TANZANIA
HIGH COURT DIGEST
1967-1968

VOLUMES 1 &11

FACULTY OF LAW
UNIVERSITY COLLEGE
DAR ES SALAAM
TANZANIA.

CIITATION

These digests are cited as in the following example;

[1967] H.C.D. n.203.

The number in square brackets indicates the year, and the final number indicates the number of the digest, not the page number.

EDITOR'S NOTE

This volume is a re-publication, in a more convenient form, of the Tanzania High Court Digest for the years 1967 and 1968.

The digests appear as before, except that typographical errors and omissions which crept into the originals have been corrected to the best of our abilities. The classification of cases under headings such as "Procedure" and "Income Tax" has been dropped, as have the brief summaries which formerly appeared at the head of each digest, since the Cumulative Index renders these redundant. The Index itself is completely new, and was drawn up on the basis of a

careful re-reading of all digests, and in certain instances of the original cases. It should be noted that the numbering of the cases in the 1968 volume has been altered, due to an over-lap of numbers in the original Digest.

ACKNOWLEDGEMENT

This volume is the product of the combined work of many people, including most staff members of the following people should be mentioned in particular. Mr. S. Huber, all former editors of the Digest. As well as Mr.S.M.M.Amlani, Mr. E.K Chesaning and Mr. F.R.S.Onyango, our student assistants.

Lal+ Patel
Brian Slattery
The Editors

Identification of Cases

The system of identifying cases which are digested is as shown by the following example:

"Ali s/o Hamisi vs., (PC) Crim. App. 828-D-66;19/1/67; Saidi J."

(1) (2) (3) (4) (5) (6) (7) (8)

(1)Parties-the full name of each party is given, first name first. Where there are several plaintiffs, defendants, or accuseds only the name of the first party is given. "R" is the abbreviation used for "Republic".

(2)Court of Origin- this indicates the type of court in which the case was originally heard. "(PC)" stands for "Primary Court", and "(LC)"stands for "Local Court". Following the practice of the High Court in marking and numbering its judgments, no abbreviation is used when the case originated in a District court.

(3) Type of Case – the following abbreviations are used:

Civ. App.	Civil Appeal
Civ. App.	Civil Application

Civ. Case.	Civil Case
Crim. App.	Criminal Appeal
Crim . Case	Criminal Case
Crim. Rev.	Criminal Revision
Crim. Sass	Criminal Session
Mart. Conf.	Matrimonial Confirmation
Misc. Apple.	Miscellaneous Application.
Misc. Crim. Cause	Miscellaneous Criminal Cause

(4) Case Number – this is the number assigned to the case by the High Court in the series indicated by parts (2) and (3) of the citation.

(5) City - this indicates the city in which the case was heard, or to whose registry the case was assigned, by the High Court. “D” is Dar es Salaam; “A” is Arusha; “M” is Mwanza; “Z” is Zanzibar. Where these may not be appropriate, the name of the city is given in full.

(6) Year of Filing – this indicates the year in which the case was filed with the High Court, and assigned a case number.

(7) Date of Decision – this is the date appearing on the decision handed down by the High Court.

(8) Name of Justice – this indicates the High Court Justice who decided the case and wrote the judgment.

Thus, in the example given, “Ali s/o Hamisi v. R.” is Primary Court Criminal Appeal Number 828 of 1966 in the Dar as Salaam registry, decided on 19 January 1967, by Mr. Justice Saudi.

Inspection Notes. Inspection Notes contain information and counsel useful to magistrates and advocates alike, and are therefore included in this Digest. The cases involved are assigned no high Court number. The citation her, therefore, includes the number assigned by the court whose decision was considered by

the High Court, the name of the court, and the cit in which that decision was rendered. The date given is that of the issuance of the Note by the High Court.

TANZANIA

HIGH COURT DIGEST

COMULATIVE INDEX

1967 – 1968

EDITOR'S NOTE

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Due to the large number of criminal cases digested, it has been found convenient to have separate indexes for civil and criminal topics. The Civil Index includes all "non-criminal" points of law which arise, whether in civil of criminal cases. The Criminal Index encompasses all points of law relating directly to criminal prosecutions for offences against the Penal Code and other statutes creating penal offences. The classification system of the Civil Index is based on that developed for the African Law Reports by Dr. Alan Milner. The Criminal Index uses an original classification system, which hopefully represents an improvement of other current systems.

In both Indexes, as in the Name Index, cases are referred to by year and number, as in: 1968/423. It should be noted that the final number is the case number, not the page number.

ACKNOWLEDGEMENT

This Index was prepared by Brian Slattery with the assistance of S.M.M Alana and F. R. S. Onyango.

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Father of children born in wedlock has absolute right to custody notwithstanding welfare of children. Customary Law Declaration. 1968/83.

Father of legitimatized child has right to custody where in child's interests – Customary Law Declaration. 1968/206.

Father of legitimatized child has right to custody where in child's interests. Islamic Law. 1968/206.

Husband entitled to child conceived during marriage. Islamic law. 1967/232

Limitation of actions. 1967/280.

Devoiced mother entitled to custody of female child until puberty. Islamic law. 1968/249

Father of children born in wedlock has absolute right to custody notwith-standing welfare

of children. Customary Law Declaration. 1968/83

Father of Legitimatized child has right to custody where in child's interests – Customary Law Declaration. 1968/206.

Father of legitimatized child has right to custody where in child's interests – Islamic law. 1968/206.

Husband entitled to child conceived during marriage – Islamic law. 1967/232.

Limitation of actions. 1967/280.

Man with whom mother is living has no right to child conceived by legal husband. Islamic law. 1967/169.

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Mother should have custody of male child until age of seven if consistent with interests of child. Islamic law. 1968/383.

Natural father entitled to custody of child he legitimatize. Customary Law Declaration. 1968/343.

Parent cannot transfer right of custody to another – Islamic Law 1968/249.

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Bridewealth – Partial refund where marriage lasted long time and produced children – Customary Law Declaration. 1968/203.

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May be legitimatized by subsequent marriage of parents – Islamic Law. 1968/206.

Natural Father may legitimatize child by making payment to father of child's mother – Customary Law Declaration. 1968/343.

Presumption that child born after six months of marriage is legitimate not rebutted by impotence of husband – Islamic Law. 1968/383.

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Right of material family to custody and bridewealth may lapse with time – Customary Law Declaration. 1967/87.

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Long cohabitation raises presumption of marriage – Islamic Law. 1968/18

Requirement of bridewealth – Zaramo custom. 1967/164.

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Man who had sexual relations with woman and whom she named as responsible for her pregnancy is held to be father of child – Customary Law Declaration. 1968/488.

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Gift of land – Burden of proof falls on party who claims gift was not absolute. 1968/498

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Children of informal marriage are illegitimate. 1967/50.

Consideration for divorce or "khului" – Payment by wife in atonement for disobedience or "kiyamu" not recognized. 1967/42.

Divorce – Formula for verbal divorce. 1967/48.

Divorce is effected by three pronouncements not one. 1968/289.

Divorce – Husband must provide separate accommodation or costs of maintenance during period of pregnancy to former wife pregnant at time of divorce. 1968/92.

Divorced mother entitled to custody of female child until puberty. 1968/249

Failure to produce marriage certificate does not mean valid marriage does not exist. 1968/18.

Father of legitimatized child has right to custody where in child's interest. 1968/206.

Husband entitled to custody of child conceived during marriage. 1967232.

Husband responsible for maintenance of wife living separately 1967/287.

Man with whom mother is living has no right to custody of child conceived by legal husband. 1967/169.

Mother should have custody of male child until age of seven if consistent with interests of child. 1968/383.

Order that spouse return against will contrary to good policy. 1967/170.

Parent cannot transfer right of custody to another 1968/249.

Presumption of marriage after long cohabitation as man and wife. 1968/18.

Presumption that child born within six months of marriage is illegitimate is probably superseded by provisions of Evidence Act. 1968/357.

Presumption that child born after six months of marriage is legitimate not rebutted by impotence of husband. 1968/383.

Recall of wife divorced by one talak – Some form of communication necessary to wife or walli. 1968/496.

Recall of wife – Time limitation of three months. 1967/170.

Requirements for "khula" divorce. 1968/383.

Revocation of divorce effective although dowry not fully paid. 1968/289.

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Primary court has no jurisdiction in divorce suit between Asian and non-Asian Muslims. 1968/120.

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Abandoned land – Reallocation by village headman before two years have passed since abandonment unlawful under by-laws of District Council. 1968/210.

Abandoned land – Reallocation by Village Committee after ten years where original occupant had no "animus revertendi" is lawful. 1968/409.

Disposition to church by local authority permissible. 1967/324.

Land allocated by chief – Reallocation by Village Executive Officers invalid. 1968/21

Land allocated to chief – Right of occupation continues after abolition of chieftainship. 1967/88

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Vacated land – Divided between owners of adjacent land despite allocation by Village Development Committee. 1968/133.

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Recovery of land – Occupant entitled to compensation from owner for improvements. 1967/117.

Redemption of land – Purchaser entitled to compensation Haya custom. 1968/124; 1968/412.

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Repossession of land let on lease – Tenant entitled to compensation – Chagga custom. 1968/211.

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Sale of land – Purchaser in possession entitled to compensation from defaulting vendor or to specific performance. 1968/132

Sale of land – Purchaser in possession not entitled to compensation for improvements effected after learning of dispute over title. 1968/349.

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Disposition of government lease – Freehold Titles (Conversion) and Government Leases Act, Cap. 523.

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Execution of decree – Objection to sale of land to satisfy judgement debt can only be made by party to original dispute – Haya custom. 1968/137.

Gift of land – Burden of proof falls on party claiming gift was not absolute. 1968/498.

Immovable property – Defined. 1968//381.

Lease – Suit for repossession after thirty-six years allowed-Chagga custom. 1968/211.

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Distinguished from sale – Haya custom. 1968/87.

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Reeds – Ownership of – Haya custom.

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Sale of clan land

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No question of redemption arises when documents of sale are forged. – Haya custom. 1967/117.

Sale by female without consent of relatives – Haya custom.1968/248

Sale to member of clan – No right of redemption – Haya custom. 1968/410.

Sale without reference to family – Redeemed land becomes property of person who repays purchase price. – Haya custom 1967/231.

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Purchaser in possession entitled to compensation for improvements from defaulting vendor or to specific performance. 1968/132.

Void – Buyer entitled to remain in possession until refund of purchase price. 1968/349.

Void – Buyer entitled to return of purchase price but not compensation for improvements effected after learning of dispute over title. 1968/349.

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Trees owned by one party growing on land of another – Rights of parties. 1968/93.

Village Development Committee. See: Allocation.

Visit of site – Advisable for magistrate to consult with village officials rather than to rely entirely on personal observations. 1968/168.

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Women's rights to inherit land

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Common lodging house – Landlord cannot deprive tenant of protection of Rent Restriction Act by obtaining licence for common lodging house. 1967/172.

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Rent Restriction Act – Applicant not bound by statement of standard rent in application to board where other parties not misled. 1968/22.

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Theft can be substituted for breaking and committing felony. 1967/31.

"Breaking" does not occur where person has legal right to do the act. 1967/80.

"Building"

Garage not included. 1967/146 B; 1967/81.

Refers only to human habitation – "Goat house" not building . 1967/365.

Charge of theft superfluous. 1968/182.

Evidence of complainant which is preposterous does not rule out conviction. 1968/175.

Housebreaking instruments should not be returned to accused convicted in same proceeding of shop-breaking. 1967/23.

Intent must exist at time of breaking. 1967/80.

"Shop" does not include bar. 1967/31.

BREAKING WITH INTENT TO COMMIT FELONY

Not scheduled offence under Minimum Sentences Act. 1967/214.

BRADCAST RECEIVING PPARATUS (LICENCING) ACT, CAP. 548

Unlicensed dealing – Employee of shop owner not "carrying on business". 1967/1.

"BUILDING"

See: BREAKING AND COMMITTING FELONY.

BURDEN OF PROOF

See: EVIDENCE.

BURGLARY

See: HOUSEBREAKING.

CANNABIS SATIVA

See: CULTIVATION OF NOXIOUS PLANTS (PROHIBITION) ORDINANCE.

CATTLE-THEFT

See: THEFT.

CAUSATION

See: HOMICIDE.

CAUSING GRIEVOUS HARM

See: GRIEVOUS HARM.

CHARGE

See: PROCEDURE.

"CHARITY"

See: MINIMUM SENTENCES ACT

CHEATING

Conviction quashed where nothing obtained. 1968/240

Facts constituting offence. 1967/187.

CIRCUMSTANTIAL EVIDENCE

See: EVIDENCE.

CLAIM OF RIGHT

Honest belief based on reasonable grounds. 1967/271; 1968/482.

Legal bases to claim not necessary – Good faith required. 1967/147; 1968/398.

No defence when previously repudiated in civil case. 1967318.

Unauthorized taking of unpaid salary not covered. 1968/373.

CO-ACCUSEDS

See: EVIDENCE.

COMMON ASSAULT

Corporal punishment by teacher which exceeds permissible bounds may constitute assault. 1968/33.

Pounding on door and threatening use of force not assault – Charge of intimidation more appropriate. 1967/335.

Sentence – Imprisonment for six months excessive for elderly first offender. 1968/459.

COMMON INTENTION

Arrow shot by unidentified member of group

Common intention established for offence of grievous harm. 1968/48.

Common intention not established for offence of attempted murder. 1968/47.

Mob beating

All participants entitled to benefit from provocation given to certain members of mob. 1967/390.

All participants not liable for robbery occurring in course of beating. 1968/52.

Liability of all participants for resulting death. 1967/390.

COMPENSATION

See: MINIMUM SENTENCES ACT; SENTENCE.

CONCEALING BIRTH OF CHILDREN

Facts constituting offence. 1967/447

CONCURRENT SENTENCES

See: SENTENCE.

CONDITIONAL DISCHARGE

See: SENTENCE.

CONFESSIONS

See: EVIDENCE.

CONSERVATION

See: FAUNA CONSERVATION ORDINANCE.

CONTEMPT OF COURT

Charge

Absence of specific charge not miscarriage of justice where contempt continues after warnings. 1967/63.

Specific charge should usually be made. 1967/63.

Refusal to appear and give evidence – Does not apply to accused. 1968/459.

Refusal to produce document not offence where court does not believe document exists. 1968/362.

Showing disrespect

Mens rea required. 1968/460.

Does not include obstructing court messenger executing search warrant. 1967/188.

Summary procedure. 1968/460.

Wrongfully retaking possession of land – Does not include failure to vacate land sold in execution of judgment. 1967/337.

"CONVERSION"

See: THEFT.

CO-OPERATIVES

See: MINIMUM SENTENCES ACT.

CORPORAL PUNISHMENT

See: MINIMUM SENTENCES ACT; SENTENCE.

CORROBORATION

See: EVIDENCE.

CORRUPTION

See: PREVENTION OF CORRUPTION ORDINANCE.

CREDIBILITY

See: EVIDENCE.

CRIMINAL TRESPASS

Alternative verdicts – Criminal trespass cannot be substituted for cattle theft. 1968/269.

Claim of right previously repudiated in litigation no defence. 1967/318.

Dispute as to ownership should be settled first in a civil action. 1968/158.

CRIMINAL TRESPASS(Continued)

Intention – Conviction quashed where accused wished only to escape apprehension for other offence. 1967/420.

"Property" refers only to private property – Does not include public offices. 1967/225.

Sentence – Imprisonment for eighteen months ultra virus and excessive for minor offence. 1967/267.

CULTIVATION

See: AGRICULTURE.

CULTIVATION OF NOXIOUS PLANTS (PROHIBITION) ORDINANCE, CAP. 134

Possession of bhang

Identification – Unsafe to convict on bald assertion of policeman that "he knows bhang". 1968/37.

Sentence – Twelve months imprisonment excessive. 1967/144.

CURRENCY NOTES ORDINANCE, CAP. 175

Forgery

Uttering forged notes – Intent to defraud must be alleged in charge. 1967/82.

Uttering forged notes – Equivocal guilty plea. 1967/82.

CUSTODY

See: ESCAPE FROM LAWFUL CUSTODY

CUSTOMARY LAW

Sentence – Belief that act constituting offence was justified by customary law is mitigating factor. 1967/109.

CUSTOMS

See: EAST AFRICAN CUSTOMS MANAGEMENT ACT.

DEFAMATION

See: LIBEL.

DEFENCE OF PERSON

Assault with wooden pestle unjustified in response to severe slap. 1967/266.

DEFILEMENT OF GIRLS UNDER TWELVE

Plea of quilt – Equivocal. 1967/96.

Sentence – Imprisonment for long terms undesirable for youthful first offenders. 1968/477.

DEMANNDING PROPERTY WITH MANACES

Robbery distinguished. 1968/279.

DENTISTS

See: MEDICAL PRACTITIONERS ORDINANCE.

DESTROYING EVIDENCE

Knowledge of impending trial essential. 1968/141.

DETENTION

See: PREVENTIVE DETENTION ACT.

DIAMOND INDUSTRY PROTECTION ORDINANCE, CAP. 129

Possession of diamonds by another in presence of accused – Does not establish joint possession. 1967/94.

DISOBEDIENCE OF LAWFUL ORDERS

Failure to pay judgment debt not covered. 1968/308.

Refusal to answer police officer not covered. 1967/27.

Violation of order of Area Secretary covered. 1967/301.

DISOBEDIENCE OF STATUTORY DUTY

"Statute or Ordinance" – Includes subsidiary legislation but not order of Area Secretary. 1967/301.

DISQUALIFICATION FROM HOLDING DRIVING LICENCE

See: ROAD TRAFFIC.

DISSUADING PERSONS FROM ASSISTING WITH SELF-HELP SCHEMES

Refusal to participate not offence. 1967/443.

DISTRESS

See: SENTENCE.

DOCTORS

See: MEDICAL PRACTITIONERS ORDINANCE.

"DOCUMENT"

See: OFFICIAL SECRETS ACT.

DOMESTIC OFFENCES

See: SENTENCE.

DRUGS

See: FOOD AND DRUGS ORDINANCE.

"DWELLING"

See: HOUSEBREAKING.

EAST AFRICAN CUSTOMS MANAGEMENT ACT, 1952

Concealing imported goods – Goods held for transshipment must be declared. 1967/64.

Possession of uncustomed goods – Goods held for transshipment must be declared. 1967/64.

EAST AFRICAN RAILWAYS AND HARBOURTS ACT, 1950

Obstructing working of train – Trial by High Court only. 1968/97.

EMPLOYMENT ORDINANCE, CAP. 366

Failure to keep records of oral contracts – Fines excessive. 1967/138.

ENDANGERING SAFETY OF RAILWAY PASSENGERS

Specific intent required. 1968/368.

Trial by High Court only. 1967/8.

ENTERING WITH INTENT TO COMMIT FELONY

Conviction quashed where accused had general permission to enter. 1968/196.

ESCAPE FROM LAWFUL CUSTODY

Attempt distinguished from full offence. 1968/179.

No defence that charge is later dropped so long as arrest lawful. 1967/65.

Prior arrest essential – Presence of officer not conclusive evidence of arrest. 1967/9.

EVIDENCE

Accomplice

Co – participant in riot not accomplice – Testimony does not require corroboration. 1967/348.

Police decoy not accomplice – Corroboration of evidence not required. 1968/40.

Police officer participating in police trap not accomplice – Corroboration required as matter of practice but not of law. 1967/338.

Self – exculpatory statement of accomplice inadmissible as evidence against accused. 1967/93.

Testimony of very secondary accomplice does not require corroboration. 1968/297

Unsafe to convict on uncorroborated testimony of accomplice. 1967/14; 1967/67; 1967/94; 1967/222; 1967/295; 1967/338; 1968/98.

Admissibility

Accomplices' statements. 1967/93.

Admissions. 1967/190; 1967/249; 1968/181; 1968/298.

Bank statement produced by police witness also acting as prosecutor inadmissible. 1967/453.

Confessions. 1967/124; 1967/252; 1967/385; 1967/386; 1968/99; 1968/112; 1968/143; 1968/181; 1968/182; 1968/298; 1968/299; 1968/365; 1968/474.

Evidence obtained in illegal search admissible. 1968/39; 1968/302.

Evidence of possession of stolen goods not specified in charge admissible when connected with offence charged. 1967/385.

Extra-judicial statements. 1967/12; 1967/66; 1967/198; 1968/262; 1968/273; 1968/301.

Hearsay. 1967/68; 1967/249.

Identification of accused in report to police – When admissible. 1968/101.

Previous convictions. 1967/13; 1967/127; 1967/184; 1967/253; 1968/41; 1968/263; 1968/365.

EVIDENCE(Continued)

Admissibility (Cont.)

Statement indivisible for purposes of admissibility. 1968/298.

Trial within trial not essential where no assessors present. 1968/181.

Admissions

Inadmissible where made to Divisional Executive Officer. 1967/249.

Inadmissible where obtained prior to police investigation. 1967/190.

Inadmissible where obtained through promise not to prosecute. 1967/249.

Statement admitting shortage of funds in case of theft constitutes admission not confession. 1968/181.

Burden of proof

Alibi – Need not be proved by accused. 1967/445; 1968/417.

Alibi – Need not be “reasonably true” 1968/142.

Conviction – Must be based on prosecution evidence. 1967/384.

Defence – Finding that defence case was “pack of lies” not proper basis for conviction. 1967/384.

Defence – Need not be proved by accused. 1967/241; 1967/251; 1967/369; 1968/366.

Gold Trading Ordinance – Proof of nature of metal. 1967/15.

Immature offender aged ten years – Prosecution must prove capacity to know wrongfulness of act. 1967/18.

Provocation – Prosecution must disprove existence of 1967/343; 1967/390.

Rape – Prosecution must show lack of consent beyond reasonable doubt. 1968/267

Recent possession of stolen goods. See RECENT POSSESSION.

Statement that testimony of important prosecution witnesses could reasonably be true implies misdirection. 1967/250.

Unlawful possession of government trophy. 1967/383.

Child of tender years as witness – Requirements and proper procedure. 1967/57; 1967/124; 1967/191; 1967/198; 1967/300; 1968/33; 1968/199; 1968/260.

Circumstantial evidence

Appeal court in as good position to weigh as trial court. 1967/383.

Death provable by – Body need not be found. 167/130.

Standard of proof. 1968/219.

EVIDENCE(Continued)

Co-accuseds

Confession – Corroboration required. 1967/386.

Confession – May serve as corroboration for other evidence. 1967/10.

Plea – Inadmissible as evidence against other accused 1967/68.

Testimony in defence – Corroboration not required. 1967/366.

Confessions

Admissibility in general. 1968/181.

Admissible as against co-accused. 1967/386.

Admissible where induced by fear of witchcraft. 1967/386.

Admissible where made to Divisional Executive Officer, 1968/143.

Admissible where made to ten-house cell leader. 1968/182

Admissions distinguished. 1968/298.

Inadmissible where involuntary. 1968/365.

Inadmissible where made to Assistant Village Executive Officer. 1967/124.

Inadmissible where made to District Council messenger. 1968/99.

Inadmissible where made to police officer. 1967/252; 1967/385; 1968/112; 1968/182; 1968/474.

Corroboration

Accomplices – Requirements 1967/14; 1967/67; 1967/94; 1967/222; 1967/295; 1967/338; 1968/98; 1967/348; 1968/40; 1968/297.

Assistant who was not suspect – Not required. 1968/181.

Children of tender years – Requirements. 1967/191; 1968/33; 1967/124.

Co-accuseds – Requirements. 1967/66; 1967/68; 1967/10; 1967/386; 1968/366.

Dying declarations – Requirements. 1967/445; 1968/38.

Experts – Requirements. 1967/197.

Sexual offences – Requirements. 1967/204; 1967/205; 1968/260; 1968/300; 1968/369; 1968/370.

Suspects – Requirements. 1967/454.

Testimony of two witnesses, both requiring corroboration, cannot corroborate each other. 1967/195; 1968/260.

Unsworn testimony – Requirements. 1967/195; 1968/419.

Credibility

Contradictory evidence given by witness at prior trial may be considered on appeal. 1967/4.

Contradictory extra – judicial statement renders testimony suspicious. 1967/341.

Contradictory prior statement destroys credibility. 1968/390

Prejudgment of reliability of witnesses prior to hearing their testimony improper. 1967/123.

EVIDENCE(Continued)

Statements of person accused of infanticide unreliable due to birth trauma and lactation. 1967/447.

Testimony of four year old child not worthy of credibility apart from question of corroboration. 1967/249.

Trial court's finding as to credibility usually binding on appeal court. 1967/59.

Villager's estimates of dates and distances not reliable. 1968/180.

Documentary evidence produced and examined in court but lost before judgement – Improper to acquit only because of loss. 1967/387.

Dying declaration – Corroboration required. 1967/445; 1968/38.

Evaluation of property – Expert testimony advisable. 1967/383.

Exhibits – Failure to produce stolen article as exhibit when it was produced and identified in court does not affect weight of evidence. 1967/296.

Experts

Evidence of medical officer as to exact age of accused not reliable. 1968/188.

Unsafe to base conviction on uncorroborated testimony of handwriting expert – Opportunity for accused to commit offence not sufficient corroboration. 1967/197.

Extra – judicial statements

Identifying co-accused – Admissible if part of confession. 1967/66.

Identifying co-accused – Requires corroboration. 1967/66.

Identifying murderer – Made by deceased – Admissible. 1967/198.

Mode to police – Admissible only with caution. 1967/12.

Made to police by accused following accident – Admissible 1968/282.

Made to police by persons not called as prosecution witnesses – Accused has right of access to. 1968/301.

Made to police by witnesses – Admissible as corroboration of testimony in court. 1968/262.

Failure of accused to testify under oath – Significance. 1968/75.

Findings of fact – Reasons for should be stated in judgement. 1968/390.

Fingerprints

Proper method of identifying. 1967/126.

Proper method of introducing as evidence broken glass with accused 's fingerprints. 1967/126.

Handwriting

Identification by non-experts allowable. 1968/282.

Identification of. 1968/438.

EVIDENCE(Continued)

Hearsay

Testimony by policeman as to statement made by third party implicating accused inadmissible. 1967/68

Testimony reporting statement of child identifying accused inadmissible. 1967/249.

Identification

Of accused not adequate because not accompanied by details. 1967/194.

Of bhang – Assertion of policeman that he knows bhang must be supported. 1968/37.

Of government trophy. 1967/383.

Of liquor – Accused 's admission insufficient. 1968/422.

Of liquor by police – 1968/302; 1968/304.

Of stolen goods – Complainant must be asked for description or special marks before goods are shown to him. 1967/446; 1968/129.

Of stolen goods – Ordinary goods not distinguishable by special marks. 1967/11.

Of stolen goods – Production of property in court not essential. 1968/261.

Identification parade

Accused must be placed among at least eight others – Unsatisfactory to show several suspects among nine persons. 1967/340.

Complainant should not be told suspect is definitely on parade. 1967/340.

Must provide 'water-tight' evidence if sole support of conviction. 1968/144; 1968/183.

Judicial notice

Legislation before National Assembly not yet enacted. 1968/417.

"Mbege" as local liquor. 1968/302.

Registration of co-operative – Only if published in Gazette. 1967/404.

Photographs – Proper method of introducing as evidence. 1967/261; 1967/383.

Previous convictions

Considered prior to conviction when issue raised by accused – Harmless error. 1967/253.

Should not be considered on appeal as to conviction. 1967/184.

Should not be considered prior to conviction. 1967/13; 1967/127; 1968/41; 1968/263; 1968/365; 1968/313.

Prima facie case defined. 1968/43.

Proof

Age of accused – Evidence of medical officer as to exact age not reliable. 1968/188.

Age of accused – Doubt operates in his favour. 1968/396.

EVIDENCE (Continued)

Proof

Arson – Evidence of threat to burn house after event sufficient to establish guilt. 1967/186.

Possible but preposterous evidence by complainant does not rule out conviction. 1968/175.

Villagers' estimate of dates and distances not reliable 1968/180.

Sexual offences

Corroboration of complainant's testimony – Statement by complainant to others shortly after incident not sufficient corroboration. 1967/205.

Corroboration of complainant's testimony – Torn clothing not necessarily corroborative of rape. 1968/370.

Corroboration of complainant's testimony normally required. 1967/204; 1967/205.

Corroboration of complainant's testimony not required where evidence is extremely convincing. 1968/369.

Corroboration of complainant's testimony not required where magistrate clearly warns himself. 1968/260; 1968/300.

Corroboration not required for burglary charge where intended felony is sexual offence. 1968/260.

Suspects – Testimony of likely suspect requires corroboration 1967/454.

Unsworn statement by accused – Questions by court proper, but not cross – examination by prosecution. 1968/45

Unsworn testimony – Corroboration required. 1967/195; 1968/419.

View of locus – Notes taken by judge – Must be read out in court and evidence allowed to be called. 1967/12.

Witnesses

Court's power to call – Court has complete discretion to call witnesses not called by parties. 1968/159.

Court's power to call – Should be used only when vital and when parties refuse to call witnesses in question. 1967/252.

Court's power to call – Restricted when prosecution has not proved case. 1967/196.

Cross – examination – Accused has right to cross-examine co-accused who gives testimony. 1967/444; 1968/44.

Cross-examination – Accused has right to cross-examine previous prosecution witnesses after alteration of charge. 1968/423.

Cross – examination – Accused has right to cross-examine prosecution witnesses. 1968/100.

Cross – examination – Court must inform accused of right to cross – examine prosecution witnesses. 1967/304.

Defence witnesses

Called only on condition that accused deposit money for expenses – Improper. 1968/160.

EVIDENCE(Continued)

Court must inform accused of right to have doctor who prepared medical report called as witness – Failure to do so harmless error in circumstances. 1967/297.

Hostile witnesses – When witness should be declared hostile. 1968/200.

Prosecuting officer appearing as witness – Failure of justice. 1967/278.

Prosecution witnesses – May be called for defence. 1968/305.

Prosecution witnesses – May be recalled by magistrate for elaboration concerning issue raised by defence. 1968/305.

Prosecution witnesses – May not be recalled to bolster case after accused has given evidence. 1968/220.

Single witness – Court may convict upon testimony of where it is absolutely reliable. Doubt where other available evidence has not been produced. 1967/125.

Single witness – Special care necessary in evaluating testimony. 1968/102.

Testimony cannot be given by letter. 1968/246.

Wife of accused – Accused must be informed of rights. 1968/418.

Wife of accused – Cannot testify except on accused 's application. 1968/39.

Witnesses who have heard prior testimony should be allowed to testify. 1967/128; 1967/192; 1967/193; 1968/149.

EXPULSION OF UNDESIRABLES ORDINANCE, CAP. 39

Factors to be considered before ordering expulsion. 1967/183.

EXTRA – JUDICIAL STATEMENTS

See EVIDENCE.

FAILURE TO COMPLY WITH POLICE SUPERVISION ORDER

Non – compliance with several requirement of single order constitutes one offence. 1967/255.

FALSE ACCOUNTING

Charge must specify intent to defraud. 1968/481.

Facts constituting offence. 1968/438.

Intent to defraud analyzed. 1968/155.

Sentence – Offence of omission less serious than one of commission. 1968/154.

FALSE ASSUMPTION OF AUTHORITY

Facts constituting offence. 1967/254.

Sentence – Imprisonment for twelve months excessive in circumstances. 1967/254.

FALSE DOCUMENT

See: MAKING FALSE DOCUMENT.

FALSE INFORMATION

Report to police that object taken as to forfeit by community consensus had been stolen. 1968/461.

FALSE PRETENCES

See: OBTAINING BY FALSE PRETENCES.

FAUNA CONSERVATION ORDINANCE, CAP. 302

Effect of statute not retrospective. 1968/458.

Forfeiture of firearm – Unjust when property of innocent third party. 1967/299.

Game trophy

Burden of proof as to lawful possession. 1967/383.

Evaluation of. 1967/383.

Game meat not trophy. 1967/16.

Game meat is trophy for purpose of s. 47(1) (b), but not for purposes of s. 2, s.47 (1) (a) or s.47(1) (c). 1967/69.

Identification of. 1967/383.

Importation of – Meaning of “import” – Knowledge of nature of imported property essential – Correct method or charging. 1967/383.

Ostrich eggs covered. 1968/388.

Possession of – Fine should be related to value of trophy. 1967/336.

Possession of – Knowledge of nature of goods possessed essential. 1967/383.

Wilde beast tail – Not covered. 1968/458.

Hunting in prohibited area – Fine more appropriate than imprisonment in circumstances. 1968/472.

Hunting without licence – Order of forfeiture of gun unjust where property of innocent third party. 1967/299.

Hunting without obtaining general game licence. 1968/361.

Transfer of game licence – Not offence. 1968/361.

FINE

See: SENTENCE.

FIREARMS

See: ARMS AND AMMUNITION ORDINANCE.

FOOD AND DRUGS ORDINANCE, CAP.93

"Sale" – Definition of term as used in statute. 1968/221.

FOOD HANDLING BY – LAWS

Separate but related acts constitute separate offences. 1967/352.

FORCIBLE ENTRY

Erecting building on property of another – Conviction quashed. 1968/283.

FORESTS ORDINANCE, CAP. 389

Cutting trees – Whether done on unreserved land in Tanga Region. 1968/91.

FORFEITURE

See: SENTENCE.

FORGERY

See also: CURRENCY NOTES ORDINANCE.

Elements of offence. 1968/438.

Illiteracy no defence. 1968/374.

Issuance of receipts after wrongful collection of monies. 1968/110.

FRAUDULENT FALSE ACCOUNTING

See: FALSE ACCOUNTING.

GAME

See: FAUNA CONSERVATION ORDINANCE.

GOLD TRADING ORDINANCE, CAP. 127

Burden of proof as to nature of metal. 1967/15.

"GOVERNMENT PROPERTY"

See: MINIMUM SENTENCES ACT.

GOVERNMENT TROPHY

See: FAUNA CONSERVATION ORDINANCE.

GRIEVOUS HARM

Charge – Must include word "unlawfully". 1968/392.

Charge of grievous harm in addition to charge of practicing without licence invalid for duplicity. 1967/201.

Facts constituting offence. 1968/48.

Loss of one tooth not grievous harm. 1968/265.

Negligence not sufficient for conviction. 1967/70.

Plea of guilty

Equivocal. 1968/392.

Unsatisfactory to merely admit wounding. 1968/46.

Sentence

Corporal punishment illegal. 1967/401.

Provocation mitigating factor. 1968/509.

GUILTY PLEA

See: PROCEDURE – Plea of guilty.

GUNS

See: ARMS AND AMMUNITION ORDINANCE.

HARBOURS

See: EAST AFRICAN RAILWAYS AND HARBOURS ACT.

HARM

See: GRIEVOUS HARM.

HOMICIDE

Attempted murder – See: ATTEMPTED MURDER

Causation – Must prove death not caused by improper medical treatment – Reasonable doubt exists in absence of evidence as to treatment received. 1967/389.

Common intention

Liability of all participants in mob beating for resulting death. 1967/390.

Participants in group beating causing death entitled to benefit from provocation given to certain members of group. 1967/390.

Manslaughter

High degree of recklessness in confining many people in small cells. 1968/367.

Negligent causing of death by traditional doctor. 1968/222.

Persons causing death in fight usually guilty of manslaughter rather than murder. 1968/49.

Sentence – Compensation paid out of fine appropriate where death could not be anticipated. 1967/136.

Sentence – Imprisonment for one week where accused killed one of gang which attacked him. 1967/343.

Sentence – Imprisonment for twenty months for killing resulting from pombe party. 1967/354.

Sentence of one day for woman who killed to protect aged husband. 1967/356.

Sentence of one day for woman who, while pregnant, killed unfaithful husband. 1967/355.

Murder

Alternative verdicts – Accessory after the fact to murder cannot be substituted for murder charge. 1967/72.

Assessors' request for investigation of accused 's sanity refused by court – Facts do not warrant investigation. 1967/198.

Death provable by circumstantial evidence. Body need not be found 1967/130; 1968/50.

Malice aforethought – Intoxication – Incapability of forming intent. 1967/71.

Persons causing death in fight usually guilty of manslaughter rather than murder. 1968/49.

Prima facie case not established. 1968/43.

HOMICIDE (Continued)

Threat to burn down deceased's house – Insufficient evidence to convict. 1967/130.

Provocation

Burden on prosecution to disprove existence of provocation 1967/343; 1967/390.

Lawful refusal of food not provocation in circumstances. 1967/198.

Mere words generally insufficient. 1968/186.

Ordinary test does not apply where accused intoxicated. 1967/71; 1968/508.

Quarrel with wife not provocation in circumstances. 1967/343.

Swearing and pushing not sufficient provocation where lethal weapon used. 1968/464.

HOUSEBREAKING

Alternative verdicts – Malicious injury to property cannot be substituted for housebreaking. 1968/270; CONTRA 1968/428.

"Breaking" constituted by opening of door with key. 1967/111.

Burglary – "Night" begins at 7.00 pm – Time of offence must be clearly proved. 1967/366.

Charge must specify felony intended. 1967/416.

"Dwelling "- Includes house occupied intermittently. 1967/53.

Intent to commit felony essential – Must be disclosed in guilty plea. 1967/32.

Sentence – Consecutive sentences improper for convictions for house-breaking and theft. 1968/239.

HUNTING

See: FAUNA CONSERVATION ORDINANCE.

IDENTIFICAION

See: EVIDENCE.

IGNORANCE OF LAW

Mistake of fact based on ignorance of law. 1968/280.

Sentence – Mitigating factor. 1967/109.

IMMIGRATION ACT, CAP. 534

Prohibited immigrant – Ministerial order need not be proved by Minister's testimony. 1968/266.

"IMPORT"

See: FAUNA CONSERVATION ORDINANCE.

IMPRISONMENT

See: SENTENCE.

INCEST BY MALES

Triable by High Court only. 1968/140.

INDECENT ASSAULT

Alternative verdicts

Indecent assault can be substituted for attempted rape. 1967/76.

Rape cannot be substituted for indecent assault. 1967/57.

Burden of proof – Prosecution must show lack of consent beyond reasonable doubt. 1968/267.

Charges of indecent assault and abduction permissible for single transaction. 1968/257

INFANTICIDE

Proof of cause of death – Statements of accused unreliable due to birth trauma and lactation. 1967/447.

INJURING ANIMALS

Alternative verdicts – Injuring animals can be substituted for cattle theft. 1967/106.

Killing of cattle distinguished from cattle theft. 1967/106.

INSANITY

Assessor's request for investigation of accused 's sanity refused by court. 1967/198.

Intention to steal – Doubtful where accused mentally disturbed. 1968/103.

Unsoundness of mind at time of trial – Proper procedure. 1968/187; 1968/420;1968/223; 1968/427.

INSULTING LANGUAGE

See: ABUSIVE LANGUAGE.

INTENTION

See: COMMON INTENTION; MENS REA.

INTIMIDATION

Facts constituting offence. 1967/335.

INTOXICATION

Capability of forming intent required for offence of murder. 1967/71.

Provocation – Test of ordinary man does not apply to intoxicated individual. 1967/71.

Rape – Mistake as to consent of complainant. 1968/370.

JUDICIAL NOTICE

See: EVIDENCE.

JUDICIAL OFFICERS

Immunity from criminal prosecution for acts done in good faith in exercising judicial functions- judicial functions defined. 1967/443; 1968/364.

JURISDICTION

See: PROCEDURE.

JUVENILES

Children and young persons – Medical examiner's certificate not conclusive as to age of accused. 1968/145.

Compensation – Court may not order parent of young offender to pay compensation without giving him hearing. 1967/300.

Corporal punishment

Cannot be imposed on juvenile in addition to other punishment such as approved school order or repatriation order 1967/24; 1968/306.

Finding of age essential. 1967/33.

Medical evidence as to age required where accused on borderline of adulthood. 1967/269.

Evidence – Corroboration required for dying declaration by child of tender years. 1968/38.

Immature offenders aged ten years

Burden on prosecution to show he had capacity to know he should not do the act. 196718.

Capacity to know wrongfulness of act may be inferred from circumstances in case of assault. 1967/300.

Immature offenders – Failure by trial court to consider question of capacity. 1968/146.

Imprisonment – Inappropriate for young persons conviction of rape. 1967/98.

Proof – Evidence of medical officer as to exact age of accused not reliable. 1968/188.

Sentences under Corporal Punishment Ordinance and Children and Young Persons Ordinance mutually exclusive. 1968/306.

Witnesses – Child of tender years – Requirements and procedure. 1967/57; 1967/124; 1967/191; 1967/198; 1967/300; 1968/33; 1968/199; 1968/260.

KILLING ANIMAL WITH INTENT TO STEAL

Cattle – theft distinguished. 1967/367.

Governed by provisions in Minimum Sentences Act, 1963, relating to cattle – theft. 1967/367.

LABOUR

See: EMPLOYMENT ORDINANCE; NATIONAL PROVIDENT FUND ACT.

LAND

See: AGRICULTURE.

LARCENY

See: THEFT.

LAWFUL CUSTODY

See: ESCAPE FROM LAWFUL CUSTODY; RESCUE FROM LAWFUL CUSTODY.

LAWFUL ORDERS

See: DISOBEDIENCE OF LAWFUL ORDERS.

LIBEL

Privileged publication – Criticism of public official in good faith. 1968/296.

Publishing defamatory matter

Matter must be communicated to someone other than person defamed. 1967/248.

Mere publication by speech not offence. 1967/293.

LIQUOR

Identification of liquor – Accused's admission insufficient. 1968/422.

Identification of liquor by police. 1968/302; 1968/304.

Making liquor without licence separate offence from selling without licence. 1967/392.

