions that appear to be intended to insult or annoy or which, though proper, appear to the court to be needlessly offensive can be forbidden by the court (section 161 of the TEA). This is important for the reason that the primary goal of the court is not to expose the character of the witness but to get credible and balanced evidence for a fair determination of the case.

ii) Discrediting a Witness Using Independent Evidence

Section 164 of the TEA deals with another mode of impeaching the credit of a witness i.e. by giving independent evidence. The discussion on this aspect is confined to sub-sections 1(a) and (b) of section 164. Under the section the credit of a witness may be impeached, by the adverse party, or, with the consent of the court, by the party calling him in two main ways.

First, by presenting evidence showing that the witness bears the general reputation for untruthfulness (section 164(1) (a) of the TEA). It is pertinent to understand that a witness called to testify on such an issue must be able to state what is generally said on the person. It is expected that such witness should himself come from the neighborhood of the individual whose character is in question. The reason for this is that such witness must have first hand knowledge and be, confidently, able to say that the witness (whose character is in issue) is unworthy of credit. In such cases evidence is confined to the general reputation for untruthfulness and, therefore, evidence cannot be given of particular facts of falsehood. In the case of **May V Brown (1824) 3 B&C 126** Lord Bayley J., said:

"…When the credit of a witness is objected to, general evidence that he is not believed on oath is admissible, but specific evidence that at some period he had committed a particular crime is not admissible…"

In such circumstances the witness may be asked three things:

(i) Whether he has knowledge of the impugned witness's general reputation for veracity;

(ii) Whether the impugned witness is to be believed;

(iii) Whether his opinion as to the impugned witness's credibility be based simply on the latter's general reputation for veracity or on his personal knowledge. See **R V Longman [1968] 2 ALL E R 761** for further elaboration.

The second method of impeaching credit is by proof of misconduct connected with the proceedings e.g. that a witness has been bribed or has received any other corrupt inducement (section 164 (1) (b) of the TEA).

iii) Confronting the Witness with Previous Conflicting Statements

Section 154 of the TEA provides:

" …A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him…"

Under this section a witness may be cross-examined as to his previous statement without showing or proving the writing in the first instance. The section covers any statement which is either written by the witness himself or which was reduced into writing by someone else. It is important to understand that section 154 does not deny the right of cross-examination without showing the particular previous statement. However if the previous statement actually contradicts his evidence in court, such evidence must be put in. In the case of **E. A.**

Navigators V Grundy [1959] EA 336, 343 (CA) the court considered that the transcript of shorthand notes of evidence given by a witness at an enquiry translated by the court interpreter and recorded by a competent stenographer and shortly afterwards checked by the officer who presided at the enquiry, was held to be a "previous statement made by him…reduced into writing" under section 145 of the Indian Evidence Act that is identical to section 154 of the TEA. For more clarification of the operation of this principle see the case of **Metafile V R 20 EACA 232**.

Where the cross-examiner intends to contradict the witness his (the witness's) attention must be called to the parts that are used for that purpose. The object of their approach is to give the witness a chance of explaining any discrepancy and inconsistency found between his oral statement and the written one and to clear the particular point that may have led to ambiguities or dispute. The general principle is that whenever a witness is proved to have made a statement on oath inconsistent with a statement previously made by him the credibility of such witness is destroyed unless he can offer an acceptable explanation for the inconsistency. In **Attorney-General V Hitch cook 1 Exch. R.. 91** at p. 102 Alderson, B., said:

"… A witness may be asked any question which if answered would qualify or contradict some previous part of the witness's testimony, given on the trial of the issue and if that question is put to him and answered, the opposite party may contradict him… you may ask him any question material to the issue, and if he denies it, you may prove that fact as you are at liberty to prove any fact material to the issue..."

And in another case of **Katar Sing Bharaj and Another V R (1953) 20 EACA at p. 137**, the Court of Appeal for Eastern Africa elaborated further that:

"…When the witness gives his evidence, the defense should call for the earlier statement recorded by the police. The defense is entitled to see the statement and to cross-examine the witness on any apparent discrepancies. The person who recorded the earlier statement should then be called to prove and put it in as an exhibit… But that does not make what is

said in the statement, substantive evidence at the trial. Its only purpose and value is to show that on a previous occasion, the witness has said something different from what he has said in evidence at the trial, which fact may lead the court to feel that his evidence at the trial is unworthy of belief…"

However, before such statement is admitted as an exhibit it must be ascertained that the earlier statement was contradictory to the statement made in court. It is important to remember that the record of the statement tendered in court under the provisions of section 154 of the TEA is considered only for the purposes of contradicting a witness and it should, under no circumstances, be taken as evidence against the accused person. In **Orete v Uganda [1966] EA 430 (CA)** the witness agreed that in earlier statements, admitted in evidence, she had not mentioned the accused by name because of fear. The Court of Appeal, commenting on the admission of the previous statement in evidence, said that the statement was wrongly admitted in evidence because the witness had conceded in the earlier statement that she did not mention the accused by name and for this reason there was nothing to contradict. Read also the case of **Kibwana Salehe V R (1968) HCD n. 391**.

In summary, therefore, where it is intended to contradict a witness by using previous statements such witness must, as aforesaid, be informed of those parts of his statement that are to be used to contradict him. A witness cannot be discredited without his attention being drawn to the document containing his previous statement inconsistent with his deposition given in court even though the documents were produced after cross-examination. That means the previous statement must be put to him and he must be asked to say something on the same. A trial court is not entitled to refer to passages in earlier statements of witnesses or depositions unless such statements or depositions have been put in evidence or a witness has admitted making some statement, which has been put to him from the depositions, or earlier statement.

The provisions of section 154 must be read together with section 164(1) of the TEA that provides:

"…The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him…"

(c) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

Take note that the ambit of section 154 is limited to statements made by a witness in writing or reduced to writing. Section 164(1) (c) is coached in general terms and therefore may apply to previous statements both oral and written. The later section is directly intended to provide for the impeachment of the credit of the witnesses. A close reading of the section indicates that it is focused on previous oral statements- see **R V Vladimir Vasir Verbi (1942) 9 EACA 42**. Of great significance is the fact that the previous inconsistent statement must relate to matters relevant to the case. Even statements recorded in a tape recorder are admissible under this section. The statements in the tape recorder can be admitted after proof that they were not only made but also accurately recorded.

A distinction must be made between the intention in sections 154 and 164(1) (c) of the TEA. The former is intended to contradict the witness and the later is focused on impeaching the credit of the witness. In order to contradict a witness, as discussed above, his attention must be drawn to those parts that are contradictory before the writing can be proved. The principle behind section 154 is that it furnishes a test by which the memory and integrity of the witness is tested. The later is geared at impeaching the credit of the witness. However the use of both provisions is a very important tool in testing the credibility of a witness. See **Sandali Saidi V R (1952) 1 T.L.R. (R) 372.**

iv) Contradicting the Witness on Relevant Matters

The fourth method of impeaching the credit of a witness is by calling witnesses or offering evidence to contradict the witness on relevant matters. There is no specific provision on the impeachment of credit by contradiction of relevant facts stated by the witness but under

section 7 of the TEA evidence may always be given of the existence or non-existence of any fact in issue or a fact relevant to the issue(s). Therefore where the facts stated by the witness are relevant to the issue, independent evidence may always be given to contradict them. What is covered in section 164(1) (c) is one such method namely by proof of former inconsistent statement(s) and in this sense the whole ground covered by section 154 is included in section 164 of the TEA.