Possession of moshi by co-accused in accused's presence does not establish joint possession. 1968/303.

Possession of moshi – Fine must bear reasonable relation to accused's power to pay. 1968/371.

Servants and agents – Licence liable only for acts of servant committed on premises. 1967/392.

LOCAL LIQUOR ORDINANCE, CAP. 77

See: LIQUOR.

MAKING FALSE DOCUMENT

Defective charge – Curable on appeal where charge set out all ingredients of offence. 1967/21.

MALICE AFORETHOUGHT

See: HOMICIDE.

MALICIOUS INJURY TO PROPERTY

Act must be intentional. 1968/147.

Alternative verdicts

Malicious injury to property can be substituted for breaking and committing felony. 1967/81.

Malicious injury to property cannot be substituted for attempted stealing from motor vehicle. 1968/480.

Malicious injury to property cannot be substituted for housebreaking. 1968/270; CONTRA 1968/428.

Damage to clothing during assault – Not separate offence. 1967/131.

Defence – Land – owner has right to remove anything brought on land by trespasser. 1967/73.

Negligence not sufficient for conviction – Ill-will not essential. 1967/19.

MANSLAUGHTER

See: HOMICIDE.

MATERIAL FACTORS

See: SENTENCE.

MARIJUANA

See: CULTIVATION OF NOXIOUS PLANTS (PROHIBITION) ORDINANCE, CAP. 134.

MEDICAL PRACTITIONERS AND DENTISTS ORDINANCE, CAP. 409.

Practicing without licence

Additional charge of grievous harm invalid for duplicity. 1967/201.

Administration of several injections for gain constitutes one offence. 1967201.

Receipt of consideration necessary element of offence. 1967/200.

MENACES

See: DEMANDING PROPERTY WITH MENACES.

MENS REA

Aiding and abetting offence against Broadcasting Receiving Apparatus (Licensing) Act, Cap. 548- Knowledge that act constituted offence essential. 1967/1.

Aiding prisoners to escape – Negligence insufficient. 1968/309.

Arson – Negligence insufficient. 1967/6.

Attempted murder – Intention to cause death not merely grievous harm essential. 1967/342; 1967/388.

Breaking and committing felony – Intent must exist at time of breaking. 1967/80.

Contempt of court – Showing disrespect – Mens rea required. 1968/460.

Corrupt transaction – Must be done with "evil mind". 1968/363.

Criminal trespass – Intent to escape not sufficient mens rea 1967/420.

Destroying evidence – Knowledge of impending trial essential. 1968/141.

Endangering safety of railway passengers – Specific intent required. 1968/224.

Failure to report accident – After injury to person – Conviction sustained where driver did not know of injury. 1968/152.

False accounting – Intent to defraud analysed. 1968/155.

Grievous harm – Intent to cause grievous harm essential- mere negligence insufficient. 1967/70.

Housebreaking – Intent to commit felony essential. 1967/32.

Malicious injury to property – Mens rea required. 1967/19; 1968/47.

Obtaining by false pretences – Intent to defraud defined. 1968/73.

"Permitting" unlawful use of vehicle – Mens rea required. 1968/395.

MENS REA (Continued)

Possession of housebreaking instruments – Intent to commit felony essential. 1967/396.

Receiving stolen property – Mens rea may be inferred from concealment of goods. 1967/37.

Theft – Fraudulent intent need not be formed at time of taking. 1967/272; CONTRA 1968/197.

Theft – Fraudulent intent essential. 1968/375; 1968/376.

Unlawful importation or possession of government trophy. Knowledge or nature of property essential. 1967383.

Unlawful wounding – Mere accident not offence. 1967/84.

Uttering forged notes – Intent to defraud must be alleged in charge. 1967/82.

XC111

CRIMINAL

MINIMUM SENTENCES ACT, CAP. 526

Age of accused – Any doubt operates in his favour. 1968/389; 1968/396.

Evidence of medical officer not reliable as to exact age. 1968/188.

Prison medical officer must give independent opinion. 1968/396.

Alternative verdicts – Scheduled offence cannot be substituted for non – scheduled

Offence. 1968/322; 1968/475.

Appeal – Sentence may be enhanced on appeal so as to accord with Act after original sentence served. 1967/311.

"Charity" – African Liberation Committee included 1967/358 Tanganyika Parents' Association, T.A.PA., included 1967/313.

Umoja wa Wanawake possibly included 1967/142

Compensation – Meaning of "obtained in s. 6(1). 1968/190.

Method of recovery. 1968/316.

Order for distress in default of payment improper. 1968/190.

Order must be put in monetary terms. 1967/309; 1968/62; 1968/507.

Power to award under Act not limited by s. 176, Criminal Procedure Code 1967/23.

Purpose of s. 6(1). 1968/507.

Confirmation of sentence – Required only where minimum exceeded by six months. 1968/311.

Cooperatives – Improper to remand case to trial court for evidence of registration. 1967/404.

Judicial notice of registration may be taken only if proof is given of publication in Gazette. 1967/404.

Registration must be proved. 1967/357.

Corporal punishment – Age of accused. – Doubt operates in accused's favour. 1967/450.

Age of accused – medical examination necessary where accused claims exemption. 1968/321.

Age of accused – Specific finding necessary. 1967/194.

Cumulative orders in respect of several convictions for scheduled offences. – Improper even though convictions are in separate cases. 1967/405; 1968/318; 1968/417; CONTRA 1967/406; CONTRA 1967/419.

Cumulative orders in respect of several convictions for f scheduled offences - Improper where convictions are in single trial. 1967/265.

"Government property" – Funds of African Liberation Committee not included. 1967/358.

Funds of National Bank of Commerce not included 1968/323.

Grounds for leniency – Not available in cases of cattle – theft. 1967/312; 1967/361.

MINIMUM SENTENCES ACT, CAP. 526 (Continued)

Specific finding necessary for all grounds. 1968/234; 1968/236.

Interpretation – Must be strictly construed. 1967/357.

"Political party" – Umoja wa Wanawake not included. 1967/142.

Previous convictions – Cannot be considered unless admitted or proved. 1967/19

Conviction occurring after commission of scheduled offence not included 1967/148.

Severe penalty warranted. 1967/412; 1968/276.

Probation order – Improper for scheduled offence. 1967/143.

Procedure – Recording should be made of exact value of stolen property and age of

accused. 1967/100.

Public service – East African Common Services Organization included. 1967/276.

East African Community included. 1968/473.

East African Posts & Telecommunication Administration included. 1968/438.

National Development Corporation not included. 1968/435.

National Development Credit Agency not included 1968/437.

Special constables included 1968/235.

Scheduled offences – Breaking with intent to commit felony not included. 1967/214.

Entering with intent to commit felony not included. 1968/67.

Killing animal with intent to steal included. 1967/367.

Receiving property stolen during burglary included even when accused did not know of burglary. 1968/474.

Receiving stolen property included. 1967/37.

Stealing government property – Essential that accused know or be deemed to know of government ownership. 1967/317.

Theft by servant not included. 1968/194.

Sentence imposed under s. 5(2) – May not be in the alternative. 1968/69.

May not be combination of corporal punishment and imprisonment 1968/68.

Sentence in excess of minimum – Should only be imposed when aggravating circumstances exist such as abuse of trust, previous convictions, etc. 1967/213.

"Special Circumstances"

May be found at magistrate's discretion. 1967/103.

May be found by High Court on revision. 1968/325.

May be found where accused committed crime for "good" Motive. 1968/476.

May be found where accused has dependants. 1967/359; 1968/107.

May be found where accused is repentant. 1968/476.

MINIMUM SENTENCES ACT, CAP. 526 (Continued)

May be found where accused is very poor. 1968/327.

May be found where accused is very youthful. 1967/410; 1968/476.

May be found where accused obtained nothing from his crime. 1967/359.

May be found where accused pleads guilty on first appearance in court 1968/325.

May be found where amount or value involved is small. 1967/104; 1967/360; 1967/408; 1968/409;1968/327.

May be found where crime is "silly" 1967/104; 1968/325.

Must be distinct from other statutory grounds for leniency. 1968/326.

Not found where sum involved is Shs. 45/70. 1967/407.

Not found where sum involved is Shs. 50/-. 1967/408.

Unlikely to be found where accused commits series of offences over several months. 1968/274

Time in custody- May not be taken into consideration. 1967/25; 1967/314; 1967/399.

"Trades union" – Workers Development Corporation not included. 1967/362.

Value of property – Amounts involved in series of thefts should not be added together. 1968/321; 1968/324.

Burglary – Value of property stolen, is relevant not value of property recovered. 1968/512.

Leniency permissible where exactly Shs.100/- involved. 1968/275.

Receiving stolen goods – Value of goods received is relevant, not value of goods stolen. 1968/106. Valuation of stolen cheque. 1968/397.

MINING ORDINANCE, CAP. 123

Prospecting without authority – Forfeiture mandatory penalty. 1967/132.

MISTAKE OF FACT

Ignorance of law may be basis for. 1968/280.

Rape – Mistake as to consent of victim due to drunkenness. 1968/370.

MISTAKE OF LAW

See: IGNORANCE OF LAW.

MONEY

See: CURRENCY NOTES ORDINANCE.

MOTOR VEHICLE

See: THEFT; ROAD TRAFFIC

MURDER

See: HOMICIDE

NATIONAL PROVIDENT FUND ACT, ACT 36 of 1964

Failure to pay contribution – Duty arises only after registration. 1968/259.

Failure to pay contribution for persons temporarily employed on piecemeal basis. 1968/307.

Failure to register – Determination of number of employees. 1968/259.

NATIVE LIQUOR ORDINANCE See: LIQUOR.

"NIGHT" See: HOUSEBREAKING.

OBSTRUCTING POLICE OFFICER. See: ASSAULT PUNISHABLE WITH FIVE YEARS

OBTAINING CREDIT BY FALSE PRETENCES

Conviction quashed where accused falsely represented employer would pay for goods obtained 1968/156.

Obtaining goods by false pretences distinguished. 1968/331.

OBTAINING GOODS BY FALSE PRETENCES

Alternative counts of theft and obtaining by false pretences where conviction on one count acquittal should not be entered on second count. 1968/177.

Attempt – See: ATTEMPTED OBTAINING GOODS BY FALSE PRETENCES.

Charge – Each offence must be charged in separate count. 1967/34.

Nature of false pretence must be set out. 1967/220; 1968/277.

Separate charge must be made for each payment unless payments made simultaneously 1967/34

Intent to defraud – Defined and distinguished from intent to deceive. 1968/73.

Minimum Sentences Act – Not covered by 1968/51.

Obtaining credit by false pretences distinguished. 1968/331.

Promise as to future action not false pretence. 1968/277.

Promise as to performance of future services not false pretence. 1967/316.

Theft distinguished. 1968/51; 1968/75; 1968/109; 1968/110; 1968/277; 1968/278; 1968/281; 1968/332; 1968/374; 1968/377.

Whether cheque which is dishonored constitutes false pretence. 1967/453.

OFFICIAL SECRETS ACT, CAP. 45.

Bail – When it may be granted to person arrested under Act. 1967/441.

"Document" construed. 19658/463.

Sentence – Communicating contents of official secret document Imprisonment for eighteen months justified in order to enhance security consciousness. 1968/463.

ORDERS See: DISOBEDIENCE OF LAWFUL ORDERS.

PASSENGERS See: ENDANGERING SAFETY OF RAILWAY PASSENGERS

PERJURY

False evidence must be material to case. 1968/224.

PERSONATING PUBLIC OFFICERS

Performance of official act essential element of offence. 1967/302.

PLEA See: PROCEDURE

POLICE SUPERVISION ORDER See: FAILURE TO COMPLY WITH POLICE SUPERVISION ORDER; SENTENCE.

"POLITICAL PARTY" See: MINIMUM SENTENCES ACT.

"POSSESSION" (See also: RECENT POSSESSION)

Goods buried on premises shared by several persons – Joint possession not established. 1967/222.

Goods possessed by another in presence of accused – Does not establish joint possession. 1967/94; 1967/303.

POSSESSION OF HOUSEBREAKING INSTRUMENTS

Forfeiture – Housebreaking instruments should not be returned to accused convicted in same proceeding of shop-breaking. 1967/23.

Intent to commit felony essential element of offence. 1967/396.

Possession of keys not offence in circumstances. 1968/195.

POSSESSION OF PROPERTY SUSPECTED OF HAVING BEEN STOLEN

Alternative verdicts – Theft cannot be substituted for possession of property suspected of having been stolen although reverse can be done. 1967/273.

Elements of offence. 1967/221; 1967/370; 1967/371; 1968/113; 1968/430.

No conviction possible where accused is thief. 1968/482.

No conviction possible where owner of property can be identified. 1967/273; 1968/108; 1968/334.

Plea of guilty cannot be accepted before accused has been given opportunity to give satisfactory explanation. 1967/273.

PREVENTION OF CORRUPTION ORDINANCE, CAP. 400

Alternative verdicts – Person charge under s.3(1) cannot be convicted under s.6. 1968/149.

Corrupt transaction c/s.3 (1) – No conviction where accused was not empowered to do solicited act – Ten-house leader not government official. 1967/442.

Transaction must be related to principal's affairs. 1967/62.

PREVENTION OF CORRUPTION ORDINANCE, CAP. 400 (Cont'd)

Corrupt transaction c/s. 3 (2) – Conviction quashed where accused had no intention to corrupt. 1968/363.

Immaterial that officer bribed was not empowered to do solicited act. 1967/92.

Money paid as bribe by accused cannot be ordered forfeited under s. 3 (3) (b). 1967/92; 1968/231.

PREVENTIVE DETENTION ACT, CAP. 490

Detention order implicitly worked where detainee charged in court for act prompting detention – Bail may be granted. 1968/139.

PREVIOUS CONVICTIONS See: EVIDENCE; MINIMUM SENTENCES ACT. SENTENCE.

PRINCIPLES OF PUNISHMENT See: SENTENCE.

PRISONERS See: AIDING PRISONERS TO ESCAPE

PRISONS ORDINANCE, CAP. 58

Supplying prohibited article to prisoner. 1968/268.

PROCEDURE

Adjournment – Right to adjournment of trial in order to obtain counsel. 1967/99.

Alternation of charge in course of trial – proper procedure. 1968/225; 1968/226.

Alternative counts – Where conviction is entered on one count, acquittal should not be entered on other count. 1968/177.

Where conviction is entered on one count, no verdict should be entered on other count. 1967/396.

Alternative verdicts – Accessory after the fact to murder cannot be substituted for murder. 1967/72.

Assault causing bodily harm cannot be substituted for assault with intent to steal. 1968/428.

Criminal trespass cannot be substituted for cattle theft. 1968/269.

Indecent assault can be substituted for attempted rape. 1967/76.

Injuring animal can be substituted for cattle-theft. 1967/106.

Malicious injury to property can be substituted for breaking and committing felony. 1967/81.

Malicious injury to property cannot be substituted for attempted stealing from motor vehicle. 1968/480.

Malicious injury to property cannot be substituted for house-breaking. 1968/270; CONTRA 1968/428.

Offence scheduled under minimum sentences act cannot be substituted for non-scheduled offence. 1968/322; 1968/475; CONTRA 1967/276.

Prevention of Corruption Ordinance – Person charged under s. 3 (1) cannot be convicted under s. 6. 1968/149.

Rape cannot be substituted for indecent assault. 1967/57.

Receiving stolen property can be substituted for theft. 1967/108; 1967/417.

Retaining stolen property can be substituted for receiving stolen property. 1967/368.

Robbery with violence cannot be substituted for robbery 1968/465.

Stealing by agent cannot be substituted for stealing by agent cannot be substituted for stealing by public servant. 1967/224.

Stealing by public servant cannot be substituted for stealing by servant. 1968/484; CONTRA 1967/276.

Theft cannot be substituted for receiving stolen property 1967/108.

Theft can be substituted for beating and committing a felony. 1967/31.

Theft cannot be substituted for possession of property suspected of having been stolen although reverse can be done. 1967/273.

Arrest – Accused's wife cannot be arrested to force accused' surrender. 1968/330.

Arrest without warrant by Divisional Executive Officer. See: ABUSE OF OFFICE.

Attachment and sale of property – Proper procedure. 1967/382.

Autrefois acquit – Not applicable where first trial nullity. 1968/464.

Bail – Circumstances justifying partial payment of bond by sureties – Escape of accused in daring and unexpected way. 1967/245.

Condition that accused shall appear daily at police station not valid and no penalty can be imposed for its breach. 1967/245.

Consequences of default – Surety may not be imprisoned. 1968/96.

Forfeiture by bondsman where accused fails to appear but is later produced by bondsman – Power of court to review forfeiture by way of revision. 1967/244.

May be granted where accused was originally detained under Preventive Detention Act and subsequently charged. 1968/139.

Special conditions improper. 1968/416.

Surety's obligation continuous until affirmatively discharged. 1967/245.

When it may be granted to person arrested pursuant to official secrets act. 1967/441.

Bail pending appeal. See: APPEAL.

Change of venue – Grounds for. 1968/416.

PROCEDURE(Continued)

Charge – Abusive language – Proper form. 1967/440.

Accused charged separately cannot be tried together 1967/344.

Alteration during trial. 1968/312.

Assault with intent – Proper form 1967/440.

Cattle – theft – Owner or special owner of cow must be specified. 1967/415.

Charge against different persons for unrelated offences may not be joined in same information. 1967/303.

Contempt of court – Specific charge should usually be made. 1967/63.

Defective charge curable on appeal where particulars set out all ingredients of offence. 1967/21.

False accounting – Intent to defraud must be specified. 1968/481.

Grievous harm – Proper form 1968/392.

Grievous harm in addition on to practicing with out licence invalid for duplicity. 1967/201.

Housebreaking – Proper form. 1967/416.

Land under repealed statute – Error sometimes curable 1968/423.

Material variation between particulars of charge and facts proved. 1968/54; 1968/55.

Obtaining by false pretences – Charge must set out nature of false pretence. 1967/220.

Obtaining by false pretences – Each offence must be charged in separate count. 1967/34.

Obtaining by false pretences – Intent to defraud must be alleged. 1968/55.

Obtaining by false pretences – Separate charge should be made for each payment. 1967/35

Rogues and vagabonds – Insufficient particulars given. 1968/148.

Separate instances of single offence – Charges should be consolidated. 1968/372.

Separate offences must be charged in separate counts. 1967/346.

Theft – Property stolen should be itemized. 1967/446.

Theft superfluous to charge of shop breaking. 1968/182.

Twin charges of abusive language and brawling proper for acts occurring in single transaction. 1968/36.

Twin charges of indecent assault and abduction permissible for single transaction 1968/464.

Where new charges is brought after prosecution witnesses have already testified accused must be advised of right to recall witnesses. 1967/201; **1967**

Wrong quotation of section number harmless error. 1967/345.

C1

CRIMINAL

PROCEDURE(Continued)

Counsel – Right to adjournment in order to obtain counsel. 1967/99.

Defence – Where defences of various accused are different they should not be considered together. 1967/251.

Discharge of accused following withdrawal of complaint in Primary Court no bar to new proceedings. 1967/247.

Dispensing with presence of accused – When proper. 1968/464.

Extra – Judicial statement – Must be re-recorded at trial. 1968/189.

Interpretation of evidence – Record must show accused understood language used to interpret. 1967/394

Judgment – Failure by trial magistrate to analyse prosecution case improper. 1968/216.

Jurisdiction – Causing death by dangerous driving – Triable by Resident Magistrate not District Magistrate. 1968/178.

Endangering safety of railway passengers – Triable by High Court only. 1967/8.

In cost by mates – Triable by High Court only, 1968/140.

Obstructing working of train – Triable by High Court only. 1968/97.

Notes taken by judge in view of locus – Must be read out in court. 1967/12.

Petition for clemency – Not an appeal. 1967/109.

Plea – Failure to take plea nullifies proceedings. 1967/74; 1967/133.

Must be taken for every charge 1968/424; 1968/425; 1968/426.

Plea of guilty – Acceptable where clear despite claim that it was obtained by inducement. 1967/305.

Accused cannot plead guilty when plea is taken to possession of property suspected of having been stolen – Must be given opportunity to give explanation. 1967/273.

Accused must be given opportunity to confirm or deny facts stated. 1968/427.

Arson – Equivocal. 1968/32.

Defilement – Equivocal. 1967/96.

Driving while efficiency impaired by drinks – Equivocal. 1968/151.

Grievous harm – Equivocal. 1968/46; 1968/56.

May be withdrawn before sentencing. 1968/429.

Must constitute full and explicit admission of ingredients of offence. 1967/397.

No appeal from unequivocal guilty plea. 1967/239.

Possession of housebreaking instruments. – Equivocal. 1967/396.

Robber – Equivocal. 1967/150.

PROCEDURE(Continued)

Plea of guilty - Statement of facts either meaningless or do not support charge. 1968/466.

Theft – equivocal . 1968/333.

Theft by public servant – Equivocal. 1967/152.

Transfer of firearm – Equivocal. 1968/457.

Uttering forged notes – Equivocal. 1967/82.

When advocate may enter plea on behalf of accused. 1967/395

Words of accused in pleading guilty must be recorded as nearly as possible. 1967/257.

Prosecution – May not produce evidence after close of defence case except in most unusual circumstances. 1967/298; 1967/339.

Record of evidence – Gratuitous punctuation of accused's testimony improper. 1968/57.

Retrial – Appropriate where first trial declared nullity. 1968/75.

Appropriate where trial court neither considered nor decided issues in case. 1967/242.

Criteria in ordering. 1967/444; 1968/149.

Not ordered where accused has spent substantial times in prison. 1968/392.

Ordered where it would allow prosecution to fill in gaps in case. 1967/60.

When trial before another magistrate is appropriate. 1967/453

Return – Proper form in offences coming under minimum Sentences Act. 1967/203.

Right of accused to examine statements made to police by persons not called as prosecution witnesses. 1968/301.

Search – Evidence obtained in admissible. 1968/39.

Substitution of charges – See: Alternative verdicts.

Transfer of case from primary court – not discretionary. 1968/312.

Transfer of case from primary court to resident magistrate's court – not prejudicial to accused. 1968/227.

Transfer of case to new magistrate – Grounds. 1968/272.

Trial – Accused charged separately cannot be tried together. 1967/344.

Hold before magistrate who has previously convicted accused – not necessarily improper. 1968/58.

Hold before successive magistrates. 1967/134; 1967/75; 1967/347.

Trials of different persons for unrelated offences should be separate. 1967/303.

Trial within a trial – Not essential in determining admissibility of evidence where no assessors present. 1968/181.

PROCEDURE(Continued)

Witnesses – Accused need not give advance notice of request to call witnesses. 1967/123.

Accused to be advised of right to recall witnesses who testified before new charge laid. 1967/201. AND 1967/256.

Court must caution accused who cross-examines prosecution witness in manner prejudicial to own case. 1967/339.

Court should call witness only when vital and when request for parties to do so has been refused. 1967/252.

Evidence must not be obtained by prosecuting a witness in a separate case. 1968/313.

Magistrate has duty to call defence witnesses essential to just decision. 1967/258.

Magistrate must record whether or not accused requested witnesses. 1967/202.

Power of court to call witnesses when prosecution has not proved case is restricted. 1967/196.

Prosecution may not call witnesses after close of defence case except in exceptional circumstances. 1967/339; 1968/220.

Refractory witness – Does not cover witness who does not refuse to answer but merely answers improperly or unsatisfactorily. 1967/319.

PROBATION See: MINIMUM SENTENCES ACT; SENTENCE.

PROHIBITED IMMIGRANT See: IMMIGRATION ACT.

PROOF See: EVIDENCE.

"PROPERTY" See: CRIMINAL TRESPASS.

PROVOCATION See: ASSAULT CAUSING ACTUAL BODILY HARM; HOMICIDE; SENTENCE.

PUBLIC SERVICE See; MINIMUM SENTENCES ACT.

PUBLICATION See: LIBEL

RAILWAYS See: EAST AFRICAN RAILWAYS AND HARBOURS ACT.; ENDANGERING

SAFETY OF RAILWAY PASSANGERS;

RAPE

Alternative verdicts – Rape cannot be substitute for indecent assault. 1967/57.

Attempt – See: ATTEMPTED RAPE.

Consent – Agreement to engage in sexual intimacy does not constitute consent to intercourse. 1968/329.

Complainant too drunk to resist. 1968/370.

Evidence – Torn clothing not necessarily corroboration. 1968/370.

Uncorroborated testimony of complainant inadequate basis for conviction. 1967/204; 1967/205.

RAPE(Continued)

Intention – Possibly lacking due to drunkenness. 1968/370.

Sentence – Partial consent of complainant mitigating factor. 1968/329.

RECEIVING STOLEN PROPERTY

Alternative verdicts – Receiving stolen property can be substituted for theft. 1967/108; 1967/417.

Retaining stolen property can be substituted for receiving stolen property. 1967/368.

Theft cannot be substituted for receiving stolen property. 1967/108.

Mens rea may be inferred from concealment of goods. 1967/37.

Property must be shown to have been stolen 1968/430.

Sentence – Application of Minimum Sentence Act. 1967/37.

RECENT POSSESSION

Accused's explanation need not be reasonable and convincing. 1967/107.

Burden of proof does not shift to accused. 1967/38.

Conviction for receiving rather than theft appropriate where small portion of stolen property recovered after one and half months. 1968/335

Conviction for robbery improper where accused were merely in presence of party possessing stolen goods. 1967/67.

Conviction justified in absence of any explanation. 1967/148.

Five months "recent" in respect to uncommon articles. 1967/454.

Four months not "recent" where stolen item is easily transferable. 1968/483.

Four years not "recent" in case of cattle theft. 1968/149.

One month "recent" in case of theft. 1968/157.

Possession of leg of stolen animal one day after theft not sufficient evidence for conviction. 1968/330.

Presumption of guilt rebutted by explanation naming friend as owner of property. Prosecution must disprove explanation. 1967/122.

Presumption of guilt rebutted by explanation which could reasonably be true. 1967/68; 1967/418; 1968/242.

Presumption of guilt rebutted by explanation which could reasonably be true – Court need not believe explanation. 1967/83.

Six months not "recent" where small portion of stolen property recovered. 1967/417.

REGULATION OF WAGES AND TERMS OF EMPLOYMENT ORDINCE CAP. 300

Contract of service – Whether exists. 1968/421.

REPARTIATION See: SENTENCE.

REPORT TO POLICE See: FALSE INFORMATION

RESCUE FROM LAWFUL CUSTODY

Covers rescues of all lawful prisoners, whether convicted or merely awaiting trial. 1967/294.

RESISTING LAWFUL ARREST See: ASSAULT PUNISHABLE WITH FIVE YEARS.

RETAINING STOLEN PROPERTY See: RECEIVING STOLEN PROPERTY.

RETRIAL See: PROCEDURE.

REVISION See: APPEAL.

RIOT

Evidence of co-participant in inter – tribal battle does not require corroboration. 1967/348.

Presence at meeting leading to riot coupled with flight from scene of riot sufficient for conviction. 1967/348.

Presence at meeting leading to riot not sufficient for conviction. 1967/348.

Presence at scene of riot not sufficient for conviction. 1967/348

ROAD TRAFFIC

Carrying goods for hire without licence- Cancellation of road licence or vehicle registration illegal. 1967/448.

Causing death by dangerous driving – Driver dazzled by lights – Duty to slow or stop. 1968/273.

-Duty of care owed to passengers and users of road. 1968/394.

Defective brakes – No provision for double convictions where both handbrake and footbrake are defective. 1967/260; 1967/349; 1968/150.

Disqualification from holding driving licence. – Accused must be given opportunity to show" special reasons". 1967/206

Order imposed on manager of offending company. 1968/59.

Should exceed length of prison term. 1968/293.

Special reasons cannot be "general". 1968/468.

"Special reasons" do not exist where accused allowed other to drive uninsured vehicle 1967/135.

"Special reasons do not exist where accused did not know that insurance had expired. 1968/468

"Special reasons" do not exist where accused has good driving record. 1968/153.

"Special reasons" do not exist where accused's job requires him to drive extensively. 1967/259; 1967/350.

"Special reasons" do not exist where accused's livelihood depends on driving. 1968/153; 1968/431.

"Special reasons" do not exist where unlicensed farm vehicle was driven on public road for short distance in order to be repaired. 1967/351.

CV1

CRIMINAL

ROAD TRAFFIC (Continued)

Disqualification from holding driving license (cont'd)

"Special reasons" exist where driver was mechanic delivering repaired vehicle to owner. 1967/308.

"Special reasons" must relate to offence rather than offender. 1967/206; 1967/259; 1967/350; 1968/153; 1968/468.

Two year period excessive in circumstances. 1967/277.

Driving defective, unlicensed, uninsured vehicle – Accused charged specifically with driving cannot be convicted on basis that he was owner and in charge of vehicle at time. 1967/398.

Driving while efficiency impaired by drinks – Elements of offence. 1968/151.

Failure to comply with conditions of road service license Only license-holder may be charged. 1968/432.

Failure to report accident – Conviction sustained where accused did not know injury occurred. 1968/152.

- Not offence where damage only caused to adjacent property. 1968/60

Foreign vehicle – Whether car registered in Zanzibar is foreign. 1968/229.

Neglect of traffic directions – Failure to obey policeman Essential that policeman be engaged in regulation of traffic. 1967/307.

"Permitting" unlawful use of vehicle – Mens rea required. 1968/395.

Public Service vehicle – Carrying passengers for hire without license – Cancellation order mandatory for second conviction even where previous conviction concerned different vehicle. 1967/306.

Carrying passengers for hire without licence. – Fire of Shs. 35/- inadequate. 1967/105.

Carrying passengers for hire without licence – Persons liable. 1967/77.

"Road"- Possibly does not include estate road. 1968/433.

Sentence – Primary duty with respect to motor vehicle rests with owner not driver – Driver should not be fined heavily. 1967/20.

ROBBERY

Alternative verdicts – Robbery with violence cannot be substituted for robbery. 1968/465.

Common intention – Participants in group beating not all liable for robbery which occurs in course of beating 1968/52.

Demanding property with menaces distinguished. 1968/279.

Does not cover case where force is used after theft but not immediately after. 1967/372.

ROBBERY(Continued)

Separate offences are not created by Penal Code provision relating to robbery with violence. 1968/115.

Threat of force does not necessarily exist where accused are armed and "force" complainant to hand over money –Guilty plea equivocal. 1967/150.

Violence must be for the purpose of stealing. 1968/74; 1968/243.

ROGUES AND VAGABONDS

Charge – Insufficient particulars given. 1968/148.

Facts constituting offence. 1968/195.

Homelessness does not constitute roguishness. 1968/469.

Maximum Sentence should not usually be imposed on first offender. 1967/353.

Presence for illegal or disorderly purpose essential element of offence. 1967/396; 1968/61.

"SALE" See; FOOD AND DRUGS ORDINANCE

SCHEDULED OFFENCES See: MINIMUM SENTENCES ACT.

SEARCH AND SEIZURE See: also PROCEDURE

Absence of accused does not invalidate search of premises. 1967/449.

SECRETS See: OFFICIAL SECRETS ACT.

SECURITY See: OFFICIAL SECRETS ACT.

SELF-DEFENCE See DEFENCE OF PERSON

SELF-HELP SCHEMES See: DISSUADING PERSONS FROM ASSISTING WITH SELF-HELP SCHEMES.

SENTENCE

Enhancement of sentence – Accused must be given notice. 1968 / 320.

Appeal – Enhancement of sentence – Appeal court may enhance sentence in accordance with Minimum Sentences Act after original sentence has been served. 1967/311.

Fine under Shs. 100/- not appeal able to High Court without leave. 1967/240.

Lenient sentence determined by proper methods not enhanced on appeal. 1967/201.

Reduction of sentence – Proper only where sentence so excessive as to be unsuitable. 1968/237.

Sentencing power of District Court on appeal does not exceed that of Primary Court. 1967/189; 1967/310; 1968/194.

Sentencing power of High Court on appeal does not exceed power of subordinate court. 1967/7.

Compensation – Allocation as between two or more accused. 1968/62.

Appropriate for minor case of manslaughter. 1967/136.

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CRIMINAL

SENTENCE(Continued)

Compensation – Appropriate in case of attempted rape where complainant injured. 1967/207.

Appropriate where man assaults woman. 1968/227.

Frivolous or vexatious charge – Basis for award. 1968/393.

Frivolous or vexatious charge – Persons against whom it may be ordered. 1968/317.

Only appropriate in domestic offences. 1967/208.

Limited to Shs. 2,000/- In cases not under Minimum Sentences Act. 1967/211.

Loss must be proved. 1967/22; 1967/78; 1968/190.

May be awarded to cover expenses incurred by complainant in searching for stolen property. 1968/230.

May be awarded for business losses resulting from criminal acts. 1968/35.

May not be awarded in respect of separate case. 1967/393.

Must be made in terms of money if made under Minimum Sentences Act. 1967/309; 1968/62; 1968/507.

Should be made in favour of owner of property at time of theft. 1967/101.

Parent of young offender may not be ordered to pay compensation without being heard. 1967/300.

Concurrent sentences – Appropriate for conviction for abusive language and brawling arising from same transaction. 1968/36.

Appropriate for convictions for housebreaking and theft. 1968/239.

Appropriate for crimes arising out of same transaction 1967/26; 1967/27; 1967/137; 1968/154; 1968/321; 1968/328.

Appropriate for offences of burglary and indecent assault when parts of single transaction. 1967/262.

Appropriate for separate but similar offences. 1968/372.

Appropriate for offences of theft and false accounting where amount is small and accused first offender. 1967/403.

Inappropriate for separate transactions on consecutive days 1968/331.

May be ordered for separate convictions on same day for related offences. 1967/405.

Orders for corporal punishment cannot be concurrent. 1968/63; 1968/64.

Sentences can be ordered to run concurrently with previous sentence as from date imposed. 1968/510.

Sentences for conviction in separate primary court trials must run consecutively. 1967/102.

Sentences presumed to run consecutively unless otherwise ordered. 1968/63.

Conditional discharge – Where appropriate. 1968/238.

Corporal punishment Age of accused – Accused should receive benefit of doubt about age. 1967/450.

SENTENCE(Continued)

Corporal punishment – Finding essential. 1967/33.

Medical evidence as to age required where accused on borderline. 1967/209; 1967/269.

Cannot be imposed on juvenile in addition to other form of punishment such as approved school order. 1967/24.

Inappropriate for attempted suicide. 1968/479.

May be imposed for assault only in aggravated cases. 1967/402; 1968/191; 1968/319; 1968/471.

May not be imposed for causing grievous harm. 1967/401.

May not be imposed on juvenile in addition to repatriation order. 1968/306.

Only one order imposable in single trial. 1968/64; 1967/265.

Orders in separate trials cannot be concurrent. 1968/63.

When imposable on adults. 1968/470.

Distress – Improper where appeal is pending. 1968/192.

Order for imprisonment in default of distress improper before attempt at distress made. 1967/261.

Domestic offences – Principles relating to. 1967/208; 1967266; 1968/65; 1968/105.

Fine – Appropriate as substitute for short prison term. 1967/362.

Appropriate for minor case of manslaughter. 1967/136.

Desirable to inquire into financial means of accused. 1967/139; 1968/227.

Employment Ordinance – Failure to keep records of oral contracts – Fines excessive. 1967/138.

Fauna Conservation Ordinance – Government trophy – Amount of fine proportionate to value of property. 1967/336.

Fauna Conservation Ordinance – More appropriate than imprisonment. 1968/472

Inappropriate for witchcraft. 1967/110

Maximum term of imprisonment in default six months. 1967/210; 1967/139.

May not be suspended. 1967/217

Must be cumulative – Cannot be concurrent . 1967/140.

Must bear reasonable relation to accused ’s power to pay. 1967/210; 1967/451; 1968/192; 1968/371.

Road traffic – Carrying passengers without licence – Fine of thirty-five shillings inadequate. 1967/105.

Road traffic – Primary duty for obtaining vehicle licence rests with owner not driver-Driver should not be fined heavily. 1967/20.

Sentence of less than Shs. 100/- Not appeal able to High Court without leave. 1967/240.

Should not exceed one-third of accused 's monthly income 1967/451.

SENTENCE(Cont'd)

Fine – Terms of imprisonment in default of fines cannot be concurrent . 1967/140; 1967/141; 1968/66; 1968/232.

Forfeiture – Agricultural Products (Control and Marketing) Act – Unlawful buying of products – Order of forfeiture improper. 1968/30. 1968/31; 1968/314.

Arms and Ammunition Ordinance – Unlawful possession of firearm – Improper where owner has not been heard. 1967/90.

Arms and Ammunition Ordinance – Unlawful possession of firearm – Improper where owner is innocent third party 1967/299.

Fauna Conservation Ordinance – Unauthorized possession of firearm – Forfeiture order unjust where firearm belongs to innocent third party. 1967/299

Housebreaking instruments should not be returned to accused convicted in same proceeding of shop-breaking 1967/23.

Mining Ordinance – Prospecting without authority – Forfeiture mandatory penalty. 1967/132.

Mining Ordinance – Prospecting without authority-Mandatory. 1967/132.

Prevention of Corruption Ordinance – Money paid as bribe by accused cannot be ordered forfeited. 1967/92; 1968/231.

Quantum of recovery where forfeiture wrongful. 1968184.

Imprisonment – Arms and Ammunition Ordinance – Unlawful possession of firearm – Six months excessive. 1967/90.

Assault with intent – Three years excessive for elderly first offender. 1968/459.

Attempted suicide – Inappropriate. 1967/30; 1967/79; 1967/270; 1968/310; 1968/479.

Common Assault – Six months excessive for elderly first offender. 1968/459.

Communicating contents of official secret document – Eighteen months justified to enhance security consciousness. 1968/463.

Criminal trespass – Sentence of eighteen months ultra vires and excessive for offence involving Shs. 13/50. 1967/267.

Domestic offence – Inappropriate. 1968/65; 1968/105.

Domestic offence – Long term excessive. 1967/266; 1968/477.

False assumption of authority – Twelve months excessive 1967/254.

Manslaughter – Inappropriate in minor case 1967/136.

Manslaughter – One week sentence imposed when accused killed member of gang which attacked him. 1967/199.

Manslaughter – Three months appropriate where death resulted from ruptured spleen. 1968/511.

Possession of bhang – Twelve months excessive. 1967/144

Rape Inappropriate for young offender. 1967/98.

SENTENCE(Cont'd)

Imprisonment – Short terms undesirable. 1967/305; 1967/364; 1968/61.

Stealing from person – Sentence of twelve months enhanced to two years for offence involving Shs. 1/- where accused had three relevant previous convictions. 1967/268.

Theft-sentence of twelve months excessive for offence involving Shs. 13/50. 1967/267.

Unlawful possession of bhang – Twelve months excessive. 1967/144.

Unlawful wounding – Nine months appropriate where provation existed. 1968/513.

Unnatural offence – Inappropriate. 1967/315.

Wrongful confinement – Maximum penalty excessive in circumstances. 1967/146.

Youthful first offender – Long term undesirable 1968/477;

Youthful first offenders – Short terms undesirable 1967/216; 1968/238.

Imprisonment in default of fine – Arms and Ammunition Ordinance – Unlawful possession of firearm – Length of prison term governed by Penal Code provisions. 1968/415.

Limitation on. 1968/233.

Terms cannot be concurrent. 1967/140; 1967/141; 1968/66; 1968/231.

Material factors – Accused 's good record. 1968/193.

Belief that offence was justified under customary law. 1967/109.

Carelessness of complainant. 1968/323.

Failure to charge co-participants in offence. 1968/509.

Frequency of offence in area – Should be considered in open court. 1967/212.

Guilty plea. 1968/325; 1968/510.

Intoxication. 1967/95; 1968/193; 1968/434.

Intoxication not mitigating factor in view of prevalence of crime in area. 1967/17.

Lack of premeditation. 1968/472.

Leading role in crime 1967/225.

Loss of job Consequent upon offence. 1968/434.

Manslaughter – Death could not be anticipated. 1967/136.

Manslaughter – Killing by woman to protect aged husband-Sentence of one day. 1967/356.

Manslaughter – Pregnancy of accused at time of killing – Unfaithfulness of deceased – Sentence of one day. 1967/355.

Manslaughter – Sentence of forty months where accused killed father in course of struggle. 1967/363.

Manslaughter resulting from pombe party – Sentence of twenty months. 1967/354.

SENTENCE(Continued)

Material factors – Maximum sentence for offence with which accused should properly have been charged. 1968/331.

Mistake of law. 1967/109.

Partial consent of complainant in rape case 1968/329.

Pending charge – Cannot be taken into consideration. 1967/400.

Possible hereditary taint of insanity. 1967/95.

Provocation. 1968/34; 1968/509.

Sudden temptation. 1968/323.

Time spent in custody. 1967/82

Minimum Sentences Act. See: MINIMUM SENTENCES ACT..

Mitigation. See: Material factors.

Police supervision – Failure to comply with several requirements of single order constitutes one offence only. 1967/255.

May not be ordered for acts done after imposition of sentence. 1967/29.

Powers – Order to pay costs of maintenance in jail illegal. 1967/411.

Previous convictions – Accused must be given chance to confirm or deny them. 1967/28; 1968/427.

Disentitle accused to leniency but not grounds for ultra-severe sentence. 1968/72.

Only relevant convictions may be considered. 1967/145.

Proof required. 1967/29; 1967/145; 1967/215; 1968/42; 1968/70; 1968/71; 1968/220; 1968/436.

Principles of punishment – Co-accused who are first offenders should receive identical sentences. 1967/210.

Discrimination between co-accused on basis of prior convictions improper in circumstances-Ringleader may deserve more severe punishment. 1967/225.

Maximum penalty should not generally be imposed on first offender. 1967/353.

Offences committed is main determining factor in assessing punishment. 1968/72.

Offences of omission deserve more lenient treatment than offences of commission. 1968/154

Sentence must bear relation to gravity of offence, i.e., value of property involved. 1967/267.

Where there are several convictions arising from one transaction concurrent sentences should be imposed whose total is appropriate to the entire transaction. 1968/328.

Probation – Improper to impose other punishment in additions to probation order. 1967/413.

Inappropriate in case of attempted suicide. 1968/310. Violation of probation by commission of further offence -Not punishable as offence in itself. 1968/310.

SENTENCE(Continued)

Procedure – Accused may not be given choice of punishments 1968/104.

Accused should be heard in mitigation. 1967/305.

Commencement of sentence – Cannot predate conviction. 1967/399; 1968/315.

Court may alter sentence after verbally pronouncing it if proceedings not yet complete. 1967/400.

Enhancement on revision. – Accused must be given notice. 1968/320

Omnibus sentence – Improper to impose single sentence for several convictions. 1967/263; 1967/264; 1968/220.

Only one sentence imposable for single offence of cattle theft – Conviction under two sections does not authorize two sentences. 1967/100.

Record must disclose sentencing proceedings. 1967/99.

Repatriation order – May not be imposed on juvenile in addition to corporal punishment. 1968/306.

Revision. See: Appeal.

Suspended Sentence – Fine may not be suspended. 1967/217.

SEXUAL OFFENCES See: EVIDENCE; also individual headings.

"SHOP" See: BREAKING AND COMMITTING FELONY.

SODOMY See: UNNATURAL OFFENCES.

"SPECIAL CIRCUMSTANCES" See: MINIMUM SENTENCES ACT.

"SPECIAL REASONS" See: ROAD TRAFFIC.

STATUTORY DUTY See: DISOBEDIENCE OF STATUTORY DUTY.

STEALING See: THEFT.

SUBSTITUTION OF CHARGES See: PROCEDURE – Alternative verdicts.

SUICIDE See: ATTEMPTED SUICIDE

SUSPENDED SENTENCE See: SENTENCE.

"TAKING" See: THEFT.

TESTIMONY See: EVIDENCE.

THEFT

Alternative counts of theft and obtaining by false pretences –Where conviction is entered on one count no conviction should be entered on second count. 1968/177.

Alternative verdicts – Criminal trespass cannot be substituted for cattle-theft. 1968/29.

Injuring animals can be substituted for cattle-theft. 1967/106.

Receiving stolen property can be substituted for theft. 1967/108.

THEFT (Continued)

Alternative verdicts – Stealing by agent cannot be substituted for stealing by public servant. 1967/224.

Stealing by public servant cannot be substituted for stealing by servant. 1968/484; CONTRA 1967/276.

Theft can be substituted for breaking and committing felony. 1967/31.

Theft cannot be substituted for possession of property suspected of having been stolen although reverse can be done. 1967/273.

Theft cannot be substituted for receiving stolen property. 1967/108.

Animus furandi. See Fraudulent intent.

Attempt. See: ATTEMPTED THEFT.

Cattle-theft- Charge defective where owner of cow not specified. 1967/415.

Compensation order must be in terms of money not cattle. 1967/309; 1968/507.

Compensation proper for expenses of complainant in searching for stolen cattle. 1968/230.

Evidence – Leg of sheep found with accused – Insufficient proof. 1968/330.

False claim of ownership without "taking" not offence. 1968/430.

Killing animal with intent to steal distinguished 1967/106; 1967/367.

Limited to live animals. 1967/218.

Minimum sentence mandatory in all cases – section 5(2),

Minimum sentence Act, inapplicable. 1967/312; 1967/361.

Charge – should itemize property stolen. 1967/446.

Claim of right. See: CLAIM OF RIGHT.

"Conversion" – Distinguished from loan. 1967/219.

Verbal misrepresentation of amount due on cheque presented at bank. 1968/323.

Crime not reported to police – Does not preclude conviction. 1968/108.

Defence of lawful possession to be accepted if possible true. 1968/264.

Definition in Tanzania includes both fraudulent conversion and larceny. 1967/36.

Fraudulent intent – Doubtful where accused is mentally disturbed. 1968/103.

Essential element. 1968/376.

Intention to return money taken – Does not affect guilt. 1968/112; 1968/280.

Must be intention to deprive permanently. 1968/375.

Need not be formed at time of taking 1967/272; CONTRA 1968/197.

THEFT (Continued)

Identification of stolen goods – Complainant must be asked for description or special marks before goods are shown to him 1967/129; 1967/446.

Ordinary goods without special marks 1967/11.

Money innocently received – Animus furandi must be formed at time of reception. 1968/197.

No offence where object is taken as forfeit by Community consensus. 1968/461.

Obtaining by false pretences distinguished. 1968/51; 1968/75; 1968/109; 1968/110; 1968/277; 1968/278; 1968/281; 1968/332; 1968/374; 1968/377.

Plea of guilty – Equivocal. 1968/333.

Property not found in possession of accused – Does not preclude convictions. 1968/108.

Property taken need not have value. 1968/333.

Sentence – Stealing from person – Sentence of twelve months enhanced to two years where value of property was Shs. 1/- and accused had three relevant previous convictions. 1967/268.

Twelve months excessive for theft of Shs. 13/50. 1967/267.

Stealing by public servant – Covers misappropriation by employee of District Council of funds intended for judiciary. 1967/419.

Does not cover appropriation of money intended for government which accused had no authority to collect – Appropriate charge stealing by agent. 1967/224.

Does not cover case where monies never received by government . 1968/110.

Does not cover retention by servant of money intended for but not owed to master. 1967/223.

Equivocal guilty plea – Mere negligence insufficient. 1967/152.

Money received outside scope of normal duties gained "by virtue of his employment". 1968/382.

"Public servant" defined. 1968/241.

Question of employment must be specifically dealt with. 1968/378.

Testimony of handwriting expert insufficient basis for conviction – Opportunity for accused to commit offence not sufficient corroboration. 1967/197.

Whether money stolen belonged to government. 1968/484.

Stealing by servant – Appropriation of unpaid salary without authorization. 1968/373.

Does not cover negligent loss of money. 1967/369.

Lack of intent to collect funds on behalf of employer. 1967/274.

Proof of negligent accounting does not justify conviction. 1967/151.

Stealing from motor vehicle – Conviction quashed where goods not removed from vehicle. 1968/198.

Conviction quashed where thing stolen part of motor vehicle. 1968/244.

THEFT(Continued)

Stealing from person – Act of picking pocket where purse only partially removed constitutes attempt. 1967/275.

"Taking" – Conviction for stealing from motor vehicle quashed where goods not removed from vehicle. 1968/198.

Not taking in absence of proof that accused moved goods. 1964/414.

No taking where accused did not remove goats from goat-house. 1967/365.

Things capable of being stolen – Includes water running in furrow. 1968/245.

Whether wild animal which is wounded by one party is capable of being stolen by another person who finds it dead – Ownership of animal not obtained by wounding 1967/341.

"TRADES UNION" See: MINIMUM SENTENCES ACT

TRAFFIC ORDINANCE CAP, 168 See: ROAD TRAFFIC.

TRAINS See: EAST AFRICAN RAILWAYS AND HARBOURS ACT.

TRANSPORT LICENSING ORDINANCE CAP. 373 See: ROAD TRAFFIC

"TRANSFER" See: ARMS AND AMMUNITION ORDINANCE FAUNA CONSERVATION

ORDINANCE.

TRESPASS See: CRIMINAL TRESPASS.

TRIAL See: PROCEDURE.

TROPHY See: FAUNA CONSERVATION ORDINANCE.

UNDESIRABLES See: EXPULSION OF UNDESIRABLES ORDINANCE

UNLAWFUL ASSEMBLY

Facts constituting offence. 1967/225.

UNLAWFUL WOUNDING

Accidental wounding not offence. 1967/84.

Sentence – Nine months appropriate where provocation existed. 1968/513.

UNNATURAL OFFENCE

Corroboration not required where evidence extremely convicting. 1968/369.

Sentence – Imprisonment possibly inappropriate form of punishment. 1967/315

UNSOUNDNESS OF MIND See: INSANITY

UTTERING FALSE DOCUMENTS

Illiteracy no defence. 1968/374.

Issuance of receipt after wrongful collection of monies. 1968/110

UTTERING FORGED NOTES See: CURRENCY NOTES ORDINANCE.

VAGABONDS See: ROGUES AND VAGABONDS.

WILD-LIFE See: FAUNA CONSERVATION ORDINANCE.

WITCHCRAFT ORDINANCE, CAP. 18

Sentence – Fine inappropriate. 1967/110.

WITNESSES See: EVIDENCE; PROCEDURE.

"WOMAN" See: ABDUCTION.

WOUNDING See: UNLAWFUL WOUNDING.

WRITTEN THREATS TO MURDER

Breach of peace distinguished. 1968/185.

Triable by High Court only. 1968/185

WRONGFUL CONFINEMENT

Arrest without warrant by Divisional Executive Officer. 1968/364.

Sentence – Maximum prison term excessive in circumstances. 1967/146.

1. Ali s/o Islam v. R., Crim. App. 828-D-66; 19/1/67; Biron, Ag. C.J.

Accused was convicted of dealing in broadcast receivers without a licence (Broadcast Receiving Apparatus (Licensing) Act, 1964,s. 5(1), on evidence that he had hidden several radios when he observed a police officer approach the store and produced no licence when the radios were found.

Held (1) The accused was not "carrying on business" under the Act, since he was an employee only. To be "carrying on business" one must exercise some control or act as a partner. (2) Accused was nonetheless guilty if he aided or abetted another person in committing the offence, with full knowledge that it was an offence (P.C. s. 22). (3) Concealment of the evidence that an offence had been committed was sufficient to show men rea.

2. R. v. Halfani Reli Kapile, Misc. Crim. 1-D-67; 2/1/67; Saidi, J.

Accused was convicted on five counts of stealing and two of forgery. He petitioned the High Court to permit him to go free on bail, pending an appeal of his conviction.

Held: (1) Bail pending and appeal of a criminal conviction will be granted only in exceptional circumstances, citin R. v. Lernster (Duke), 17 Cr. App. R. 147. (2) Accused notes that he has dependants, is a Tanzanian citizen, and that the charge of theft is not an uncommon one. These are not sufficient to constitute valid grounds for granting bail.

3. Jura s/o Kanslawi v. R., Crim. App. 16-D-67; -/1/67; Saidi, J

Accused was convicted ,inter alia, of stealing. When arrested, he admitted having stolen the articles in question. On appeal, for the first time, accused claimed that in fact it was his property which had earlier been stolen from him by the complainant.

Held: “The appellant has raised his claim to the property so ( ) late. Had his claim been genuine, he should have raised it from the beginning of the proceedings”.

4.Kizengeze s/o Mugamba v. R. Crim. App. 99-M-66; 3/1/67; Platt, J

Accused was charged with cattle theft (P.C. ss. 265, 268). His trial was begun before one magistrate but before it was completed a second magistrate was appointed who commenced a trial de novo.

Held: The appellate court could consider testimony given before the first magistrate which tended to contradict testimony given by a prosecution witness, since, had the accused been represented by counsel, counsel would have introduced the testimony by deposition. Citing R. v. Wilbald s/o Tiba-nyendela (1948) 15 E.A.C.A. 111.

5.Joseph s/o Jacob v. R., Crim. App. 603-M-66; 19/1/67; Platt, J.

Appellant, convicted of theft, complained that his trial had not been public, but had been held in a trial magistrate’s home. The District Court summarily rejected his appeal.

Held: (1) The District Court should have taken appellant’s affidavit and obtained a reply from the trial magistrate. (2) Since the magistrate had not responded to the High Court’s inquiry in a “reasonable” length of time, and since appellant had nearly completed his sentence, appeal was allowed without further inquiry.

6. Sixtus s/o Anini v.R.,Crim. App. 870-D-66; 10/1/67; Otto, J.

Accused had been hunting pigs, and had set a fire in a forest to capture a wounded pig which had escaped. The fire spread and three house were burned.

Held: Where the evidence establishes an accused 's careless or negligent conduct, but does not establish willful or unlawful behavior, as here, an arson conviction will not stand.

7. Jando v.R., Crim App. 32-D-67; 18/2/67; Biron, Ag. J

Accused was convicted in Magistrate Court on his own pleas to several charges of forgery (P.C.ss.333,337) and theft by public servant (P. C. ss. 265, 271) and given various concurrent and consecutive sentences to talling 10 years' imprisonment. The Penal Code, section 7, as amended by the Magistrate Courts Act of 1963, Schedule 6, Part 111, limits sentences imposed by subordinate courts to 3years, for offenses not included in the schedules of the Minimum Sentences Act of 1963. Accused's offenses were not scheduled offenses. The Criminal Procedure Code, section 12, limits subordinate courts to consecutive sentences of no more that twice the amount ordinarily authorized, and states that higher sentences may be imposed only by higher courts to which the subordinate courts may refer appropriate cases.

Held: (1) Since the subordinate court did not refer the case to a higher court, no more than 6 years' imprisonment could be imposed by it. (2) Though the 10-years sentence might be fully deserved, the appellate jurisdiction of the High Court in sentencing matters was limited by the sentencing power of the subordinate court, so that it too, could impose a sentence of no longer than 6 years. Citing Badan Njoroge s/o Gaithuma v.R., 17E. A. C. A. 136.

8.R. v. Issumail s/o Hamissi. Crim. Rev. 1-A-67; 2/1/67; Bannernan, J.

Accused pleaded guilty in District Court to a charge of intentionally endangering the safety of persons traveling by intentionally endangering the safety of persons traveling by railway (P.C. s. 224 (2)).

Held: The Criminal Code (Cap. 20, s. 4) requires that such offenses be tried in the High Court. (See also Cap. 20, First Schedule, Part A, Column 5.) A district Court Magistrate may hold a preliminary inquiry and commit the accused to the High Court, but may not take a plea or sentence the accused.

9. R. v. Raphael s/o Yohanes, Crim. Rev. 3-D-67; 7/1/67; Mustafa, J.
Accused was convicted of escape from lawful custody (P. C. s.116) on evidence that he ran away from a policeman while allegedly showing him where stolen goods had been hidden.

Held: Although it was shown that accused was physically in the presence of an officer, the prosecution had the burden of showing that accused had been placed under arrest at the time he fled.

10. Shamshudin Kassam Vibji v. R., Crim. App. 871-D-66; -/2/67; Hamlyn, J.
The accused, with several others, was convicted of stealing goods in transit (P.C. ss. 265 and 269). The confession of another of the accused was admitted against him.

Held: (1) Pursuant to section 30 of the Indian Evidence Act, when there is introduced into evidence a confession made by one accused which also affects other of the accused, “the court may take into consideration such confession as against such other person…..” (2) As against such other person “such confession is to be treated more as corroborative of other evidence ….., it is not, as it were, evidence completely probative in its own right.” The appeal was dismissed.

11. Bawari s/o Abedi v. R., Crim. App. 15-D-67; -/1/67; Saidi, J.
Accused was convicted of shopbreaking and stealing (P. C. s. 296 (1)). The shop owner identified an ordinary looking pair of Khanga found in the possession of the accused as one of the item stolen. The defense that accused had legiti-

mately purchased the item was rejected on the ground that he had produced no receipt.

Held: (1) Exhibition of a pair of khanga not distinguishable from other such items by special marks or features will not support a finding that they are the same as those stolen. (2) The burden is not upon the accused to prove his defence, but is upon the prosecution to disprove it beyond a reasonable doubt.

12. Sumaili s/o Bwalo v. R., Crim. App. 780-M-66; Abdallah s/o Saidi v.R. Crim, App. 785-M-66; 9/1/67; Platt, J.

Accused were covicted of stealing by a public servant (P. C. ss. 265 and 270.)

Held: (1) A judge must read or have read in court any notes taken during a view of the locus and allow evidence to be called on any points covered therein. Citing Mwanja s/o Nkii v. R., 16 E.A.C.A, 142; Musaka v. Uganda, (1964) E.A. 700. (2) Extra-judicial statements made to police officers by the accused may not be admitted without caution if the officers are not available to give evidence. (3) Such statements may not be admitted without caution if made while the accused are in custody where or not the officers give testimony. (4) If a prima facie case has not been independently established, guilt may not be inferred merely from the accused 's "unimpressive demeanor or evidence" Citing Raferi Munya v. R., (1953) 20 E. A. C. A. 226.

13. R. v. Lokordilo s/o Manyanga, Crim. Rev. 5-A-67; 7/1/67; Bannerman, J.

The accused was convicted of breaking and clearing land within the Ngorongoro Conservation Area for the purpose of cultivation without a written permit (Cap. 18, ss. 9(b) (i) and 18, as amended by Act 43 of 1964). During the presentation of its case the prosecution introduced evidence that the accused had previously been fined for cultivating in the area.

Held: Evidence of the previous conviction was wrongly admitted as it was not open to the prosecution to prove any previous conviction or bad character at that stage of the trial.

14. Salum s/o Chakapu v. R., Crim. App. 884-D-66, Saidi Alli Mandai v.R. 885-D-66; 25/1/67; Biron, J.

Accused were convicted of housebreaking and stealing solely upon the testimony of their alleged accomplice who was convicted on his own plea. Neither of the accused had a criminal record.

Held: Although uncorroborated testimony by an alleged accomplice may support a conviction, the "general practice"

Is not to convict on such evidence. Departures from this practice are justified only if the judge, fully cognizant of the dangers, is satisfied that the accomplice's testimony is so exceptionally cogent that the danger has disappeared. Citing Canisio s/o Walwa v. R., 25. E.A.C.A. 453.

15. R.v.Nrikumana Chizanya, Crim Rev. 1-M-67; 3/1/67; Platt, J.

Accused pleaded guilty to unlawful possession of raw gold, which was forfeited, and he was sentenced to 6 months imprisonment. Some months later an assay was run on the metal and it turned out to be copper, and not gold.

Held: The conviction was quashed. Under section 21 of the Gold Trading Ordinance, the burden of proof is on the prosecution to show that a metal is in fact gold, the burden of proof on that issue is on the party making such claim.

16. R.v.Sefu Abdullah, Crim. Rev. 19-D-67; 18/2/67; Otto, J.

Accused were convicted o unlawfully possessing a Government trophy (Cap. 302, ss. 49, 53) upon evidence that they were found in the possession of greater kudu and impala meat.

Held in no case can the possession of game meat support a charge of unlawful possession of Government trophy. The act defines a Government trophy as being a durable portion, and meat is not a durable portion of an animal. The convictions were quashed.

17. R. v. August Mawinga, Crim. Rev. 93-A-66; 6/1/67; Bannerman, J.
Accused, while under the influence of pombe, severely cut a woman with a panga. He alleged that he meant only to strike her with the side of the knife. The court stated, obiter; "The learned magistrate is fully aware of the prevalence of crimes of violence of this nature in his area, and the fact that the accused said he was drunk when he committed the offense should in no way be taken as minimizing its gravity ……"

18. R.v. Thomas s/o Mfaume. Crim. Rev. 4-D-67; 6/1/67; Mustafa, J.
Accused, 10 years of age, kindled a fire to warm himself while grazing cattle. The fire spread and burned the complainant 'house. Accused was convicted of negligently doing an act with fire or omitting to take precautions against the danger of fire, and compensation of Shs. 2,540/- was awarded. (P.C. s. 16)

Held: (1) P. C. s. 15 provides that a person under the age of 7 years is not responsible for any act or omission, and that a person under the age of 12 years is not criminally responsible unless at the time of the act, he had the capacity to know that he should not commit the act. The burden is on the prosecution to show that the accused had known that he should not kindle the fire. (2) A father, ordered to pay compensation for the act of his child, must be given the opportunity to be heard in opposition to the order.

19. Juma s/o Faranani, Crim. App. 860-D-66; 13/2/67; Hamlyn, J.
During an altercation between police and accused, a policeman's watch-strap was snapped. Accused was charged with malicious damage to property.

Held: The “malice” involved in malicious property damage (P. C. s. 326) “probably” connotes something more than mere negligence or mischance,” though it is not necessary to prove the

Accused ’s “ill-will” toward the policeman. Charge dismissed.

20. R. v. Athumani Saidi, Crim. Rev. 5-D-67; 9/1/67; Mustafa, J.

Accused was convicted of using a motor vehicle on a public road without a valid licence (Traffic Ordinance ss. 6, 70), and fined Shs. 150/- or distress.

Held: The primary responsibility for obtaining a vehicle licence rests with the owner of the vehicle, and a fine of Shs. 150/- is excessive when applied to a mere driver. A fine of Shs. 30/- was substituted.

21. Dauda s/o Hamisi v. R. Crim. App. 340-M-66; 14/1/67; Platt, J.

Accused was charged with making a false document (P.C. s. 335 (b)). The charge was defective in that Section 335(b) merely defines the offense. The substantive section creating the offense and prescribing the punishment for forgery is section 337 of the Penal Code.

Held: Under Section 346 of the Criminal Procedure Code, an irregularity in a charge is curable where the accused was not prejudiced by it. The irregularity does not prejudice the accused where, as here, “The particulars set out all the ingredients of a charge” Citing R. v. Indu Prasad Dave, Crim. Rev. No. 40 of 1963; and distinguishing Uganda v. Hadi Jamal (1964) E.A. 294.

22. Issa s/o Bilali v. R. Crim App. 825-D-66; /1/67; Saidi, J.

The accused was convicted of stealing and shop breaking. Compensation of Shs. 12,000/- was awarded to the owner of the automobile which had been stolen and damaged.

Held: An award of compensation cannot be made in the absence of evidence as to the amount of loss. The award was set aside.

23. R.v.Abala. Crim. Rev. 7-A-67; 10/2/67; Bannerman, J.

Accused was convicted of shop breaking and stealing (P. C. 296 (1) and of possessing tools suitable for shop breaking with intent to commit a felony (P. C. s. 298 (b)). Compensation was awarded under Minimum Sentences Act, Cap. 526, s.6, which authorizes compensation "equal to the value of the property as assessed by the court"

Held: (1) The power to order full compensation under section 6 of the Minimum Sentences act is not limited by Criminal Procedure Code section 176 which otherwise limits compensation awarded by "any court" to Shs. 2,000/- (2) Tools suitable for shop breaking should not be returned to an accused convicted in the same proceeding of shop breaking.

24. R. v. Ally John. Crim. Rev. 9-M-67; 10/2/67; Bannerman, J.

The accused, a juvenile aged 15, was sentenced to ten strokes and was also committed to an approved school (Children and Young Persons Ordinance, Cap. 13, s. 24).

Held: Under Cap. 17, s. 6 a juvenile convicted of any offence under the Penal Code other than one punishable by death "shall be liable to corporal punishment in licu of any other punishment …" Since corporal punishment is in licu of other punishment, the order committing the accused to an approved school was quashed, for the corporal punishment had already been carried out.

25.Michael Y. Nungzama v. R., Crim. App. 704-D-66; 5/1/67; Biron, J.

Accused was convicted of theft (P. C. ss. 271 and 285. The minimum sentence prescribed by law was imposed. The accused claimed that the time which he spent in custody prior to sentencing should be credited against the sentence.

Held: Such credit is precluded by Criminal Procedure Code section 295 which provides, "Every sentence shall be deemed to commence from and to include the whole of the day on which it was pronounced except where otherwise provided in this Code or the Penal Code". Quaere whether such credit would be permitted if more than the minimum sentence were imposed.

26. Robert s/o Nyagangare, Crim. App. 48-D-67; 17/2/67; Otto, J.
The accused was convicted on one count of fraudulent false accounting and two counts of stealing by a person employed in the public service. The sentence on the first of these counts was made to run consecutively to the latter two counts, which were to run concurrently with each other.

Held: The fraudulent and false accounting was part and parcel of the charge of theft and arose out of the same transaction. Therefore, all sentences should have been made to run concurrently. It was so ordered.

27. R. v. Raphael Lameck, Crim. Rev. 6-A-67; 30/1/67; Bannerman, J.
Accused were convicted for creating a malicious disturbance at a police station and of damaging the physical plant in the process. The sentences on the two counts were ordered to run consecutively. While in custody one of the accused had refused to give his name and address when ordered to do so by a policeman.

Held: (1) Because both offenses arose out of the same transaction, they "……. Should have been ordered to run concurrently and not consecutively in the absence of any facts justifying an order to the contrary. "(2) The accused committed no wrongful act under Penal Code section 124 by refusing to answer the police officer. His name and address could have been obtained within 24 hours at the time of arraignment before a magistrate.

28. R. v. Tanga African Motor Transport, Crim. Rev. 9-D-67; 10-1-67, Mustafa, J.
Accused was convicted of violating the Transport Licensing Ordinance, Cap. 373, ss. 23(3) and 26(1) (i), on his own plea, and fined Shs. 450/- or distress.

Held: Prior convictions for similar ordinance violations may not be considered in sentencing unless the accused is gives the opportunity to acknowledge or deny them. Fine was reduced to Shs. 30/- or distress. R. v. Tanga African Motor Transport Crim. Rev. 7-D-67; 10/1/67, Mustafa, J. Accord: R. v. Tanga African Motor Transport, Crim. Rev. 8-D- 67; 10/1/67; Mustafa J

29. Joseph v. R. Crim. App. 218-D-66; 20/1/67; Bannerman, J.

Accused was convicted of assaulting a police officer, resisting lawful apprehension, and robbery with violence (P. C. ss. 243 (b), 243 (a), 285 and 286). In imposing sentence of three years and 24 stokes on the last count the court relied upon the statement of the prosecutor-unsubstantiated, and challenged by the accused-that the accused had previously been convicted of housebreaking and stealing. As he was led from the courtroom, accused made a threatening remark, and for this statement it was ordered that he be subject to police supervision for two years after completion of his sentence (C. P. C. s. 308 (1) (a).

Held: (1) An unsubstantiated allegation of a prior conviction, challenged by the accused, will not support an increase in a sentence imposed. (2) Criminal Procedure Code section 308(1) (a) may not be applied in punishment for acts done after sentencing – even momentarily afterward-as it requires the order to be made “at the time of sentencing”. The proper procedure would have been contempt of court.

30. R. v. D’sai, Crim. Rev. 18/D/67; 16/2/67; Saidi, J.

Accused was convicted of attempting suicide contrary to P.C. s. 217 and sentenced to four months imprisonment.

Held: Individuals convicted of this offence ought not be sent to jail but should be discharged absolutely or conditionally. An order for absolute discharge was substituted.

31. Magwa s/o Juma v. R., Crim. App. 46-M-67; Platt, J.

Held: (1) Section 296 of the Penal Code, covering shop breaking, does not include breaking and entering a bar. The distinction, though unrealistic, is well settled judicially. (2) Breaking and entering a bar is theft, however (P. C. s .265), and such a charge may be substituted by virtue of Paragraph 33(1) of the Primary Courts Criminal Procedure Code. Charge substituted.

32. Ramadhani s/o Masudi v. R., Crim. App. 851-D-66; 10/1/67; Otto, J.

Accused allegedly pleaded guilty to a charge of housebreaking (P. C. s. 294 (1)). In his plea, he admitted breaking and entering the room of a friend, but said that he had not intended to steal anything. The agreed facts showed that the accused was found inside the place and that the padlock had been broken.

Held: (1) Neither the facts nor the plea disclosed any intent on the part of the accused to commit a felony in the dwelling place; therefore, the crime of housebreaking was not established. (2)Because the plea did not disclose felonious intent, it was equivocal, and therefore could not be given any weight.

33. Bakari s/o Issa v. R., Crim. App. 800-D66; 11/1/67; Biron, J.

Accused were convicted of housebreaking (P.C. s. 294(1)) and stealing (P.C. s. 265). One charge of housebreaking was dismissed as against all the accused. All but one of the accused were acquitted of the remaining charge or were successful on appeal.

The Court State, obiter: (1) With respect to the dismissed housebreaking charge, the fact that the house was occupied only intermittently did not preclude a conviction. (2) With respect to two of the accused who presented evidence of their minority, medical evidence of their ages should have been adduced and a finding made thereon before they were awarded the statutory corporal punishment.

34. Hamisi s/o Bakari v. R., Crim. App. 652-M-66; 7/2/67; Mustafa, J.
Accused was convicted of obtaining money by false pretences with intent to defraud from 13 different persons. These charges were all contained in a single count.

Held: The charge should have been in 13 separate counts (cf. C. P. C. s. 138). "Here the appellant would not know the details of the charge and in fact as to what the whole case was about ….."

35. Thuma v. R. Crim App. 355-M-66; 7/1/67; Platt, J.
Accused was convicted of obtaining by false pretenses (P.C. s. 302). Charges against a co-accused were dropped, but fresh charges against the accused were not filed. The several payment which accused allegedly obtained were all charged in a single count.

Held: (1) Each of the several payments must be covered in a separate count unless the charge is that they were paid simultaneously. (2) A fresh charge should be made against persons still charged when charges against co-accused are withdrawn. (3) Intent to defraud must be expressly alleged and proven by the prosecution.

36. Yohana s/o Kuranga v. R., Crim. App. 23-D-67; -/2/67; Hamlyn, J
Held: Penal Code section 258, which defines stealing, included the offense of fraudulent conversion of property as well as larceny. Although fraudulent conversion and stealing are distinct offenses under the 1916 Larceny Act, Penal Code section 258 designates both as theft.

37. Saidi Meke v. R., Crim. App. 850-D-66; 11/1/67; Biron, J.
Accused was convicted of receiving stolen goods and of stealing from a motor vehicle.

Held: (1) Mens Rea in the crime of receiving stolen goods may properly be inferred from the accused 's possession of the goods and from his concealment of some, though not all, of the goods stolen in an established theft or burglary. (2)

Under the doctrine of recent possession, a person found in possession of stolen goods may be rebuttably presumed to have stolen them and may be convicted either of receiving, or stealing or, in appropriate case, of housebreaking. (3) Under the Minimum Sentences Act of 1963, an accused may be given the scheduled sentence for receiving stolen goods if he knew or should have known that the goods had been feloniously taken. He need not have known that they were taken n the course of an offense set out in Part 1 of the schedule to the act. Citing, reluctantly, R. v. Mohamed Naweki, (1964) E.A. 353.

38. Ferdinand s/o Rajabu v. R., Crim. App. 14-D-67; 19/2/67; Hamlyn, J.
Accused was convicted of housebreaking and stealing (P.C. ss. 294 and 295) upon evidence found sufficient by the reviewing court. The magistrate had directed himself that possession of recent stolen property by the accused will cause the law to presume the commission of the theft or guilty receipt.

Held (1) An accused 's possession of property recently stolen may support an inference of guilty knowledge but does not shift to the accused the burden of proving his innocence. (2) A misdirection as to the burden of proof was not critical since the evidence established guilt beyond a reasonable doubt.

39. Ngoye s/o Kwakila v. Ndemere s/o Kihamba, Civ. App. 39-M-66; 17/2/67; Mustafa, J.
Pursuant to the Waha custom of "Bugabile" which was found by the lower court to be no longer part of the customary law, appellant received a cow from respondent. "Bugabile" was a concept some what like that of conditional gift; accordingly, respondent, after several years had passed, sought to revoke the gift and recover the cow.

Held: Although the custom is no longer practiced, the concept of “Bugabile” should be given effect (and the revocation of the “gift” sanctioned), since it reflects the intention of the parties.

40. Jacobo Tibufumula v. Abrahim Kipala, Civ. App. 29-M-66; 14/2/67; Mustafa, J.

This action was brought to determine the distribution of property of the deceased. Respondents claimed the property under a will executed by the decedent in September 1959. Appellants claimed under a will which decedent allegedly made in September 1963 revoking the prior will.

Held: Pursuant to the customary law of the Haya trible, in order to revoke a will either its witnesses or a majority of them must be called and informed of the revocation or, should this not be possible, at least ten witnesses must be called to make a valid revocation. (Customary Law of the Hay Tribe, Cory and Hartnool, paragraphs 51 and 52) None of these provisions were
complied with and the second will did not super cede the first.

41. Abdulnasul Haji Jooma v. Harnam Singh Bhambra, Civ. App. 3-D-67; 22/2/67; Saidi, J.

In an earlier action respondent was ordered to vacate premises which he had leased from appellant. In the present action the trial court ruled that the previous order be stayed for three months to enable respondent to find new premises.

Held: Section 151 of the Indian Civil Code gives a court inherent jurisdictional over cases not specifically covered by other jurisdictional sections if a denial of hearing would subvert justice. However, the above section is inapplicable to the present case since respondent failed to avail himself of other remedies specifically provided (C.P.C. s. 148; Rent Restriction Act, s. 19 (5)).

42.Nanyanje v. Mwanaarafa s/o Mwenyimanzi, Civil App. 263-D-651 15/2/67; Duff,J.

Appellant claimed that money paid by his wife was not “khului”, or consideration for a divorce, but was a consideration in atonement for her disobedience, known as “kiyamu”.

Held: (1) Mohammedan Law recognized as remedies of a husband against a disobedient wife the right to diverse the wife, the right to refuse to maintain her and the right to institute a civil suit for restitution of conjugal rights. (2) the last of the above remedies, the institution of a civil suit, might occasion a payment to the petitioning husband, but Mohammedan law does not seem to recognize any reparatory payment known as “Kiyamu”. (3) The payment in the present case was in consideration for divorce and was not in atonement for disobedience.

43. Rajabu s/o Marijani v. Hadiji s/o Saidi, Civ. App. 42-D-66; -/2/67; Saidi J.

Held: (1) Absolute and permanent dedication of wakf property by the wakf is necessary for an effective wakf. (2) A wakf is conditional and fails if it is only to take effect upon the death of the owner, who continues to utilize and exercise control over the property. (3) If one executes a deed of wakf without the intention to divect himself of ownership of the property, but rather to immunize it from claims others might have against him, the deed fails. (4) A wakf is generally to be created by a separate deed rather than by will.

44. Abdallah Abede Tamimu v. Saidi Salum Hekan, Civ. App. 20-D-66; 16/2/67; Hamlyn J.

Plaintiff brought actions against three defendants in a plaint which, because it was drafted without the assistance of counsel, failed to delineate a cause of action. Preliminary objection was made by defendants alleging misjoinder of parties, misjoinder of causes of action, and failure to state a cause of action.

Held (1) An objection, without elaboration, that a plaint “disclosed no cause of action” will not be entertained by the court. (2) The plaintiff, after paying

taxed costs incurred by defendants in the present suit, may withdraw the suit with liberty to file any fresh suit or suits.

45. Emanuel Bwegilire v. Juma Hamisi, (PC) Civ. App. 135-M-66; 3/3/67; Mustafa J.

Defendant, while engaged in an action over the ownership of a shamba, contracted to sell the shamba to plaintiff if he won that action. Plaintiff made a down payment of Shs. 100/- the balance of Shs. 1200/- to be paid if defendant won his law-suit. Defendant was successful, and soon thereafter, on August 22, 1960, plaintiff wrote him: "…….. I will come on 3rd of 4th September 1960, so that we can finish the matter. " Between August 22 and September 3, plaintiff was arrested, and then spent three years in jail, without paying the balance of Shs. 1200/- In 1966, plaintiff claimed the right to "complete the purchase," but defendant had sold the shamba to a third party.

Held: (1) Defendant's obligation to sell the shamba to plaintiff was conditional upon payment of the balance by plaintiff within a reasonable time after defendant obtained plaintiff within a reasonable time after defendant obtained clear title. (2) Defendant, however, was not entitled to the Shs. 100/- paid earlier toward the purchase, and plaintiff was allowed to recover this sum.

46. Stephen s/o Sokoni v. Millioni s/o; Sokoni (pc) Civ. App. 183-D-67, 19/2/67, Saidi J.

The magistrate granted petitioner a divorce, relying solely on the contents of the petition. Cap. 364, Martimonial Causes Rules, Rule 25 (1) stipulates that witnesses at a trial or hearing of any matrimonial cause be examined viva voce or, with the permission of the court, that facts be proven by affidavit.

Held: A decree dissolving a marriage cannot be made where no evidence was examined by the court. The case was returned to the lower court to allow petitioner to substantiate his claim.

47. Thomas v. Thomas, Mat. Conf. 1-D-67; 4/3/67; Duff, J.

The magistrate granted petitioner a divorce, relying solely

On the contents of the petition. Cap. 364, Matrimonial Causes Rules, Rule 25(1) stipulates that witnesses at a trial or hearing of any matrimonial cause be examined vivavoce or, with the permission of the court, that facts be proven by affidavit.

Held: A decree dissolving a marriage cannot be made where no evidence was examined by the court. The case was returned to the lower court to allow petitioner to substantiate his claim.

48. Hamea s/o Mohamed v. Omari s/o Abdullah, P. Cv. App. 227-D-65; 7/3/67; Biron, Ag. C. J.

A husband obtained an order from a Primary Court requiring appellants to permit their daughter, his wife to return to him. It appeared that he had told her that if she visited his sick relative at a hospital on a certain morning, rather than on the previous evening as he wished, they would be divorced. It was not clear whether he had said, “I will divorce you” or “If you go you are divorced.” The High Court ”s language suggests, but does not state explicitly, that the wife may have wished to return to her husband, and that it was her parents’ objections which necessitated a lawsuit.

Held: (1) A marriage is deemed valid and subsisting until its dissolution is proved. (2) Under Muslim Law, the formula for verbal divorce is precise; “I will divorce you” is a mere threat; “If you go you are divorced” is a phrase resulting in divorce upon the realization of the stated condition. Appeal dismissed; Judgment allowing the wife to return to her husband upheld.

49 Iddi d/o Kungunya v. Ali. s/o Mpate, (PC) Civ. App. 81-D-66; 27/2/67; Saidi, J.

Respondent a divorced woman, sued her former husband for shares of four shambas owned by him but developed through their joint efforts during covertures.

Held: A wife owes her husband a duty to assist him with his gainful word, whether it be cultivation, shop keeping, or any other lawful engagement. “Absent a contribution of capital by the wife, or some special agreement between husband and wife, the divorced wife will not be treated as a partner in the man’s enterprises.

50. Saidi Aleiko (Administrator) v. Mwatatu d/o Ibrahim, (PC) Civ. App. 25-D-66; 3/3/67; Otto, J.

The father of a deceased child sought a share of her estate. He admitted that he had not formally married her mother, but he argued that the child was legitimate because he had always accepted her, and the other offspring of this union, as his own. All parties agreed that, in question of inheritance by parents, an illegitimate child is deemed the child of the mother only.

Held: Under Islamic law, there can be no “marriage” without the proper formalities. The children of this union were therefore illegitimate, and the father may not inherit from them.

51. Dhaniben Chaku Hirji v. Vinaychandra G. Modessa, Civ Case 33-D-66; 29/3/67; Otto, J.

Deceased had managed a Hindu family business, which was owned by his father. When he was killed, his mother brought an action on her own behalf and on behalf of some of her children as dependants of the deceased. Following Hindu family custom, the family lived “as a Unit”. Accordingly, the deceased withdrew approximately Shs. 2500/- each month from the profits of the business (which were more than Shs, 50,000/- yearly), for the maintenance of the family.

Held: Though mathematical computation might be impossible, the family was dependant of the father's business, and its profits were only partly attributable to the son; his role as "provider," under Hindu custom, does not of itself establish the total dependency of the family upon him Shs. 500/- (funeral expenses) and Shs. 2000/- (general damages) were awarded to plaintiff and dependants.

52. Hassamali Issa & Co. v. Jeraj Produce Store, Civ. App. 20-D-66; -/2/67; Hamlyn, J.

Appellant brought an action on a cheque. Leave was given to defend upon an affidavit alleging that the cheque was given by defendant under duress. Appellant argued that duress had to be proven before appellant would be obliged to prove consideration for the underlying contract.

Held: (1) An action upon a negotiable instrument succeeds unless, fraud, mistake or "something similar" is averred. (2) Where such averral is made, "acceptance of the affidavit makes it incumbent on the holder to prove consideration." The affidavit destroys the plaintiff's "position of being entitled to a decree on the ground that the defendant is deemed to admit the allegation in the plaint, "and "the case becomes a simple suit for recovery of money."

53. Hamisi Kinyaju v. Hussein Mkodo, (PC) Civ. App. 32-A-66; 21/2/67; Bannerman, J.

Plaintiff and defendant were partners in a butchery business, each having contributed Shs. 500/- at the outset. In 1964, defendant purchased plaintiff's share of the business for the amount of his original investment. Plaintiff then filed the present action claiming additional compensation for other assets which he had contributed to the business.

Held: Plaintiff could have claimed for a dissolution of the partnership and an accounting, and would have been entitled to one half of the partnership assets. However, he chose in stead to sell his entire interest in the business for Shs. 500/-. This sale extinguished all interest which he had in the assets, just as,

between the partners, it ended his responsibility for the liabilities. Judgment for defendant.

54.Kumbata Mahimbo v. Kumbata Mugendi, (PC) Civ. App. 52-D-66; 1/3/67; Saidi, J.

Appellant had brought an action in a primary court for unpaid bride wealth. The parties settled the case respondent agreeing that the bride wealth was due. Appellant withdrew his suit without claiming costs, and later filed another action for the costs of the initial suit.

Held; "The fact that (appellant) withdrew the action cannot debar him from claiming his costs……." The bride wealth was in fact due, and was paid only after appellant brought legal proceedings. The respondent could have avoided the costs by paying his just debt, and "cannot now escape the liability to pay the costs of the suit."