When a person is prosecuted for rape or attempted rape it may be shown that the prosecutrix was of, generally, immoral character (section 164 (1) (d) of the TEA). Proof that she is a reputed prostitute is intended to raise an inference that she yielded willingly to the accused's advances. The provision refers to such evidence as indicating that the complainant's general reputation was that of a prostitute or that she had the general reputation of going about committing immoral acts with men.

2:2:2 Observing the Demeanor of the Witness in Court

Apart from impeachment, another method of testing the credibility of a witness is by observing his demeanor. Demeanor is conduct or the manner in which a witness comports himself while on the witness box. Unless a witness is a skilled actor, his demeanor frequently furnishes a clue to the weight of his testimony. On this point the court in the case of **Clarke V Edinburgh Tramway Co. [1916] SC (HL) 35** made the following important comment:

"…Witnesses without any conscious bias towards a conclusion may have in their demeanor, their manner, in their hesitation, in their nuances of their expressions and even the turn of their eye-lids, left an impression upon the man who saw and heard them which could never be reproduced in the printed page…"

Observation of a demeanor is done by the court. This is the observation on the manner a witness, as aforesaid, comports himself in court while giving evidence. The basic aspects mentioned in Clarke's case above are very important in gagging the creditworthiness of a particular witness. Normally the decision of the court on whether or not to believe a witness is based much on his demeanor.

When the issue of credibility depends on the demeanor in the witness box the manner in which the witness answers questions and how he seems to be affected by the questions put to him, etc. the trial judge has an advantage. An impression as to the demeanor of a witness ought not to be adopted by the trial judge without testing it against the whole of his evidence and it is open to the appellate court to find the view of the trial judge as to demeanor ill founded. In this light the court in **Ibrahim Ahmed V Halima Guleti (1968) HCD n. 76** held that where the issue is entirely one of credibility of a witness, the weight of evidence is best judged by the court before whom that evidence is given and not a tribunal which merely reads a transcript of evidence. In another case of **Godfrey Machage V R [1977] LRT n. 37** Katiti, J., said when the question of credibility depends on the demeanor of the witness in court, the trial court stands at an advantage, but when the views upon argumentative inference from disputed facts are to be made both the trial and appellate courts are in the same position. In summary proper observation of the magistrate/judge on the witness while giving evidence is a very important element in establishing the creditworthiness of the particular witness.

2:3 Weight of Evidence and Number of Witnesses.

The weight of evidence is its cogency or probative worth in relation to the fats in issue. The assessment of the weight of evidence is essentially a matter of common sense. There is a longtime maxim in law that "evidence is to be weighted and not counted." In practice a witness may give evidence in court but such evidence may be of very little value. The reason for this, **inter alia**, is that the witness may be one whose word carry little weight. The court may take this position on account of his demeanor in court; the manner he has stood up in cross-examination; the interest of the witness in the case; the knowledge on the witness on the case; the knowledge of the witness on the facts and the circumstances under which the witness received the facts.

Keane, A., in his book **The Modern Law of Evidence** has suggested another formula in determining the weight to be accorded to evidence given by a witness. He has articulated

three factors that are important to take into account in determining the weight of evidence. These are the following:

- The extent to which the testimony of the witness is supported or contradicted by other evidence adduced;

- Where the evidence is direct, the demeanor, plausibility and credibility of the witness and all the circumstances in which he claims to have perceived the fact in issue;

- In case the evidence is hearsay, all the circumstances in which any inference can reasonably be drawn as to the accuracy or otherwise of the out of court statement.

Keane adds that where the evidence adduced by a party in relation to the fact in issue is, even if uncontradicted, so weak that it could not reasonably justify a finding in his favor it is described as "insufficient evidence." However where evidence adduced by a party is so weighty that it could reasonably justify a finding in his favor, it is described as "prima facie evidence." These are terms as used in Britain.

An examination of the weight of evidence should not be confused with the issue of admissibility. There is no doubt that the two are related. The weight of evidence is a question of fact, its admissibility a question f law. Both of them are determined by the trial judge.

Linked to matters on weight of evidence is the issue of the number of witnesses required to prove a case. There is no hard and fast rule that a particular number of witnesses is required to prove any case. In this context section 143 of the TEA provides:

"…Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for proof of any fact…"

By this provision the discretion of the judge has been left unfettered. This means that a single witness is entitled to full credit and he is sufficient for a decision. All that the court needs to examine is the quality and not the quantity of the evidence presented in court. However in the application of this general rule caution should be exercised. The operation of section 143 of the TEA is made subject to other written laws. There are some situations under which a conviction cannot be sustained if it follows from the uncorroborated evidence of a single witness. One example in which corroboration of a single witness's testimony is necessary is section 105 of the Penal Code providing for perjury. The section provides:

"…A person cannot be convicted of committing perjury or of subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false…"

The section, however, does not mean that there must always be a minimum of two witnesses for a conviction to stand. There may be situations where the nature of the evidence given is worth of belief to warrant a conviction. Section 105 of the PC was once interpreted in the case of **Ramadhani V R. (1953) 20 EACA 212** where the court said:

"…It used to be said that there must be two witnesses: this was a dilution, the evidence of one witness and a confession may be enough…"

In addition to the express legal requirement for corroboration in certain cases, rules of practice in certain situations, now amounting to rules of law, require corroboration of evidence. Some of the examples falling under this include unsworn evidence of a child of tender years, accomplice evidence, evidence of identification by a single witness where circumstances were unfavorable, dying declarations and evidence of interested witnesses. Some of these will be, albeit briefly, examined later.

2: 4 Conclusion

In any case the most important thing is to get trustworthy evidence for a just decision of the case. Such evidence is obtainable from any number of witnesses (one or more) who can be trusted to have told the truth on the issues before the court. Even where evidence has been given by only witness once the court is reasonably convinced that the witness is telling the truth it has every reason to determine the rights of the parties on the basis of such information.

LECTURE 3
EXAMINATION AND QUESTIONING OF WITNESSES

3:1 Introduction

When a witness is brought to court he/she is expected to give some information that would assist the court to reach the a decision of the case. This is done through the questioning of witnesses. The questioning of witnesses is ordinarily done in three stages namely, examination-in-chief, cross-examination and re-examination. Only in exceptional circumstances that witnesses are re-examined in chief and re-cross examined. These stages are very important in gathering information from witnesses. The manner of examining witnesses is the subject matter of this chapter. At the end of this lecture you should be able to understand the meaning of examination-in-chief; cross-examination and re-examination and how these are used to get information in civil and criminal proceedings.

3:2 Examination-in-Chief

The examination of a witness by a party who calls him is called examination-in-chief or direct examination (section 146(1) of TEA). The object of examination-in-chief is to get from the witness all material facts within his knowledge relating to the case. It is, therefore, important that a party calling a witness should elicit from him all material facts, which he knows about the case. For this reason the examiner should not only make himself thoroughly acquainted with the entire facts of the case but also with the particular facts which the witness has come to depose, the nature and character of the witness and the degree of his intelligence. A timid witness should be encouraged; a talkative witness controlled; and a partisan witness must be checked. In addition, the facts deposed to must be within the personal knowledge and recollection of the witness.

Questions in examination-in-chief must be confined to facts in issue or relevant facts. Inferences, opinions, or beliefs, unless they come within sections 47-53 of the TEA, of a witness must be excluded. As regards documents a witness may, in general, be asked about the execution but not on the contents, which must be proved by the production of the document itself (ss. 63 & 100 of the TEA).