55. Alexander – Tryphon Dembeniotis v. Central Africa Co. Ltd., Civ. Case 29-D-66; -/3/67; Otto, J.

Plaintiff sued to cancel an agreement, alleging lack of consideration and claiming that the agreement had been obtained by extortion. Defendant admitted lack of consideration, and submitted the agreement for cancellation, but denied the claim of extortion. Plaintiff was denied full costs, and appealed.

Held: Full costs should be awarded to a plaintiff who " has succeeded in the main purpose of his suit" and "obtained the precise form of relief he wanted." It is immaterial that he did not succeed with one of the claimed grounds of relief since the resolution of that claim did not affect the result. Citing Jiwan Singh v. Rugnath Jeram, 12 E. A. C. A. 21, and authorities cited therein.

56.Watson Seafood & Poultry Co. v. Hassanali Hirji Shariff, Civ. Case 8-D-66; 29/3/67; Otto, J.

In a claim for goods sold and delivered, judgment was entered against defendants in ex parte decree, when they failed to appear on the day the suit had been called on for hearing.

Held: A party's failure to give proper instruction to his advocates does not justify non-appearance at a hearing. Citing Simon Petero Zirabamuzale v. Andrew Gorrect (1962) E.A 694. A party cannot claim "sufficient cause" where his non-appearance seems to have been "another episode in a long line of delaying tactics."

57. Robert s/o Sakila v. R., Crim. App. 928-M-66; 25/2/67; Platt, J.
Accused was convicted of defiling a girl under the age of 12 years (P.C. s.136(1)) on evidence which disclosed that the girl was between 12 and 13. The republic sought to have the Court "alter the finding" to one of "guilty of rape" (P.C s.131), pursuant to its powers under Criminal Procedure Code section 319. At the trial, various children of uncertain age testified after the magistrate had informed them of the importance of giving evidence and the gravity of the oath.

Held: Criminal Procedure Code section 319 authorizes the High Court to "alter findings" on appeal where the error to be remedied affects only the charge itself; where the evidence does not sustain a charge of defilement, the High Court may not alter the finding to one of rape. (2) The magistrate's duty, as to witnesses of "tender years" is not just to admonish them of the serious nature of the oath, but to determine whether they understand the oath, and to allow then to testify only after being satisfied that they do. To attempt merely to inform them of their duties is to commit an error which is in itself a sufficient ground of appeal. Distinguishing Oloo Gai v. R., (1960) E.A.86.

58. Katamba s/o Mwaisunga v. R., P. Crim. App. 15-D-67; 25/3/67; Hamlyn, J.
The accused was convicted in primary court of assault; a fine and compensation were awarded. The accused then appealed to the district court and his appeal was allowed. The present appeal was brought by the complainant.

Held: Section 21 of the Magistrates' Courts Act 1963 provides that in proceedings of a criminal nature, the Director of Public Prosecutions alone has the right to appeal to the High Court in cases in which a district court has substituted an acquittal for a conviction in a primary court. Therefore the High court lacks jurisdiction to hear this appeal.

59. Daudi Mwabusila v. John Mwakfwila, L. Civ. App. 30-D-66; -/-/67; Hamlyn, J
Appellant sued for six head of cattle in primary court. He relied on the testimony of two witnesses whom the magistrate found not to be credible. On appeal, the district court found that this testimony was credible and therefore reversed the judgment.

Held: The witnesses did not appear in person at the appeal, and the district court should have followed the valuation of their creditability given by the trial court. An appellate court should reassess the credibility of witness only if there are circumstances of an unusual nature which appear in the record, particularly if as here, the testimony has explicitly been rejected by the trial court. The judgment of the district court was set aside and that of the primary court restored.

60. Samwel s/o Komba v. R. Crim. App. 1-D-67; -/3/67; Otto, J.
Accused was convicted of theft on inadequate evidence, some of it hearsay. Accused had served several moths of the sentence at the time of appeal. Conviction was reversed on appeal.

Held: Retrial will not be ordered in cases where it would allow the prosecution to "fill in gaps in its case." The court noted, obiter: "This appellant has already served several months of his sentence which could not be taken into account in the event of conviction ensuing should a retrial be ordered."

61. R.v. John s/o Augustino, Crim. Rev. 29-D-67; 17/3/67; Hamlyn, J.

While intoxicated, accused verbally deprecated the President o Tanzania, and said that he would burn down the house of anyone who disagreed with him. One witness was “very annoyed ”and another claimed “not to have been pleased” by accused ’s remarks. Accused was convicted of “using insulting language …… in such manner as is likely to cause a breach of the peace “ (P. C. s. 89(1)(a))

Held: (1) The statute is aimed at preventing incitements to physical violence. Mere annoyance or displeasure among the listeners is not sufficient. (2) The threats to burn the houses of those who disagreed were not relevant; the breach of the peace referred to by the statute contemplates only action by the listeners.

62. Mayagila s/o Shima v. R., Crim. App. 921-D-66; 17/3/67; Otto, J.

The accused was convicted of a corrupt transaction with an agent (Cap. 400, ss. 3(1), (4). The complaining witness had been charged with cattle theft and had properly been released at the instigation of a police inspector. Afterwards, the accused, who was a special constable, demanded payment of Shs. 100/- from the complainant, purportedly on behalf of the inspector. The complainant paid under threat of a new prosecution. There was no evidence that the inspector was involved.

Held: Although a crime was undoubtedly committed, the crime charged was not proven. At the time of the solicitation, nothing could be done or forborne to be done in relation to the principal’s affairs. The accused was acting entirely for himself and it is immaterial whether he could himself have caused the complainant to be re-arrested.

63. Chicna alias Wadson s/o Kaombwe v. R. Crim. App. 881-D-66; -/3/67; Otto, J.

Appellant had been repeatedly and clearly in contempt of court. The magistrate, acting under section 114 (2) of the Penal Code, summarily convicted appellant and ordered him to pay Shs. 150/-.

Held: While in most cases of contempt a charge should be framed and the accused given a chance to answer it, where an accused had continued his contempt after several warnings there was "no miscarriage of justice by reason of the fact that the specific charge was not drawn."

64. Kiyungi Abdukheri v. R., Crim. App. 22-M-67; 1/3/67; Mustafa, J.
Accused, a sailor on a ship docked in Kigoma, had on board a quantity of cigarettes, which he failed to declare. His explanation was that he planned to transship the cigarettes on a ship bound for Urundi, which had not yet arrived in Kigoma. The lower court ordered a fine of Shs. 1000/-, or three months imprisonment in default.

Held: In such circumstances, cigarettes held for transshipment must nonetheless be declared to customs. The sentence was proper, and the goods were forfeited to East African Customs and Excise.

65. Limbu s/o Kiloshimba v. R., Crim App. 7-D-67; 3/3/67; Otto, J.
Accused was arrested for theft, but escaped from custody. He was captured and charged with both theft and escape from lawful custody (P. C. s. 116). Before trial, the theft charges were dropped, but there was no indication that original arrest or the subsequent custody had been unlawful.

Held: Where an arrest and custody are lawful, an accused may be punished for escaping from custody, notwithstanding the fact that the charge on which the initial arrest was made is later found to groundless.

66. Lugenya s/o Nila v. R., Crim. App. 5-M-67; 10/3/67; Platt, J.
Accused was convicted of shop breaking. One Magonda was caught leaving the shop but his accomplices escaped. After his arrest, Magonda led a constable to the accused 's house and purportedly stated that he was an accomplice. This

statement was introduced into evidence as against accused, but at the trial Magonda denied having made the statement.

Held: (1) If a statement of a co-accused forms part of a confession, it may be introduced as against the accused. See Indian Evidence Act, section 30. (2) However, Magonda's denial at the trial that he made the statement vitiates the constable's testimony that he identified the accused. (3) The court stated, obiter; Even if there had been a confession, it would not alone support the conviction of accused. Corroborative testimony would be required.

67. Augustine s/o Machau v. R., Crim. App. 874,875, 876-M-66; 19/1/67; Duff, J.

Accused were convicted of robbery and possession of the shotgun.

Held: (1) Possession by one person of a stolen item, in the presence of two other persons, cannot support the inference that the two participated in the robbery in which the items was taken. (2) Similarly, "it cannot be said that there was a conscious possession of a firearm without a licence on the part of all the three accused".

68. Bugi s/o Rioba v. R. Mtatiro Waiyaga v. R., Crim. App. 456, 457-M-66; 16/1/67; Platt, J.

Accused Bugi was convicted of burglary and theft and accused Mtatiro of receiving stolen property. The testimony of an accomplice was admitted as against both of the accused. Also admitted into evidence was 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 safe-keeping; he denied knowing that it was stolen property.

Held: (1) The testimony of the accomplice was uncorroborated and her veracity was doubtful. Therefore, her testimony could not support a conviction. (2) The statements of Bugi' wife were hearsay and were inadmissible. (3) The statements of a co-accused in his plea of guilty should not have been admitted as against the accused Bugi. If the prosecution desired to introduce his testimony he should have been called as a witness. (4) The presumption arising from the possession of recently stolen property is rebutted by exculpatory testimony of the accused which could reasonably be true.

69. R. v. Chamba Magina, Crim. Rev. 112-M-66; 1/3/67; Platt, J

Accused were convicted of unlawful possession of a government trophy (Fauna Conservation Ordinance, Cap. 302, ss. 49 (1), 53) after pleading to being in possession of giraffe meat without permission.

Held: (1) The definition of the term "trophy" in section 2 of the ordinance does not include animal meat because meat is not durable portion of the animal. Citing Yahya Saidi v. Reg., Crim. App. 666 of 1961; Abdulla Libengyile v. R., Crim. Rev. 3 of 1963. (2) Similarly, the definition of Government tropics in section 47(1) ,with the exception of part (b) thereof, excludes animal meat. Parts (a) and (c) or section 47(1), which deal with game animals which have been killed or capture, do to denominate meat as a Government trophy. (3) However, part (b) of section 47(1), which deals with animals which have been found dead, provides that a government trophy includes the animal and the trophy of any such animal "or any part of any game animal which is found. "Thus, if part (b) is applicable, the meat of a game animal is a government trophy. Citing R. v. Mohamedi Musa, Crim. Rev. 79 of the accused came within part (b) of section 47 (1), the convictions were quashed.

70. R. v. Maulddi s/o Yusufu, Crim. Rev. 22-D-67; 26/6/67, Hamlyn J.

Accused was convicted, inter alia, of doing grievous harm (P.C. s. 225). Accused was showing a firearm to a friend when the

Weapon discharged, wounding the friend. Accused stated, "I had no intention whatsoever to wound my friend," but the magistrate entered a plea of guilty to the charge.

Held: No amount of mere negligence or lack of care will suffice for a conviction of grievous harm. Intent to perpetrate such harm is an essential element of the offence. Accused acquitted.

71. R. v. Danson s/o Simbacungile, Crim. Sass. 167-Mbeya-66; 3/2/67; Otto, J.
Accused killed his mother-in-law during an argument, after spending some time drinking in a pombe shop.

Held: (1) The evidence showed sufficient provocation to vitiate the malice aforethought required for a conviction of murder, in view of the accused 's evident intoxication:'….. one must consider that because of the liquor that he had consumed he was more easily provoked, and under these circumstances one must not apply the test of the ordinary man." (2) "One must consider the effect of liquor in coming to a conclusion as to whether or not the accused person was able to form the necessary intent." Accused was convicted of manslaughter.

72. R.v. Mariam. d/o Mihambo, Crim. Sass. 133-M-66; 1/3/67; Platt, J.
Accused was acquitted on a charge of murder.

The Court stated, Obiter: Consideration has been given to whether the accused can be said to be guilty of being an accessory after the fact. It has been held that an accused person acquitted of murder cannot be convicted of being an accessory after the fact to such murder, when he has not been charged with that offence. He cannot be convicted because the offence is not minor and cognate to the offence of murder. Citing Mutiu s/o Wamai v. R., c (1955) 22 E.A.C.A. 417. The accused was ordered set free unless held for some other lawful cause.

73. Saidi Mohamed Geshi v. Hamadi Rashid, (PC) Crim. App. 117-D-66; 27/2/67; Saidi, J.

Respondents destroyed a house built on their land by appellant. Their conviction of malicious property damage was quashed by the District Court, and the compensation order was set aside.

Held: "…….The respondents were at law entitled to eject Saidi who was trespassing on their own land in their presence, and ….. they were further entitled to remove any object Saidi had brought thereon during the trespass." The complainant's appeal was summarily rejected.

74. R.v. Nanju Kara, Crim. App. 26-D-67; -/3/67; Hamlyn, J.

This is an appeal by way of case stated. Accused was charged with failure to pay an employee the statutory minimum wage, but no plea was taken from the accused.

Held: (1) Where no plea is taken from an accused, everything that follows in the proceedings is a nullity. (2) Therefore, there has been to "hearing and determination" (Crim. Proc. Code s. 333) by the court, and consequently no "case" which can be stated on appeal. (3) The omission of the trial court here was not proceedings were a nullity, accused was never tried, and the Republic can proceed de novo against him.

75. Remenisele s/o Elisawo v. R., Crim. App. 19-A-67; 10/3/67; Bannerman, J.

Accused was convicted of forgery and theft. The magistrate who commenced the case heard the evidence of the prosecution and, after a recess of three months, heard some of the defence witnesses. After another recess a second magistrate replaced the first who had been transferred to another district. Exercising his discretion under Criminal Procedure Code Section 196, the second magistrate

elected not to re-commence the trial but to hear only the remaining portion of the defence.

Held: (1) The discretion given to a magistrate by Criminal Procedure Code section 196 should be exercised with great care, for a primary purpose of the hearing is to permit the court to observe the demeanor and evaluate the creditability of all the witnesses. In the present case the charges were grave and the accused vigorously contested the allegations of the prosecution's witnesses. (2) Criminal Procedure Code section 196(a) permits the accused to demand that witnesses heard by the first magistrate be resummoned and reheard and provides that the accused "shall be informed of such right by the second magistrate ….." there is no record that the accused was so informed. A new trial was ordered.

76. R.v.Haruna Ibrahim, Crim. Rev. 115-M-66; 7/3/67;

Accused was convicted of attempted rape (P.C. s. 132). The evidence was that he had dragged the complainant to a ditch, placed his hand over her mouth and pulled down her underclothes while lying on to of her, when he was observed by a passerby and fled. There was no evidence that at the time he fled. Undressed.

Held: (1) The acts of the accused did not constitute attempted rape, since he had not yet undressed. Rather the acts constituted mere preparation for that crime. Citing Adamu Mulira v. Reg. (1953) XX E.A.C.A. 223. (2) The acts did, however, constitute the crime of indecent assault (P.C. s. 135(1)). A conviction for indecent assault was substituted. Crim. Proc. Code, s. 185).

77. R.v.Masumbuko Lengisia, Crim. Rev. 10-A-67; 27/2/67; Bannerman, J.

The accused, convicted of carrying passengers for hire without a valid Public Service Vehile

Licence (Cap. 168, s. 27A), were described as the "driver" and the "turnboy." The convictions of both were based on observation by the police of the rurnboy in the act of taking money from passengers. Cap. 168, s. 27A (1) provides punish-

ment only for a “driver, owner or person in charge of a motor vehicle” used in violation of the licensing requirements.

Held: Conviction of the driver was proper. However, since the rurnboy was not charged as “driver, owner, or person in charge” of the vehicle, and since the evidence did not suggest that such a charge would have been supportable, his conviction was improper. Conviction quashed.

78. Sultani s/o Sefu v. R., Juma s/o Saidi v. R. Crim. App. 165 and 166-D-67; 30/3/67; Saidi, J.

The two accused were convicted of stealing a motor vehicle (P.C. s. 265) and shop breaking and stealing (P.C. s. 296(1)). Compensation was awarded.

Held: A compensation award must properly value the property not recovered and order that the complainant be compensated by both of the accused in equal proportions. The district court was directed to make such a valuation and order.

79. R. v. Maandazi s/o Maandayi, Crim. Case 6-D-67; 20/3/67; Otto, J.

Accused was convicted of attempted suicide (P.C. s. 217) and was sentenced to a term of imprisonment.

Held: A sentence of imprisonment is seldom if ever warranted for an offence of this nature. Citing items 25 and 160 of the Bulletins of the High Court of Tanganyika.

80. Martin Senzota v. R. Crim. App. 4-A-67; 24/2/67; Bannerman, J.

Appellant was convicted of school breaking and stealing (P.C. s. 296 (1)). He was a teacher in charge of a primary school. When the school was closed and he was transferred elsewhere, he entered a classroom with his own key and removed property belonging to him and some items belonging to the school. The

magistrate found that he had no intention of stealing at the time he entered the room.

Held: (1) A “breaking” must be “unlawful and without a legal right to do the act which constitutes the breaking.” (2) The intention to commit a felony must be present at the time of the entry. Convictions quashed, and a conviction for stealing substituted.

81. Masenu s/o Butili v. R., Crim. App. 379-M-66; 7/3/67; Platt, J.
Accused broke a garage door, but before he could enter the building he was frightened away. He was convicted under Penal Code, section 296(1).

Held: (1) To establish the offence under this section the prosecution must prove: (a) a breaking and entering (b) into one of the buildings specified in the statute and (c) the commission of a felony therein. Accused did not dispute that a garage was within the specified types of building nor a commission of a felony therein. (2) A conviction of causing malicious property damage was substituted.

82. R. v. William s/o Gabagumbi, Crim. Rev. 111-M-66; 21/1/67; Platt, J.
The accused was convicted of uttering forged notes (Currency Notes Ordinance, Cap. 175, s. 6(1)). The charge alleged that he uttered the notes knowing them to be forged, but it did not allege that he did so with intent to defraud. In his plea defendant stated, “I agree the notes were not genuine.” This statement was accepted as a plea of guilty.

Held: (1) The charge was defective in that it did not allege that he uttered the forged notes with intent to defraud. (2) The plea did not state in terms that he admitted uttering the notes and, therefore, should not have been accepted as a plea of guilty. (3) After quashing the conviction and ordering a retrial the judge stated that if the accused is convicted on retrial, “the learned magistrate will not doubt take into account the time which will have elapsed from the date into account the time which will have elapsed from the date on which the accused was first brought to court to the date on which he is finally convicted, when imposing a further sentence”.

83. Magabe Kisand v. R. Crim. App. 835-M-66; 24/1/67; Platt. J.
The accused was convicted of receiving stolen cattle upon

That the cattle were found in a boma which he shared with his son three days after they were stolen. His defence was that the cattle had been brought to the boma by his son, that he had not been present when they were brought, and that he did not know they were stolen. The magistrate stated that the accused had the burden "to bring at least some evidence which may bring a balance of probability" and that his unsubstantiated testimony was insufficient to do so.

Held; A presumption that the accused was either a thief or receiver arose from the prosecution evidence of recent possession. However, the testimony of the accused, if reliable, was sufficient to rebut this presumption. The standard of reliability to be applied is not whether the magistrate believes the defence to be true; rather, the test is whether the defence could reasonably be true based upon the evidence in the record.

84. Daniel s/o Iganana v. R., Crim. App. 847-M-66; 7/3/67; Platt, J.
Accused appeals his conviction of unlawful wounding on the ground that the wounding was accidental. The trial court stated that even if the wounding was accidental accused was guilty since "…. Accused is the one to blame. He was the source of the trouble."

Held: If the complainant was wounded accidentally, regardless of who was at fault initially or morally, the prosecution had failed to prove its case beyond a reasonable doubt. The appeal was allowed.

85. Nathanael Ijukaine v. Martin Kalokola, (PC) Civ. App. 36-M-66; 3/4/67; Mustafa, J.

Plaintiff sued for the unpaid amount of a loan. The original amount of the loan was Shs. 300/- plus “interest” or “a profit” or Shs. 175/-. The contract also provided that if the loan were not paid on the date due, additional interest of Shs. 10/- per month would be charged.

Held: (1) The rate of interest is exorbitant and is not recoverable. The court allowed recovery of Shs. 300/-, the amount of the loan, and interest of ten percent per annum on that amount for the period between the date the loan was due and the day judgment was entered.

86. Manyoni Witare v. Palapala Kakoro, (LC) Civ. App. 80-D-65; 18/4/67; Saidi, J.

Plaintiff ’s uncle married defendant’s sister, paying seven cattle and ten goats in bride price. Plaintiff inherited the wife after his uncle died, and they lived together for some years, until she deserted him. She was at the time of plaintiff’s action to recover the bride price, “old” and with-out “good prospects of getting married to another man who would pay bride price to (the defendant)”.

Held: (1) Plaintiff may bring the claim for bride price for desertion, just as his uncle could have, had he lived and been deserted. (2) Because the wife’s prospects of marriage are poor, and the bride price claimed by plaintiff not likely to recouped by defendant by her subsequent marriage the bride price refundable to plaintiff is properly reduced by half, under clause 52A of the Local Customary Laws (Declaration) Order 1963, Cap. 333.

87. Sambwe Mwakilaba v. Andrew Mwakamsale, (LC) Civ. App. 75-D-65; 7/4/67; Saidi, J

In 1939, appellant married a woman who was six months pregnant by another man. He brought up the child, a girl, as his own daughter. When she was married, he received the bride price paid by her husband. In 1964, after she had born three children, her maternal uncle brought an action in Rugwe District for custody

of her under the Local Customary Law (Declaration) Order in 1963 (Government Notice No. 279 of 1963, extended to Rungwe District by Government Notice No. 250 of 1964). Section 178-180 of that Order provide that children not born in wedlock "belong to their maternal family" and that "if the child is a girl her bride wealth is received by her mother's father or his heir."

Held: (1) "(1) Illegitimate children of unknown fathers belong to the maternal family under customary law, " and an illegitimate daughter's bride price. "is taken by the mother's father or his heirs." (2) However, since this claim was made after the child was fully grown, married and with three children, and since the uncle had contributed nothing to her upbringing, "it was too late (for him) to lodge his claim over this woman…" He should have claimed for custody "when she was five years old." (3) Similarly, "the appellant who brought her up as his own daughter and arranged for the marriage should take the bride price to the exclusion of any other person who did not contribute anything ….." Appeal allowed.

88. Abedi Shekulwavu v. Salimu Juma, (LC) Civ. App. 26-D-66; 24/467; Saidi J.
Under the customary practice of "gunda" in Lushoto, a piece of land was given to the local ruler. Defendant, a traditional chieftain, accordingly had lived on a shamba for fifty years; his family had farmed the same shamba for twenty-five years before that. With the abolition of traditional Chieftainship in 1962, plaintiff brought proceedings on behalf of his clan to recover the shamba from defendant.

Held: The clan gave up the land permanently. It would be "utterly unfair and unreasonable to disturb (defendant's) long occupation of the shamba." Plaintiff' 's claim dismissed.

89. Ndayanyi Lukas v. R. Crim. App. 53-M-67, 23/3/67, Platt, J.
Accused was convicted of arson but the case against him was circumstantial, and weak.

Held: "….. it seems to me that, serious though the charge against the appellant was, there were aspects of the prosecution case which rendered it doubt-

ful, and that the defence might well have raised doubt in the mind of a reasonable court if the doubtful aspects of the prosecution case had been fully considered. It follows therefore that it would be unsafe to uphold this conviction."

90. Mapera s/o Sendegyu v. R., Crim. App. 113-D-67; -/4/67; Saidi J
Accused was convicted of possession of a muzzle – loading gun without a licence under section 13(1) of the Arms and Ammunition Ordinance, Cap. 223. He was holding the gun for a third party, who had pledged it to him as security for a loan.

Held: (1) Accused, although not the owner of the gun pledged to him, was not entitled to have it in his possession without.

A firearms licence. Even if the owner had a licence, he "could not have handed over his gun….without a temporary permit from the licensing authority." (2) A sentence of 6 months, under the circumstances, was to severe; sentence was reduced to two months. (3) The true owner must be given opportunity of showing cause why an order of forfeiture should not be made.

91 Volter Hopp v. R., Crim. App. 58-M-67; 31/3/67; Mustafa, J.
Accused said to one Paskali in the presence of one Kassese, "Why have you not finished your work? What is wrong with the African brain? African brain is the same as my anus." Paskale was not called as a witness at the trial of accused for using abusive or obscene language in a manner likely to cause a breach of the peace. Kassese, however, testified that upon hearing accused 's statements, he was "angry and annoyed." (Quote is from the High Court's opinion, not the witness' testimony.)

Held: (1) Since the purpose of the statute is to prevent public disturbances as a result of hearing offensive language, it is immaterial that the person to whom

the remarks are directed does not testify, or is himself not incited. (2) Accepting Kassese's evidence, as the trial court did, the conviction was "perfectly justified."

92. Korba s/o Farah v. R., Crim. App. 590-D-66; 18/2/67; ----------, J

Accused was convicted of violating section 3(2) of the Prevention of Corruption Ordinance, Chapter 400. The evidence was that he had paid Shs. 300/- to an Area Commissioner in an attempt to obtain a permit to transport maize. He was immediately arrested by two constables who were in the vicinity by arrangement. Accused 's defence was that the Area Commissioner had no power to issue the permit. In addition to the sentence prescribed by the Minimum Sentences Act, the trial court ordered that the money handed to the Area Commissioner be forfeited by the accused.

Held: (1) It is no defence that the Area Commissioner had no authority to issue the desired permit since the accused intended that he act as an intermediary and influence the members of the board empowered to issue such permits. Citing R. v. Smith, 44 Crim. App. Rep. 55. Thus the action of the accused was "putrid, vitiated and tainted." Citing Emperor v. Rams Nana Hagvane, I L..R. Vol XLV1 (Bombay) 317 (2) Under Section 3(3) (b) of the Prevention of corruption Ordinance, money may be forfeited only where the accused has received something and in this case the accused received nothing. It was ordered that the forfeiture be set aside and the money be returned to the accused. The appeal was otherwise dismissed.

93. Halidi s/o Athumani v. R., Crim. App. 106-D-67; 12/4/67; Biron, J.

Accused was convicted, along with another, of stealing. Complainant allegedly saw the co-accused standing outside her hut with a bundle of her clothing, and saw the accused inside the hut. Both men ran off, but the co-accused was caught. Accused passed by shortly afterward, and complainant identified him as the second thief. The co-accused, who did not appeal his conviction, stated that the accused had told him that the hut belonged to his brother-in law, and that it would be proper to take the clothing.

Held: (1) The statement of one accused which implicates another is admissible only if it incriminates the speaker as well. Where, as here, the statement is self-exculpatory, it cannot be admitted. (2) The conviction, resting otherwise on complainant unreliable identification of accused, was quashed.

94. Saidi Ali v. R., Crim. App. 849-M-66; 10/3/67; Platt, J.

Accused was convicted of unlawful possession of diamonds Diamond Industry Protection Ordinance, Cap. 129, s. 3(1). His alleged accomplice, in the presence of accused, attempted to sell some diamonds to a third party, who was a police informed. The three were together on two occasions on which the sale was negotiated, the accomplice being in possession of the diamonds. The accused was not present for the exchange of diamonds for money, at which time the accomplice was arrested. The accomplice testified that he had told the informer, in the presence of the accused, that the accused was the owner of the diamonds. The accused denied this, as did the informer. The testimony of the accomplice differed in other respects with that of the informer and with an unsworn statement by the accused.

Held(1)"(1) t would not be safe" to accept the accomplice's testimony, without "material corroboration," solely because of his impressive demeanor. "The first test was to see whether (his story) was corroborated by other independent an material evidence." (2) To convict the accused, it would be necessary participated in the negotiations in such a way that it could be said that he was in joint possession of the diamonds …." Appeal allowed, conviction and sentence set aside.

95. R.v. Semberit Magnus Kassembere, Crim. Rev. 44-D-67; 14/4/67; Biron, J.

Accused was convicted of assaulting a police officer. He was intoxicated at the time of arrest. His conviction was upheld, but sentence was reduced from eighteen months to nine months.

The Court stated, obiter: (1)"I think it is open to argument as to whether intoxication is or is not a mitigating factor in such an offence….. (1) t can even constitute a defence where intent is a necessary ingredient of an offence." (2) "….. (A) s the accused 's father is a lunatic, there may well be some hereditary taint which would further affect the accused 's judgment and sense of responsibility."

96. R.v. Milango s/o Misoji, Crim. Rev. 95-M-66; 3/1/67; Platt, J.
Accused was convicted on his own plea of defilement of a girl under the age of twelve years. (P. C. s.136(1).) His pleas was as follows: "I did have sexual relations with this girl who is twelve years of age."

Held: (1) Accused 's statement could have meant either that the girl was twelve at the time of the offence, or that she was twelve at time of his trial. The former meaning would raise a defence under sub-section 2 of section 136 of the Penal Code: his reasonable belief that the girl was not under twelve. The plea of guilty was not, therefore, unequivocal. (2) As accused was properly convicted of abduction (P. C. s. 134), and given a concurrent sentence on that charge, no retrial, was ordered. Conviction of defilement quashed.

97. Shabani s/o Mvutakamba v. R. Crim. App. 57-M-67; 16/3/67; Platt, J.
Complainant alleged that accused had attacked and beaten him. Accused categorically denied this. There was not independent corroborative evidence for either side. Because the evidence was unclear the trial court conviction was quashed.

The High Court stated, obiter: “The evidence of a single witness for the prosecution can be relied upon to base a conviction, but of course the evidence of single witness can only be accepted with care.”

98. Matonya Chima v.R. Crim. App. 89,90,91-D-67; Duff, J

Accused, aged fourteen sixteen and seventeen years respectively, were convicted of rape. (P.C., ss. 13,130.) All three were sentenced to twelve months’ imprisonment, the magistrate stating that two were adults while the third was a young person.

Held: (1) Section 22 of the Children an Young Persons Ordinance, Cap. 13, prescribes that no young person shall be imprisoned unless the court considers that “none of the other methods of punishment are suitable.” The Court stated, “A more appropriate punishment would have been corporal punishment.” (2) The sentences of all three were set aside, and sentences substituted so as to result in their immediate release.

99. Damiel s/o Mugema v. R., Crim. App. 956-M-66; 23/3/67; Platt, J.

Accused were convicted of assaulting a police officer. At the close of the prosecution case, accused Daniel Mugema informed the court that he had expected to be represented by an advocate and requested that the court adjourn the trial to permit him to obtain counsel. Prior to the trial a letter had been written to the court stating that counsel had been briefed, but this letter had been lost. The request for adjournment was denied. The only indications in the record that the accused had been sentenced were unsigned and undated judgments and unsigned warrants of commitment; there was no record of any proceedings of any kind after the close of the defence case.

Held: (1) If the accused delayed unreasonably, circumstances might warrant a refusal to grant an adjournment at the trial so that he could obtain counsel. However, in the present case the accused attempted prior to the trial to inform the court by letter that he would be represented. His failure to request counsel at the commencement of the trial is excusable because of his lack of knowledge of

the procedure to be followed. Citing Jaffrali Abdulla Haji v. R., I.T.L.R. 299. (2) The failure of the record to disclose any sentencing proceedings and the fact that the judgments were undated and unsigned and the orders of commitment were unsigned constitute gross irregularity which should not be cured under section 346 of the Criminal Procedure Code. The convictions were quashed.

100. Kahumbila Mgalula v. R., Crim. App. 16-M-67; 23/3/67; Platt, J
Accused was convicted of cattle theft under the general theft provision of the Penal Code (P.C. s. 265), and the provision dealing specifically with cattle theft (P.C. s. 268). The latter section provides for an enhanced sentence. Accused was sentenced to three years imprisonment and twenty-four strokes.

Under section 265, and to a concurrent sentence of twelve months under section 268.

Held: "Cattle theft is ….. charged under section 265 and 268 of the Penal Code and requires only one sentence to be passed, "since cattle theft is an " aggravated form" of the "substantive offence" of theft. The concurrent sentence was set aside as "superfluence".

The Court stated, obiter: (1) "(1) t would be better in future cases to record the exact value based on such evidence as that of …… the owner" of property stolen. (2) "(T) he learned magistrate should always record the age of the accused." Here, the authorities concerned had certified that the accused was 40 years of age, and the sentence under the Minimum Sentences Act was upheld.

101. Kareo Kisabasu Tills v. R. Crim. App. 104-D-67; 14/4/67; Duff, J.
Accused, a chief clerk assigned to courts in Panyoni, received a cheque, the proceeds of which were to be paid to widow of a court messenger as payment from the National Provident Fund. He cashed the cheque and misappropriated the money, for which he was convicted of theft by public servant. (P.C. ss. 265,

270.) His appeal was held to be groundless, but counsel for the Republic argued that the compensation order should have directed payment to the Government and not to the widow.

Held: Because the money belonged to the Government until handed over to the widow, and because the Government would still be bound to pay the amount due from the Provident Fund to her, the order should have directed payment to the Government. The Court noted, “It is clear that the widow will receive payment from the Government and it is doubtful that she would recover it from the accused.”

102. John s/o Kiwanuka v. R. (PC) Crim. App. 391-M-66; 23/3/67; Platt, J.
Accused was convicted in three separate cases of housebreaking and stealing, and in a fourth case of school breaking and stealing, in Primary Court. Sentences of two years and twenty-four strokes were imposed for housebreaking, with one-year sentences for the thefts in those cases ordered to run concurrently with the housebreaking sentences- and a similar sentence was imposed in the school breaking –theft case; to run concurrently with one of the housebreaking sentences – by the magistrate who had tried all four cases. This magistrate ordered that the housebreaking sentences should run consecutively, resulting in an effective order for six years’ imprisonment and seventy-two strokes. On Appeal to the District Court, the District magistrate confirmed each sentence but ordered that all four should concurrently.

Held: (1) Had the housebreaking charges been tried in a single case, concurrent sentences could have been imposed, under Primary Courts Criminal Procedure, paragraph 6. Moreover, only one sentence of corporal punishment could have been imposed according to Corporal Punishment Ordinance, Cap. 17, s. 10. (2) However, there is no provision in the Primary Courts Criminal Procedure Code defining the magistrates’ power as to sentence imposed in two or more separate cases. Section 36 of the Penal Code is “wide enough” to cover such a situation, but it has not been re-enacted as Primary Court legislation—apparently only because of legislative “oversight.’

(3) Thus, in dealing with the charges in separate trials, the magistrate "excluded," and the sentences "must be understood to be consecutive." (4) The evidence does not support the school breaking conviction: a conviction of receiving stolen goods and a sentence of nine months is imposed thereon. (5)The "alarming result" is that the accused is sentenced to six years and nine months' imprisonment and seventy-two strokes. (6) While the High Court has "no power to mitigate the severity of this sentence," the matter would be placed before the Attorney General for consideration.

103. Celestin Alei Mzigo v. R. Crim. App. 101-D-67; 13/4/67; Biron, J.

Accused was convicted of corruption, having promised a bribe of Shs. 100/- and having offered a bribe of Shs. 40/- to a police officer as inducements to drop charges that accused was facing. Section 5(2) of the Minimum Sentences Act allows the imposition of a sentence less than the prescribed minimum, where (a) the accused is a first offender, (b) the sum involved is not more than Shs. 100/- and (c) there are "special circumstances" justifying such action. The magistrate found no such "special circumstances", and imposed a sentence of two years' imprisonment and twenty – four strokes.

Held: The sentence was affirmed. The Court stated, "The learned magistrate had an unfettered. Discretion in the matter and no objection can be taken to the exercise of his discretion, nor can it be criticized."

104. Ngoliba s/o Soli v. R., Crim. App. 111-D-67; 14/4/67; Duff, J.

Accused was convicted of attempting to bribe a magistrate who was trying him on a charge of theft of meat. The sum involved was Shs. 20/-. (Prevention of Corruption Ordinance, Cap. 400,s. 3(1).) Accused was sentenced under the Minimum Sentences Act to two years' imprisonment and twenty-four strokes.

Held: Because the accused, a first offender, had done nothing "very sinister which would justify a court in not invoking the provisions of section 5(2)" of the Minimum Sentences Act –the provision for leniency in "special circumstances" --- the Court set aside the magistrate's sentence and substituted a sentence of six months. The Court stated, and substituted a sentence of six months. The Court stated, "…….I cannot think that the rig ours of Cap. 526 were intended to a person such as the accused whose crime was silly in the extreme."

105. R. v. Mathew Andrew, Crim. Rev. 11-D-67; -/-/67; Biron, J.
Accused was convicted of carrying passengers for hire without a valid public service vehicle's licence, and sentenced to pay a fine of Shs. 35/- or serve one month's imprisonment in default. The conviction was quashed because it was based on hearsay evidence.

The Court stated, obiter "……..(T) he sentence was manifestly inadequate, not reflecting the seriousness with which the Legislature views such offence, as on a first conviction the court may order the cancellation of the registration and licence of the vehicle and on a second or subsequent conviction such cancellation is mandatory."

106. R. v. Mgomba s/o Makunya,(PC) Crim. Rev. 2-D-67, 11/4/67; Saidi, J
Accused killed a goat but fled without moving the care as when an alarm was raised. On these facts he was convicted of cattle theft, and sentenced to three years' imprisonment plus twenty four strokes.

Held: (1) Since there was no asportation proved (or alleged), the conviction was improper, (2) A conviction of willfully and unlawfully killing an animal contrary to section 325 of the Penal Code was substituted, and sentence was lowered to three months imprisonment.

107. Abdul s/o Salumu v. R. (PC) Crim. App. 746-M-66; 14/4/67; Mustafa, J.
Accused was convicted of burglary and stealing before a primary court. The evidence established his possession of stolen goods some twenty days after they had been taken, but failed to connect him with the original taking. The District Court held that while a conviction of burglary and theft was improper, accused could be convicted of receiving stolen goods under section 311(1) of the Penal Code.

Held: An accused 's explanation of his possession of stolen goods need not be "reasonably be true ……"

108. Mtematuku s/o Mlima v. R., Crim. App. 882-D-66; 4/3/67; Duff, J.
Accused was convicted of stealing a watch, after having been charged with receiving the watch knowing or having reason to believe the same to have been feloniously obtained.

Held: "Nowhere is there a provision where by a court may convict an accused person of stealing an article in respect of which he had been charged with receiving the same article." Section 181(2) of the Crim. Proc. Code permits a court to convict an accused of a crime different than that with which he was charged only when (a) the circumstances embodied in the major charge necessarily and according to the definition imputed by that charge constitute the minor offence also, and (b) the major charge as formulated given the accused notice of all the circumstances going to constitute the minor offence of which it is proposed that he no be convicted. (2) While the theft conviction could not be upheld, there was ample evidence to support a conviction of receiving stolen property knowing it to be stolen, and a conviction for this offence was substituted by the High Court.

109. R. v. Ali s/o Nassoro, Crim. Rev. 2-D-67; 28/4/67; Georges, C.J
The four accused were attending a circumcision ceremony for males only. They discovered a female there, and forcibly circumcised her. From their convictions of

unlawful wounding and indecent assault, they petitioned the High Court for clemency, alleging that they sincerely feared that "dire consequences" would befall them and the boys being circumcised unless the lady were punished in this particular manner. Accused also requested bail pending investigation of their petition.

Held: (1) If the accused 's belief were genuine, it would properly be considered as mitigating factor, even if it were

Not a "general held" tribal belief; in the latter event how ever, their claim would be weakened. (20 Under section 321 of the Criminal Procedure Code, the High Court may grant bail to a convicted person only when the person is entitled to appeal and enters an appeal. A petition for clemency is not an appeal; the application for bail must be dismissed.

110. R.v. Andrea s/o Katwera, Crim. Rev. 23-D-67, Saidi, J.

Accused was convicted of employing another for the use of witchcraft, and ordered to pay a fine (Witchcraft Ordinance, Cap. 18, ss. 5, 7) The Court's judgment is reproduced below in its entirety.

Held: "Witchcraft practices must be discouraged. They have always caused so much trouble. In many instances they are the cause of murders. I agree that fines are not deterrent. Accordingly. The fine, which has been paid, is to be refunded to the accused.

111. Kotak Limited v. Vallabhdas Kooverji, Civ. App. 4-D-67; -/5/67; Hamlyn J.

Appellant filed a memorandum of appeal and a copy of the ruling of the District Court, but failed to file a certified copy of the District Court's order.

Held: (1) Rule 1 (1) of Civil Procedure Code, Order 39, provides in part, "The memorandum … shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith of the judgment on which it is

founded." This requirement is extended to orders and rulings, respectively by rule 2 of Civil Procedure Code, Order 40. Citing Munshiram & Co. v. Star Soda Water Factory, 16 K.L.R. 50 (2) Orders are to be distinguished from rulings or judgments, and the presentation of the ruling of the District Court did not obviate the necessity of presenting the order as well. Citing Qasim Ali Khan v. Bhagwanta Kunwar, 40 I. L. R. All 12; Bashiri Ram and others. V. The Municipal Committee Chinior, 1922 Lahore A.I.R. 191. (3) The fact that appellant had applied to the District Court for the proper documents does not excuse his failure to present the order on appeal. The Appeal was dismissed.

112. Mohan's v. A. G. Virjee, Civ. App. 12-D-66; 17/5/67; Georges, C. J.
Plaintiff sued defendant for goods sold and delivered. In finding for defendant , the magistrate considered at least three matters which, for various reasons, should not have been considered. On appeal, defendant's counsel argued that the magistrate had held to that defendant was not indebted, either because he did not order the goods or, if he did order them, because he appeared to have paid for them --- and that the evidence supported either view. The High Court seemed to agree that the evidence would support such a view, "There is much merit in this approach."

Held: (T) he learned magistrate has imported into the case so many irrelevant consideration that, in the absence of clear findings on the pertinent issues, it would not be wise to conclude that he would made the findings which it is being inferred he had made had he considered the matter properly." Appeal allowed; new trial ordered.

113. Abdallah Tamim v. Saidi Ally, (PC) Civ. App. 56-D-67; 23/5/67; Saidi J.
In June 1963, defendant agreed to sell a boat to plaintiff for Shs. 1,500/- Plaintiff paid Shs. 500/- in advance and took

114. Mohamedi Ngonyani v. Mtumwa Dodo, (PC) Civ. App. 34-D-67; 6/5/67; Duff, J.

Defendant appeal an ejectment order issued by a primary court with respect to premises which he occupied.

Held: The case involved no matter of customary law (see Magistrates' Courts Act, Cap. 537,s. 14) and the action is not one which the court is empowered to hear pursuant to Part 11 of the First Schedule to Cap. 537. Therefore, the Primary Court lacked jurisdiction. The case should have been instituted before the Rent Restriction Board, and the court to which the matter should have been referred is the Resident Magistrate's (Rent Restriction (Amendment)(No. 2.) Act 1966, s. 11A).

115. Range Chacha v. Elias Nyirabu, (PC) Civil Application 24-M-66; 24/4/67; Platt, J

Plaintiff was divorced by his wife, and there was evidence that she had deserted him for another man whom she later married. Plaintiff sued her father for the return of cattle given as bride wealth, in the Nyamwanga Primary Court. The Primary and District Courts came to differing conclusions as to the number of cattle originally given, and as to the number which had been repaid by the defendant. The Primary Court, finding that six of thirty – eight cattle were as yet unreturned, ordered the return of only two, on the grounds that the marriage had lasted four years and a child had been born. The District Court ordered full repayment of the bride wealth, because the divorce had been "due to the fault of the wife".

Held: (1) Under Paragraph 58 of the Local Customary Law (Declaration) Order of 1963, "where a divorce was due entirely to the fault of the wife, no divorce can be granted unless the full bride price is repaid." (2) Although the defendant might have been as much as "a month out of time in lodging his appeal" to the High Court, he had produced evidence that he was sick during that time, and the application would therefore be allowed. (3) The record was remitted to the District Court for further evidence on the issue of the number of cattle originally given.

The court stated, Obiter; "(A) s the appellant has already been paid bride price a second time on the second marriage of daughter, it would only be fair that

he should make full restitution of the bride price paid on the occasion of the first marriage."

Held: As was found by the assessors in both courts below, "inheritance in this tribe is traced through maternal uncles and this is exactly what had taken place in this case." Citing Vol 11, Kilosa District Rules 71 and page 6 of File No. 1/3/C/1 Provincial Office, Eastern Province (from the Archives).

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116. Naisikie s/o Lolemore v. Mbaya s/o Ikayo, (PC) Civ. App. 166-D-65; 23/5/57; Saidi, J.

Mbarukuyu, the widow was originally married to defendant's brother to whom she bore three children. She left her husband who thereafter died. After his death, she married plaintiff, who paid the normal bride price to her father, but she soon left him. She had two more children, the paternity of whom is uncertain. Plaintiff sued for the custody of Mbarakuyu and the five children.

Held: (1) The marriage to defendant's brother was still in still existence at the time Mbarakuyu married plaintiff; the bride price to her first husband had not yet been repaid. (2)Under Masai custom, children born of a married woman in such circumstances belong to the husband whose marriage has not been children, who together with their mother were living with defendant, plaintiff's appeal was dismissed.

117. Paskazia d/o Bwahama v. Aloys Cyrilo, (Pc) Civ. App. 182-D-65; 19/5/67; Saidi, J.

Plaintiff sued for the redemption of a clan shamba under the Buhara customary law. The land allegedly was sold by plaintiff's brother, acting as administrator of plaintiff's father's estate, in 1937 to defendant's father, from whom he inherited it in 1953. The sale price was Shs. 3000/-. The signatures on the documents of sale appeared to have been forged.

Held: (1) According to the customary law of the Haya tribe, land is considered to be the joint property of a clan and may be redeemed by a member of the clan if it is sold to a stranger by an individual member. However, suits for redemption should be brought within three months of the date of sale or of the date the interested clan member first hears of the sale. Citing Hans Cory and Hartnoll, Customary Law of the Haya Tribe. (2) Since the signatures on the sale documents were forgeries, and since the sale price appears to have been below the value of the land, the evidence supports a finding that no sale took place. Thus the question of redemption of the shamba would not arise. (3) In order to support a claim to the property based upon adverse possession, defendant must show that he has been in continuous and uninterrupted possession of the shamba for twelve years or more. (4) If he has not obtained title to the property by adverse possession, defendant would nevertheless be entitled to fair compensation for any improvements he may have made. The appeal was allowed and the case remitted to the District Court the court which had heard the first appeal of the case) for the trial of the issue of adverse possession.

118. Donald s/o Musa v. Tutilo s/o Yonathan, (PC) Civ. App. 100-D-66; -/5/67; Saidi, J. A member of the Wakuguru tribe of Kilosa didd: he was survived by four wives and twenty children. Plaintiff, one of his sons, brought an action to recover possession of several cattle which had been taken by the nephew of the deceased . The nephew the son of the deceased's sister, had acted as administrator of the estate and guardian of the widows and children, according to an established custom of the Wakuguru, a matrilineal tribe. He had claimed the cattle as "family property" i.e., inherited by deceased from the family, not acquired by his own efforts – after dividing the other cattle among the other heirs.

Possession of the boat. The remainder of the purchase price was to be paid within one month. Plaintiff paid Shs. 700/- over the next several months but left his

home in Zanzibar at the time of the revolution with Shs. 300/- of the purchase price still due. Defendant made diligent attempts to find plaintiff but was unable to do so. In February 1965, he took possession of the boat, which had been left on a beach of Zanzibar, upon the authorization of the Area Commissioner. It was necessary for him to make repairs before the boat could be sailed back to his home in Bagamoyo.

Held: (1) In these circumstances defendant was justified in seizing the boat, for plaintiff had not honored the agreement (2) If defendant is to surrender possession of the boat to plaintiff, as he is willing to do, he should be paid the remainder of the purchase price and compensated for the necessary repairs. (3) The trial court erred in awarding plaintiff damages for the profits defendant earned while in possession of the boat.

119. Meta Tebera v. Isakwe Rongoya, (LC) Civ. App. 63-D-65, 16/5/67, Duff, J.
In an earlier judgment Warioba, the brother of the present appellant, was ordered to pay compensation to the present respondent for having committed adultery with his wife Because Warioba had no property, several head of cattle belonging to appellant were seized by respondent in satisfaction of the earlier judgment. Appellant brought this action to recover the cattle.

Held: Under customary law the respondent had a bon fide claim to the cattle and they could be seized in satisfaction of the judgment. However, the High Court was "satisfied that this law, if applied, would be repugnant to justice and morality….." The Court ordered that the cattle be returned to appellant.

120. Cosmas s/o Athuman v. R., Crim. App. 517-D-66; 19/5/66; 19/5/67; Saidi, J.
Accused was convicted of burglary and stealing. He appealed and filed a copy of the judgment of the trial court but the record of the trial court had been lost.

Held; The judgment of the trial court was not sufficiently elaborate to form the basis for the consideration of the appeal. Although noting that it would "in-

evitably cause inconvenience to the appellant, who has already been in jail since 5th July 1966," the court quashed the conviction and ordered that he be re-tried on the same charges.

121. R. v. Ernest Telenga, Crim. Rev. 20-M-67; 5/5/67; Platt, J.

Accused was charged under section 6 of the Prevention of Corruption Ordinance, Cap. 400. The prosecution and defence both presented their cases at the trial but before judgment was entered the trial court found that it had no jurisdiction under section 14 of the Ordinance. That section provides that if a person is charged under section 6, there shall be no further proceedings without the written permission of the Attorney General except by way of remand. The court thereafter allowed the prosecutor's request to withdraw the charge, under section 86(b) of the Criminal Procedure Code. That section provides that if the withdrawal is made after the defence has been given, the accused shall be acquitted. In an attempt to avoid a bar to further proceedings, the Director of Public Prosecutions moved in the present action to have all proceedings after arraignment be set aside by way of revisional order.

Held: (1) Section 329(1)(b) of the Criminal Procedure Code provides that the court shall have the power to alter or reverse findings in the case of any order "other" than an order of acquittal." Subsection (4) of that section provides, "Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction." Therefore, the court has no jurisdiction. (2) The Court stated, Obiter, that the Director might be able to state a case on the ground that he order of acquittal was without jurisdiction.

122. Saidi Mtondo v. R. (PC) Crim. App. 41-D-67; 24/5/67; Saidi, J.

Accused was convicted of burglary and stealing upon evidence that he was seen wearing a pair of trousers about five days after they had been stolen from complainant's house, which had been broken into at night. Accused, from the time of

his arrest, asserted that the trousers had been left at his house by a friend whom he named. No attempt was made to investigate this allegation or to trace the friend.

Held: The onus is always on the prosecution to prove the charge beyond a reasonable doubt; the accused need not prove the innocence nor the defence he puts forward to the same extent the prosecution must establish its case. The accused having from the start named his friend as the source of stolen trousers, it was the duty of the prosecution to look for evidence to disprove this allegation. The conviction was quashed.

123. Masalu Mpima v. R., Crim. App. 88-M-67; 3/5/67; Platt, J.

Accused were convicted of burglary and theft. At the time for the presentation of the defence case, accused requested that certain witnesses, who were incarcerated in Malya Prison, be called to testify. The trial court refused on the grounds that the witnesses would be unreliable and that accused had not given sufficient advance notice of his request.

Held: (1) Defence witnesses, if called for, should be allowed to appear in court and give their evidence. The evidence can then be tested as to its reliability. (2) The accused were not represented and may not have known of their power to have witnesses called in advance. Moreover under section 206 of the Criminal Procedure Code, they could elect to call the witness at the time for presentation of the defence case even though and adjournment would have been required.

124. Idefence Mpendakazi v. R., Crim. App. 202-D-67; 12/5/67; Saidi, J.

The accused was convicted of cattle theft. A confession which accused made before an Assistant Village Executive Officer was admitted into evidence. The only other prosecution evidence was the testimony of a twelve-year-old boy.

Held: (1) A confession to the Assistant Village Executive Officer, who had the power to arrest and detain persons suspected of having committed offences amounted to a confession to a police officer and was inadmissible under section 25 of to a police officer and was inadmissible under section 25 of the Indian Evidence Act. (2) The testimony of the boy required corroboration and would not support a conviction. The conviction was quashed.

125. Warioba s/o Kandose v. R., (PC) Crim. App. 216-M-66; 21/1/67; Platt, J.
Accused was convicted of cattle theft (P.C. ss. 265,268) solely upon the testimony of the complaining witness. The evidence presented was circumstantial. Other witnesses were mentioned in the testimony but were not called at the trial.

Held: Where the prosecution case is based upon the testimony of single witness, the court must find that the testimony is absolutely reliable in order to convict. Careful scrutiny of the testimony is especially important if the evidence is circumstantial . Where available evidence has not been called, there is some suspicion that the evidence would not support the allegation concerning it. The conviction was quashed for insufficient evidence.

126. Paulo Tamvule v. R. Crim. App. 85-M-67; 28/4/67; Platt, J.
Accused was convicted of two counts of office breaking. (P.C. s. 296(1).) With regard to each of the counts, there were introduced into evidence pieces of glass on which accused 's fingerprints were allegedly found. All of this glass was at some time in the possession of police officers who did not testify at the trial and the evidence did not reveal the identity of all of the officers who had had possession of the glass. The prosecution also introduced a fingerprint form, but the officer who had taken the fingerprints did not testify nor did any other person who witnessed the taking of the fingerprints and might have identified the forms.

Held: (1) A clear chain of evidence was not established showing that the glass examined by the expert was the same glass as was found at the scene of

the offences. It is not satisfactory for one police officer to say he took the glass and the expert to say that another police officer gave him the glass unless some explanation is given. In such circumstances there is not certainty that the exhibits have not been tampered with. (2)Since the fingerprints form introduced into evidence was not identified by the officer who prepared the form or by any witness to its preparation, there is not evidence that the form examined by the expert was that taken from the accused. The convictions were quashed.

127. R. v. Petrol s/o Kakimala, (PC) Crim. App. 590-M-66; 14/4/67; Platt, J.
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 accused stole from time to time, and had been in prison eight times. Accused denied this, but was not given a further opportunity for rebuttal or cross examination. The father had sent his son away from home more than thirty years ago.

Held: (1) An accused 's 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. (2) This was not so clear a case that the magistrate could not have been influenced by the character evidence. Conviction quashed.

128. R. v. Christopher Makunja, Crim. App. 225-M-67; 24/5/67; Platt, J
Accused was convicted of stealing by a public servant (P.C. ss. 265, 270) and with failing to issue a ticket or receipt within half an hour (East African Railways and Harbours Act, 1950, as amended in 1953, s. 70(Q)). After the accused had given evidence he requested that his only witness be called. The witness had been sitting in the courtroom but had heard the testimony of the last
precut ion witness and of the accused. For that reason the trial court refused to permit him to testify.

Held: The witness should have been called and the court could then consider the weight of his testimony. Since he was not called there is no way to de-

termine whether his testimony would have been affected by hearing the two prior witnesses.

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129. Henery Gervase v. R., (PC) Crim. App. 68-D-67; 10/5/67; Hamlyn, J.
Accused was convicted of stealing a sheet and blanket. The evidence against him was that he was found in possession of the sheet and blanket, which the complainant identified merely by stating. “They are my property.”

Held: “The acceptance of these bland assurances by the court lays the way open for many dangers and such identification would not be in any way acceptable even in a civil court…….” In a criminal case, claimant should be asked for “marks on the property” before it is shown to him, “from which the ownership can be established to the court beyond reasonable doubt.

130. R. v. Evadi s/o Sylivester, Crim. Sass. 91-M-66; -/-67; ----------, J.
Accused was convicted of murder (P. C. s. 196). There was evidence that accused and the deceased had quarreled in a pombe shop and accused had threatened to set fire to the deceased’s house. Later that night the deceased’s house burned. A body was found inside but was burned beyond recognition. At the close of the prosecution case, the accused moved that no case had been made out for him to answer.

Held: (1) Death is provable by circumstantial evidence notwithstanding that neither the body nor any trace of a body is found. Citing Regina v. Onufrejezyk, 1965 1, QB 388. Although the body could not be identified, there was sufficient circumstantial evidence that deceased died in the fire. (2) The only evidence connecting accused with the death was the threat he made the evening before the fire. This evidence was insufficient to require accused to present his defence case. Citing R. v. Sipirian (1947) 14 E.A.C.A. 72, The accused was found not guilty.

131. Leo s/o Pigangoma v. R., Crim. App. 671-M-66; 17/4/67; Platt J.
Accused was convicted of assault causing actual bodily harm (P.C. s. 241), common assault (P.C. s. 240) and malicious damage to property (P.C. s. 326(1)). In the course of the assault, accused tore complainant's shirt and vest and broke his spectacles.

Held: Where an assault takes place which causes damage to property worn by or in the possession of the complainant, such damage is to be considered merely incidental to the assault, rather than a separate offence, unless there is evidence of willful damage to property as such. There was no such evidence in this case. The conviction for malicious property damage was quashed.

132. R.v. Ally Kage, Crim. Rev. 14-A-66; 16/4/67; Bannernan, J.
Accused were convicted of prospecting without authority (Cap. 123, s. 6). There was evidence that they had, without a permit, mined stones and sold them for Shs. 65/-.

Held: It was mandatory that the court order the forfeiture of the minerals in addition to the fine imposed (Cap. 123, s. 5). Since the minerals had been sold, the sale price should have been adjudged their fair value and that amount should have been forfeited in addition to the fine.

133. Misago s/o Semumba v. R. Crim. App. 97-D-67; 12/5/67; Hamlyn, J.
Accused was convicted of burglary and stealing. The trial commenced in November 1966 but was immediately adjourned. When it was resumed in December 1966, accused was not properly charged nor was he required to plead to any charges.

Held: Where no pleading is taken the trial is a nullity. There has therefore been no trial in these proceedings. The court made no specific order for re-trial, which it considered a matter to be decided by the prosecutor.

134. David Mwita s/o Paulo v. R. Crim. App. 560, 561-M-66; 18/4/67; Platt, J.
Accused were convicted of cattle theft. The trial was heard by two magistrates, the first having heard the witnesses for the prosecution, and the second the witnesses for the defence. Testimony of the witnesses was in direct conflict as to material matters.

Held: The outcome of the case depended entirely upon an evaluation of the credibility of the witnesses. In these circumstances, the magistrate erred in accepting the testimony of the prosecution witnesses whom he had never seen. The trial should have been started de novo.

135. R. v. Shabani Hamisi, Crim. Rev. 113-M-66; 21/4/66; Platt, J.
Accused was convicted on his own plea of two traffic offences, including allowing his tractor to be driven on the road without there being an insurance policy in force. (Cap. 169, s. 4(1).) For this offence, he was fined Shs. 100/- or three weeks' imprisonment.

Held: That the accused was not himself driving the tractor when it was stopped does not affect his responsibility for the failure to have it insured, since he had given permission for the driver to take it on the road. Therefore, there was no reason "special to the offence" for the
magistrate's failure to disqualify the accused from holding or obtaining a driving licence. Order of disqualification for twelve months from the time of the offence was entered.

136. R. v. Caphas s/o Simon, Crim. Sass. 150-M-66; 2/3/67; Platt, J.
Accused was convicted of manslaughter. The death arose out of a minor quarrel in a bar. The accused merely hit deceased once with his hand, but deceased suffered from a very much enlarged spleen which raptures and caused his death. The blow was not one which would be expected to have been lethal.

Held: In these circumstances imprisonment would not be proper. The court found it advisable "to introduce an element of customary law by way of re-

ducing compensation to the widow of the deceased person." It was ordered that accused pay a fine of Shs. 75/- of which Shs. 500/- was to be paid to the widow under section 178 of the Criminal Procedure Code.

137. Martin s/o Mwiyula v. R. Crim App. 286-D-67; 22/5/67; Hamlyn, J.
Accused was convicted of burglary and attempted defilement of a girl under twelve years of age (P.C .ss. 294(1), 136 (2)), upon evidence that he had broken into a house and attempted the defilement.

Held: As the attempted defilement was the outcome of the breaking and entering, the sentences on the two violations should run concurrently and not consecutively as the trial court ordered.

138. K. K. Namani v. R., Crim. App. 115-D-67; 12/5/67; Duff, J.
Accused firm was convicted of failing to keep records of oral contracts (Employment Ordinance, s. 35 (1),) 35(4) and fined Shs. 400/- and Shs. 450/- respectively on the two counts.

Held: The failure was caused by the fact that the firm had incomplete records; there was nothing sinister in the commissions, and this was the firm's first offence against this section. In these circumstances the fines were excessive. A fine of Shs. 100/- on both counts was substituted.

139. R. v. Hassani Omari Hassani, Crim. Rev. 53-D-67; 8/5/67; Duff, J.
Accused was convicted inter alia, of causing death by reckless or dangerous driving. He was fined Shs. 500/- or two years' in prisonment in default.

Held: (1) The maximum term of imprisonment that could have been imposed in default of such payment was a period of six months. (2) There is nothing in the record to indicate what salary the accused was receiving. It is desirable

to make an inquiry into the financial means of the accused before determining the amount of a fine. "(T) o impose a substantial fine on people of little or no means does not indicate a proper judicial approach to the question of penalty." A term of six months' imprisonment in default was substituted for the original two year term.

140. R.v. Finho s/o Lowio, Crim. Cas. 78-D-67; 25/4/67; Duff, J.
Accused was fined Shs. 20/- or one week's imprisonment in default on each of three traffic offences, the fines to cumulative but the terms of imprisonment in default to be concurrent.

Held: Fines, by their very nature, cannot be concurrent; therefore, terms of imprisonment in default of payment of separate fines also may not be concurrent.

141. R. v. James s/o Sulu, Crim. Rev. 21-M-67; 13/5/67; Mustafa, J.
Accused was convicted of two counts, one of forgery and one of uttering a false document. He was sentenced on each of the two counts to a fine of Shs. 30/- or one month's imprisonment in default on each count, the terms to run concurrently.

Held: The two terms of imprisonment on the two fines cannot be ordered to run concurrently, but must be consecutive. (See. P.C. s. 29 (iii) (a).)

142. Omar Saidi v. R. Crim. App. 205-D-67; 12/5/67; Duff, J.
Accused was convicted of stealing by servant (P. C. s. 271) upon evidence that he had taken Shs. 120/- belonging to Umoja wa Wanawake. The trial court found that the Minimum Sentences Act applied to the offence.

Held: (1) The Minimum Sentences Act was applicable only if the U.W.T is a society, body, party or charity included in these mentioned in items 2 or 3 of Part 1 of the Schedule to that Act. (2) Although U.W.T. is affiliated with T.A.N.U.

It is not a political party within the meaning of that term in items 2 or 3 of Part 1 of the Schedule. (3) It is possible that the money stolen was from funds used for charitable purposes such as those described in Part 1 of the Schedule to the Act, but no such evidence was introduced. There for, the Minimum Sentences Act was inapplicable to this case.

143. R. v. Calboake Camarasingha, Crim, Rev. 46-D-67; 19/5/67; Saidi, J.
Accused was convicted of stealing by a person employed in the public service. (P. C. ss. 270,265). The amount stolen was Shs. 2000/- The trial court placed him on probation for two years upon the condition that he repay the money and surrender his passport.

Held: The minimum sentence of two years imprisonment was mandatory. Since the amount involved exceeded Shs. 100/- special circumstances could not be entertained.

144. Makunya s/o Mjarangi v.R. Crim. App/ 480-M-66; 8/3/67; Platt, J.
Accused pleaded guilty to possession of bhang. In mitigation, he stated that he had formed the habit of smoking bhang when he was a child, and was unable to stop. The magistrate sentenced him to twelve months' imprisonment, feeling that accused needed a sufficiently long period away from the drug to enable him to break his habit. When the appeal was heard, accused had completed his sentence, and no action could be taken.

The Court stated, obiter; The trial court's hope was perhaps "too pious," a shorter sentence should be imposed in such circumstances in the future.

145. R. v. John Muselema, Crim. Rev. 49-D-67; 5/5/67; Duff, J.
Accused was convicted of being in possession of property suspected to have been stolen or unlawfully obtained. (P. C. s. 312). He received a sentence of two years. Accused was said to have six previous convictions. He denied them, and the magistrate proceeded, "without further ado, to take them into consideration in assessing the punishment."

Held: (1) “It appears that only two (of the convictions were relevant.” (2) “(T) he magistrate should have adverted to the provisions of section 143 of the Criminal Procedure Code before holding that the convictions were relevant (3) “In these circumstances I must hold that the previous convictions were not proved, and the accused must be treated convictions were not proved, and the accused must be treated as a first offender,” Sentence reduced to six months.

146. Kamili Sambulu v. R. Crim. App. 39-D-67; 17/5/67; Hamlyn, J.
Accused was convicted of wrongful confinement and sentenced to imprisonment for one year. He had a dispute with another, the result of which was that accused locked the other man in a storage room for twenty four hours without food or water. The only issue of substance on appeal was the length of sentence. Accused had no prior convictions of any sort.

Held: (1) The offence here involved is a misdemeanor, Accused ’s behavior does not merit the severe punishment meted our to him. Sentence was reduced to three months. (2) The person damaged by accused ’s wrongful behavior has it open to him to bring a civil action for false imprisonment, there by punishing accused according to amount of harm inflicted by his actions.

This paragraph is to supplement the digest of case number 81 (Masenu s/o Butili v. R., Crim. App. 379-M-66; 7/3/67; Platt, J.) digested in Volume 1, Number 2. The digest of that case stated, “Accused did not dispute that a garage was within the specified types of buildings. “(See P. C. s. 296 (1).) The digest should have read as follows;

The court stated, obiter; Although accused did not raise the issue, it would seem that a garage is not within the building specified in Penal Code Section 296 (1) This case affords another example of the necessity for amending that section.

147. Laurian Kabobwe v. R., (PC) Crim. App. 147-D-67; 12/5/67; Hamlyn, J.
Accused was convicted of stealing bananas under section 265 of the Penal Code. The sole dispute was whether the accused or the complainant was the owner of the shamba from which the bananas were taken. Section 258 of the Penal Code states: "A person who fraudulently and without claim of right takes anything capable of being stolen… is said to steal that thing."

Held: It is not theft to take goods under a genuine claim of right: "It is immaterial whether such claim is properly based in law, as long as (the accused) believes it to be good." Conviction set aside.

148. Adam s/o Athumani v. R., Crim. App. 802-D-66; 5/4/67; Biron, J.
Accused was convicted of housebreaking, stealing, and forgery upon evidence that on 17 July 1966 he was found in possession of an obviously altered rate receipt stolen from the complainant's house on 1 May 1966. Eighteen shillings had also been stolen. On the day of the instant conviction, accused was also convicted on an unrelated charge of housebreaking. Because of the latter conviction, he was not treated as a first offender with regard to the Minimum Sentences Act, 1963.

Held: (1) The evidence of the possession of the stolen rate receipt, in the absence of any explanation at all, fully supports the conviction under the doctrine of recent possession. (2) The unrelated conviction occurred after the commission of the instant offense and does not constitute a previous conviction so as to disentitle accused from treatment as first offender under the Minimum Sentence Act, 1963. Therefore, the court was empowered to consider whether special circumstances justified imposition of a sentence less than the prescribed minimum (Minimum Sentence Act, 1963,s. 5(2). The proceedings were remitted for such consideration.

149. Kamando Mahinyira v. R. (PC) Crim. App. 31-D-67; 16/5/67; Saidi, J.
Accused was convicted of cattle theft upon evidence that he was found in possession of a stolen bull four years after the theft had taken place. From the out-

set, accused claimed that he had received the bull from a third person in exchange for five goats. This third person was jointly charged with accused but was acquitted after telling the court that it was another bull which he had exchanged with accused.

Held; (1) It is doubtful whether the doctrine of recent possession could be invoked after a period of four years. (2) The explanation of possession by accused was not unreasonable; it would not be expected that the co-accused would admit giving him the stolen bull. Accused need not prove his explanation to

The entire satisfaction of the court. It was the duty of the prosecution to prove the explanation false. The appeal was allowed and the conviction quashed.

150. Saidi s/o Kasongo v. R. Crim. App. 1-M-67; 24/4/67; Platt, J.

The accused were convicted of burglary (P. C. s. 294(1)) and robbery (P. C. ss. 285, 286.) The facts stated by the prosecution, which the accused accepted, were that the accused had broken into the complainant's house armed with weapons and forced him to give them Shs. 3025/-. In their pleas, two of the accused stated that they "robbed" complainant of his money, and the third accused stated that they "forced" complainant to give them money These were recorded as pleas of guilty.

Held: Penal Code section 285 provides that the threat or actual use of violence is an element in the crime of robbery. The words "robbed" and "forced" in the pleas were used colloquially and do not in themselves show the threat or use of actual violence. The facts presented by the prosecution –that the three armed men told the complainant to give them fear in doing so was because they had actually threatened or used violence against him. " The convictions of robbery were set aside and convictions of theft substituted.

151. Moses s/o Kalamu v. R., Crim. App. 678-M-66; 28/4/67;---------,J.
Accused was convicted of stealing as the servant of the Tanganyika African Parents Association. (P.C. ss. 271, 265.) There was evidence that he had received the money but had not recorded the receipt in his accounts. However, there was no evidence that T.A.P.A. did not receive the money at some subsequent time.

Held; "(1) t must be shown that an accused has not only failed to account as a matter of book entries but that he has failed to account at a time when he should have accounted, there being evidence to show that the money was not to hand. The prosecution must always show that an accused is not merely at fault through negligence but guilty of theft."

152. Jackson s/o Sumuni v. R., Crim. App. 89-M-67; 24/4/67; Platt, J.
Accused was convicted of theft by public servant and sentenced to two years' imprisonment and twenty-four strokes. He pleaded guilty with the words, "It is true." The statement to which he assented averred that he was "personally responsible" for the loss of money.

Held: (1) "It is true" is not an adequate plea of guilty. (2) The offence of theft by public servant must include an actual theft; that the accused was "personally responsible" for the loss may establish mere negligence. (3) Although a conviction would necessitate a minimum sentence, the accused "would not really be prejudiced" by a re-trial, since he "has not been long in prison." Re-trial ordered.

153. Tajdin P. Mamdani v. The New Great Insurance Company of India, Ltd., Civ. App. 18-D-66; 15/6/67; Duff, J.
This action involved claims under a marine insurance policy . The appeal was properly filed together with a copy of the decree of the court of first instance, against which this appeal was brought. Respondent cross-appealed but did not file a copy of the decree.

Held: Order 39, rule 1, of the Civil Procedure Code, 1966, provides that a memorandum of appeal "shall be accompanied by a copy of the decree appealed from …." The rule is imperative, and the cross-appeal must be dismissed, even though the Court had before it the copy of the decree filed with the appeal.

154. Salum s/o Rashidi v. Hadija d/o Abdallah, (P.C) Civ. App. 61-D-66; 2/5/67; Saidi, J.

Plaintiff's wife died shortly after the birth of their son. The child remained with the wife's sister until the age of five years, when plaintiff brought this action for his custody. The Primary Court ruled that plaintiff could have the child when he had reached the age of seven years. Plaintiff applied for a copy of the judgment and the proceedings, but did not receive them, and for this reason was unable to file his appeal until the time (30 days) had expired.

Held: (1) "Until (plaintiff) had received such a copy the period of thirty days' limitation could not be said to have started to run against him. Normally the time requisite for obtaining a copy of a judgment or an order appealed against should be excluded in computing the period of thirty days …"

The Court stated, obiter: "It would also appear that it is unfair for a court to grant custody of a child to any person other than a parent who is keen and able to maintain such child unless such parent is disqualified by unsuitable character, such as loose morals or chronic drunkenness.

155. In re Shariff Jamal & Sons Limited, Misc. Civ. Cause 23-D-67; 15/6/67; Duff, J.

The applicant company, which was actively doing business, was struck from the rolls for failure to make the necessary returns. The applicant moved, by means of a chamber summons, for restoration to the Register of Companies. The only issue before the High Court was whether the form of proceeding had been proper.

Held: Such an application should be made by way of petition Citing In re National Agricultural Credit Agency, Misc. Civ. Cause of 1967. However, in the

absence of any prejudice, the chamber summons was treated as a petition and restoration was ordered.

156 Burns & Blane Limited v. United Construction Company Limited, Civ. Case 4-D-66; 6/5/67; Duff, J.

Plaintiff sued for goods sold and delivered and services rendered. Plaintiff had acted as a subcontractor to defendant, the main contractor, on a construction project. Defendant did not deny that it was liable under the contract. However, defendant alleged that plaintiff's recovery should be reduced by the amount of expenses which defendant had incurred in correcting certain defects and also by the amount of a settlement which defendant had made with a third party, the company for which the building was being constructed, because of other defects in materials which plaintiff had supplied.

Held: (1) There was no privity of contract between plaintiff and the third party with which defendant made the settlement, nor did defendant expend funds to correct those defects in respect of which the settlement was made. Therefore, the amount of the settlement should not be deducted from plaintiff's

Claim. (2) With respect to those expenses incurred by defendant in correcting certain of plaintiff's defects, the damages sought by defendant were by way of set-off and should not be treated as special damages which should have to be specially pleaded. These damages should not, in equity, be rejected. Citing Habib Javer Nanji et. Al. v. Vir Singh, (1962) E.A. 557. If plaintiff required further particulars as to such damages, it was required to seek them, and it cannot now raise the matter on appeal.

157. Manji Gangji Alidin v. Globe Mercantile Corporation Ltd., Civ. Case 18-D-65; 15/6/67; Duff, J.

In March 1964 plaintiff contracted to supply defendant with 70/80 tons of sisal before December 1964. By September 1964, 25 tons had been delivered. Defendant failed to pay for the last two deliveries, claiming that it had the right to remove them to another place after delivery and to reject them after an inspection there. Plaintiff had four more tons of sisal prepared, but sold them to a third party at a loss after defendant had stated its intention to reject them by disputing their quality. The court found this sisal to have been of the required quality. Plaintiff also claimed damages for 21 tons of sisal which were due under the contract but which he had not produced at the time of defendant's refusal of deliveries.

Held: (1) With regard to the sisal which plaintiff had delivered, ownership passed at the time they were delivered to the first warehouse. Thereafter, defendant could not repudiate delivery, and its only remedy if the sisal was defective was to sell at the best possible price and sue for the loss suffered. (2) With regard to the sisal which was ready to be delivered, defendant in effect rejected delivery, and plaintiff is entitled to the difference between the contract price and the cost of production. (3) Plaintiff had the burden of proving that he would have been able to complete the contract had it not been broken by defendant. He failed to do so and cannot recover for any losses with respect to the sisal which had not been produced at the time of the breach.

158. Bundile d/o Waziri v. Tekla d/o Paul, (PC) Civ. App. 31-D-67; 6/6/67: Daff, J. Plaintiff brought an action in Primary Court seeking, inter alia, to have the register of business names amended.

Held: Under section 7 of the Business Names (Registration) Ordinance, Cap. 213, the amendment of the register of business names is a matter "purely within the province of the High Court." The Primary Court had no jurisdiction to deal with this cause, and its order was properly quashed by the District Court.

159. Musa s/o Makono v. Rehema d/o Hassani, (PC) Civ. App. 106-D-66, 31/5/67, Georges, C.J

Appellant was the uncle of respondent, and executor of her father's estate. The parties are Wagoni by tribe and Muslim by religion. Appellant's defence to respondent's action for her share of the estate was that the respondent had not treated him as an uncle, as she should have done, and therefore she had forfeited her right to a share of her father estate. Appellant conceded that he had no cause of action If Ngoni law was applicable.

Held: Ngoni law should be applied here. "There is nothing in the circumstances of this case to show that the parties intended their religious law to apply as their personal law rather than their tribal law." The trial court's award of damages to respondent (with a minor adjustment was affirmed.

160. Salim Ramadhani v. Mariam Ikunga, (PC) Civ. App. 23-D-67; 24/6/67; Georges, C.J.

This was a suit by a wife for part of the produce of a field of rice which she helped her husband to cultivate to before they were divorced. It was agreed that the field produced 10 bags of rice.

Held: Rule 71 of the Local Customary Law Declaration Order (1962) provides, " A farmer's wife shall get 1/4 of the crops non-perennial or perennial, stored or standing in the field, for the year during which divorce was granted." Accordingly, the wife was awarded 2.5 bags of rice.

161. Luth d/o Nkotwa v. Neva s/o Mwandumbya, (PC) Civ. App. 60-D-66; 7/6/67; Duff, J

Plaintiff's husband died in 1955, and she was inherited by the defendant in the same year, consenting to be his wife. They were divorced in 1966, at the instance of the defendant. Plaintiff brought an action to recover property which she claimed constituted her late husband's estate.

Held: The District Magistrate, having considered the Local Customary Law (Declaration) Orders 1963, Government Notices 279 and 436 of 1963, and acting on the recommendation of two assessors, correctly held that the defendant was the late husband's lawful heir, and that the wife was entitled only to maintenance and to retain possession of her private property. The customary law involved was not specified by the High Court.

162. Hemedi Shemmela v. Amiri Shemmela, (PC) Civ. App. 7-D-67; 14/6/67 Hamlyn, J.

Appellant and respondent are each sons of the deceased and claim a share in his estate. Appellant is the natural child of deceased, but his mother was inherited by deceased when her first husband died. Respondent claimed that because appellant is the son of an inherited wife, he should not share in the estate.

Held: Samba law is unclear on this issue, but the Court, upholding the court below, held that even if appellant's mother were an inherited wife, that did not affect his right to a share in the estate. (Local Customary Law (Declaration) Order, 1963, Rule 64.) Therefore, he should share in the estate on the same basis as the other claimants.

163. Robert F. Lugakingira v. Leonard F. Lugakingira, (LC) Civ. App. 13-D-63; -/6/67; Hamlyn, J.

This action concerned the division of a house and plot among the heirs of deceased. The appellate court which first heard the case conceded that according to Haya customary law, the house and property were to be physically divided among the heirs. However, the court noted that the dispute had led to much animosity among the claimants and that criminal proceedings had arisen from the quarrels. Therefore,

The court decided that a “new remedy” was required and ordered that the property be sold and the proceeds distributed to the claimants.

Held: Customary law originates from the repetitive decisions of persons who, by general consent, act as arbiters. As conditions change, new concepts may replace the old in such decisions. Citing Cory and Hartnoll, Customary Law of the Haya Tribe, introduction; Kabaka v. Kitonto, (1965) E.A. 278. However a custom derives its validity from the assent of the vative community, and changes may not be imposed by a court of law. Citing Eskugbayo Eleko v. Nigeria Government, (1931) A.C. 662, 673; Marko Kajubi v. Kulanima Kabali, 11 E.A.C.A. 34. Therefore, the order of sale was incorrect and the property itself must be distributed.

164. Kidukila d/o Alli v. Rashidi s/o Rashidi, (PC) Civ. App. 10-D-67; 2/6/67; Hamlyn, J.

The precise nature of the action brought by plaintiff is not clear, but the issue whether he and defendant had been married under Islamic and Zaramo law. Although defendant had lived with him for a number of years, and plaintiff had made a payment of Shs. 100/- to her father, she argued that the payment was only a customary “introduction-fee” and that it did not effect a marriage. The Primary Court found for defendant, the assessors agreeing that plaintiff had not paid the required dowry and that, in any event, the Islamic form of marriage had been followed in the Zaramo area for some time. The District Court of Ilala found that there was a marriage, despite the advice of the assessors that “neither by local custom nor by Islamic law did a true marriage exist between the parties.”

Held: Because the assessors were unanimous in saying that no marriage existed, and because “there was nothing else on the record” to show the contrary, the arrangement between the parties must be held not to have been a marriage.

165. Asukile s/o Mwakyoma v. Manyase s/o Mainge, Civ. App. 19-D-67; Duff, J.

Plaintiff's seven-year old daughter was killed in a motor accident. In this action he sough damages of Shs. 1000/- for loss of society, and Shs. 2200/- to compensate for the value of cattle he would have received when she married.

Held: (1) The measure of damages under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Chapter 360, is the dependant's net cumulative loss resulting from the deceased's death. It must be shown that the dependant had a reasonable expectation of pecuniary benefit if the deceased had lived. (2) There was no evidence that the child assisted in domestic service and no suggestion that she would have assisted had she lived. Therefore, the general damages of Shs. 1000/- were not proven. (3) Damages with respect to the child's marriage were equally conjectural and must be rejected.

166. In re Petition by Habel Kasenha, Misc. Civ. Cause 9-D-67; -/6/67; Saidi, J.
Petitioner received more than half the votes cast at the preliminary nominations by the Branch Annual Conference. Before the election for the seat in Ward 29 of the Mpwapwa District

Council. The District Returning Officer forwarded his name, with four others, to the District Executive Committee. He testified, however, that for reasons contained in a "confidential letter" in his possession, which letter "he did not wish to be read in Court, "petitioner's name was not recommended by the District Executive Committee. Thus, two other candidates were nominated and the election was held.

Held: (1) The proceeding of a meeting of a Branch Annual Conference "or any other organ of the party" which is held under the Local Government (Elections) Act 1966 are not subject to court review, by way of election petition or otherwise. Citing section 78(2) of that Act. (2) The conference proceedings could not

be treated as tantamount to a by-election. “By-election have the same results as elections – the designation of persons to fill given positions –when a vacancy occurs other than at the usual time for elections. The proceedings here were clearly preliminary to an election. Citing Local Government (Elections) Act 1966, s. 2(1); Local Government (Elections) (Amendment) Act 1966, s. 7F Petition dismissed.

167. In ro Petition by K. A. Thabit, Misc. Civ. 5-D-67; -/6/67; Saidi J.

Petitioner, the unsuccessful candidate in the election to the seat in Ward 10 of the Rufiji District Council, prays that the election be declared void, because the election symbols given to him and his rival were reversed on the ballot papers. Petitioner had been given the symbol “House”, his opponent was given the symbol “Hoe”. The Returning Officer testified that 75 per cent of the voters in the Rufiji District were illiterate and were guided by the symbols rather than the names of the candidates. Petitioner received 31 votes to 267 for his opponent.

Held: It cannot be surely said that the results would be reversed had the symbols been aligned with the proper names, so the petitioner cannot be declared elected. The fairest solution would be to hold the election afresh, and the High Court so ordered.

168. South India Corporation (Travencore) Private Ltd. v. H. J. Stanley & Sons Ltd., Civ. Case 37-D-60, 14/6/67; Georges, C. J.

Defendant contracted to sell cashew nuts to plaintiff, and this suit arose out of a dispute as to their quality. Two samples of the nuts were taken and were sent for inspection to a company (General Superintendents) nominated by plaintiff. With respect to one of these samples defendant offered into evidence the original certificates of General Superintendents stating the results of the inspection. With respect to the other sample, the original certificate was not introduced, but defendant offered a letter purporting to state the results of the test.

Ruled: (1) Neither the certificate nor the letter were admissible as a business entry under section 32 (2) of the Indian Evidence Act. To come within that section, the business entry must deal with matters of fact rather than of expert

opinion as did this evidence. (2) The opinion of the expert must be given orally, and a mere certificate by him is not evidence. Citing commentary of Indian Evidence Act, section 45; Ratantal and Dhirajlal Thakore, The Law of Evidence, 14th Ed., p. 133. (3) The original certificate was, however admissible as an admission by plaintiff. Section 20 of the Indian Evidence Act, which applies to both oral and written statements, provides, "Statement made by persons to whom a party to the suit has

Expressly referred for information in reference to a matter in dispute are admissions. " (4) The letter constituted secondary evidence of the original certificate and cannot be admitted until a proper foundation has been laid.