In examination-in-chief the general rule is that a witness should not be asked leading questions, except with the permission of the court (section 151(1) of the TEA). The question is: what is a leading question? A leading question is one which itself suggests the answer, which the person putting the question desires from the witness. A party calling a witness and seeking to elicit evidence supporting his case often faces a witness who, although favorable, is not particularly forthcoming. The party calling him may be tempted to put words in the witness's mouth and thereby explain what he wants him to say. In other words it is a question assuming expressly or impliedly a material fact not testified to, which points out the desired answer to enable the witness to affirm such fact. Thus it would be a leading question if the counsel for the prosecution, seeking to establish an assault, were to ask the victim: "Did X hit you in the face with his fist?" The proper course would be to ask: "Did X do anything to you?" Questions are also leading if so framed as to assume the existence of facts yet to be established. For example if evidence had yet to be given of the assault it would be improper to ask: "What were you doing immediately before X hit you?"

However the court may, in its discretion, permit leading questions in the course of examination-in-chief especially in matters which are introductory, such as his name and address, or undisputed or have already been sufficiently proved (section 151 of the TEA). The rule prohibiting the asking of leading questions to a party's own witness has its foundation on the assumption that a witness is always biased in favor of the party calling him.

In addition a party seeking to elicit evidence in support of his version of the facts in issue may call a witness who fails to come up to proof or gives evidence in support of the other party's version of the facts in issue. In such disappointment and in a bid to remedy the situation the party may attack the credibility of such witness. The general principle in such a situation is that except with the permission of the court (as elaborated in sections 163 & 164 of the TEA) a party is not allowed to cross-examine or impeach the credit of his own witness. The only time when a party is allowed to impeach the credit of his own witness is when such witness is hostile, i.e. he tries to defeat the party's case by suppressing the truth. However,

the fact that the witness's answer to a certain question is in direct conflict with the evidence of other witnesses (of the party) is not and can never be a reason for allowing the witness to be treated as hostile and permitted to be cross-examined. A witness is considered hostile if, in the opinion of the court, he bears a hostile animus to the party calling him. We shall deal with this aspect later in the lecture.

Sarkar quotes David Paul Brown's Eleven Rules for a good examination-in-chief. They are traditionally called Paul Brown's "Golden Rules." These are the following:

1. If the witness is bold and may injure your case by pertness or forwardness, observe a gravity and ceremony of manner towards him, which may be calculated to repress his assurance.
2. If the witness is darned or diffident and his thoughts are evidently scattered commence your examination-in-chief with matters of a familiar character remotely connected with the subject of his alarm or the matter in issue when you have restored his confidence and his mind has gained equilibrium proceed to more essential features of the case.
3. If the evidence of your witness is unfavorable to you do not show that you are disturbed.
4. If you are not confident that the witness will advance your case don't call him but if you think he is the only witness who can testify on the facts make sure that you confine your examination on those facts only.
5. Never call a witness whom your adversary will be compelled to call.
6. Never ask questions without an object nor without being able to connect that object with the case, if objected to as irrelevant.
7. Be careful not to put your questions in such a manner that if opposed for informality, you cannot sustain it or give reasons on its support.
8. Never object to a question from your adversary without being able to explain your objection.
9. Speak to your witness clearly and make him also respond clearly to your questions.

10. Regulate your voice as circumstances may require: “Inspire the fearful and repress the bold.”
11. Do not question for the question’s sake, but for a particular answer.

3:3 Cross-Examination

When examination-in-chief has been completed the opposite party is given an opportunity to question the witness. This is called cross-examination. Ordinarily cross-examination follows immediately upon examination-in-chief unless the court for some reason postpones it. The essence of cross-examination is that it is the interrogation, by one party, of a witness called by his adversary with the object either to obtain from such witness admissions favorable to his cause or to discredit him. Cross-examination is therefore directed to:

1. the credibility of the witness;
2. the facts to which he had deposed in chief, including the cross-examiner’s version of the same; and,
3. The facts to which the witness has not deposed but which the cross-examiner thinks he is able to depose.

Cross-examination is, therefore, intended to weaken, qualify or destroy the case of the opponent and to establish the party’s own case by means of his opponent’s witness. In other words it is intended to impeach the accuracy, credibility and general value of the evidence given in chief, tom sift facts deposed by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the examining party.

The failure to afford opportunity to exercise the right to cross-examine is a fatal error. In **Issa Jakala V R (1968) HCD no. 100** the accused was convicted of cattle theft. At the trial the magistrate did not give him an opportunity to cross-examine the prosecution witnesses. On appeal the High Court stated two things:

i) The failure to extend to the accused the right to cross-examine was a fundamental error and the conviction cannot stand despite the apparent strength of the prosecution case;

ii) If the accused does not desire to cross-examine a particular prosecution witness after he has been given the opportunity to do so, a note to that effect should be embodied in the record.

For this reason the High Court quashed the conviction.

The extent of cross-examination is governed by section 147(2) of the TEA, which provides that the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. This means cross-examination is not restricted in scope as examination-in- chief. However that liberty does not extend to the questioning of a witness on in-admissible evidence e.g. hearsay evidence. It is for this reason in **R.V Thomson [1912] 3 KB 19** it was held that a doctor charged with aborting a woman, since deceased, had been rightly refused permission to ask a prosecution witness in cross-examination whether the deceased had not told her that she intended to operate on herself and later that she had in fact done so. It is evident that if the accused had called a witness to prove these statements, they would have been in-admissible hearsay and they would not have lost that character by being elicited in cross-examination. In the case of **R v Treacy [1944] 2 All E.R. 229** the accused, charged with murder, was held by the Court of Criminal Appeal to have been improperly cross-examined upon certain inadmissible confessions made on arrest and inconsistent with his testimony.

Leading questions are permitted in cross-examination (section 152 of TEA). The basis of this rule is that normally a witness is biased in favor of the party who calls him. Leading questions asked by the adverse party would, under normal circumstances, be a good instrument to get important facts of the case from the witness. In cross-examination a great latitude of interrogation is permitted, when, from the temper or conduct of the witness or from other circumstances, such course seem essential to the discovery of truth and other important matters of the case. Despite of this wide discretion there are a minimum rules that need to be observed while cross-examining a witness:

- The court may forbid any questions or enquiries, which it regards as indecent or scandalous unless they relate to facts in issue or to matters to be known in order to determine whether or not the facts in issue exist (section 160 of the TEA)

- The court may forbid any question which appears to it to be intended to insult or annoy or which, though proper in itself, appears to the court to be needlessly offensive in form (section 161 of the TEA).

- No question referred in section 158 of the TEA are permissible unless the person asking the has reasonable grounds for thinking that the imputation which it conveys is well founded (section 159 of the TEA

- In the course of cross-examination, except as provided in the proviso to section 162, a witness may be asked any question tending to impeach his character or credit, but unless such questions are also relevant to the matters in issue, the witness's answers are conclusive and cannot be contradicted by other evidence (section 162 of TEA).

The general rule is that all witnesses are liable to be cross-examined. However there are three main exceptions to this:

i) A person summoned to produce a document cannot be cross-examined unless and until he is called as a witness (section 148 of the TEA).

ii) A witness who is not examined-in-chief because he has been called by mistake – see the case of **Wood V Mackinson (1840) 2 Mood & R 273**.

iii) A witness giving replies in answer to questions by the court can only be cross-examined with the leave of the court (section 176 of the TES). Ordinarily leave of the court to cross-examine is given if the evidence is adverse to either party. See **Coulson v Disborough [1894] 2 QB 316**.