169. Mohamed Hamisi v. Salum Alli, (PC) Civ. App. 17-D-67; -/6/67; Hamlyn, J.
A woman deserted her husband, after conceiving a child by him, and went to live with another man. The child was born while she was living with this man. The issue was whether this man or the husband was entitled to custody of the child.

Held; The fact that the woman left her husband does not entitle her to a divorce. This being so, her living with another man does not confer upon him the status of husband. He has no claim to the custody of the child as it was conceived while a valid marriage was in force.

170. Shomari Kitimu v. Kambi Selemani, (PC) Civ. App. 1-D-66; 23/5/67; Saidi J.
Plaintiff brought this action against his father –in-law in connection with his marriage to defendant's daughter. Plaintiff had obtained a divorce in 1964 but sometime later recalled his wife. She refused to return. The trial court ordered defendant to order his daughter to return to plaintiff. Plaintiff had previously brought three other actions in connection with these same matters.

Held (1) Under Islamic Law, the recall had to be made within three months. (2) The evidence presented at this trial and three previous trials fails to

support plaintiff's claim that he recalled his former wife within three months of the divorce. Defendant's appeal was allowed.

The Court stated, obiter: "I do not think that it is a good policy for a court of law to order either spouse to return to the other against his or her will."

171. Jayant D. Desai v. Hashi Warsama, (PV) Civ. App. 51-D-66; -/6/67; Hamlyn, J.

An Asian doctor sued defendant, a Somali, for house rent and medical fees. The Primary Court entered an ex parte judgment in his favour. The District Court ruled that the Primary Court proceedings were a nullity, since that court had no jurisdiction, recovery of rent being a matter for the Rent Restriction Board. Plaintiff argued that the Primary Court did have jurisdiction to hear the case as one involving "Customary law" since it is "a custom of people to lease houses and pay rent therefore."

Held: "Customary Law" cannot be the basis of any proceedings between parties "who meet on no common ground of legal procedure and jurisprudence." Appeal dismissed.

172. Cecilia Fernandes v. Noordin Ali Vali Issa, Misc. Civ. App. 2-D-67; 29/A/67; Duff, J.

Appellent applied to the Rent Restriction Board for a declaration that the room she occupied was in residential premises, and for other relief against the respondents. At the time of the application, the premises had been licensed as a "common lodging house" by the City Council of Dar es Salaam, but it was not clear whether the licence had been issued before or after the letting of the premises to appellant. Because the licence had been issued, however, the Board dismissed the application for want of jurisdiction.

Held: “It is obvious that a landlord cannot deprive a tenant of the protection afforded by the Rent Restriction Act by an unilateral action on his part, viz. the obtaining of a licence for a common lodging house in respect of ….. premises which had previously been let …” The matter was referred to the Resident Magistrate’s Court for a hearing de novo.

173. Fatuma d/o Amani v. Rashidi s/o Athumani, (PC) Civ. App. 105-D-66; 25/5/67; Hamlyn, J

Defendant claimed to be the true wife of the deceased. There was evidence that she had co-habited with him for a long period, and two witnesses testified that deceased had told them that defendant was his wife. The district court on appeal reversed a judgment for defendant.

Held: (1) The common law principle that prolonged co-habitation raises a presumption of marriage, where circumstances to the contrary do not arise should be applied. There was no evidence to the contrary in the present case.(2) The district court (the first appellate court) erred in giving no weight to the testimony concerning the statement of deceased that defendant was his wife.

174. In re Abdallah Salim Ali Ab-Salaam, Misc. Civ. 19-D-67; 15/6/67; Georges, C.J.

Applicant sought a court order prohibiting enforcement of a notice which stated that he was a prohibited immigrant and ordered him to leave Tanganyika within 24 hours. (Immigration Regulations 1964, Regulation 13.) He contended that he was both a citizen and an African and, therefore, was exempted from the Immigration Act by section 2(1) (a) and 2(1) (b) thereof, Several witnesses, including several respected and well-informed wazee, testified that they had known both the applicant and his mother for many years and that both had been born in Tanganyika. There was also similar evidence that his father was an Arab and his mother half-Arab and half-Mnyamwezi. However at various times in the past, the applicant had claimed in passport, visa and other official applications to have been born in Muscat and to be a Muscat citizen.

Held: Section 1(1) of the Citizenship Act, 1961 designates persons born in Tanganyika as citizens, "(p)rovided that a person shall not be a citizen if neither of his parents that a person shall not be a citizen if neither of his parents was born in Tanganyika," This section clearly requires only that one parent have been born in Tanganyika. (2) Section 2(4) of the Immigration Act defines "African" as including Swahilis. "Swahili" is the name given to an ethnic group of the coastal regions consisting of persons descended from the union of African and certain non-African stocks, such as Arab or Somali. It is irrelevant whether the union occurred one or many generations ago. Citing Purshottan Narandes Kotak v. A. Ali Abdullah (1957) E.A. 321. Therefore, applicant's evidence, if believed, would prove he is on the applicant. (Immigration Act, ss. 22(a), 22(b).) However, his evidence here was sufficient to overcome the force of the prior inconsistent statement he had made. Therefore, he cannot be deported.

175. Akber Morali Alibhai v. Total Jamhuri Service Station. Civ. Case 43-D-65; 15/6/67; Duff, J.

Plaintiff and defendants were all partners in an oil business, the profits of which were to be shared. Plaintiff was appointed manager of the business and sued for unpaid salary of Shs. 34500/-

Held; Plaintiff cannot sue his co-partners. To do so would establish a relationship of creditor and debtor, and such a relationship cannot arise until after a partnership has been dissolved and accounts have been taken. "The present suit…. Involves a claim for salary by an employee against employers, a relationship that does not exist." The proper remedy was an action for a general or a limited accounting. The suit was dismissed.

176. Attilia Mosca v. Hassanali Kassam Damji, Civ, App. 2-D-67; 15/6/67; Duff, J.

Plaintiff obtained an ex parte decree against defendant in an action on debt. Defendant applied to have the decree set aside after the thirty-day period for so doing had expired. A summons had been issued, but it was not clear whether it had been served.

Held: (1) Article 164 of the Limitation Act requires the application to be filed within thirty days of the date of the decree or, where the summons is not served, the date when the applicant has "knowledge of the decree." The Magistrate must therefore determine whether the summons has been served (2) "Knowledge of the decree" means knowledge "not merely that a decree has been passed by some Court ….. but that a particular decree has been passed …. In a particular Court in favour of a particular person for a particular sum. A.L.R. (1923) Bombay 193. Case remitted to the lower court for further directions.

177. Ali Nyamgunda v. Emilian Kihwili, (PC) Civ. App. 68-D-66; 13/6/67; Hamlyn, J.

Plaintiff alleged that defendant had made her pregnant. Plaintiff was successful, and submitted a Bill of Costs including an Instructions Fee of Shs. 1500/- This amount was reduced by the Taxing Master to Shs. 200/- The case was brought before the High Court on an Application for Reference.

Held: "(A)n order will be made on an Application for Reference upon Taxation only if the officer dealing with the Bill has proceeded upon some wrong principle. The certificate of the taxing officer will not be reviewed on a mere question of quantum save in exceptional circumstances." Citing In the Estate of Ogilvie; Ogilvie v. Massey (1910) p. 243.

178. Esther David Mmari v. Emmanuel Makaidi, Misc. Civ. Cause 8-D-67; 26/5/67; Georges, C.J.

Applicant, the father, sued respondent, the mother, for custody of a child. The service of summons was defective in that it failed to state affirmatively that respondent should appear and did not specify the date, time or place for appearance. Service was rejected by respondent. Later, the magistrate sent a letter to

respondent advising her of the hearing. However, there was no indication in the record that the letter was posted, correctly addressed or received. Applicant was awarded custody of the child. Respondent the filed this appeal within the required time, but the notice of intention to file the appeal was filed out of time.

Held: (1) This case justifies extension of the time for filing notice of intention to appeal. (2) A court can proceed

To deal with a matter ex parte only where there is proof that there was service of a proper summons on the absent party. (3) The magistrate's letter did not cure the defect in the service of summons because there was not indication that it was received. The Court stated, obiter, that it was in any event quite undesirable that a party should be summoned to appear in court by a letter signed by the magistrate.

The Court also stated, obiter; Although there were allegations that respondent could not take proper care of the child, there was not allegation and no evidence that the father was in a better position to do so. Thus, the evidence would in any event have been insufficient to support the award.

179. Ebrahim Abdulla Bahurmuz v. The City Council of Dar es Salaam Civ. Case 73-D-66; 27/5/66; ----------, J.

Plaintiff brought this action against the city Council of Dar es Salaam, and alleged erroneous

valuation of their property, which defendant had acquired under the Town and Country Planning Ordinance. During the taking of evidence concerning an unrelated preliminary point, testimony was introduced suggesting that a mistake had been made, and that defendant's valuation had in fact referred to a neighboring house. Defendant then applied for leave to present a third party notice against the owner or the neighboring house, but did not specify what claim might be

made against the third party. At the time of the application the pleading were closed.

Held: The court has a general discretion in all cases to allow or not to allow the notice to be served, but it should not allow this procedure if the result will be to embrass or delay a plaintiff. Such applications as a general rule will be refused if not made until after the close of the pleadings. Citing Birmingham and District Land Co. Ltd. V. London and North Western Railway Company 56 L. T. 702. The application was dismissed.

180. Saidi Sefu v. Aidan A. Mwambeta, (PC) Civ. App. 37-D-67; -/5/67, Saidi, J.
Plaintiff's daughter was seduced by defendant; she did not become pregnant.

Held: (1) Because no pregnancy resulted there can be no cause of action for loss of services. (2) Damages can be claimed by the parents for injured feelings and for the dishonors to the daughter and the family caused by the act of the seducer. However, because no pregnancy
occurred the damages allowed are not substantial. The High Court affirmed an award of Shs. 150/- damages to plaintiff.

181. Halfani Salumu v. Hasifa Kondo, (PC) Civ. App. 52-D-67; -/5/67, Saidi, J.
Respondent claimed damages for "the expenses incurred by her in educating her daughter for six years on the ground that the daughter was expelled from school because she was made pregnant by the defendant."

Held: (1) The claim does not disclose a cause of action as presented because it is the duty of a cause of action child. Expenses incurred for that purpose cannot be claimed for the child's education being cut short by intervening circumstances, such as the ones in the instant case. (2) However, respondent was entitled to damages for seduction of his daughter on the ground of loss of services, to the extent of Shs. 600/-

The Court stated, obiter: “There is a good case for a claim for the maintenance of the child who has been born as a result of the pregnancy …… under the Affiliation Ordinance, Cap. 278,

182. Nasoro Asumani v. R., (PC) Crim. App. 77-D-67; 22/6/67; Hamlyn, J.
Accused pleaded guilty to the charge of failing to cultivate the minimum area prescribed and to plant it with cotton. The appeal was dismissed as incompetent, but it raised the issue that his plot had not been measured by the authority prior to being cultivated and that this procedure was unjust.

The Court stated, obiter: It is the duty of the accused to ensure that the area is not less than that prescribed. However, many small – holders may be in doubt as to what area does in fact constitute the minimum area and it is suggested that the District Council or some other authority assist them by providing some person to aid them in this matter.

183. Peter John v. R., Crim. App. 595-M-66; 17/5/67; Platt, J.
Accused was convicted of receiving stolen property and escape from lawful custody. In addition to a sentence of imprisonment and corporal punishment, the trial court recommended his expulsion as an undesirable person. (Expulsion of Undesirables Ordinance, Cap. 39,s.13.) Accused was from Rwanda, had a long record of previous convictions, and had no settled place of residence in Tanzania.

Held: (1) Before making a recommendation for expulsion, a magistrate must consider first, whether he has the power to make recommendation, secondly, whether the public good appears to require it and thirdly, whether the public good appears to require it and thirdly, whether disproportionate hardship would be caused to the accused or his dependents. (2) Having convicted the accused of a felony, the magistrate was empowered to make the recommendation in addition to the sentence imposed. (3) Accused ’s previous convictions and bad character support the conclusion that his expulsion would be in the public interest. (4) No undue hardship would be caused accused. The Court noted that it was for

the authorities to decide whether it would be convenient for the Government to arrange the expulsion.

184. Saidi Rajabu v. R., (PC) Crim. App. 40-D-67; 25/5/67; Hamlyn, J.
Accused was convicted in a Primary Court of stealing and housebreaking. The District Magistrate upheld the conviction, one of his reasons being that the accused "was once convicted with similar offence in October, 1966."

Held: This remark was "most improper". The fact of such a conviction should carry no eight in deciding a case on appeal. Conviction set aside.

185. R. v. Amosi s/o Mwakisitu, Crim. Rev. 59-D-67; Duff, J.
Accused set fire to his house, to end his relationship with his wife, whom he believed to have been unfaithful. He was convicted of arson, under section 319(a) of the Penal Code.

Held; This "It would be unlawful for him to set fire to his own property if a person is in the premises or other building were endangered and were accidentally set on fire …… In this case it appears that only the home of the accused was.

Damages and this cannot constitute arson within the meaning of section 319 of the Penal Code." Conviction quashed.

186. Bosco @ Lucas s/o Sungura v. R., Crim. App. 341-M-67, 2/6/67, Cross, J.
Accused was convicted of arson. The evidence for the prosecution was that the appellant was heard by two witnesses to utter threats to burn the complainant's house almost immediately after the house was seen to be on fire and the appellant was observed walking away from it.

Held: This was sufficient to support the appellant's conviction if the magistrate believed the testimony of the witnesses. Conviction was affirmed.

187. Paulo s/o Mwanjiti v. R., Crim. App. 316-D-66, 20/7/66, Otto, J.
Accused was convicted on two counts of robbery. Posing as a police officer, he relieved two persons of Shs. 304/10 after "arresting" them. He took the money as "bail" and told the victims to appear at the local police station the next day.

Held: (1) Robbery, as defined in P. C. s. 285, involves stealing plus the use or threat of violence by the accused. The evidence disclosed not use or threat of violence, so the conviction of robbery could not be maintained. (2) The evidence was, however, sufficient to support a charge of cheating contrary to P.C. s. 304, conviction being substituted for the robbery conviction under Crim. Proc. Code section 181 and 187. A sentence of 12 months imprisonment was imposed on each count, sentence to run concurrently.

188. John Makindi v. R. (PC) Crim. App. 679-M-66; 2/6/67; Mustafa, J.
Accused was convicted under Penal Code, section 114 (a), with obstructing a court messenger in the execution of a search warrant.

Held: This section is in respect of contempt of court within the premises in which any judicial proceeding is being had or taken. It does not apply to obstructing the execution of a search warrant. The conviction was quashed.

189. Rashidi s/o Hamisi v. R., District Court Criminal Appeal 39-Kondoa-67; 7/6/67; Inspection Note by Hamlyn, J.
Accused was convicted in Primary Court of unlawful wounding, and sentenced to six months' imprisonment. The District Court enhanced the sentence to eighteen months. Under the Third Schedule to the Magistrates' Courts Act, 1963, the "ordinary powers of the primary court do not exceed a twelve month's term of imprisonment."

Noted: Under section 17(b) of the Magistrates' Courts Act, 1963, the decision of a Primary Court may not be altered by a District Court so as to be in excess of the jurisdiction of the Primary Court. Sentence set aside "in the reversionary capacity of this Court;" twelve months' imprisonment substituted.

190. Marcus Liopold Lupembe v. R. Crim. App. 145-M-67; 7/6/67; Platt, J.
Accused was convicted of theft by Public servant. (P.C. ss. 265, 270.) He was in charge of paying compensation claims and there was evidence that he failed to give the money to the rightful claimants. His defence was the money had been paid to other persons by mistake and there had been no theft. However, there was evidence that when an accountant had notified him.

of the missing funds, he had stated that he had lost them and made partial restitution.

Held: (1) Both the admission that accused had lost the money and the evidence that he had made partial restitution were admissible into evidence because these events took place before the police had been called in to investigate the case. (2) However, the admission might have referred to the fact that the money had been paid by mistake to the wrong persons. Therefore, it was ambiguous. The conviction was quashed for insufficient evidence.

191 Jeremius s/o Boramwendo v. R., Crim. App. 260-D-67; 9/6/67; Saidi, J.
Accused was convicted of housebreaking and stealing solely on the basis of the testimony of an eight-year-old child who saw the theft. The trial magistrate was satisfied that the child understood the nature of an oath and was sufficiently intelligent to distinguish the truth a lie. Therefore, the child was sworn.

Held: A conviction cannot be based on the uncorroborated testimony of a child of tender years. In the absence of any special circumstances, this proscription applies to any child who is less than fourteen years old. Citing Kibageny Arap Kolil v. R., (1959) E.A. 92. The conviction was quashed.

192. John Sheta v. R. Crim. App. 27-M-67; 31/5/67; Platt, J.

Accused was convicted of forgery and theft. During the trial he attempted to call a witness, but the magistrate refused because that witness had been in court during part of the proceedings.

Held: "It must always be remembered that though a witness has been in court, his evidence is not therefore inadmissible, though it may well be that the weight of his evidence is affected. But this is a matter which can only be tested after the witness has given evidence." Convictions quashed.

193. Adam Shabani v. R., Crim. App. 149,150,151,152-M-67; 3/6/67; Platt, J.
Accused was one of four persons convicted of robbery with violence (P.C. s. 286). He said that at the relevant time he had been at home with his mother, and that he had sold some bananas to a customer, while he was there. He did not call the customer as a witness. He tried to call his mother, but the prosecutor objected, stating that she had been present in the courtroom though out the trial. The magistrate sustained the objection. He later stated that he was not "entirely" satisfied with the defence.

Held: (1) The fact that a witness for the defence may have been present during the testimony of other witnesses "does not make his or her evidence inadmissible. It is a matter of ascertaining the materiality of the evidence and the weight to be attached to it." (2) The refusal of this evidence, coupled with the magistrate's implied suggestion that accused 's defence had had some force, meant that the trial "was not carried out with fairness to the appellant, with the result that it must be held a nullity." Conviction quashed.

194. Ludovico s/o Kashaku v. R., (PC) Crim. App. 600, 601-M-66; 31/5/57; Platt, J.

Accused were convicted of burglary and stealing, and were sentenced under the Minimum Sentences Act. They were allegedly caught in the home of complainant

after having broken in at night, and complainant stated that Shs.100/- were taken. One of the accused was apprehended on the spot, and the other was found later elsewhere; the second accused was identified by the two men who had rescued the complainant. It was also alleged that the first accused had been convicted of an offence previously, but this was not proved. No finding was made as to the age of the first accused. The convictions for stealing were set aside for lack of sufficient evidence.

Held: (1) It is unsafe to support the conviction of the second accused, who was not brought directly from the scene of the offence to the custody of the police, on "the bare assertions of the witnesses that they had recognized him." In the circumstances, especially because it was dark when the offenders were found by the witnesses, "there ought to be evidence showing clearly in what way they were identified," e.g., by the sound of their voices, their distinctive clothing, etc. (2) Prior convictions cannot be considered in sentencing unless they are admitted by the accused, or proved. (3) Where corporal punishment is involved a specific finding as to the age of the accused must be made. (4) "As the charge of theft had not been sustained and as the appellant had no proven previous convictions it seems to me that this is a case where discretion should be exercised under section 5(2) of the Minimum Sentences Act, "which allows leniency in appropriate cases Conviction and sentence of second accused set aside; convictions of first accused upheld, but sentence reduced to result in immediate release.

195. R. v. Iddi Noel, Crim. Rev. 65-D-67; 14/6/67; Georges, C.J.

Accused was convicted of entering a dwelling house with intent to steal. The only evidence connecting accused with the crime was the testimony of two children, neither of whom testified under oath.

Held: Criminal Procedure Code, section 152, requires that where evidence is given not on oath or affirmation by a child, "the accused shall not be convicted unless such evidence is corroborated by some other material evidence in support

thereof." Unsworn testimony, which itself needs corroboration, cannot be used as corroboration for other unsworn testimony.

196. ----------v.----------, Cim. App. 217-M-67; 10/6/67; Platt, J.
Accused was convicted of theft by public servant. (P.C. ss. 265, 270.) The trial magistrate was apparently not satisfied with the prosecution evidence, and called a court witness to testify at the close of the prosecution case.

The Court stated, obiter; "Having in mind the recent decision of the Court of Appeal in Criminal Appeal No. 50 of 1967 Charles s/o Murimi v. Republic which unfortunately cut down the scope of a trial Court's power in calling witnesses under section 151 of the Criminal Procedure Code where the prosecution had not proved its case, the procedure adopted by the learned magistrate is doubtful." The conviction was quashed on other grounds.

197. R. v. Raphael Alphonse, Crim. App. 213-M-67; 19/5/67; Platt J.
Accused was convicted of theft by public servant. (Penal Code, ss. 265,270). The evidence showed that a cheque had been forged and that accused, a clerk in the Public Works Department, had had ample opportunity to commit the offence. A handwriting expert and accused 's superior both testified that the writing on the cheque was that of the accused; the latter witness, however subsequently admitted that he was not certain.

Held: (1) There must be some evidence connecting an accused with a forgery other than the testimony of a handwriting analyst. (2) " (O)pportunity alone does not amount to corroboration unless the circumstances and locality of the opportunity are such as in themselves amount to corroboration." Citing Omari s/o Hassan v. R., (1956) 23 E.A.C.A. 580. (3) As the evidence showed that others also had had an opportunity to commit the offence, and did not with certainty place the accused at the locality of the offence, at the time of the offence, the re-

sult could be no more than a “grave suspicion” that the accused was guilty. Conviction quashed.

198. R. v. Athumani s/o Mlia, Crim. Sass. 83-D-67; 26/5/67; Georges, C. J.
Accused was charged with murder. The policeman who arrested him testified that the victim had stated, in the presence of the accused, that the accused had approached him in the victim’s tea-shop to ask him for food, and that when he refused the accused had beaten him. The victim’s son, apparently an infant also testified that the he saw the accused strike his father with an iron bar. The assessors requested that a medical investigation be conducted to determine whether the accused was legally sane, but the request was denied.

Held: (1) The policeman’s account of the victim’s statement was admissible under section 32(1) of the Indian Evidence Act, as a statement “made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death” in a case in which “the cause of that person’s death” came into question (2) While the child’s testimony was admitted, the court should not rely heavily on his evidence. It was not given on oath, as he could not understand the nature of an oath. (3) The refusal of food could not amount to provocation. It would not be a wrongful act or insult. (4) The facts that the accused had no apparent motive for the attack, that he was walking about carrying a heavy burden (a gearbox and a gear shaft), and that he did not run away after the deed, did not raise a question as to the capacity of the accused to understand the nature and quality of his act, so as to warrant a medical investigation. The Accused was found guilty of murder as charged.

199. R. v. John s/o Mshindo, Crim. Sass. 57-Iringa-67; 28/4/67; Hamlyn J.
Accused had pleaded guilty to manslaughter, saying, “I killed as charged and admit that I killed unlawfully but I did not intend to kill.” He had been set upon by a gang during a beer-drinking quarrel and, apparently without trying to escape, killed one of the gang with a pen knife. Act the time of the High Court judgment, the had been in custody for six months.

Held: "I am aware that, in the difficulties in which (accused) was placed, it is hard to consider what action he should take which complies with the law, and that the struck without any intention of killing. He has however pleaded that the blow was struck unlawfully. " " (T)he accused, having been in custody for the past six months, has been punished, though it must be impressed upon him and the public that these beer drinking quarrels must cease." Sentence of one week's imprisonment imposed.

200. R. v. Omari s/o Hassani, Crim. Rev. 63-D-67; 12/6/67; Duff, J.

Accused was convicted of practicing medicine without a licence. (Cap. 407, s. 36(1) (b).) There was not evidence that he acquired or received anything of value.

Held: An element of the offence is the receipt of something (monetary or otherwise) for the medical service rendered. In the absence of such evidence, the conviction was quashed.

201. Msine Ludivico s/o Niganya v. R., Crim. App. 199-M-67; 7/6/67; Cross, J.

Accused was convicted of practicing medicine without being registered and without a licence (Medical Practitioners and Dentists Ordinance, Cap. 409, s. 36(1)(b) and with doing grievous harm (P.C. s.225). He was sentenced to concurrent sentences of twelve months on the first charge and eighteen months on the second charge. The first charge alleged that accused "did practice medicine for gain by injecting five persons. ……" After all but two of the prosecution witnesses had testified, the second charge of doing grievous harm during the injections to two named persons was added. The magistrate did not advice accused

of his right to recall the witnesses who had testified before this charge was introduced.

Held: (1) The first charge was not invalid because of duplicity. The offence is of practicing medicine and section 2 of the Medical Practitioners and Dentists Ordinance defines the term “practice medicine” as giving treatment or advice “on one or more occasions for gain.” Therefore the several injections constituted one offence. Citing Apothecaries Company v. Jones (1893) 1.Q.B. 889; Attorney General v. Ayre (1951) K.L.R. vol. XX1V, Part 11, p. 126. (2) The second charge, which alleged grievous harm to two people was invalid for duplicity. (3) The second charge was completely different from the first with respect to the evidence required. Therefore, the failure of the magistrate to advise accused of the right to recall witnesses who had testified before the charge was introduced or to call such witnesses himself was prejudicial. (4) Although the sentence was lenient, the trial court determined the sentence by proper methods and it should not be disturbed merely because the appellate court might itself have imposed a more severe sentence.

202. Musa s/o Kiumbe v. R., Crim. App. 813, 817, 856-M-66; 31/5/67; Platt, J.
The three accused were convicted of robbery. On appeal they urged, inter alia, that they had been debarred from calling defence witnesses. The trial record was unclear and incomplete as to what, if any, requests for witnesses had been made.

Held: Normally the record would be returned to the trial magistrate for certificate stating what had occurred. But here the appellants have been in custody for some time and to delay the appeal further would cause injustice. “As the record is incomplete the appellants must be given the benefit of doubt that the trial may

not have been conducted with complete fairness. I have no doubt that the learned trial magistrate will in future record whether or not an accused person wishes to call defence witnesses, and in the event of witnesses for the defence being applied for, he will no doubt call such witnesses or record his reasons for refusing the application. If this procedure is followed accused persons will not then be able to challenge the fairness of the trial." The convictions were quashed.

203. R. v. Remiguis Bakari, District Court Crim. Case 43-Mbinga-67; Inspection Note by Saidi, J

The Court noted. "(I)n scheduled offences, such as (cattle theft), the return must show that an order for compensation has been made in respect of stolen goods that have not been recovered and where all goods stolen have been recovered and restored to the owner this fact must be shown in column 11 of the return."

204. R. v. Charles Kisengedo, Crim. Rev. 62-D-67; 29/5/67; Duff, J.

Accused was convicted of rape under section 131 of the Penal Code. The complainant, a school girl aged 15, gave the only evidence implicating the accused

Held: "(I)n sexual cases independent corroboration of the complainant's story, implicating the accused, will be required notwithstanding the trial court's warning itself of the danger of convicting without it……" Conviction quashed.

205. Henry Kitelaeya v. R., Crim. App. 200-M-67, 4/6/67, Cross, J.

Accused was convicted of rape, on the testimony of the woman who was raped, and of two people who saw the victim shortly after she was raped, but who never saw accused.

Held: The mere allegation of a rape victim is insufficient to sustain a conviction of rape. The testimony of the two witnesses who saw the victim after she was raped supplied no corroboration because their only basis for believing that accused committed the rape was the word of the victim. Conviction and sentence were quashed.

206. N. J. M. Mendoza v. R., Crim. App. 284-D-67; 9/6/67; Saidi, J.
Accused was convicted of using a motor vehicle without an appropriate licence (Traffic Ordinance, s. 6), and using a motor vehicle without third party insurance (Motor Vehicle Insurance Ordinance, ss. 491), 4(2). In addition to the fines imposed, he was disqualified from holding or obtaining a driving licence for twelve months in respect of the latter offence.

Held: Under the Ordinance, disqualification from obtaining or holding a licence is automatic in the absence of "special reasons" for allowing an accused to retain his licence. These "special reasons" must relate to the commission of the offence rather than to personal circumstances. Citing R. v. Ali s/o Hamisi, High Court Bulleting No. 78 of 1963.

Accused must be so informed and given an opportunity to suggest such special reasons. Citing R.v.John Gedeon and Simon Jeremiag, (1957) E.A.664; R. v. Azizi Mrimbe, High Court Bulletin No. 204 of 1964.

207. R. v. Pauni Nasinda, Resident Magistrates' Court Crim. Case 2850-Moshi-66; 14/6/67; Inspection Note by Platt, J.
Accused was convicted of attempted rape. He was sentenced to 9 months' imprisonment, of which 6 months were suspended.

The court noted: after suggesting that the sentence was perhaps too lenient, that the magistrate "might consider compensation in cases where the complainant has been injured."

208. R. v. Morris Kyamanywa, Crim. Rev. 25-M-67; 6/6/67; Platt, J.
Accused was convicted of unlawful wounding (P.C. s. 228(1) for severely cutting his wife with a panga. Accused was ordered, inter alia, to pay Shs. 500/- compensation to his wife.

Held: In principle, compensation between spouses ought to be limited. If the marriage is still subsisting ordering a large payment from one spouse to the other can only result in difficulty and aggravate the differences between the spouses. Compensation was reduced to Shs. 200/-

209. R. v. Saidi s/o Abdallah, Crim. Rev. 56-D-67; 6/6/67, Saidi, J.
The only issue considered by the High Court was that of the sentence imposed. The district magistrate sentenced accused "to go to prison for 2 years and 24 strokes if he is below 45 year subject to medical examination as to his age." In mitigation the accused had stated, inter alia, that he was about 4 8 year old.

Held: The trial court should have heard medical evidence as to the age of accused, made a finding of fact on that issue, and then passed sentence accordingly. The case was remanded to Theo trial court for the hearing of medical evidence and proper sentencing.

210. R.v. Athumani s/o Selemani, Crim. Rev. 64-D-67; -/-/67; Saidi, J.
Accused were convicted of assaulting a police officer, resisting lawful arrest and obstructing a police officer. The first accused was fined Shs. 800/- or 12 months imprisonment in default on one count, and Shs. 100/- or 3 months on the second and third counts. The second and third accused were each sentenced to 2 months' imprisonment on counts 1 and 2, the sentences to run concurrently. At the time of the High Court judgment, the latter accused had served their sentences. Nothing on the record indicated that the first accused was able to pay the fine imposed.

Held; (1) The fines imposed on the first accused were set aside as excessive, there being "nothing on the record indicating that the accused was able to pay so large a fine." Fines "should bear reasonable relation to the accused 's power to pay….." Citing Mohamed Juma v. Rex, 1T.L.R.257; Nyakulina d/o Chacha v. Rex, 1 T.L.R. 341. (2) Under section 29 of the Penal Code, the maximum term of imprisonment in default of payment of any fine is six months. (3) As the

accused were all first offenders, the magistrate “should have imposed exactly the same sentence on all of them.’

The sentence of the first accused was reduced to result in immediate release.

211. R. v. Doti Bakari, Crim. Rev. 58-D-67, 25/5/67, Duff, J.

Accused was convicted of recklessly and negligently setting fire to complainant’s crops, for which a three month sentence was imposed. In addition, accused was ordered to pay Shs. 3200/- to complainant by way of compensation for the damage he had caused.

Held (1) Section 176 (1) of the Criminal Procedure Code limits the amount of compensation that may be awarded in cases not arising under the Minimum Sentences Act to Shs. 2000/- (2) It is open to complainant to institute civil proceedings if he deems Shs. 2,000/- to be insufficient to cover his losses.

212. Mbaruku Ndima v. R., Crim. App. 78-D-67; 24/6/67; Hamlyn, J.

Accused were convicted of assault occasioning actual bodily harm. (P.C. s. 241) Each was sentenced to a fine of Shs. 500/-, or six months’ imprisonment in liou thereof, and to pay compensation of Shs. 40/- to each injured person. In imposing this heavy sentence, the magistrate stated that crimes of this nature were very common in the area.

Held: This was a proper factor to consider in assessing sentence. The Court stated,

obiter; “(N)ormally if the prosecutor alleges such a state of affairs it is as well that he makes the allegation in court before the accused and the letter be given an opportunity to contradict or comment upon it.” The appeals were dismissed.

213. Allen s/o Nyelo v. R., Crim. App. 311-D-67; 14/6/67; Geoges, C. J.

Accused was convicted of theft and sentenced 2.5 years' imprisonment and 24 strokes under the Minimum Sentence Act. The sum involved was Shs. 440/- In passing sentence, the magistrate observed, "It is agonizing to note that thievish mentality is spreading like barn fire or contagious disease and the public funds are at great stake. My hatred for thieves knows no bounds and I consider a tougher punishment should be imposed."

Held: "(T)he minimum sentence fixed by law takes into account the public abhorrence for the offence …. And the need for deterrent punishment. Though it is a minimum sentence and not a maximum, it should be increased only where there are circumstances of aggravation – where a large sum was stolen or where there are previous convictions or a grave abuse of position of trust." As there were to such circumstances here, the term of imprisonment was reduced to the statutory minimum of 2 years.

214. R. v. Masanja Zengo, Crim Rev. 24-M-67, 22/5/67, Mustafa, J.

Accused was convicted of breaking into a school building with intent to steal, contrary to section 297 of the Penal Code. The trial magistrate found that breaking into a school was a scheduled offence under the Minimum Sentences Act, whereupon he sentenced accused to two years and twenty-four strokes.

Held: "(A)n offence contrary to section 297 of the Penal Code is not within the mischief of the Minimum Sentence.

Act. In the circumstances, I set aside the sentence of corporal punishment. In the result, the accused will serve only two years imprisonment."

215. Rashidi s/o Ally v. R. Crim. App. 241-D-67, 9/6/67, Georges, C. J.

Accused was convicted of burglary. The only question on appeal involved consideration of

Accused 's alleged criminal record for purposes of sentencing. Of four alleged convictions, accused denied three and, while admitting one, said it was for assault and not a theft offence. No corroborative proof of the convictions was put forth by the prosecution.

Held: "When an accused person denies a conviction appearing on his record, it is necessary to call someone who was present at the conviction – preferably the police complainant ---- to prove the conviction. Entries may be made in files in error, and since previous conviction affect the severity of sentence …… they must be strictly proved. Where they are not strictly proved, they cannot be taken into account in sentencing." Sentence was reduced from 3 years and 30 strokes to 2 years and 24 strokes.

216. R. v. Teodosia s/o Alifa, District Court Crim. Case 252 Mbeya 67; -/-/67; Inspection Note by Saidi, J.

The accused, young men of 18 and 19 years of age, one of whom was a student, were convicted on their own pleas of stealing certain properties of Frelimo, a political party. Neither had been convicted previously. Both were sentenced to one month's imprisonment, and had already served their sentence at the time of the High Court judgment.

The Court noted, "This Court has repeatedly raised objection to short prison sentences such as the one imposed in the present case, for the reason that they hardly serve any good purpose and apart from this they tend to bring the convicts in contact with experienced criminals and make it difficult for them to reform." The case was thought suitable for a conditional discharge order, a binding over order, or a probation order,

217. R. Nsee s/o Loti, District Court Crim. Case 1574-Moshi-66; 16/6/67; Inspection Note by Platt, J.

Accused pleaded guilty to three charges of violating sections 49(1) and 53 of the Fauna Conservation Ordinance, Chapter 302. He was sentenced to a fine of Shs. 50/- or two week's imprisonment in default of each count, the sentences of imprisonment to run consecutively. However, the magistrate suspended both the fines and terms of imprisonment for one year provided the accused was of good behavior and did not commit a similar offence.

The Court noted: (1) The result of the order was that the accused received no punishment at all. Such an order does nothing to aid enforcement of the ordinance and it was not a responsible sentence to impose (2) Section 294 (A)(1) of the Criminal Procedure Code provides that "the court may pass a sentence of imprisonment but order the operation of the whole or any part of the sentence to be suspended ……". The section does not apply to sentences by way of fine, and the order was therefore improper.

218. Michael Zephania v. R., Crim. App. 169-M-67; 17/5/67; Platt, J.

Accused was convicted of cattle theft (P.C. ss. 268, 265) upon evidence that he stole a goat carcass which his dogs had previously killed.

Held: (1) Marginal notes to a statute cannot control the content of the sections to which they refer. However, they may be borne in mind in construing the sections. (Citing Mohamed

Murtadha v. Reg. (1954) 21 E.A.C.A. 90; Stephens v. Cuckfield Rural District Council (1960) 2 A.E.R. 716.) (2) The marginal note to Penal Code section 257 refers to "things capable of being stolen." The substance of this section refers to animate as well as inanimate classifications. Because the words of the marginal note to section 257 were reproduced almost verbatim in the substantive portion of section 265, they may be taken as part of the Penal Code. (Citing Halsbury's Laws of England, 3rd Edn., Vol. 36, pp. 373, 374.) Therefore, the word "thing" in other sections of the Code may be taken to refer to either animals or inanimate objects according to the sense of the particular section. Thus the word "thing" in

section 268 does not demonstrate that that section refers to carcasses of animals (3) Penal Code, section 268 leaves ambiguous whether that section applies to animal carcasses, and the marginal not – "cattle theft" – should be borne in mind. Interpreting the section in light of the marginal note, the ambiguity should be resolved by limiting the application of the section to live animals. A conviction of simple theft was substituted.

219. Ale s/o Iddi v. R. Crim. App. 64-A-67; 22/6/67, Geoges, C.J.
Accused was convicted of theft on the following facts. Complainant gave him shs. 580/- of old Tanzanian notes to be exchanged for new notes. Although complainant wanted all the money back, accused returned only Shs. 400/- in new notes giving complainant a written acknowledgement of Shs. 180/- not paid. Accused kept avoiding complainant, who finally brought the matter to the attention of the police. Accused 's defence was that the Shs. 180/- constituted a loan.

Held: A person who uses money entrusted to him voluntarily by another may be guilty of larceny even if he intends to repay it. Accused may have intended to repay, but the evidence established that he used complainant's money for his own purposes without permission to do so. The conviction for theft was upheld.

220. Bandama Johnson Mahindi v. R., Crim. App. 229-M-67; 8/6/67; Mustafa, J.
Accused was convicted on five counts of obtaining money by false pretences. None of the counts set out the nature of the false pretences.

Held: The charge was clearly defective because of the omission. The conviction and sentence were quashed.

221. Charles s/o Mumba v. R., Crim. App. 176-D-67; -/6/67; Saidi, J.
Accused was convicted of possessing property suspected to have been stolen (P.C. s. 312). The goods were found in an unfinished building, but it was not known how the had come to that place. The circumstances of accused 's arrest

were not detailed by the High Court, but "he was not detained at first by a police officer."

Held: Under the "very technical" section 312, "the accused must first be detained by a police officer exercising his powers under section 24 of the Criminal Procedure Code and …… at the time of such detention the accused person must be conveying the thing or things suspected of having been stolen ….." Possession of such goods in a building would be punishable under this section only if it occurred during "the course of a journey." Citing Regina v. Msengi s/o Abdallah, 1 T.L.R. 107.

The Court stated, obiter: (I)t is now high time to review the provisions of section 312 ……. And remove some of its strict technicalities. Its application if too limited to be of such use and its strict technicalities provide ample room for ostensible offenders to escape from the arms of the law, making the law entirely unintelligible to the unsophisticated public.

222. Daniel s/o Stephen v. R., Crim. App. 567-M-66; 15/5/67; Platt, J.

Accused were convicted of shop-breaking and stealing. (P.C. s. 296(1), 265.) The theft took place in a bar. The primary evidence against accused was the confession of a third accused which implicated them. There was also evidence that the goods were found buried on premises which accused shared with three others.

Held: (1) The confession of the accomplice ought to have been corroborated before it was accepted; this was not a case where the accomplice evidence was such that it could be relied on alone. Section 30 of the Indian Evidence Act provides that a confession of one accused "may be taken into account against a co-accused, but there is settled authority that there must be other evidence as well. (2) Because accused shared the premises with other, It could not be said that finding the goods on the premises proved their possession of the goods.

Since there was no significant evidence corroborating the confession, the convictions were quashed.

223. Alfred Christopher Carere v. R., Crim. App. 229-D-67; 31/5/67; Georges, C. J.

Accused was convicted of stealing by persons in the public service. (P.C. ss. 265, 270.) In his capacity as commercial manager for Radio Tanzania, accused arranged with third persons for the production of a radio programme. The programme was to be sponsored, and was not to be produced by Radio Tanzania. However, circulars sent to advertisers suggested that the programme was a Radio Tanzania production and that fees which they paid would be paid to Radio Tanzania. After confused negotiations, accused himself formed a firm which sponsored the programme and the fees were retained by this firm.

Held: Accused was under no obligation to pay the funds to Radio Tanzania. In these circumstances, he was not guilty of stealing even if the advertisers were under the mistaken impression that the fees were for the benefit of the radio station. Citing Rajabu Nbaruku v. R., (1962) E.A. 669; R. V. Cullum, (1873) 2 C.C.R. 28; distinguishing Burton Mwakapesile v. R., (1965) E.A. 407. (2) The evidence was insufficient in any event to prove that the advertisers were misled as to the recipient of the fees.

224. Francis s/o Kitana v. R., Crim. App. 918-M-66, 31/3/67, Platt, J.

Accused, a teacher in a secondary school, was convicted of stealing and theft by public servant. (P.C. ss. 265, 270.) Under the authorized procedure for paying school fees, the students were to pay the fees directly to the appropriate government officials, and accused was merely to record their receipt in the school register. However there was evidence that, contrary to this procedure, accused himself had received fees from the students and had failed to account for them.

Held: (1) Accused was acting as the agent of the students in receiving the fees and not as the agent of the government officials. He had not duty or authority to collect the fees and, therefore, did not receive the money by virtue of his employment. The conviction of theft by public servant was quashed. (2) Accused could have been charged with theft by agent contrary to section 273 (b) of the Penal Code. However, a conviction under this section cannot be substituted on appeal because it is not a lesser offence included within the offence of theft by public servant.

225. Kombo s/o Haji Ngenge v. R., Crim. App. 337-D-67; 22/6/67; Georges, C.J. Thirteen members of the Dar es Salaam Charcoal Union marched to the Forestry Office with the intention, as they later put it, to commandeer it in the name of "Commercial Revolution." Entering the premises over the clerk's objections, they placed a board outside the office and hoisted a flag in the window, engaging the while in "a loud conversation in an unintelligible tongue." Apparently, no one asked them to leave. They insulted no one, and made no threats. "They were, in affect, demonstrating" There were subsequently convicted of unlawful assembly and criminal trespass. (P.C. ss. 74, 299(b).) On the convictions for unlawful assembly, those with previous convictions (whose character was not specified by the High Court) were sentenced to 9 months' imprisonment, while the first offenders received sentences of 6 months.

Held: (1) The criminal trespass convictions cannot stand, since the statute clearly applies to private property and not to public offence. (2) The convictions for unlawful assembly were sound. Accused s' conduct was not "likely to provoke a breach of the peace by others," but it was "such that a person in the neighborhood could reasonably fear that they would commit a breach of the peace."(3) This was not "the sort of case where any distinction in punishment should have been made between one accused and another on the basis of previous convictions. There would have been justification for imposing a more severe sentence on the ringleader if his role could be established," but there was no specific evidence on that point.

226. Automobile Stores Ltd. v. L. K. Msosa, Civ. App. 3-D-66; 6/7/67; Saidi, J.
This case arose out of a motor accident. The judgment of the District Court was delivered on 8th February, 1966, and a decree was issued on 13th March 1966. Appellant applied for certified copies of the judgment and the decree on 27th May, 1966. Respondent claimed that the time for filing an appeal had expired on 9th May, 1966, ninety days after the judgment was delivered.

Held (1) The appeal is lodged against the decision of the trial court, and that decision is contained in the judgment rather than in the decree. The decree is merely a brief declaration of the decision; it is required to agree with the

Judgment an to bear the date on which the judgment was pronounced. (0.20 rules 6 and 7, C.P.C0 Therefore, the time for filing an appeal should be measured from the date judgment was pronounced. (2) Although, contrary to the provisions of the Civil Procedure Code, the decree in this case bore a date later than the judgment, this error did not extend the time for filing an appeal. The appeal was rejected.

227. Abbas G. Essaji et al. v. Gordhan D. Solanki t/a Tailors, Misc. Civ. App. 12-D-67; Hamlyn, J.
Appellant applied to the district court for a copy of that court's order and received a document headed "Ruling". At the end of the document, after the magistrate's signature, there was a sentence, "Order; The date of vacant possession to (sic) 30/11/1967. Cost of 100/- to the Respondent." There followed a second signature. The preliminary issue on appeal was whether the filing of this document satisfied the provisions of Order 39 rule 1 and Order 40 rule, 2, which require that an appellant file a copy of the order appealed from.

Held: (1) Section 3 of the Civil Procedure Code defines an order as "the formal expression of a decision of a civil court which is not a decree." Although the code contains no provision prescribing the form in which orders should be drafted, they should be in a form similar to the form of decree set out in Appendix D to the Indian Civil Procedure Code. (2) The purported order in the present case virtually forms a part of the ruling and cannot be described as a "formal expression of a decision." It does not satisfy the requirement that appellant file a copy of the order appealed from. (3) It would be improper to adjourn the appeal in order to give appellant the opportunity to file the proper papers. Citing Harnam Singh Bhogal, t/a Harnam Singh v. Hirda Ram (1919) A.I.R. (Lahore) 125. The appeal was dismissed.

228. Abdallah Salum v. Twentsche Overseas Trading Co. Ltd., Civ. App. 16-D-66; 10/7/67; Georges, C.J.

Appellant obtained a lorry from respondent on hire purchase. Appellant did not keep up the required payments, whereupon respondent repossessed the vehicle. The contract between the parties provided, inter alia, that appellant was liable for the cost of all repairs and replacement necessary to put the vehicle in good working order. Item 9 of the plaint sought damages because" …. The hirer failed to maintain the said chattel in good repair and to return the same in good order and condition." The lorry had been in an accident, for which respondent obtained Shs. 4,281/- in insurance proceeds. Estimated damage to the vehicle was Shs. 6,281/- (The policy contained a 100 pound deductible clause.) The only real issue on appeal was how much, if anything, respondent could recover for the damage to the lorry. The trial court awarded Shs. 6,281/- to respondent.

Held: (1) Even though item 9 of the plaint does not specify in what way the lorry was in bad repair, it clearly put appellant on notice as to the nature of respondent's claim. (2) In computing the amount owed, appellant should have been credited for the Shs. 4,281/- paid by the insurance company to respondent. The damages awarded in the court below were reduced accordingly.

229. Bakari Hoya v. Gabriel Mdoe, (PC) Civ. App. 6-D-67; 26/7/67; Hamlyn, J.
Plaintiff was a grandson, and defendants were the son and daughter, of deceased. Plaintiff claimed that he had inherited the property, and defendants answered that it had passed to the defendant daughter who had then transferred it to the defendant son. The primary court, relying on the opinion of the assessors, ruled in favour of plaintiff. On appeal, the district court reversed, but made no reference to the customary law or to the opinions of the assessors who had heard the appeal.

Held: (1) The matter is governed by customary law "and this of course depends upon the view taken by the assessors of the matter," The district court should have referred in its judgment to the opinions of the assessors and to the customary law. (2) In the absence of other authority as to the Sambaa law, the court must accept the opinion of the assessors at the primary court that female may not inherit real estate but has a right to monetary value only. The judgment of the primary court for plaintiff was restored.

230. Ibrahim Lihoha v. Saidi Meda, (PC) Civ. App. 101-D-66; -/-/67; Hamlyn, J.
Plaintiff and defendant are owners of adjacent land holdings which are separated by a stream. For no apparent cause, the stream began to crode defendant's land and to deposit soil on plaintiff's side of the stream. Over a period of several years about one-half acre was eroded and deposited in this manner. Defendant claimed the right to follow the soil and began to farm the land which had been deposited. Plaintiff filed this action claiming the land.

Held: Under Hehe customary law, if the eroded area is considerable and is gradually deposited as an addition to another's property, the original holder of the eroded land can "follow" it and he retains ownership. The court distinguished this result from that reached under Roman Law where gradual deposits normally ensure to the benefit of the owner of land contiguous to the deposit. It compared the result to the Roman Law concept of ager limitatus.

231. Boniface Muhigi v. Philemon Muhigi (PC) Civ. App. 38-M-66; 18/7/67; Cross, J.

In 1946, plaintiff sold a clan shamba without the permission of his paternal relatives. Defendant then brought an action in the Court of the Kanyigo Chiefdom. The judgment provided that defendant should pay Shs. 300/- to plaintiff who should use it to refund the purchase price and reclaim the land. The defendant, and he in fact entered into possession of the land. In the present action, plaintiff claimed the right to redeem the shamba for himself by reimbursing defendant for the money which he had paid as a result of the earlier judgment.

Held: (1) The Customary Law (Limitation or Proceedings Rules, 1963, provide that the period of limitation is deemed to have commenced on the day when the right of action arose or on the day when the Rules came into operation, which ever is later. The rules came into operation on 29th May, 1964, and this suit was filed only nine months thereafter. Therefore, the suit is not barred. (2) If a person sells his land to someone other than a member of the clan without informing his

Paternal relatives of the transaction, these relatives may invalidate the sale by bringing an action against the vendor, who must then return the purchase price or allow the relatives to do so. The land then returns to the family and becomes the property of the man who repays the purchase price. Citing Corr and Hartnoll, Customary Law of the Haya Tribe, section 560, 561,562; distinguishing section 567, which is said to refer to sales of which the relatives have been informed. Therefore, the shamba is the property of defendant.

232. Nikuro binti Mbwana v. Iddi s/o Ruwa, (PC) Civ. App. 18-D-67; 1/7/67; Hamlyn, J

Respondent divorced appellant at a time when he suspected that she was pregnant. She denied this and, when a child was later born, said that another man was the father. Respondent was eventually awarded custody of the child.

Held: The Islamic law governing cases such as this, involving "eda," supports the view that the husband is entitled to custody of the child. Citing Sheikh Ali Hemedi el Buhriy, Kitabu cha Nahik, 118.

233. Shabani Nasoro v. Rajabu Simba, (PC) Civ. App. 6-D-66; 26/7/67; Saidi, J.

Plaintiff claimed land which defendant occupied. It was conceded that plaintiff's father originally owned the land but gave possession to defendant's father. Plaintiff, however, claimed that the possession had been wrongful since the death of plaintiff's father sometime "in the middle of the Second World War." He also claimed a right to the crop from trees which his father had allegedly planted on the land. Plaintiff argued that the limitation period of 20 years was not a bar since there was not sufficient evidence to show that defendant had been in physical occupation without interruption for twenty years.

Held; (1) The court has been reluctant to disturb persons who have occupied land and developed it over a long period. "(T)he respondent and his father have been in occupation of the land for a minimum of 18 years, which is quite a long time. It would be unfair to disturb their occupation ……" (2) For similar reasons, it would be unfair to give plaintiff a right to the crops even if his father planted the treas.

234. Jamal Hirji v. Hassanali Kassam Harji, Misc. Civ. App. 8-D-67; 4/8/67; Saidi, J.

Appellant by verbal contract let a ground floor shop to respondent. After about a year, respondent received notice to vacate the premises. Respondent contended that the shop was let to him as mixed premises ((that is, for use both as a shop and as a dwelling house), and therefore he was protected from eviction by the Rent Restriction Act. The back of the shop contained a bedroom, kitchen, and toilet, partitioned off from the store. However, the building plan made no provision

for such partition, and it was done without the approval of the City council, in violation of rule 46 of the Township. Building Rules. The Rent Restriction Board held that these were mixed premises and consequently respondent could not be evicted.

Appellant argued that if respondent prevailed, this would amount to sanctioning a breach of the Township Rules, in contravention of public policy. Respondent argued that appellant was the only wrongdoer here, that he should not be made to suffer because of the wrong of another, and that he was using the premises according to the tenor of his contract with appellant.

Held: (1) The premises were not mixed premises in the eyes of the law. "The Township Ordinance Cap. 101 and Rules made there under are part and parcel of the laws of the country which no court of law in the country can overload. It would therefore be wrong to approve the violation of any of the country's laws or by-laws." (2) As the appellant himself was responsible for the unauthorized alterations and he misled the respondent by letting to him a shop purporting to be mixed premises which he was not authorized to do, appellant was ordered to pay the costs of this appeal and of the proceedings before the Rent Restriction Board.

235. Abdul Javer Heghji v. Alibhai Mitha, Civ. Case 22-D-66; 14/7/67; Georges, C. J.

Defendant had obtained a judgment against plaintiffs. Subsequently, defendant filed in the High Court a Chamber Summons applying for the arrest of plaintiffs, alleging that he had cause to suspect that the plaintiffs, were in default and that they were about to leave the country. On the bases of his affidavit, the Court issued an order for the issuance of a warrant of arrest. Plaintiffs were arrested and released on an undertaking to appear before the Court; they did appear, and were conditionally released on surrendering their passports and on an undertak-

ing to appear for further hearings. The defendant then applied for execution of the decree in the original action by arrest and detention of the plaintiffs in civil jail, on the ground that they had defaulted in their payments. This application was heard and dismissed, the Court holding that no default had occurred.

Plaintiff then brought an action alleging "malicious abuse of the process of law or alternatively …… a breach by the defendant of his duty of care …… to avoid careless allegations which would cause them, the plaintiffs, damage ……" They did not specifically plead that the order for issuance of the arrest warrant had been vacated by the High Court.

Defendant contended that their failure to plead vacation of the order was fatal to the cause of action. Plaintiffs replied that it was not, and further argued that even if it were fatal to the action for malicious prosecution, it would not affect the alternative theory of liability (defendant's breach of a duty to avoid careless allegations.).

Defendant also urged that, through tout the proceedings in question, he had resorted to legal counsel. His advocate was not called, however, to testify as to the advice he had given defendant.

Held: (1) The plaint stated only one cause of action, that for malicious prosecution. The element of malice is essential: there is no action for breach of an alleged duty not to made careless allegations which could lead to another persons' arrest. (2) In an action for malicious prosecution, it must be averred that "in as far as the proceedings on which (plaintiff) sues could have terminated in his favor ……. They have in fact done so." Here, although the order for issuance of the warrant may not have been vacated, the

Application for execution of the decree was dismissed, and this was sufficient to satisfy the requirement. (Citing numerous authorities, with an exhaustive discussion.) (3) A showing that the defendant sought legal advice in proceeding against the plaintiffs weights in his favour; but it is not, in itself, sufficient to show that he

had reasonable and probable cause to act as he did. (4) The evidence showed reasonable cause to suspect the plaintiffs of default, but not of an intention to leave the country. Judgment for plaintiffs.

236. Mzee Hamisi v. Shabani Senge, (PC) Civ. App. 109-D-67; 17/7/67; Saidi, J
Plaintiff and defendant started a small flour mill in partner-ship in 1962. A dispute soon developed, and plaintiff refunded a portion of defendant's contribution to the capital. Son thereafter, plaintiff took the mill to another place and treated it as his own property: at the same time, he handed over his house and shamba and 25 goats to defendant. Plaintiff later brought an action, alleging that this property had been left in defendant's care, and had not been given to him to pay off his outstanding share capital or partnership profits. The District Court having ruled in his favor, plaintiff appealed claiming that the profits from the house, goats and shamba had been underestimated. The High Court noted that the defendant "appeared to be a simple minded village man and he seemed to have been fooled by (plaintiff)."

Held: " The only way of doing justice ……is to restore the parties to the position they were in 1962 before they entered into the partnership." The accounts were too confused for an accurate determination of the proper figures. Therefore, the plaintiff would retain all partnership profits, the defendant would retain all profits from the property left in his care, and the plaintiff would refund the remainder of defendant's share capital.

237. Lonrho Ltd. v. Alexandre Tryphon Dembeniotis, Civ. Case 73-D—65; 28-D-66; 13/7/67, Saidi, J.
Applicant applied for the adjournment of two consolidated cases in order to obtain senior counsel. Applicant's advocate stated that two senior counsel. Applicant's advocated stated that two senior counsel had been briefed, but through no fault of applicant, had had to withdraw. Further attempts to find new senior counsel had been interrupted by settlement negotiations and had failed. The advocate for the opposing party stated that this clients, who were high officials in a large

London firm, had made special arrangements to fly to Dar es Salaam at the specified time and would have great difficulty making other arrangements.

Ruled: The cases are complicated and the sums claimed are very large. Applicant would not be fairly represented without senior counsel. The inconvenience to the opposing party is mitigated by applicant's offer to pay costs arising from the delay. The application for adjournment was allowed.

238. In re Mohamed husein Sharif Jiwa, Misc. Civ. Cause 3-A-67; 17/7/67; Platt, J.

Settlor established a trust for the benefit of his wife and children. The income was to be used for their maintenance education and advancement until all of the children attained

Their majority. At that time, the property was to be sold and the proceeds distributed to the beneficiaries. In this application the trustees requested authorization to depart from the terms of the trust and distribute the trust property itself rather than selling the property and distributing the proceeds. There was evidence that all of the beneficiaries preferred such a disposition and that it was in their best interests.

Held: (1) The law relating to trust and trustees in force in England on 1st January 1922 applies in Tanganyika. [Land (Law of Property and Conveyancing) Ordinance, Cap. 114, s. 2.] A declaration was made under section 10 of the Act stating that the Trustee Act 1893 (England) is still applicable. Citing Elfie Heinrichsdorff-Gies & Another v. Henry George Dodd & Another (1960) E.A.327; Parry v. Carson (1963) E.A. 91. (2) The general rule in England in 1922 was that trustees were required to carry out the exact terms of the trust, However, if all the beneficiaries were sui juris, and acting under no incapacity or undue influence, consented or concurred in a breach of trust after being fully informed of the circumstances, the court could relieve the trustees from liability. Citing Chapman v.

Chapman (1954) A.C. 429. (3) In the present case these conditions were met and the beneficiaries all consented to the breach. The distribution of the trust property was ordered.

239. Issa s/o Kibwana v. R., Crim. App. 81-D-67; 27/7/67; Hamlyn, J.
Accused was convicted of robbery after entering an unequivocal plea of guilty to the charge.

Held: Section 313 (1) of the Criminal Procedure Code provides that no appeal is permissible in so far as conviction is concerned, upon a plea of guilty being recorded. The appeal against conviction was rejected as inadmissible, and the appeal against sentence was summarily rejected because accused had received the minimum sentence prescribed.

240. Leo Albera v. R., Crim. App. 477-M-67; 25/7/67; Cross, J.
Set out below is the complete judgment in this case. “Under the provisions of section 313(2) of the Crim Proc. Code this judgment is not appeal able since the fine imposed on each count is less than Shs. 100/- except with the leave of the High Court.
“The accused has not applied for such leave and in any case I see no good reason why leave should be granted and the appeal, which I shall treat as an application for leave to appeal, is therefore refused.”

241. Ali s/o Mohamed v. R., Crim. App. 561-D-67; 24/6/67; Hamlyn, J.
Accused was convicted of stealing, on evidence the High Court found wholly sufficient. The magistrate stated, however, that accused had “failed to prove the clothes in question were his,” this being his main defence.

Held: Since an accused ’s burden, in a criminal case is merely to cast doubt upon the prosecution’s version of the matter, magistrates should avoid expression such as this one. However, because “there was plenty of evidence on which to base a conviction,” the conviction was sustained despite this misdirection.

242. Mathias s/o Kajara v. R., Crim. App. 112-M-67; 28/6/67; Cross, J.

Appellant was convicted of stealing, but "(i)t seems obvious to this court that the learned magistrate ….. found himself utterly at sea and not only did he not address his mind to the issues in the case but he appeared unable to determine what they were." Conviction was quashed, leaving only the question of whether there should be a re-trial. Accused argued that Slim Muksin v. Salim bin Mohamed, (1950) 7 B.A.C.A. 128 precluded a re-trial. In that case there was misdirection by the magistrate, without fault on the part of either party. Because the accused was not at fault the Court of Appeal refused to permit a re-trial, notwithstanding the fact that the prosecution was equally blameless.

Held: In the instant case the ends of justice would best be served by re-trial, not because the magistrate had misdirected himself but because the magistrate had neither considered nor determined any of the issues in this case. Citing Kagoyi s/o Bundala v. R. (1959) E.A. 900. There was not sufficient material to enable the High Court to decide the appeal on the merits of the case. Re-trial ordered, before a different magistrate.

243. In re R. v. Sakerbai M. A. Gangji, Misc. Crim. Cause 12-D-67; 4/5/67; Saidi, J.

Applicants were convicted of assault occasioning actual bodily harm and applied for bail pending the hearing of their appeal. They argued that the granting of bail would make it easier for their advocate to prepare the appeal, that they would otherwise be imprisoned for an extended period, that they would otherwise be imprisoned for an extended period, that they were in poor health, that they were of good character, and that there was an overwhelming probability that the appeal would succeed. The court found serious conflicts in the evidence of the prosecution.

Ruled: (1) Bail pending appeal should only be granted for exceptional and unusual reasons. Neither the complexity of the case nor the good character of the applicant, nor alleged hardship to his dependents is sufficient in itself. The court must be satisfied that there is an overwhelming probability that the appeal will succeed. (2) On the facts of the present case, the weakness of the prosecution evidence justifies the granting of bail.

244. R. v. Abdallahamid s/o Daleyusufu, Crim. Rev. 74-D-67; 23/6/67; Georges, C.J.

The surety signed a bond to produce the accused. Accused did not appear on the specified day and, after further proceedings, the amount of the bond was forfeited. Subsequently, the surety succeeded after extensive efforts in producing the accused. Accused was re-arrested but later escaped.

Held: (1) Section 132 of the Criminal Procedure Code grants the power to review the forfeiture either by way of revision or appeal. (2) Although the surety was remiss in failing to produce the accused at the specified time, the whole sum due would not have been forfeited if the facts now before the Court had been known. The Court stated, obiter: It is preferable that bonds should not be forfeited too quickly if the accused fails to appear. It is usually best to adjourn the proceedings to allow the surety some time to find the accused if he thinks he can succeed, and the fact that

The accused is later produced can be taken into account in deciding whether there should be forfeiture. The forfeiture was reduced to Shs. 1,000/- of the Shs. 4,000/- due on the bond.

245. I. A. Fergusson v. R., Misc. Crim. Cause 19-D-67; Georges, C. J.

This was an application requiring sureties to show cause why their recognizance's should not be forfeited. Bail was granted on 27th May 1967; on condition

that accused appear daily at the police station; this condition did not appear the forms signed by the sureties. Each surety posted a bond of Shs. 40,000/- Accused appeared in court on 29th and 30th May as required, and on each occasions the case was adjourned until the following day and the bail specifically extended. On 31 May it was again adjourned; no date was set for its resumption, and bail was not specifically extended. On 3rd June, accused escaped by taking off from Dar es Salaam Airport in a small airplane without authorization. Thereafter, the sureties were served with notice of a further hearing, but notice was, of course, not served on accused.

Held: (1) (a) Criminal Procedure Code section 124 provides that bail shall be granted upon the condition that the accused "shall attend at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the Court or police officer, as the case may be." While a court may refuse to grant bail unless the accused agrees, for example, to report daily to the police, there is no statutory authorization of such a condition and no penalty can be imposed on sureties for its breach. (b) That condition did not, and could not, appear on the forms executed by the sureties and was not binding upon them.
(c) The High Court, as well as subordinate courts, is bound by the terms of section 124. (2) Although on 31st May no further date for hearing was set, the bail agreement stated that accused should "continue to attend until other-wise directed." Sureties may be discharged only if they apply to be discharged, and they made no such application. Therefore, accused and the sureties should have attended court daily until directed to do otherwise even though no hearing date had been set. They failed to do so and are in breach of the bail agreement. (3) Accused escaped in a daring and unexpected way. There is no evidence that the sureties connived at his escape, and almost no degree of care would have prevented it. However, the sureties have taken no steps since the escape to locate accused. In these circumstances, partial payment on the bond is justified. The Court ordered that Shs. 20,000/- be forfeited by each surety.

246. Hamidu s/o Udu v. R., (PC) Crim. App. 66-D-67; 26/6/67; Hamlyn, J.

Accused was convicted, inter alia, of “Brawling contrary to section 89 (1) (b) of the Penal Code, Cap. 16.” He was the sole person involved in the disturbance.

Held: In English law, the term “brawling” is apparently confined to “improper behaviors in religious building.” The Oxford dictionary, however, defines the verb as “to wrangle or “to squabble “, and the noun as “a noisy turbulent quarrel, a row.” This indicates that two or more persons must be involved, and the conviction, therefore, must be set aside.

247.R. v. Macdonal Lenge, Crim. Rev. 14-A-67; 30/6/67; Platt, J.

In a prior action, accused were charged with assault causing actual bodily harm. Prior to trial, the complainant requested permission to withdraw his case and they were discharged under the provisions of paragraph 22(1) of the Primary Court Criminal Procedure Code. About one year later they were charged in the present action with robbery with violence. (P.C. ss. 285, 286.) Accused were acquitted upon the ground that they could not be tried again for a crime arising out of the same facts as those involved in the Primary Court action. The Republic requested the High Court to exercise its revisional jurisdiction.

Held: (1) The District Court Magistrate erred in finding that the dismissal of the charge under paragraph 22 (1) of the Primary Court Criminal Procedure Code was a bar to the present action.(2) Although the acquittal was erroneous, the High Court has no jurisdiction to alter, or reverse an order of acquittal by way of revision. The Republic’s application for revision was incompetent. The court stated, obiter; The result is unfortunate and the Republic should advise the complainant of some other way by which he might obtain redress .

248. Yustace Mhina Mahita v. R. Crim. App. 380-D-67; 20/6/67; Hamlyn, J.

Accused was convicted of publishing defamatory matter, contrary to P.C. s. 187. The defamatory matter was contained in a letter to Mr.Mkusa, and concerned that gentleman’s competence as a District Executive Officer.

Held: One element of the offence of defamation is that the defamatory material be communicated to someone other than the person about whom the statements are made. Since the requisite publication was absent here, the conviction and fine of Shs. 200/- were set aside.

249. R.v.Alex Goswino Liengela, (PC) Crim. Rev. 4-D-67; 15/7/67; Hamlyn J.
Accused was suspected of having broken into the home of the complainant to steal money. He had apparently come to the complainant's house and been seen by a child four years of age. Complainant agreed that no charges would be brought if the money were returned. Accused gave the money to the Divisional Executive Officer to be returned, and admitted that he had stolen it. The police later received an anonymous letter which gave the details of this transaction, and prosecution of accused followed. During the trial, both the admission to the Divisional Executive Officer, and testimony by another witness as to statements allegedly made by the child, were admitted in evidence.

Held: (1) The admission was inadmissible on either of two grounds; first, it was made to a person who "carried out executive duties similar to those of a police officer"; second, "it was patently obtained by the promise that no criminal case would be brought …." (2) The child's statement is inadmissible ad hearsay.

The Court stated, obiter; If the child had been called and had been able to give an unsworn statement, corroboration would have been required. Further, "it would seem that a child of such tender years would scarcely be able to give a credible story, such tender would scarcely be able to give a credible story, albeit unsworn, apart from the matter of corroboration".

250. Mwita s/o Marwa v. R., Crim. App. 326-M-67; 12/7/67; Cross, J.
Accused was convicted of stealing a cow. (P. C. s. 311(1).) In his judgment, the trial magistrate said of the testimony of two important prosecution witnesses, "It appears that what P.W.4 and P.W. 5 say could reasonably be true. "

Held; The statement plainly suggests that the magistrate applied a lower standard of proof to the prosecution evidence than the criminal law requires. The conviction was quashed.

251. Tyamosi Asao v. R., Crim. App. 191, 249, 224, 180, 187-M-67; 30/6/67; Cross, J.

The five accused were convicted of burglary, stealing and assault. The evidence against three of the accused was overwhelming. However a fourth accused denied his guilt under oath and pointed out that the police did not arrest him for several days although they questioned him earlier. A fifth accused gave the alibi that he had been sleeping at home and his witness supported this defence. The trial magistrate dealt with all of the defence together and stated that the accused had not satisfied him that they were not the people who had committed the crime.

Held: (1) The defences of the various accused were different, and the trial magistrate should not have considered all of them together. (2) The burden of proof in a criminal case is on the prosecution, and the magistrate erred in stating that they must satisfy him that they were not the guilty persons. (3) The evidence against the first accused was so strong that it is clear they would have been convicted had the magistrate properly directed himself. They were not prejudiced by the misdirection and their convictions should be upheld. Citing Shah v. Reg, (1956) 23 E.A.C.A. 401, 416. The convictions of the fourth and fifth accused were quashed.

252. Patric s/o Taumbe v. R., Crim. App. 422-D-67; 19/7/67; Georges, C. J.

Accused was convicted of theft by public servant. Convicting evidence for the prosecution, including accused 's including accused 's was introduced. However, another confession before a police officer and certain hearsay evidence was also introduced. The trial magistrate called on witness on his own initiative.

Held: (1) The confession to the police officer was inadmissible under section 23 of the Indian Evidence Act. The Court stated, obiter: that the confession would also be inadmissible under the new Evidence Act and that it is the duty of

the police as well as the magistrate to see that such confessions are not proffered.(2) A magistrate normally should call a witness only if he has been refused. Only if the testimony of the witness is vital to the case should the court exercise its undoubted power to call him.(3) Although there were irregularities at the trial a conviction would inevitably have followed on the basis of the admissible evidence alone. For that reason, the conviction was upheld.

253. R. v. Joseph s/o Michael, Crim. Rev. 23-M-67; 28/6/67; Cross, J.
Accused was convicted of assault causing actual bodily harm. (P. C. s.241) Under cross- examination. Accused mentioned that he had been charged with or convicted of similar offences on two previous occasions. His apparent intention was to discredit

One of the prosecution witnesses, pointing out that the same person had testified against him on the two previous occasions.

Held: (1) As the statement was “gratuitous” introduction of the damaging evidence by the accused himself, and as it impugned the character of the prosecution witness, the magistrate “had a discretion as to whether he ought to permit cross-examination as to the previous conviction …..” (2) However, he probably did not exercise his discretion, since he apparently though that the prosecution could put the question as a matter of right. “Moreover, no warning had been given to the accused, who was unrepresented …..” (3) Although the cross-examination was inadmissible, its admission occasioned no failure of justice; the conviction and sentence were confirmed. (Crim. Proc. Code s. 346.) Citing R. v. Rook (1959) 43 Cr. App. R. 138.

254. Uburiel Titila Msuya v. R., Crim. App. 75-A-67; 5/7/67; Georges, C. J.
One Husseing set fire to his shamba without permission. The fire spread and caused damage to neighboring shambas. Accused, a Field Assistant, Agriculture,

later went to Hussein's house and, after some discussion, asked him whether he admitted the offence. Hussein did so, and accused immediately imposed a fine of Shs. 45/-. On these facts he was convicted of false assumption of judicial authority. (P.C. s. 99(1), as amended by section 4 of Part 11 of the Sixth Schedule to the Magistrates' Courts Act, 1963.) A sentence of twelve month's imprisonment was imposed.

Held: (1) There was, in effect, the taking of a plea and a fine was imposed. While the dividing line between false assumption of judicial authority and corruptly accepting money to stifle a prosecution is difficult to determine, the facts in this case support the charge. (2) The sentence was unreasonably severe. A sentence of six months' imprisonment was substituted.

255. Hamisi s/o Shaha @ Hamisi s/o Issa v. R., Crim. App. 487-D-67; 31/7/67; Hamlyn, J.

Accused was convicted under section 310 of the Criminal Procedure Code of two counts of failing to comply with section 309, which prescribes certain requirements for those subject to a police supervision order. Each count charged a separate violation of section 309.

Held: It is a single offence under section 310 to refuse to comply with one or several of the requirements of section 309. A conviction in separate counts of violating separate requirements of section 309 is improper and may even contravene section 21 of the Penal Code. The conviction on the second count was set aside.

256. Pius s/o Zacharia v. R., Crim. App. 212-M-67; 8/6/67; Mustafa, J.

Accused was originally charged with theft. When the prosecution case was almost complete, a new charge of breaking and stealing was added. Accused was given no opportunity to recall any of his witnesses.

Held: This procedure did not satisfy the requirements of section 209 of the Crim. Proc. Code, and it cannot be said whether the non-compliance with that section was prejudicial to accused. Conviction quashed.

257. Machibya Magida v. R., Crim. App. 447-M-67; 19/7/67: Cross J

Accused initially denied stealing cattle. The record shows that he later changed his plea to one of guilty, his admission being paraphrased in the words of the magistrate.

Held: The admission of an accused must be recorded "as nearly as possible in the words used by him." Citing Crim. Proc. Code s. 203 (2); Chacha s/o Wambura 20 E.A.C.A. 339. Because the magistrate's action "may will have resulted in a failure of justice." Conviction and sentence were set aside and re-trial by a different magistrate ordered.

258. Ngongoseke s/o Mwangalazi v. R. (PC) Crim. App. 166-M-67; 7/6/67; Cross, J.

Accused was convicted of obtaining money by false pretences. He alleged that he and complainant had agreed that accused would tender two bags of cassava flour, instead of the money that he had obtained from complainant , and that the flour was in fact delivered to complainant in the presence of two witnesses. Accused did not call these witnesses, or request that the magistrate do so. The High Court noted "inconsistencies" in accused 's version of the matter.

Held: (1) A magistrate had a clear duty to call defence witnesses only where he makes a "finding that the evidence of the witness (is) essential to a just decision of the case. " Citing Crim. Proc. Code, s. 151; Kulukana Otim v. R., (1963) E.A. 253. (2) Where no such finding is made, an appellate court should not disturb his decision unless it is satisfied that he was "plainly wrong." Citing Langan v. Regina (1954) T.L.R. (R) 96. Conviction upheld.

259. Olairivan s/o Mollel v. R., Crim. App. 412-D-67, 5/7/67, Saidi, J.

Appellant was disqualified from holding or obtaining a driving licence following his conviction, inter alia, of driving on a public road without having third party insur-

ance, in violation of the Motor Vehicles Insurance Ordinance, Cap. 169,s.4(1). Pursuant to section 4(2) of the Ordinance, appellant would not have lost his licence had been able to show "special reasons" for his illegal action. In his petition to the court, appellant stated as reasons the fact that his job requires him to drive extensively

Held: Special reasons must be reasons special to the circumstances of the case and not to the accused himself. In the present case the appellant has no explanation to offer showing the necessity for his driving the uninsured car at the relevant time. The fact that his job requires him to drive a car is not a "special reason" as it does not relate to the offence but to himself.

260. R.v. Saidi Husseni, Crim. Rev. 75-D-67, 26/6/67, Hamlyn, J.
Accused was convicted of driving a motor vehicle with assorted defects. Among these was one count for having a defective hand-brake, and another count for having a defective footbrake.

Held: The Traffic Ordinance, Cap. 168, provides only for the offence of using a motor vehicle on the road with a defective brake. Since there is no provision for further punishment when both handbrake and footbrake are defective, the conviction on both counts stand, the latter one being quashed.

261. R.v. Magagania s/o Tunda, Crim. Rev. 17-A-67; 15/6/67; Platt, J.

Accused was convicted of arson, for which he was sentenced to 15 months imprisonment. In addition, he was ordered "…..to pay compensation of Shs. 356/- to (complainant) or 4 months imprisonment in default of sufficient distress."

Held: The order for 4 months imprisonment in default of sufficient distress was quashed. If an attempt at distress is made (see Crim. Proc. Code ss. 176, 177, 296, 299, 300) and it fails, a person may be committed to prison in lieu of

distress In the procedure adopted here by the trial court, however, there is always a danger that if such them of imprisonment in default of distress is entered on the original commitment warrant, it may result in an additional term of imprisonment being automatically carried on to the accused 's sentence without any attempt at distress being made. Citing Crim. Rev. 26-D-63, per Biron, J.

262. Mussa s/o Hassan v. R., Crim. App. 402-M-67; 19/7/67; Cross, J.
Accused was convicted of indecent assault and burglary, both offences being part of one transaction. The trial magistrate gave consecutive sentence, citing R. v. Kasongo s/o Luhogwa T.L.R. 47, which judgment contained the following statement: "Offences committed in the same transaction should carry concurrent sentences and before any departure is made from this principle the trial magistrate must be satisfied that there are very exceptional circumstances." The court then posited, as an example of exceptional circumstances, a situation where a person breaks and enters into a house and commits the felony of rape therein.

Held: There were no exceptional circumstances here to justify consecutive sentences here. Accused was convicted of indecent assault, a far lesser crime than that of rape. Also, he was a first offender.

263. R. v. Lucas Katingisha, Crim. Rev. 77-D-67; 29/6/67; Hamlyn, J.
Accused was charged in two separate counts of using a bicycle without a licence and of using a bicycle without affective brakes. He pleaded guilty and was fined Shs. 10/-

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

264. John Ngarama v. R., Crim. App. 215-M-67, -/7/67, Cross, J.
Accused was convicted on two counts of stealing, both arising out of the same transaction (taking money belonging to two people from a single purse.) The Ma-

gistrate's judgment stated that he was convicted "as charged" and sentenced to 9 months' imprisonment.

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

265. R. v. Green Mwanangwa, Crim, Rev. 25-A-67; 11/7/67; Platt, J.
Accused convicted on two counts of robbery with violence, and sentenced to 2 years and 24 strokes and 2 years and 12 strokes, respectively.

Held: Where an accused is convicted at one trial of two or more distinct offences, any two of which are punishable by corporal punishment, only one sentence of corporal punishment may be passed in respect of all the offences (Corporal Punishment Ordinance, Cap. 17 s. 10). Order for 12 strokes set aside.

266. Saidi s/o Abdallah v. R., Crim. App. 399, 400-D-67; 19/7/67; Georges, C. J.
Complainant slapped the second accused, who is his niece and an adult, hard enough that she fell down. Thereupon the niece picked up al large pestle(apparently the nearest thing at hand which might serve as a weapon) and started hitting the complainant with site. The first accused immediately joined the fray on the side of the niece. The damage to complainant was superficial, mainly a few lacerations and abrasions. Accused were convicted of assault and sentenced to eight months each.

Held: (1) Even though this quarrel was initiated by the complainant, accused were not justified in retaliating as they did. The convictions were upheld. (2) However, the sentences were patently too severe. A fine and compensation would have met the justice of the case, and probably fostered reconciliation. As

both accused had already spent two months in jail, sentence was reduced so as to result in their immediate release.

267. R. v. Chrisant Kalo, (PC) Crim. Rev. 3-D-67; 3/7/67; Saidi, J.
Accused was convicted of criminal trespass and stealing, for which he received concurrent sentences of 18 months and 12 months respectively. The value of the articles stolen was Shs. 13/50.

Held: (1) The sentence for criminal trespass is illegal because the maximum period of imprisonment allowed by law for this offence is 12 months. In view of the small amount involved, sentence was reduced from 18 months to 6 months on this count. A sentence must bear proper relation to the intrinsic gravity of the offence committed. Citing Hamisi bin Bakari, I.T.L. 200. (2) For the same reasons, the sentence for stealing was reduced to 3 months, sentences to run concurrently.

268 Daniford Shangai v. R., Crim. App. 401-D-67; 22/6/67; Hamlyn, J,; 12/7/67, Georges, C.J.
Accused was convicted of stealing from the person of another, contrary to P.C. ss. 265, 269 (a). Accused has three previous convictions for similar offences. The two notebooks stolen, which contained no money were valued at Shs. 1/-. A sentence of imprisonment for one year was imposed.

Held: Hamlyn, J. found the sentence imposed to be patently inadequate. Accused was given notice to show cause why sentence should not be enhanced. (2) On hearing to show cause, before Georges, C.J., the Court quashed the original sentences and substituted a sentence of two years imprisonment. Although the value of the property stolen was trivial, it was merely accused 's bad luck that the not books contained no money.

269. R. v. Justin Ngwaulanga, District Court Crim. Case 51-Iringa-67; 4/7/67; Inspection Note by Saidi, J."

Accused, shown to be aged 16 years on the charge sheet, was convicted of malicious damage to property. His sentence included corporal punishment; it had been executed when the case came before the High Court. Accused was an adult, "outside the ambit of the Children and Young Persons Ordinance, Cap. 13" and therefore the sentence of corporal punishment was improper.

The Court noted: Where a person is alleged to be 16 years old, "i.e., a person just on the borderline between a young person and an adult," medical evidence should be called for to determine the precise age of the accused, to assure proper trial procedure and proper sentencing.

270.R. v. Marko Matota, Crim. Rev. 79-D-67; 8/7/67; Hamlyn, J.

Accused pleaded guilty to attempted suicide (P.C. s. 217), and was sentenced to three months' imprisonment.

Held: While the Penal Code permits the imposing of imprisonment for such an act, it would be a very rare case which would call for imprisonment. The cause of the offence can be regarded as a mental aberration rather than a moral lapse, and psychiatric treatment, if available, or an interview with the local probation officer is of far greater value than imprisonment. The sentence of imprisonment was set aside.

271. Charles @ Makanyaga s/o Makobe v. R. Crim. App. 351-M-67; 15/7/67; Cross, J.

Accused was convicted of stealing cattle and sheep from his uncle. On a prior occasion accused had openly claimed a right to the cattle and sheep, and the openly took them in the middle of the afternoon in the presence the complainant's wife and another person.

Held: Even if accused had no right to the animals, it would be defence that he had an honest belief based upon reasonable grounds that he had such a

right. The trial magistrate erred in failing to consider this issue. The conviction was quashed.

272. Aniset Bonaventura v. R. Crim. App. 281-M-67; 23/6/67; Cross, J.
Accused was convicted of theft by public servant (P.C. ss. 265, 270). The magistrate found as a fact that he had formed animus furandi on the date he deposited a certain sum in his bank account, and also on the date his bank account was credited with another sum.

Held: The English Larceny Act emphasizes animus furandi at the time of the taking and carrying away of the goods concerned. The Tanzania Penal Code, s. 258, however, like the Uganda Penal Code, is so worded that "the offence can be committed not necessarily at the time of taking and carrying away but even at any time subsequently thereafter depending …… on the circumstances." Citing Bwire v. Uganda (1965) E.A. 606, 610. Conviction upheld.

273. Jackson James v. R., Crim. App. 310-D-67; 22/6/67; Georges, C.J.
Accused was convicted of possession of property suspected to have

Been stolen. (P.C. s.312). The facts stated were that when apprehended by the police he was in possession of a watch in suspicious circumstances. He was taken to the market place where he said he had picked up the watch, and a watch repairer produced a receipt identifying the owner of the watch. The owner was never traced. When at trial the charge was read to accused, he replied, "I picked it up in the market square." This was recorded as a plea of guilty.