The adverse party ordinarily does the cross-examination. On the art of effective cross-examination Sarkkar quotes Paul Brown's Golden Rules for cross-examination. These are the following:

1. Except in indifferent matters never take your eye from that of the witness as this is an important channel for communication.
2. Carefully study the voice of the witness, as this is the best interpreter of the mind. The mental reservation of the witness is often manifested in the tone or accent or emphasis of the voice.
3. Be mild with the mild, shrewd with the crafty, confiding with the honest, merciful to the young, the frail or the fearful, rough to the ruffian and thunderbolt to the liar.
4. In criminal cases ask few but carefully cultivated questions and make sure that the answers expected from your questions do not destroy your case.
5. Ask clear and well-focused questions and avoid asking questions objectionable in form.
6. Do not loose your temper if the witness gives you a damaging answer or is witty or refractory.
7. Be cautious and gentle if you have scored a point in cross-examination. Don't show it by a sigh of relief or an exuberant smile.
8. Do not undervalue your adversary.
9. Be respectful to the court and members of the bar but never sacrifice any duty to your case.

Denying a party the right to cross-examine a witness on important matters of the case is fatal. In the case of **Bhandari v Gautama [1964] EA 606 (C.A.)** the court held that the denial of the right of the appellant's counsel to cross-examine the respondent on vital issues rendered the trial unsatisfactory, resulting in the appeal being allowed. In addition the right to cross-examine under section 146 is mandatory while that under section 176 of TEA needs an application to the court and a specific leave of the court to do so.

Apart from the ordinary situations where the opposite party does the cross-examination a party calling a witness may need to cross-examine his own witness. This may occur in situations where a witness turns hostile at the time when examination-in-chief is being conducted. In such cases the party calling the witness may be permitted by the court to cross-examine him. It has to be born in mind that a witness is not hostile merely because he gives

unfavorable evidence against the party calling him. Such witness cannot be said to be hostile but is simply an unfavorable witness. An unfavorable witness is one who, although he displays no hostile animus to the party calling him, fails to come up to proof or give evidence unfavorable to the party that called him. At common law a party is not permitted impeach the credit of an unfavorable witness but may call another witness to give evidence contradicting that of the unfavorable witness. In the case of **Ewer v Ambrose (1825) 3 B & C 746**, for example, the defendant having called a witness to prove partnership and the witness testifying to the contrary, it was held that while the defendant could not give evidence to show that the witness was not to be believed on his oath, he was entitled to contradict him by calling other witnesses. The position in Tanzania is the same.

As aforesaid, cross-examination of a witness by a party calling him is only allowed when such witness turns hostile. Who then is a hostile witness? Justice Chipeta B. D in his book **A Handbook for Public Prosecutors** says:

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

Stephen in his book **Digest of the Law of Evidence** defines a hostile witness to mean:

"…a witness who, in the opinion of the judge, shows no desire to tell the truth at the instance of the party calling him, to whom he displays a hostile animus…"

Despite of showing apparent hostility a witness cannot be cross-examined by the party calling him unless leave of the court is obtained. The party seeking to cross-examine his own witness on the ground of hostility must first apply to the court to do the same. The court, upon satisfying itself that the contents of the former statement and what the witness has told the court are substantially inconsistent, my grant leave to cross – examine a party's own witness. In deciding whether a witness is not merely unfavorable but should be treated as hostile, the court may take into account the attitude and demeanor displayed by the witness,

his willingness to cooperate, and the extent to which any prior statement made by him is inconsistent with his testimony. In such circumstances the witness should first be given opportunity of explaining the alleged inconsistencies. In the case of **Jumanne Athman Mketo V R [1977] LRT n. 63** the court stated three important things. First, before a court permits a party to put questions to his own witness by way of cross-examination, it should call for the previous statement of the witness so as to determine whether an application to declare a witness hostile has any factual basis. Second, the question whether a witness has in fact turned hostile is to be determined by the court and not by the party. Third, as a general rule, when a witness is treated as hostile the effect of it is to make his evidence unreliable.

Where a witness has been declared hostile his/her evidence should be ignored. Elaborating this point, the court in the case of **Teddy Lucas V R [1977] LRT n. 33** said that it is a fatal irregularity for the court to treat the statement of a hostile witness as evidence and rely on it to convict. A similar view was held in the case of Mabati **bin Ruadiba V R (1938) 5 EACA 52.**

3:4 Re-Examination

Re-examination is a means of allowing the witness to explain anything he had said in cross-examination through inadvertence, excitement or misunderstanding and which would damage your case if not explained or qualified. The right to re-examine a witness, therefore, arises only after the conclusion of cross-examination. Therefore where a party opts not to cross-examine a witness no right of re-examination exists. As stated above re-examination is directed to the explanation of any part of the evidence given during cross-examination, which is capable of being construed unfavorably by his own side. In summary the objects of re-examination are three:

i) To give opportunity to the witness to reconcile the discrepancies, if any, between the statements in the examination-in-chief and cross-examination, or
ii) To explain any statement inadvertently made in cross-examination, or
iii) To remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination.

In the case of **Scott V Sampson (1882) 8 QBD 491** the court said:

"…I think that counsel has a right upon examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful but also of the motive by which the witness was induced to use these expressions, but I think he has no right to go further, and to introduce a matter new I itself and not wanted for the purpose of explaining either expressions or the motives of the witness…"

In re-examination, therefore, a party must satisfy himself that it is possible for the witness to explain any damaging answer, vague phrases and seemingly contradictory statements made during cross-examination.

Under section 176 of the TEA the court has power to put any question it pleases in any form. No objections from the parties are allowed. The rationale for this is that the court has not only to see to it that the proceedings are conducted according to law but also to administer justice and to find the truth. Where a material fact has been omitted which ought to be brought out, it is not only the right but also the duty of the court to question the witness with a view to getting the facts clearer. There is, however, no right to cross-examine any witness upon any answer given in reply to any such question except with the permission of the court. In cases tried with assessors, they may put questions to the witness through or by leave of the judge which the judge himself might put and which he considers proper (section 177 of TEA).

3:5 Re-Examination in Chief and Re-Cross examination

Normally it is not necessary or permissible to allow a witness once examined and dismissed by a party to be re-called. The reason for this is that it is presumed that by the time such witness is dismissed the parties have extracted all material points touching on he case. Nevertheless unforeseen situations may develop or there may have been an inadvertent omission. Another possibility is where the prosecution substitutes a charge or a particular count after taking the evidence of some witness.

In such cases section 147(4) gives power to the court to recall the witness for further examination-in-chief. Where a witness is called for that purpose the right to cross-examine and re-examine him exists. In **Halid s/o Twalibu V R (1968) HCD n. 423** the accused was convicted of one count of throwing or introducing prohibited articles into a prison and in the second for possession of bhang. The first count was laid under section 119(1) of the Prison Ordinance CAP 58 that had been repealed and replaced by section 85(1) of the Prison Act of 1967. The second count was added by an amendment during the trial. After the amendment the accused requested that the first prosecution witness be re-called for cross-examination but this request was refused. The court, on appeal, held that after the amendment adding the second count accused should have been given opportunity to cross-examine prosecution witnesses who had previously testified and it cannot be said positively in this case that the accused was not prejudiced by the failure to do so.

Apart from the aforesaid, there may be situations where a subsequent witness brings new facts upon which the prior witness may throw some light. As the case is with re-examination in chief the court has power to re-call the witness for re-cross-examination. In such a case the party whose witness is re-cross-examined has the right of further re-examination (section 147(4) of the TEA).

3:6 Conclusion

There is no better way of getting information from a witness other than asking him questions. The scope for asking questions is limited for the party calling a witness in that he will have to ask questions only in regard to matters that are relevant to the case and no leading question is allowed. However the opposite party has a wider room of maneuver in that there is liberty of asking not only leading questions but also asking questions even on irrelevant matters. Where there is good reason a witness may be re-examined-in-chief and re-cross-examined.

LECTURE 4
REFRESHING MEMORY AND PRODUCTION OF DOCUMENTS

4:1 Introduction

A witness, once brought to court by a party, is expected to give evidence on a specific point/issue(es) needed for the just determination of a case. However there are situations when such witness may have forgotten, at varying degrees, information obtainable in some document. In such a case the law allows a witness, to refresh his memory by reading the particular document. In addition, in certain situations, the document may have to be tendered in court as evidence. In this chapter you will study when and under what circumstances can a witness refresh his mind on a document and, where relevant, tender the same in court as evidence.

4:2 Refreshing Memory (Sections 168-172 of the TEA)

In normal circumstances a witness is expected to testify on facts based on his recollection of matters involved in the case. In some situations a witness may forget such facts especially where those events took place a long time before the proceedings. It is prudent, therefore, that he should be allowed to assist his memory by looking at documents containing an account of such facts if there is any. This is known as refreshing memory. The TEA provides for this right in sections 168 (i) & (ii) and 172 of the Act. Under this law for a witness to be allowed to refresh his memory on some document the following conditions must be fulfilled:

i) the writing must have been made by the witness himself contemporaneously with the transaction to which he testifies or soon afterwards when facts were fresh in his memory, or

ii) if the writing is made by someone else it must have been read by the witness within the said time and known by him to be correct i.e. the witness must have read the document when the facts were still fresh in his memory and noted their accuracy, and

iii) The writing must be produced for inspection by either the court or the opposite party when required;

Section 168 of the TEA deals with situations where a reference to the writing by the witness revives, in the witness's mind, recollection of facts relating to the transaction i.e. as soon as he looks at the writing/document he remembers the facts. It is important to note that refreshing of memory must be done when the witness is examined in court. When the right to refresh memory exists and if the court is satisfied about the non-production of the original, the court may permit the witness to refresh his memory by using a copy (s.169 of TEA). The proper procedure to be followed is for the advocate to lay the foundation for the use of the document by eliciting from the witness evidence as to the writing having been made at the time of the transaction. It is only after fulfilling this step that an advocate may request the permission of the court for the witness to refresh his memory. An expert witness is at liberty to refer to professional treaties (s.170 of the TEA). In the case of **Sharmpal Singh v R [1960] EA 762,** the court said:

"…Under English practice and law of evidence there is no doubt that medical textbooks are not evidence per se, though if passages from them are put to a medical expert he may refresh his memory from them or describe them as representing his own views…" (at p. 770)

It is stressed, in such cases, that where the right is exercised it is oral testimony of the witness whose memory has been refreshed and not the document which constitutes evidence in the case. In other words what is evidence is the recollection about which the witness testifies after having had his memory refreshed by the particular document. For this reason once permission to refresh memory is granted the questions to be asked are only those that relate to the transaction in question and not on the document. In **Maugham v Hubbard (1828) 8 B & C 14** a witness, called to prove that he had received a sum of money, looked at an unstamped acknowledgement signed by himself and thereupon gave evidence that he had no doubt that he had received the money although he had no recollection of having done so. The court held that the witness's oral evidence sufficed to establish receipt of the money, the written acknowledgement not being evidence in the case because it was unstamped.

Section 171 elaborates further the issue of refreshing memory. In this section a witness is permitted to testify to facts mentioned in documents referred in section 168 and 169 although

he has no specific recollection of the facts themselves but is sure that they were correctly recorded. For example a bookkeeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept although he has forgotten the particular transaction entered.

A close reading of sections 168 and 171 of the TEA indicates that there are two types of recollections covered under them. First, is what is normally called “present recollection” of facts. Under this category the witness remembers the facts under enquiry referred to him. Such a situation is covered under section 168. Second, is what can be called “past recollection.” In such a case the witness does not remember the facts and cannot revive them by stimulation but there was a time when he did have a sufficient recollection when the same were recorded. On this ground he can adopt and, therefore use them, as sufficiently representing what he knew when the incident took place. This is the subject of section 171 of the TEA.

The difference between sections 168 and 171 is that under section 168 the witness refreshes his memory by looking at the document and gives evidence in the ordinary way. In such a case the document itself is not evidence nor is it tendered. It is the statement of the witness and not the statement in the document which constitutes evidence in the case. However under section 171 the memory of the witness is not refreshed as such and although he has no specific recollection, he guarantees that the writing contains a true record of the facts. Under this section the document itself is tendered and it is in evidence. In cases where the witness does not “refresh” his memory and having no clear recollection of the events in question, gives evidence as to the accuracy of the contents of the document the original document must be used. In case the original has been lost or destroyed a verified or accurate copy will suffice.

Section 172 provides for the rights of the adverse party on the writing used to refresh memory. The section deals with the adverse party’s right as to production, inspection and cross-examination, when a document is used to refresh a witness’s memory. It requires that the writings, which are used under sections 168 and 169 for the purpose of refreshing the

memory of a witness, be produced for inspection and shown to the adverse party if he requires it. The opposite party is also, under the same provision, given the optional right of cross-examination. There are three grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness:

i) to secure the full benefit of the witness's recollection on the facts under enquiry;
ii) to check the use of improper documents; and,
iii) to compare the witness's oral testimony with his written statement.

4:3 Production of Documents (sect.173-175)

Sections 173 –175 of the TEA deal with the production of documents. A witness summoned to produce a document must, if it is in his possession and power, bring it to the court that will decide on the validity of any objection which the witness may have or admissibility (section 173(i)). This provision is mandatory and covers both public as well as private documents. The section clearly makes a distinction between the terms "brings into the court" and "production" or "admissibility." It is apparent that a person summoned to produce a document may do one of the following: First, he may send the document to court in a sealed cover and claim privilege to its disclosure, or second, after having brought the document in court, the witness himself may claim privilege, or; third, he may prefer other objections that he may have against the production or admissibility of the document and the validity of the objection shall be determined by the court. The court may, if it sees fit, inspect the document unless it is a document to which section 132 of the TEA (relating to privileged documents) applies or may take other evidence to determine its admissibility (section 173 (2) (a) of the TEA)

Section 172(2)(a) should be construed to refer to the objections both as to the production and the admissibility of documents. Otherwise in the absence of any limitation to its power the court would be justified in exercising its authority under section 173(1) of the TEA. Para (b) of section 173(2) provides that if, in order to determine the validity of the objection, any translation of the document is necessary the court will cause it to be translated and if it is desirable that the contents of the document in respect of which privilege has been claimed

should be kept secret, unless the document is to be given in evidence, the court may direct the interpreter accordingly. Disobedience by the interpreter to such court order is punishable under section 96 of the Penal code.

In addition, when a party calls for a document he has given the other party notice to produce and such document is infant produced and inspected by the party calling it such party must give it in evidence if the party producing it requires him to do so and it is admissible (section 174 of TEA). It has to be made clear that the mere calling for a document and its production by the opposite party does not bind the party calling it in evidence. The obligation comes up when the opposite party inspects the document and the party producing it requires him to put it in evidence. When a party refuses to produce a document for which he had a notice to produce he cannot use it afterwards as evidence without the consent of the other party or the order of the court (section 175 of the TEA). In other words a party after refusing to produce a document cannot make the document his own evidence or put it into the hands of his adversary's witness for cross-examination save with the consent of the other party or the order of the court. This is intended to promote fairness on both sides.

4:4 Conclusion

In this chapter you first studied how a witness may refresh his memory. Under section 168 of the TEA a witness is allowed to have recourse to a document that can assists him to remember what actually happened in the transaction in question. The particular document is not part of the evidence his oral statement is. However, under section 171 of the TEA the document referred to by the witness is part of the evidence and is tendered to form part of the evidence. Another important thing studied in this lecture is on the production of documents. Apparently what is contained on this point must be understood in the context of the whole issue of documentary evidence studied in part two of this series.

LECTURE 5

PROOF

5:1 Introduction

Any case or issue brought before the court must be proved. One important aspect in matters related to proof is the burden of proof that you studied in part two of this series. There are, however, certain related situations that require special consideration. These include cases where the evidence available is circumstantial and where the evidence of the witness requires corroboration. This lecture is intended to outline, in brief, the requirements of the law in the two situations. At the end of the lecture you should be able to understand the demands of the law, in regard to proof, where the evidence is circumstantial and the requirement of corroboration in certain situations where the evidence of an accomplice and dying declarations are involved.

5:2 Circumstantial Evidence

All judicial evidence is either direct or circumstantial. It is "direct evidence" when the principal fact is attested directly by witnesses, things or documents. In other words circumstantial evidence is that which is afforded not by direct testimony of an eyewitness but by considering surrounding circumstances relating to the facts in issue or subsidiary facts, which are relied upon in confirming the truth of the principal fact. Osborn defines circumstantial evidence as:

"…A series of circumstances leading to the inference or conclusion of guilt. Evidence which, although not directly establishing the existence of the facts required to be proved, is admissible as making the facts in issue probable by reason of its connection with or relation to them…" (Osborn: Concise Law Dictionary).

In a number of cases direct evidence is not available and so, in criminal cases, the prosecution may have to rely on circumstantial evidence. It is well settled that when a case rests on circumstantial evidence the same has to satisfy three tests. First, the circumstance

from which an inference of guilt is sought to be drawn, must be cogently and firmly established i.e. they must be proved beyond reasonable doubt and must clearly be connected with the facts sought to be inferred from. Second, those circumstances should be of a definite tendency un-erringly pointing towards the guilt of the accused. This means that all incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of accused guilt. Third, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

One of the best case to illustrate these points is the case of **R.V Lugalo and Others (1971) HCD No 443**. In this case three accused persons were jointly charged with murder c/s 196 of the Penal Code. On the material date the diseased, his wife and three accused persons had been drinking liquor in a bar from 2pm until sunset. Later the deceased, his wife and a third person left together and were soon followed by the three accused persons. There was evidence of a quarrel and exchange of abusive words between the deceased and the accused persons. Later at a nearby crossroad the wife of the accused took one path, the deceased, his friend and the first accused took another and the other two accused persons took the third path. The deceased did not return home and on the next morning his wife went to look for him near the crossroad. She found him dead on the side of the road. During investigation bloodstained clothes of all the three accused persons were recovered and according to the government chemist report the blood stains on the clothing on the first two accused persons were human blood of the same group as that of the deceased being of AB group. The blood groups of the accused persons were B and O respectively. Their explanation for this incident was that they had slaughtered a goat few days before. The blood on the clothing of the third accused was not human. This accused was acquitted of murder and the other two were convicted of manslaughter. In his reasoned judgment the learned judge said:

" …For an accused to be found guilty on purely circumstantial evidence the inculpatory facts must be such as to be incompatible with the innocence of the accused and incapable of any other explanation than that of the accused guilt. Thus evidence of blood stains on the two

accused's' clothing being of the same group as the deceased added to the evidence that the two accused wee involved in the fight with the deceased only hours before he was found dead and the bogus explanation as to how their clothes got blood stains clearly shows that the two accused's had a good reason to tell lies. The totality of inculpatory facts are in my view incapable of any other reasonable explanation that the first two accused's are implicated with the death of the accused..."

And in the case of **Hassani Fadhili V R [1994] TLR (CA)** the appellant was charged with and convicted of murder, and sentenced to death. The conviction was based on circumstantial evidence. The key evidence stated by the trial judge in the following words: `... the accused's act of taking the deceased from his house to the afore-mentioned hospitals and paying for transport charges clearly demonstrates his involvement in the said abortion'. The deceased died as a result of hemorrhagic shock due to loss of a lot of blood because of incomplete abortion, said to have been performed by the appellant. The learned Trial Judge was satisfied that the appellant had committed the offence. On appeal it was contended that the prosecution did not discharge its burden of proof and that the circumstances relied upon were capable of more than one interpretation. In this case the Court of Appeal held the view that the circumstantial evidence available was capable of other interpretations and was therefore not convinced that it was only the appellant and no other person who could have performed the abortion. The appeal was allowed.

In the case of **Nuhu Selemani v R. [1984] TLR 93 (CA)** the Court of Appeal of Tanzania held the view that generally voice identification alone is not sufficient to found a conviction. In this case the appellant had been convicted of murder based on purely circumstantial evidence. The first, identification of the voice of the appellant on what he had said to the deceased; and the second identification of blood stained shirt seized in the appellant's house. On appeal it was considered whether the circumstantial evidence in the case did irresistibly lead to the inevitable inference that it was the appellant who killed the deceased. The Court held: (i) it is notorious that voice identification by itself is not very reliable; (ii) the evidence by the prosecution to link the shirt to the appellant was insufficient. The appeal was allowed.

Matters on circumstantial evidence had another day in the Court of Appeal in the case of **Protas J Kitongole and Another V R. [1992] TLR 51 (CA)**. In this case the appellants were charged with and convicted of murder by the High Court. The case against both accused/appellants was based wholly on circumstantial evidence. The pieces of circumstantial evidence tending to implicate the second appellant were: (i) after the two deceased watchmen had been fatally wounded he was found at the home he was staying with a big fresh cut wound which was bleeding; (ii) a trail of blood was traced from there right up to the carpentry workshop where the murders were committed. The appellants explanation that the cut wound was inflicted on him by bandits who had invaded the home was not backed up by any evidence; (iii) on the fateful night some 14 carpentry planes were stolen from the workshop, and six days later the appellant told PW5, a relative, that he had carpentry planes for sale but cautioned him not to disclose this to anyone because theft of carpentry planes had taken place at Tosamaganga; (iv) just about six days prior to the commission of the murders, the same workshop had been broken into and a welding machine (electric motor) was stolen from there but was later found abandoned only about nine meters away. In the dead of that same night the appellant had approached PW4 and asked him for a motor-vehicle to transport a motor from the workshop. Sensing that the said motor was stolen PW4 refused to oblige.

As for the first appellant there were the following pieces of circumstantial evidence: (i) the appellant's companionship with his co-appellant (ii) the appellant's girl friend said that five to six days following the murders she visited the appellant's home where she noticed the appellant with a big cut wound on his lower arm; the wound was not fresh. He threatened to kill her if she told people about the wound. She went on to say that the appellant used to put on T-shirts but that after the murders he used to put on long-sleeved shirt and a big coat; (iii) the appellant claimed that he sustained the cut wound when he was trying to commit adultery with someone's wife. However there was no evidence to that effect.

The main issue before the Court of Appeal was whether or not the pieces of circumstantial evidence could ground a conviction in respect of each appellant. The majority of the Judges in the Court of Appeal found the appellants guilty on the following reasons: (i) the fact that

only shortly after the murders were committed, the second appellant was found with a big cut wound and that a trail of blood was traced from where he was found to the scene of the murders were incriminating circumstances which lead to the only reasonable inference that the appellant took part in the murders. And the fact that the second appellant gave a false account of how he sustained the injury goes to strengthen this view; (ii) although the evidence against the second appellant was a great deal stronger than that against the first appellant we are fully satisfied that the circumstantial evidence against the first appellant was enough to lead to the irresistible conclusion that he was one of the killers. Two appellate judges, who constituted the majority, dismissed the appeal.

Honorable Justice Kisanga was of a different view and gave a dissenting judgment. Although this was not the judgment of the court it is thought fit to be reflected here for the sake of comparing the reasoning in such cases. Hon Justice Kisanga found one of the appellants not guilty. The following is the summary of his arguments: (i) the fact that the first appellant had sustained a cut wound on a certain day which wound according to the prosecution he was hiding cannot justify drawing the only reasonable inference that the first appellant sustained that wound during the commission of the murders at the workshop on the night in question. That fact can be explained on another reasonable hypothesis, namely, that the injury could have been sustained elsewhere and the appellant would have reason to conceal it in order to avoid detection; (ii) the fact that the appellant has not given a true account of how he sustained the cut wound would be relevant only if there was evidence which implicates him sufficiently with the offences charged; (iii) that to attach any importance to the appellant's giving a false account of how he sustained the injury and to his subsequent attempt to conceal the injury, and then to proceed to convict him would, in the circumstances of this case amount to basing conviction on the weakness of the defense rather than on the strength of the prosecution case; (iv) that each of the inculpatory facts or set of inculpatory facts, adduced against the first appellant, considered singly does not justify the drawing of the inference that the first appellant committed the murders in question. Likewise when considered together they could not justify the drawing of such inference for the simple reason that it is not possible to add nothing to nothing and get something. It is for these reasons that the judge

concurred that the appeal by Wilbert had no merit and should be dismissed but thought that the appeal by Protas should have been allowed.

In cases where reliance is made on circumstantial evidence facts from which inference of guilt is drawn must be proved beyond reasonable doubt. In the case of **Ally Bakari and Another v R. [1992] TLR 10 (CA)** the Court of Appeal clearly stated that where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred.

For further elaboration on circumstantial evidence read the following cases: **Mulugole V. R [1977] LRT n. 25; Enock Shamba V R (1968) HCD n. 219; Simoni Musoke V R [1958] EA 715 (CA); R V Joseph (1946) 13 EACA 187; Somacya V R (1953) EACA 144; and Makugire V R [1983] TLR 179.**

5:3 Corroboration of Witnesses

According to section 143 of the TEA no particular number of witnesses is required to prove any particular fact. However there are circumstances in which corroboration is, from the nature of the case, essential or the law specifically provides that evidence of one witness cannot form the basis of a conviction unless it has been corroborated in some material particular. As for the later situation a good example is evidence of a single witness in charges under sections 104 and 105 of the Penal Code. Apart from the requirement of law there have developed rules of practice, which have attained the force of law, requiring corroboration of evidence in certain circumstances. Examples of situations of this nature include, dying declarations, retracted and repudiated confessions, evidence of interested witnesses, identification by single witnesses where the condition for such identification are not favorable etc. The requirement for corroboration is not a **sine qua non** of accepting the evidence in all cases. In some situations the law dispenses with the requirement of corroboration if the court is satisfied that the witness is saying nothing but the truth. A good example of such a case is section 127(7) of the TEA where, in sexual offences,

uncorroborated evidence of a child or the victim of the sexual offence may be accepted as sufficient evidence for a particular offence.

Before getting into specific cases let us examine the meaning and rationale of corroboration. In its simplest form one can say that corroboration is evidence tending to confirm some fact of which other evidence is given. Lord Reid in the case of **DPP V Kilbourne [1973] AC 729** at p. 750 once elaborated that when in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances related to the particular case; the better it fits in the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by other statements or circumstances with which it fits in. In another case of **R V Baskerville [1916] 2 KB 658** the court said:

"…We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms, in some material particular, not only the evidence that the crime has been committed, but also that the prisoner committed it…the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime…"

However mere opportunity is not corroboration without more. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. To be capable of amounting to corroboration evidence must not only be relevant and admissible but also credible and independent. The requirement of independent evidence was, for example the subject in the case of **R v Whitehead [1929] 1 K B 99 (C.C.A.)** where the accused was charged with unlawful intercourse with a girl under sixteen years of age. The judge directed the jury that the girl's story was capable of being corroborated by the fact that she had complained to her mother several months after the alleged offence as an immediate result of which the mother accused the defendant. Allowing the appeal against conviction Lord Hewart C.J. held that this evidence was not capable of amounting to corroboration because it emanated from the girl herself. He added that in order for evidence to amount to

corroboration it must be extraneous to the witness who is to be corroborated. In summary evidence amounting to corroboration may be defined then, as evidence, which is relevant, admissible, credible, and independent and which (in criminal cases) implicates the accused in a material particular.

Other important principles regarding corroboration of evidence include:

a) Where the complainant is of unreliable character corroboration is desirable **Mohamed Musoma v R [1989] TLR 227 (HC).**
b) Evidence of persons who have their own interests to serve cannot corroborate the evidence of others **– Asia Iddi v R [1989]TLR 174 (HC).**
c) Evidence which needs to be corroborated cannot corroborate other evidence **– Mkumbwa Said omar v SMZ [1992] TLR 365 (CA).**
d) Confession of a co-accused must be corroborated before founding a conviction on it **– Thadei Mlomo and others v R [1995] TLR 187 (CA).**
e) Courts look for corroboration when, in the light of all the evidence, a witness is worthy of belief. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which as evidence is sufficient and satisfactory and credible - **Mbushuu alias Domonic Mnyaroje and Another v R [1995] TLR 97(CA).**

For further analysis on corroboration read the following cases: **Ishwarlal Purohit V R [1963] 9 EACA 58; Lenton V R [1963] EA 9 and Mansukh V R (1971) HCD n. 440.**

A number of points have traditionally been made infavour of a general corroboration requirement. The most outstanding include the following:

- Such a rule prevents a man of honor from being destroyed by the assertions of a single rogue.

- The second justification is based on what Montesquieu said: ‘ reason requires two witnesses: because a witness who affirms, and a party accused who denies, makes assertion against assertion, and it requires a third to turn the scale.’

- A general corroboration rule protects the innocent because ‘ it is hard for two or so to agree upon all circumstances relating onto a lye, not to thwart one another.’

As indicated above there are a number of situations requiring corroboration. We shall revisit a few examples.

5:3:1 Accomplice

It is not easy to define an accomplice. However one attempted definition was given in the case of **Davies V DPP [1954] AC 378** in which the court said:

“…it would appear that the following persons if called as witnesses for the prosecution have been treated as falling within the category:

(i) …persons who are **participes criminis** in respect of the actual crime charged whether as principals or accessories before or after the fact or persons committing, procuring or aiding and abetting…

(ii) Receivers have been held to be accomplices of thieves from whom they receive goods on the trial of the later for larceny…

(iii) Where X has been charged with a specific offence on a particular occasion and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration…

…in both of these cases (2) and (3) a person not a party or necessarily a party to the substantive crime charged was treated as an accomplice for the requirement of warning.

In short three groups of people are classified as accomplices namely persons who participate in the crime whether as principals or accessories before or after the fact; receivers of stolen goods and when evidence is admissible that the accused took part in crimes on other occasions as proving system or intent or as negativing accident, then those who took part In such crimes are accomplices. This position was confirmed in East Africa in the case of **Githae s/o Gathigi and Anor V. R (1956) 23 EACA 440.**

However, a person who merely acquiesces in what is happening or fails to report a crime is not an accomplice. In the case of **Kamau V R [1965] EA 501** the Court of Appeal stated at p. 509:

"…It follows from these authorities, in our view, that while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or fails to report a crime is not normally an accomplice but the weight to be given to such person's evidence will vary according to the reason for acquiescence…"

Under section 142 of the TEA an accomplice is a competent witness against an accused person and conviction is not illegal merely because it proceeds upon an uncorroborated testimony of an accomplice. For a clearer explanation on this read the case of **Fanuel V R [1989] TLR 22.** An accomplice is a guilty associate in crime. That is the reason courts have warned against the dangers of relying on uncorroborated evidence of an accomplice. It is also a settled principle of practice to require corroboration of the evidence of an accomplice and this rule of practice has virtually assumed the force of a rule of law.

In the case of **Pascal Kitigwa V R [1994] TLR 65(CA) t**he appellant, together with two others, were jointly charged and convicted of robbery with violence by the Ilala District

Court, and sentenced to thirty years imprisonment and corporal punishment. His appeal to the High Court was unsuccessful. He appealed further to the Court of Appeal complaining that it was unfair for the Trial Magistrate to proceed with the hearing of the case after the defense advocate had left, without giving the applicant an opportunity to get another advocate. He also argued that it was wrong for the trial court to convict on the evidence of a co-accused. The Court of Appeal of Tanzania held as follows: (i) the second accused in the trial court was an accomplice: a participant to the crime charged; (ii) evidence from a co-accused as in this case is accomplice's evidence and a court may convict on accomplice's evidence without corroboration if it is convinced that the evidence is true, and provided it warns itself of the dangers of convicting on uncorroborated accomplice's evidence; (iii) although the law does not say that conviction on uncorroborated accomplice's evidence is illegal, it is still unsafe, as a matter of practice, to uphold a conviction cased on the uncorroborated evidence of a co-accused; and that (iv) corroborative evidence may be circumstantial and may well come from the words or conduct of the accused and, in this case, the appellant independently corroborated the evidence of the co-accused.

An important question is whether a police spy or decoy is an accomplice and whether his evidence requires corroboration. In **Habib V R (1934) 1 EACA 191** the court said that on the authority of cases decided in England, India and East Africa a witness found to be a genuine police spy is not an accomplice and therefore does not require corroboration. However where a police decoy is directly interested in the subject matter then his evidence, as a matter of practice, requires corroboration. See the cases of **Mohamed Katindi v. R [1986] TLR 134 and Davda v R [1965] EA 201**. Other cases dealing with the issue of corroboration of accomplice evidence generally include **Saidi Hatibu v R [1982] TLR 353; Selemani Rashidi v R [1981] TLR 257; and Geofrey James Ihuya and Others v R [1980] TLR 197.**

Another important issue is the extent of proof required. The degree of corroboration varies from case to case and in some cases corroboration is not essential. For example in the case of **R v Wanjerwa (1944) 11 EACA 93** the witness was a participator in a crime of murder in that she had mixed poison in a neighbor’s food. She had, however, done so believing that the

poison was medicine, which could bring about divorce. The court held that since she was only an accomplice in a very secondary sense and had been actuated by relatively innocent motives corroboration of her evidence, though desirable, was not essential.

Another important question is: why has accomplice evidence traditionally been thought to present dangers? A number of reasons have been put forward. Some of the include the following:

- That where a person wishes to suggest his/her innocence or minor participation he/she normally transfers the blame to others.

- That even if a person is certain to be found guilty he/she may seek avoidance or reduction of his punishment by drawing the leniency of the court on the ground that he/she is not alone to blame.

- It often happens that an accomplice is a friend of those who committed a crime with him, and he/she would much rather get them out of trouble and fix an innocent man than his/her real associates.

- There is a notion found in older (English) cases that a morally guilty witness should not be believed because he is a confessed or proved criminal.

The last important question is: what is the evidential value of accomplice evidence and under what circumstances can a court act upon it in the absence of corroboration? This issue was elaborated in the case of **Marjoria v R [1972] EA 10 (CA)** where the Court of Appeal said, at p. 16:

"…That of course will depend on the background and circumstances of each case or there may be no corroborative evidence available. In such an event the court will have to decide whether to reject the accomplice evidence or whether it is one of those exceptional cases

where the accomplice evidence is so cogent and reliable that the court would, after warning itself, be prepared to base a conviction on it…"

Other cases dealing with such cases are **Kinchingwi v. R (1909) 3 EAPLR 1** and **R v Wanjerwa (1944) 11 EACA 93.**

5:3:2 Dying Declaration

In homicide cases, statements made by persons, since deceased, are admissible to prove the case and circumstances of the person's death. The substance of the law relating to dying declarations was covered in lecture 6 of part one. The concern of this part is the issue of corroboration of dying declarations. A dying declaration is a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is un-alloyed truth and the whole truth and that it is absolutely safe to act upon it.

What is important to understand is the fact that there is no rule of law demanding the corroboration of a dying declaration. Corroboration need only be sought for where such declaration suffers from any infirmity. As long as the court is satisfied that the declaration is a truthful version of what happened there is no question of further corroboration. However, it is only on rare occasions that such evidence would be acted upon without corroboration. See the cases of **R v Eligu s/o Odel and Anor (1943) 10 EACA 90; R v Muyovya Bin Msumu (1939) 6 EACA 128 and Pius Jasunga V R (1954) 21 EACA 331.**

The danger of relying on a dying declaration is not only in the fact that the deceased, who cannot now be cross-examined on his declaration, may have been uncertain or actually mendacious in his statement but that he may, in declaring the identity of his assailant, sincerely believe his statement to be true and yet, in fact, have been mistaken. For this reason there has developed a rule of practice that a dying declaration should be corroborated before it can be acted upon. This was clearly stated in the case of **R v Joseph Ngaikwamo [1977] LRT No. 6**.

In the case of **R v Rutema Nzungu (1967) HCD N. 445** the accused was charged with murder. The deceased was stabbed about midnight in an un-lit room. Another person who was sleeping in the room and the deceased's mother, who lived nearby, both testified that they were awakened by the cry of the deceased that: "it is Rutema Nzungu who had killed me." Both witnesses testified that they recognized the accused as he was running away. Accused presented witnesses who supported his alibi, that he was drunken and asleep in his own house on the night of the killing. In this case the court held that it is a rule of practice that there must be corroboration for a dying declaration. It added that in the present case it was unlikely that either the deceased or the other witnesses had adequate opportunity to recognize the accused and there was no adequate corroboration.

In yet another case of **R v Marwa (1968) HCD n. 473** the victim was found lying on the floor of a house with a number of wounds, including a swollen wound on the back of his head. He made a statement naming the accused as his attacker. Later, at a dispensary, he repeated the statement. He subsequently died. The evidence showed that his death was due to compression of the brain caused by a blood clot that had formed on the inside of the skull beneath the bruise on the outside. The wound must have been caused by a heavy object and inflicted with great force. In its judgment the court stated a number of things relating to the corroboration of dying declarations:

i) Corroboration of a dying declaration can either be circumstantial (citing **R v Said s/o Abdulla (1945) 12 EACA 67**) or through the conduct of the accused if a clear declaration is made in the presence of the accused (citing **Mbingu v Uganda [1965] EA 71**) or by direct evidence.

ii) The weight to be given to such evidence depends on various circumstances such as the circumstances in which the statement was made, the effect of the wound on the maker; and the state of the memory and intellectual power of the maker.

iii) Mere repetition of the same statement is not evidence of its truth, but only an indication of consistency of the maker's belief (citing **R v Muyovya Bin Msuma (1939) 6 EACA 128).**

iv) The fact that the deceased repeated the alleged statement would not necessarily indicate that he was sound in mind when he made it.

You can study on your own other areas needing corroboration in some situations such as unsworn evidence of children and others.

5:4 Conclusion

The requirement of corroboration of circumstantial evidence in certain situations does not mean that it is evidence of a weaker kind. Circumstantial evidence is as good as direct evidence provided that all the requirements of the law are met. The same is true in other situations where corroboration is required. The purpose of the law and practice in such situations is to ensure that justice is done.