Held: (1) (1) Section 312 of the Penal Code provides that any person who is charged in court with being in possession of property suspected to have been stolen "who shall not give an account to the satisfaction of such court of how he

came by the same, is guilty of a misdemeanor." A person is guilty of the offence only if he fails to give a satisfactory account to the court. Therefore, it would seem that he cannot plead guilty at the time the plea is taken because he has not at that time been given the opportunity to give such an account. In any event, on the facts of this case, it is clear that accused 's reply could not be held to be a plea of guilty. (2) A conviction cannot be maintained under section 312 if the articles in question can be identified as the property of any known person. If the owner is identified, it is no longer a question can be identified as the property of any known person. If the owner is identified, it is no longer a question of suspicion, and the charge should be laid under a section of the Penal Code dealing with stealing or possession or receiving stolen property. Citing R. v. Msengi s/o Abdallah (1952) 1T.L. R. (R) 107; R. v. Shabani Saidi, 1.T.L.R. (R) 77. (3) The Criminal Procedure Code does not permit a conviction for stealing when a charge is laid under section 312, although the reverse can be done.

274. Joseph Lawrence Mchaa v. R., Crim. App. 384-D-67; 12/7/67; Georges, C. J.

Accused, the manager of a community center, was convicted of stealing by servant. (P. C. ss. 271, 265). In the course of his employment accused regularly conducted dances, the proceeds of which went to the City Council. On the night in question, accused conducted a dance but failed to remit the proceeds. He claimed that the dance was for the benefit of Boy Scouts Troop, and the tickets for the dance contained the words "Boy Scouts and Girl Guides….." However, the court found that this claim was ruse and that the Boy Scouts were in no way involved in the dance.

Held: A person cannot claim that he did not receive on behalf of his principal monies it was his duty to receive in that behalf. It is irrelevant that at all times he intended to convert them to his own use. Citing Burton Bwaka- pesele v. R. (1965) E.A. 407. Conviction upheld.

275. Ambokile Mwamalongo v. R., Crim. App. 371-D-67; 12/7/67; Saidi, J.

Accused was convicted of stealing from the person of another in the following circumstances. He was pulling a purse out of the pocket of another person when a sudden movement by the intended victim' prevented accused from obtaining the purse. However, the purse was far enough out of the intended victim's pocket so that when he sat down immediately thereafter, his purse fell to the floor.

Held: Accused was guilty only of the lesser offence of the attempted pick pocketing. (P.C. ss. 269 (a),381.) Conviction was substituted accordingly.

276. Augaburg Pennyll Lekajo v. R., Crim, App. 353-M-67; 14/7/67; Cross, J.

Accused, a clerk employed in the Posts & Telecommunication Administration of the East African Common Services Organisation, was convicted of theft by servant under section 271 and 265 of the Penal Code. However, he was sentenced to the term prescribed by section 270 of the Penal Code, which deals with theft by public servant.

Held: (1) Accused was a person in the public service as defined by section 5 of the Penal Code. He is, therefore, liable to the sentences provided by Minimum Sentences Act, 1963. Citing R. v. Sefu Salim @ Ngomba, Crim. Rev. 72 of 1965; Crim. App. 331 of 1962. (2) The substantive offence of stealing is created by section 265 of the Penal Code. Sections 270 and 271 merely indicate circumstances of aggravation for which special penalties are provided. Therefore, the irregularity in sentencing is curable on appeal. A conviction under section 270 and 265 was substituted for the conviction under section 271 and 265, and the sentence was confirmed.

277. R. v. Saidi s/o Tatoo, Crim. Rev. 18-A-67; 15/6/67; Platt, J

Accused was apprehended driving a motor vehicle without a licence, and while intoxicated. Sentence consisted, inter alia, of disqualification from holding or obtaining a licence to drive for two years.

Held: While the Traffic Ordinance, s. 49 (2), permits periods of disqualification of more than one year, such a sentence is not justified here. The period of disqualification was reduced to 12 months.

278. Jumanne @ Alli s/o Hamisi v. R., Crim. App. 239-M-67; -/7/67; Cross, j.
Accused were convicted of theft. Indispensable to the prosecution case was the testimony of the Prosecuting Officer, who also did much of the investigation before the case came to trial.

Held: The High Court cited Gamalieri Mubito v. R. (1961) E.A.C.A. 244, where it was stated that, "…….. in a case where an investigating officer conducted the prosecution himself or was present while the prosecution witnesses gave their evidence and then entered the witness box and supplemented their testimony," a failure of justice may well have been occasioned. In the present case the convictions were quashed because there was lacking that appearance of fairness and impartiality which should characterize the administration of the criminal law. In view of the importance of the evidence or prosecuting Officer, the Court could not be sure that there was no failure of justice.

279. Abbas G. Essaji v. Gordhan Dewji Solanki, Misc. Civ. Case 40-D-67, 10/8/67, Georges C. J.
Every memorandum of appeal must have attached a formal order of the lower court's ruling. Earlier, appellant had sought to appeal a lower court decision. He had submitted a document purporting to be a formal order of the lower court, issued by that court, but not in fact the require document. After respondent's timely objection, appellant had sought an adjournment to put the papers in order. Hamlyn, J., had held that

Because the papers were not in order, there was nothing before him and consequently nothing to adjourn. In the present application, appellant sought an extension of time for filing his appeal.

Held: (1) The earlier ruling is not res judicata so as to prevent appellant from filing his appeal again, this time in proper order. Since the earlier appeal was incompetent, there was no "res" before the Court capable of becoming "judicata." Citing Ngoni-Matengo v. Alimohamed Osman (1959) E.A. 577. (2) Counsel's failure here was in not realizing that the order he obtained from the trial court was not in proper form. Not with standing the inconvenience to respondent, justice will be best served by not barring appellant's application for an extension of time because of counsel 's error. Order that appellant be given 5 days to file an Appeal in proper form.

280. Shabani Furia v. Lokila Maura, (L.C.) Civ. App. 12-D-65; 9/8/67, Hamlyn J.
Plaintiff ' s wife left him some 17 years ago, with their baby daughter. Defendant took them in, and the girl lived with defendant thereafter until the present. The mother died recently, and plaintiff, the girl's father, brought this action to obtain custody of the girl.

Held (1) Plaintiff had the right to custody of the girl, not with standing the fact that he had made no effort in the last 17 years to ascertain the whereabouts of the daughter, let alone provide for her in any way. (2) Plaintiff was ordered to pay Shs. 500/- to defendant as compensation for the expenses incurred in caring for the girl.

281. Kilale s/o Mwakajinga v. Enos s/o Mwaikambo, (Pc) Civ. App. 130-D-67; 18/8/67, Saidi J.
Plaintiff loaned defendant Shs. 210/- in 1958. Shortly thereafter, defendant's house burned down through no fault of the defendant; in the fire, the loaned money was destroyed, along with other property of the defendant. In 1966, plaintiff sued in Primary Court to recover the loan; no showing was made as to the

reason for the delay in bringing the action. The decision in District Court was for the plaintiff, the defendant appealed out of time.

Held: (1) The appeal, though out of time, was heard "in the interests of justice." (2) "(I)t would be inequitable to compel the (defendant) to refund the money to the (plaintiff), because it was destroyed by an unfortunate event which was not anticipated by either party and was outside the control of the (defendant)." (3) "There is another point which stands in favor of the (defendant). It is definitely clear that the claim was time-barred and that both courts below in advertently overlooked this fact." (4) Because neither party was responsible for the loss of money, it is "equitable for each party to pay his own costs."

The Court did not specifically deal with the matter of whether the suit, which had been brought initially in Primary Court, turned upon an interpretation of customary law.

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282. Selemani s/o Hoti v. Iddi s/o Omari, (PC) Civ. App. 73-D-67; 30/9/67, Saidi J.

Plaintiff left 58 cattle in the charge of defendant, for herding. All the calves born were to be the property of plaintiff; all milk was to be taken by the defendant. Only 52 cattle were returned, the other 6 having been lost. Plaintiff claims for the missing 6 head of cattle.

Held: There was nothing in the record to show that defendant had fraudulently disposed of the missing cattle; nor was he in any way responsible for their loss. "In the absence of such evidence it would be inequitable to order (defendant) to pay back these 6 cattle when they got lost in the bush without his fault."

283. Omoro Nyangerere v. Matitiro Machango, (LC) Civ. App. 13-M-65, 14/8/67, Cross J.

Defendant received twelve head of cattle as dowry for his daughter, who married plaintiff. They remained married for some time without having children, but in

1963 the wife left the matrimonial home. Plaintiff then brought this action in Primary Court for return of the cattle.

Held: Since no children had been born of the marriage, it was proper to order, as the District Court did on appeal, that only nine of the cattle be refunded. {Local Customary Law (Declaration) Order, 1963, Rule 52} Appeal dismissed.

284. Mkhandi Ghumpi v. Fatuma Salum, (PC) Civ. App. 72-D-67, 28//8/67, Hamlyn, J

Plaintiff was assaulted and driven away from her home by her husband four times during 1966. On three occasions she went to the home of her parents and was ordered by her father to return to her husband. On the fourth occasion, she sued for divorce in Primary Court. The divorce was granted, the court ruling that plaintiff's father was not obliged to return the dowry.

Held: Under Nyaturu law, under such circumstances, the wife is entitled to the divorce. The husband has no right to a return of the dowry, since he has "clearly demonstrated that the marriage, so far as he was concerned, was at an end."

The Court stated, further, that the Nyaturu law, as interpreted by the trial court and its assessors, "accords with the basic principles of natural justice.

285. Peter Mwansula v. Amulike Mwamasika, (PC) Civ. App. 93-D-67, 30/8/67, Saidi J.

Plaintiff's mother, alleged to be a practicing Christian, had died. Plaintiff sued the decedent's brother, also Christian, claiming one cow under the Wanyakyusa practice of "Ukumbamba" where by the father or brother or brother of a deceased woman provides a "mourning cow" to be slaughtered for the occasion of the mourning of her death. Defendant resisted on the grounds that to do so would violate his Christian beliefs and result in his ostracism, and that the practice would not comport with the fact that his sister had died a Christian.

Held: Under the statement of this practice in Rungwe District Council by-laws, Nos. 25/51 and 22/50, the gift of the mourning cow is voluntary. Plaintiff's appeal dismissed.

286. Birsingh v. Ramnik J. Khetia, Civ. App. 6-A-66, 5/8/67, Platt J.

Applicants, who are brothers, purchased a house from respondent and paid the purchase price in full. They agreed that respondent could remain in possession of the house until it was needed, upon payment of monthly rent of Shs. 650/- In January 1966 they allegedly served him with a notice to quit the premises and brought this proceeding before the Rent Restriction Board When he failed to do so. The application stated that the house was required for the occupancy of applicants' mother, who was ill and needed a ground floor dwelling; it was unclear whether one or both applicants would also live there. Respondent owned other houses which he had leased. He had not taken reasonable steps to regain possession of these houses.

Held: (1) When a vendor remains in possession of premises which he has sold, the question of whether a tenancy is created is governed by the true intention of the parties as shown by all of circumstances. {Citing Virani v. Singh, (1946) E. A. C. A. 3; Francis Jacson Development Ltd. v. Semp. (1946) 2 A. E.R 601} In the present case, the purchase price had been paid and a rent agreed upon, and a tenancy was created. (2) The tenancy was a tenancy at will, not a tenancy from month to month, and no notice to quit was required; a demand for possession was sufficient. (3) The medical evidence of the mother's condition was a sufficient showing of need under section 19(1) (e) of the Rent Restriction Ordinance, 1962 (the case is governed by that ordinance as it read prior to the

Amending Act, No. 57 of 1966.) (4) The requirement of section 19(1)(e) that alternative accommodation be available to the tenant is satisfied by the fact that respondent owned other premises, even though those premises had been 1 cased to others. (5) Section 19 (4) of the Rent Restriction Ordinance provides that nothing in section 19 (1) (e) shall "permit the landlord to recover possession of a dwelling house if by such recovery he ….would be in occupation of more than one dwelling house at the same time." This subsection has been interpreted by the Court of Appeals for Eastern Africa as applying to join landlords, and as requiring that none of them occupy another dwelling. [Citing Manmohandas Daverchand v. A. J. Kalyanji, (1950) 17 E.A.C.A. 63, and Shaer Shair Ahmed v. Sharifa Tatoon A. Aziz, (1960) E.A. 17, both appeals from the Supreme Court of Aden, and Mclntyre. V. Hardcastle, (1948) 2 K.B. 82] (6) The High Court is bound by decisions of the Court of Appeals for Eastern Africa. The "very artificial result" is that applicants can recover possession only if (a) both of them occupy the premises, or (b) neither of them do so and the house is occupied solely by their mother. Retrial ordered, because the record was unclear as to who would occupy the house.

287. Mohamed s/o Ally v. Amina d/o Saidi, (PC) Civ. App. 77-D-67, 30/8/67, Saidi, J.

Plaintiff assaulted his wife in 1965 and she left him. In 1966 he brought this action for restitution of conjugal rights. The wife did not challenge his claim, but she sought, and was awarded, Shs. 34/- as compensation for money which she had spent out of her original family's funds for her support during the separation.

Held: Plaintiff admitted he had assaulted defendant. So long as she is his legal wife, he is responsible for maintaining her, "and it matters little whether she is living separately."

288 Tatu Seleman v. COSATA, Civ, App. 10-M-66; 14/3/67; Platt, J.
Defendant succeeded in an action brought against him for goods sold and delivered. Defendant's preliminary motion, for a ruling that no cause of action had been stated, had been rejected, but no costs on the motion had been awarded. Upon final judgment, defendant was awarded costs for Shs. 25/-, At no time did the trial court hear argument by either party on the issue of costs, and the court did not specify its reasons for the award that was made

Held: (1) Scale 11 fees of Shs. 70/- should be awarded in defended cases, such as this. [Advocates' Remunerations Taxation of Costs (Amendment Rules, Rule 61 (1).] (2) The trial court has discretion in this matter under Rule 61, paragraphs (2), (3) and (5). However, since no reasons were given, the court will not be deemed to have exercised its discretion in a judicial manner. Its order, therefore, is reviewable. (3) Under Rule 61, paragraph (5), the trial court could have awarded costs at the time of the interlocutory ruling or deferred the matter until final judgment. In either case, the parties should be allowed to address the court as to costs at some stage. (4) This was not an appropriate case for an award of costs to follow the event. However, the costs on the ruling would be reasonable. Therefore, the resulting allocation of Shs. 25/- for costs to defendant should not be disturbed.

289. Petro s/o Kihisi v. R., Crim. App. 498-M-67, 27/7/67, Cross, J.
Accused was convicted of housebreaking and stealing. On appeal, he argued for the first time that an admission made in the presence of the complainant and the Village Executive Officer had been obtained by unlawful inducement.

Held: The accused "did not suggest during his trial that the admission ….. was obtained by any promise or threat although he now, as an after-thought, includes that in his grounds of appeal." Because the evidence justified the conviction, and because there was no misdirection by the magistrate, the conviction was upheld.

290. Donatus s/o Ishindike v. R., (PC) Crim. App. 115-M-67, 25/7/67, Cross, J.

In the District Court, accused sought leave to appeal out of time his conviction in Primary Court. His claim, that he did not know the appeal procedure was rejected, because the right of appeal was explained to him in the primary court. The District Court's second reason for rejecting accused 's application was that the appeal was unlikely to succeed.

Held: Upon examining the trial court record, the High Court found that accused 's appeal would be likely to succeed, if heard. The District Court was ordered to hear the appeal out of time.

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291. Andrea Ndibalema v. R., Crim. App. 387-M-67, 27/7/67, Cross, J.

Accused was convicted of burglary and stealing, and appealed …. The Senior Resident Magistrate reported that no trace could be found of the record of the trial and other proceedings below.

Held: In these circumstances it is impossible to adjudicate this appeal. Conviction set aside and appellant ordered to be re-tried by a different magistrate.

292. Onesmus M. Ngowi v. Modesta Nhigula, Misc. Crim. App. 30-D-67, 18/8/67, Saidi, J.

Plaintiff claimed that defendant had made her pregnant, and was successful in her Affiliation Cause in District Court.

Held: (1) The defendant's responsibility for plaintiff's pregnancy is established by the plaintiff's testimony, the love letters written to her by defendant under the pretext that he was her brother, the medical evidence, and the "facial similarity between the (defendant) and the child." (2) Under clause 189 of the Local Customary Law (Declaration) Order, 1963 [Government Notice No. 279 of 1963], the defendant is responsible for expenses of pregnancy and childbirth; defendant was ordered to pay Shs. 800/- on this account. (3) Defendant was ordered to pay Shs. 100/- per month for the maintenance of the child until the child reaches the

age of 21 years. The order was made retroactive to the month in which the child was born.

293. Japhet s/o Mangwa v. R., Crim. App. 461-D-67; 18/8/67, Saidi, J.
Accused was convicted of defamation {P.C. ss. 187, 188} for having made false oral reports to the police about another man.

Held: Section 187 refers to publications of defamatory matter by "print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words or other sounds …" Slander, therefore, is not a criminal offence, and complainant's recourse is to bring a civil action. Conviction quashed.

294. Samwel s/o John v. R., Crim. App. 512-D-67, 23/8/67, Hamlyn J.
Accused was charged with rescue of a prisoner [P.C. s. 115 (c)] and obstructing a police officer [P. C. s. 243 (b)]. He was convicted on the second count. However, he was acquitted on the first count on the ground that the section applies only to the rescue of a prisoner who has been tried and convicted of an offence.

Held: (1) Penal Code section 115 applies to the rescue of any person in lawful custody whether he has been tried and convicted or is merely in custody pending trial. (2) Since the appeal as to the conviction on the second count has no merit and a sentence relating to the first count would have run concurrently with that on the second count, no change in the sentence is required. Appeal dismissed.

295.Lawrence Kaguruku Mutungi v. R., Crim. App. 401-M—67, 14/8/67, Mustafa, J.
Appellant and a co-accused were charged with theft. The co-accused was acquitted, but appellant was convicted on the bases of the co-accused 's testimony against him. The High

Court found that the co-accused was "without doubt an accomplice" of appellant.

Held: (1) A conviction cannot be based solely on the testimony of a co-accused who is an accomplice. Such evidence requires corroboration. (2) The fact that appellant seemed an untruthful person in the witness box could not serve as such corroboration. Conviction quashed.

296. Edward s/o Petro v. R. Crim. App. 405-M-67, 18/8/67, Cross J.

Accused was convicted of stealing a bed. The bed was produced in court and identified by the complainant, but it was not tendered and admitted into evidence as an exhibit.

Held: Section 61 of the Evidence Act, 1967, provides, "All facts except the contents of documents may be proved by oral evidence." Even if an article is not produced in court, that factor affects only the weight – not the admissibility – of oral evidence concerning the article. [Citing Woodroffe and Amar Ali, Law of Evidence Applicable to British India (7th Ed.), comments to section 59 of the Indian Evidence Act (from which section 61 was derived).] Where, as here, the article was produced in court, was identified, and there was ample opportunity to examine it, the failure to admit if as an exhibit would not even affect the weight of the evidence.

297. Sigismund s/o Heremenigridi v. R., Crim. App. 497-D-67, 18/8/67, Saidi, J.

Accused was convicted of doing grievous harm [P.C. s. 225], on evidence clearly showing that it was he who had assaulted the complainant. A medical report on the complainant's injuries was apparently received as evidence by the court, but not shown to accused. The doctor who had prepared the report was not called as witness.

Held: (1) Under the Criminal Procedure Code, section 213, the court must, upon request by the accused, make available for examination the doctor who has prepared a medical report received in evidence. Therefore, the court is obliged to inform an accused of his right to cross-examine the doctor, and its failure to so inform the accused here was error. (2) However, the error here was not "a se-

rious omission which would go to the root of the case," as it was clear that the accused had assaulted the complainant, and as the report itself seemed to be in order.

298 Hatibu s/o Nyatika v. R., Crim. App. 498-D-67, 4/8/67, Hamlyn J.
Accused was convicted of house breaking and stealing. Act the trial, after the close of the defence case, the Court called a witness and took his evidence.

Held: (1) "Except in most unusual circumstances, prosecution evidence cannot be called after the defence case has closed. ….." Even where such a procedure is justified as, for example, in rebuttal of an alibi unexpectedly raised during the defence ---the greatest care must be exercised by the Court. In the present case, the procedure was wholly improper. (2) The testimony admitted was unnecessary, ineffective and was not mentioned in the judgment, and its introduction did not prejudice accused. Appeal dismissed.

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299. R. v. Jafari s/o Musa, Crim. Rev. 3-D-65, 14/8/67, Hamlyn J.
Accused was convicted of hunting game animals without a licence [Fauna Conservation Ordinance, Cap. 302, s. 12] and unlawful possession of a firearm [Arms and Ammunition Ordinance, Cap. 223, s. 13 (1).] Sentence included forfeiture of the fire-arm unlawfully in accused 's possession. [Fauna Conservation Ordinance, s. 53 (2B).] Included in the record of the case sent to the High Court was a sworn affidavit by the owner of the gun stating that he was out of town when accused used the gun unlawfully and knew nothing about the events constituting the offence.

Held: It seems evident that the owner of the gun in no way connived in the commission of the offence by accused, and it would be unjust to penalize the owner for an offence committed by another without his knowledge. The Court ordered that the firearm be returned to the owner.

300. R. v. Ngado d/o Mwakalinga, (PC) Crim. Rev. 7-D-67, 17/8/67, Georges C. J.

Accused, a child of ten years of age, was convicted of assault causing actual bodily harm [P.C. s. 241] upon the bases of the testimony of the victim, a child of eleven years of age. A fine and order of compensation were imposed, both of which were ordered to be paid by the parent of accused under the provisions of section 21(1) of Cap. 13. However, the parent was given no opportunity to be heard at the trial.

Held: (1) Section 15 of the Penal Code provides, "A person under the age of twelve years is not criminally responsible for an act … unless it is proved that at the time of doing the act … he had the capacity to know that he ought not to do the act …." In such a simple charge as assault, proof may be inferred from the surrounding circumstances. Most children of 10 know that they ought not to hit other children with stones. However, it is desirable that the Magistrate specifically consider and make a finding on this issue. (2) Section 15 (1) of the Primary Courts (Evidence) Regulations, G. N. No. 22 of 1964, provides, "In both criminal and civil cases, the evidence of young children must be supported by other evidence." There was no such corroboration and the evidence was thus insufficient to support the conviction (3) Section 21(2) of Cap. 13 provides that a court may not order a parent to pay a fine or compensation order without giving the parent an opportunity to be heard. Therefore, the order was bad. Conviction set aside and sentence quashed.

301. R. v. Mohamed (Werema) s/o Ntari, Crim. Rev. 31-M-67, 8/867, Cross, J.

Accused was convicted of disobedience of statutory duty. [P. C. s. 123.] He was charged with, and admitted to, willfully disobeying a "statutory order. … not to build any building on Plot No. 7 in Bunda township….." Section 123 provides, in relevant part, "Everyone who willfully disobeys any Statute or Ordinance by doing any act which it forbids …… and which concerns the public or any part of the public, is guilty of a misdemeanor.

Held: (1)The words “Statute or Ordinance” include subsidiary legislation made or passed under the authority of any statute

Or ordinance. However, it must be alleged and proved that the act which was done has been forbidden either by a statute or ordinance or by subsidiary legislation. The act charged was in violation of an Order of an Area Secretary and was, therefore, not in violation of section 123. The charge should have been made under section 124 of the Penal Code. (3) In light of information not presented at the trial, that subsequent to the date of the commission of the offence accused was give permission to continue development of the plot, conviction was quashed.

302. Xaver Haule v. R., Crim. App. 304-D-67, 4/8/67, Hamlyn, J

Accused was convicted of personating a police officer. [P. C. s. 100 (2).] There was evidence that he informed the keeper of a local beer house of his alleged status, ordered beer and failed to pay for it.

Held: One element of the offence is commission of some act by virtue of the alleged status as a public official such as, for example, an arrest, In the present case accused did no such act. Conviction quashed.

303. Kidevu Msese v. R., Crim. App. 227-M-67, 26/7/67, Cross, J.

The accused were convicted of office-breaking, on a charge that they had broken into a service station in Kigoma on the night of 22/23rd October, 1966. At the same trial, two other persons were convicted of breaking into the same service station on the night of the 17/18th October 1966.

Held: (1) Because the appellants were not concerned in the transaction which was the subject of the charge against the other accused persons, the charge against them should not have been joined in the same information, and the trials should not have proceeded together. (Crim. Proc. Code, s. 137). (2) This defect is not curable under Criminal Procedure Code section 346, “since it is

difficult to avoid the conclusion that the appellants were prejudiced by their joint trial." The trial was therefore a nullity. (3) As there was "sufficient indication" that one appellant was in fact guilty as charged, re-trial was ordered for that appellant only.

304. Omari s/o Mwendifwa v. R., (PC) Crim. App. 106-D-67, 7/8/67, Georges C.J
Accused was convicted of cattle theft. The record did not show that he was told of his right to cross-examine the prosecution witnesses, nor that he asked any question, nor that he stated specifically that he had no questions to ask.

Held: Where the record does not show that the accused was allowed to question those testifying against him, the trial is a nullity. Conviction quashed; re-trial ordered.

305. Amiral Rashidi Rajwani v. R., Crim. App. 460-D-67, 9/8/67, Hamlyn C.J
Accused pleaded guilty to charges of stealing by servant, forgery, and uttering a false document, "without any mis-apprehension as to (the) purport" of the charges. On appeal, he argued that the police had told him he would receive a lesser sentence upon a plea of guilty than otherwise.

He did not deny committing the offence. He also argued that the sentence, one of imprisonment, should be reduced because he was a first offender, and because he had not been heard in mitigation by the magistrate.

Held: (1) Because the accused did not argue that he was in fact not guilty, and because the plea had been "clear," the claim of inducement was rejected. (2) The sentence was altered to on of 18 months' probation on the accused 's own bond, without surety, for Shs. 1000/- The Court noted that it is "always desirable" to hear an accused in mitigation. The Court also noted that "particularly short terms of imprisonment" for first offenders are "undesirable."

306. R. v. Jama Mohamed, Crim. Rev. 20-A-67, 21/7/67, Platt J.

Accused was convicted of carrying passengers for hire or reward without a public service vehicle licence. [Traffic Ordinance, s. 27A (1) – (3), amendment Act No. 31 of 1961.] He had been previously convicted of this offence but in relation to another vehicle.

Held: Section 27A(2) provides that where the conviction is for a second or subsequent offence the court shall, in addition to any other penalty imposed, order the cancellation of the registration of the motor vehicle and of the public service vehicle licence, for a period not less than six months nor exceeding two years. This provision is applicable even though the previous conviction was in respect of a different vehicle. Licence and Registration cancelled for six months.

307. Jumanne s/o Masudi v. R., Crim App. 283-M-67, 2/8/67, Cross J.

Accused was driving his motor vehicle at a very high rate of speed when there were a number of persons on the road. A policeman signaled him to stop, but accused ignored this signal. He was convicted, inter alia, of failure to obey a policeman in uniform, under Traffic Ordinance, ss 58(a), 70.

Held: Section 58 (a) provides that, "Where a police officer is … engaged in the regulation of traffic… any person driving …. Who neglects or refuses to stop the vehicle …. When directed to do so by a police officer ….. shall be guilty of an offence." There is a requirement that the police officer be "engaged in the regulation of traffic" as one part of the offence. Since the constable here was not so engaged when he signaled accused to halt, the conviction was quashed.

308. R. v. Yahaya Mohamedi, Crim. Rev. 78-D-67, 4/8/67, Hamlyn J.

Accused was a motor vehicle mechanic. After repairing a truck, he drove it to a petrol station so that its driver could take delivery. While at the station he was cited for driving a vehicle which had no licence and for which there was no insurance. Accused was unaware of these facts. He was convicted, inter alia, of driving an uninsured vehicle.

Held: In addition to other penalties, such a conviction results in disqualification from holding driving licence for at least one year unless some "special circumstances" exist . [Motor Vehicle Insurance Ordinance, s. 4.] However, the facts of this case "suffice for not imposing this additional penalty."

309.Francis (Aoko) s/o Oyengo v. R. Crim. App. 348-M-67, -/8/67, Cross J..
Accused was convicted of cattle theft and was ordered to pay one cow to complainant as compensation.

Held: Section 6(1) of the Minimum Sentence Act provides that he court shall, upon convicting a person of a scheduled offence, order the convicted person to pay the owner of the property compensation equal to the value of the property lost. Section 6(2) provides that compensation ordered under subsection (1) shall be recoverable as if it were a civil debt. This provision restricts recovery to a sum of money and does not allow payment in kind. Sentence was substituted ordering accused to pay Shs. 100/- to complainant for the loss of the cow.

310. Rashidi s/o Hamisi v. R., District Court Crim. App. 39-Kondoa-67, 7/6/67, Hamlyn, J.
Accused was convicted in Primary Court of unlawful wounding and sentenced to six months imprisonment. The District Court purported to enhance the sentence to eighteen months imprisonment.

Held: Section 17 (b) of the Magistrates' Court Act, 1963. Provides that the decision of a Primary Court shall not be altered by a District Court so as to be in excess of the jurisdiction of the Primary Court. Under the Third Schedule of the Act, the ordinary powers of the Primary Court do not exceed a twelve month term of imprisonment. The term of imprisonment was reduced to twelve months.

311. R. v. Kinumen s/o Memuri, (PC) Crim. Rev. 1-A-67, 24/6/67. Platt J.

Accused was convicted in Primary Court of stealing one sheep and sentenced to a fine of Shs. 250/- or two months' imprisonment in default. On revision before the District Court, it was correctly determined that the offence was of cattle theft, which carries a minimum sentence of three years. [Part 11 of Schedule, Minimum Sentence Act.] However, before the prison authorities were notified of the new sentence, accused had completed his two month sentence and had been released.

Held: Accused, If apprehended, must serve the balance of the enhanced sentence, "unless other authorities concerned wish to take a special course."

312. Yakobo s/o Mulaki v. R., (PC) Crim. App. 297-M-67, 11/8/67 Cross J.
Accused was convicted of stealing a goat value at Shs. 50/- months' imprisonment and 12 strokes. On revision, The District Court increased the sentence to 3 years and 24 strokes, pursuant to the provisions of the Minimum Sentences Act.

Held: Section 5 (2) of the Minimum Sentences Act, setting out the conditions upon which a sentence less than the minimum may be imposed (including inter alia, that the property stolen be of less than Shs. 100/- in value), does not apply to cattle theft. Sentence upheld.

313. William s/o Nyanda v. R. Crim. App. 346-M-67, 18/8/67, Cross J.

Accused pleaded guilty to a charge of stealing from T.A.P.A., be whom he was employed as a teacher for Shs. 85/- per month. He had received school fees, from which he had retained Shs. 390/- against his unpaid salary. He had not been paid his salary for 7 months. The stolen money was subsequently repaid.

Held: (1) T.A.P.A. is a charity, as a number of judicial decisions have held; therefore, the sentence of 2 years and 24 strokes was obligatory, under the Minimum Sentence Act. (2) A certified copy of the proceedings was ordered to be forwarded to the attorney General "with a view to a recommendation to …… the

President that earnest consideration be given at least to a reduction of the sentence …. The Court felt that the accused could "hardly be blamed" for his conduct, and that, but for the operation of the Minimum Sentences Act, "Only nominal punishment would have been imposed."

314. Alli s/o Nassoro v. R., Crim. App. 488-D-67, 8/8/67, Georges C. J.
Accused was convicted of burglary and stealing. On the burglary conviction, the minimum sentence was imposed. Accused had been on remand for 7 months, a delay "accused entirely by the prosecution who time after time sought adjournments for one reason after another."

Held: "Unfortunately, the court cannot take into account period spent in custody where a minimum sentence is imposed." Sentence confirmed.

315. R. v. Revocultus s/o Nsolo, Crim. Rev. 35-M-67, 12/8/67, Mustafa J.
Accused, an 18 year old first offender, pleaded guilty to an unnatural offence [P.C. s. 154] He had been sleeping in the same bed with complainant, and had committed buggery upon him while the latter was asleep. He was sentenced to 3 years' imprisonment.

Held: Although "the accused is indeed morally debased," the sentence was excessive in view of the facts that he was a first offender and that he pleaded guilty. Sentence reduced to 18 months.

The Court stated, obiter: "Committing this young person to a prison for three years could possibly encourage him to commit such unnatural offences in prison. I would have liked to impose a sentence of corporal punishment on him but I find this offence does not attract corporal punishment."

316. Mathew Merere v. R. Crim. App. 456-D-67, 11/8/67, Hamlyn, J
Accused opened a school, promising that a normal and adequate course of instruction would be provided. He collected fees for his services. Because of his lack of knowledge and inefficiency, he was utterly in capable of fulfilling the prom-

ises which he had made. He was convicted of obtaining money by false pretences.

Held: (1) Section 301 of the Penal Code provides that the representation must concern a matter of fact either past or present. In the present case, the representation concerned services which were to be performed in the future, and such evidence did not support the conviction. (2) In addition, it is doubtful that the evidence showed any real intent to defraud. Conviction quashed.

317. Samson s/o Karuwana v. R., (PC) Crim. App. 514-M-67, 7/8/67, Cross J.

Accused was convicted of stealing iron sheets which were the property of the South Mara District Council, He was sentenced to two years' imprisonment and 24 strokes under the Minimum Sentences Act.

Held: (1) The Minimum Sentences Act applies to convictions of theft under section 265 of the Penal Code if the offender knew or ought to have known that the thing stolen was government property. However, there was no evidence that accused knew or ought to have known that the iron sheets belonged to the District Council and the Minimum Sentences Act was, therefore, inapplicable. (2) As accused had already served his term of imprisonment, no order varying sentence was made.

318. Paulo Kajuna v. R., Crim. App. 314-M-67, 28/7/67, Cross J.

Accused was convicted of criminal trespass, despite the defence that he thought the land belonged to him. The land upon which accused trespassed had been the subject of previous litigation, in which accused had claimed ownership of the land, and lost.

Held: In view of the earlier adjudication of ownership, if cannot be argued by accused that he in good faith believed the land to be his. Conviction affirmed.

319. Wambura s/o Chacha v. R., Crim. App. 424-M-67; 9/8/67, Cross J.

In the course of a trial for cattle theft, one of the witnesses was committed to prison for not answering a question "properly" or "directly". The trial court purported to act under section 153 of the Criminal Procedure Code which, inter alia, empowers a magistrate to commit a witness to prison if he refuses to answer any question; rather, the magistrate found the answer unsatisfactory. Moreover, the magistrate apparently did not give the witness an opportunity to explain why he answered as he did. "The magistrate should be very careful when invoking the provisions of section 153….. that the procedure therein outlined is strictly followed'. Section 153 was deemed inapplicable.

320. In re Dara F. Keeka and Mohamedali Nasser Damji, Misc. Civ. Case 12-D-67, -/8/67, Hamlyn, J.

The executrix of the deceased advocate brought this application for a Bill of Costs for services rendered in a criminal case.

Held: The Bill of Costs was filed under section 62 of the Advocates Ordinance, Cap. 341, for "contentions proceedings." Although that term is not defined, it is clear that it relates only to civil actions, and does not apply to remuneration in respect of services in criminal proceedings. [Distinguishing In re Jackson, (1915) I.K.B.371.] The Court stated, obiter, that in the absence of any written agreement as to remuneration, the matter "perhaps could be regarded as one of reasonable remuneration on an implied promise – Sib Kishore Ghose v. Manik Chandra Nath (1916) A.I.R. Calcutta 669." Application dismissed.

321. Amradha Construction Co. v. Sultani Street Agip Service Station, Civ. App. 14-D-67, 29/9/67, Saidi J.

Defendant owed plaintiff Shs. 5,652/85. Defendant was closing down his business; plaintiff, out of fear that defendant would leave for India without paying his debt, petitioned to attach certain of defendant's assets without first making formal

request for payment coupled with notice of his intention to file suit. A conditional order of attachment was granted, but the full amount of the debt was deposited in court before the scheduled hearing on the attachment. The only issue involved here was who should bear the burden of advocates' fees.

Held: (1) Rule 61 of the Rules of Court (Advocates' Remuneration and Taxation of Cost Rules) Vol. v, page 194 reads, "61. If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing no advocates costs will be allowed except on a special order of the judge." That rule precisely covers this situation. (2) Since upon consideration of all the facts the situation was not as urgent as plaintiff though, there was no basis for a special order here. Consequently plaintiff must bear all costs.

322. Juma s/o Kisunda v. Hema s/o Mjie, (PC) Civ. App. 85-D-67, 14/9/67, Saidi J.

The mother of the five children in question was originally married to a member of respondent's clan. Her husband died, as did his brother who inherited her after the death. The mother then left the clan and later allegedly married appellant. Appellant is the father of the five children. Custody of the children was awarded to respondent, for the bride price paid by the first husband was not returned. Under Nyaturu customary law, the mother, as his widow, was still in his clan. Appellant did not challenge this on appeal, but he did claim expenses incurred in caring for the children. Two of the daughters are now married and the bride price was taken by respondent.

Ordered: The claim for reimbursement for the maintenance of the five children is meritorious. Evidence should be taken as to the amount maintenance of a child in that locality. Case remanded to the District Magistrate for the taking of such evidence.

323. Nyandito d/o Makori v. Wichoka Masanja, (PC) Civ. App. 95-M-66, 30/8/67, Mustafa, J.

Plaintiff divorced her husband, and 21 head of cattle paid as bride wealth were returned to him She then sued for the return of 15 cattle on the grounds that she had lived with him for 14 years and had borne him 7 children, 4 of whom were still alive. These children were living with the husband . In the Primary Court, one assessor thought that she was entitled to the return of some of the cattle originally given, while one other disagreed on the grounds that it was she who had initiated the divorce. The Primary Court (Musoma District) awarded her 10 cattle, but the District Court held that she was not entitled to any award. The District Court assessors apparently agreed that this was the proper result.

Held: Although the wife initiated the divorce proceedings, she was not clearly at fault. In view of the length of time she spent with her husband, and of the fact that she had given birth to children during the marriage, “the court has a discretion in this case to award some cattle ….” [Citing Local Customary Law (Declaration) Order, G. N. 279 of 1963, ss. 52-55; no mention was made of the specific customary law involved.] Plaintiff awarded 7 cattle.

324. Bansongile s/o Mwalugaja v. Sifumwike s/o Mwandinde, (LC) Civ. App. 78-D-65, 11/9/67, Hamlyn J.

Plaintiff sue for possession of a plot of land allegedly allotted to him by a local headman. Defendant alleged that the land had been allotted by the local authority to defendant’s church, which defendant purported to represent in the present action. Defendant appeared in his own name, however. The customary law involved was not specified.

Held: (1) The Primary Courts have a less precise mode of procedure than the courts governed by the 1966 Civil Procedure Code. Order 1, rule 8 of that Code may be loosely applied in the Primary Courts to permit the appearance of the defendant here as a representative of his church, since the fact that he meant

to so appear was "clearly known to the [plaintiff] from the start of the litigation." (2) The Local authority does not lack power to allocate land for use for religious purposes. [Citing Pamaluka Mahema v. Twipakisyege Mwakatobe (LC) Civ. App. 19 of 1966.] The evidence supports the finding that such was the disposition to the defendant in this case. Plaintiff's appeal dismissed.

325. Gabriel Kyamukubwa v. Sylvestor Kente, (PC) Civ. App. 23-M-66, 30/8/67, Mustafa J.

Plaintiff sued defendant for occupying land alleged to have been bequeathed to plaintiff by a deceased woman. Several witnesses supported his claim that the woman had orally bequeathed him the land some three hours before her death. The Kishanje Primary Court found for plaintiff, the assessors concurring. The District Court found for defendant, on the grounds that he decedent had probably not been in full possession of her faculties at the time of the bequest, again with the assessors' concurrence.

Held: Section 7 of Schedule 111 to the Laws of Inheritance, Local Customary Law (Declaration) Order, G.N. 436 of 1963, lists a testator's "insanity, disease, drunkenness or sudden anger" as factors invalidating a will. Except that the bequest was made near the time of her death, no evidence indicates that the testator's mind was impaired in this case. Judgment for plaintiff.

326. Agnes Asser Mguya v. Bakisi E. Mbaga, Misc. Crim. Cause 32-D-67, 6/9/67, Saidi, J.

Appellant, who is unmarried, sought payment for expenses connected with her pregnancy, and child support payments, from the man who sired her child.

Held: (1) The Local Customary Law (Declaration) order 1963, Govt. Notice No. 279, clause 189 specifically provides for recovery in a situation such as this one, "….. for any expenses connected with the pregnancy and child birth." (2) Respondent's salary was Shs. 630/- per month. He was

Ordered to pay appellant Shs. 100/- per month until the child reaches the age of majority, this amount being subject to review "……in the event circumstances change."

327. Commissioner of Customs and Excise v. Tarnal Industries Ltd., Civ. Case 32-D-67, 16/8/67, Georges C. J.

In April 1965 defendant wrote plaintiff Commissioner requesting a ruling as to whether a certain product described as "sodium salt of the fatty acids" was subject to import duty; a sample of the product was enclosed in the letter. Thereafter, plaintiff informed defendant by letter that the product was free of duty under tariff item 108 (k) of the First Schedule to the Customs Tariff Ordinance, and in July 1965, it was so listed in the Gazette. In November 1966, plaintiff notified defendant that the product should have been classified as soap under item 105 of the First Schedule and demanded payment of the duty on all shipments which had been made during the previous year. In December 1966 another notice was sent demanding an additional payment with respect to one of the shipments, more that one was evidence that , although the product contained impurities and would be processed further at defendant's plant, 80 percent of it was chemically classifiable as soap, and that the product me the specifications of the Central Tenders Board governing the purchase of soap by the government.

Held: (1) The word "soap" should be interpreted in the sense that businessmen dealing with the Customs and Excise Department would understand it. It should not be given a purely chemical definition. (2) Still, the word should not be defined as that which is bought and sold on the commercial marked as "soap" this definition is also inadequate. (3) As used in the Schedule , "soap" means "a cleansing agent ….. consisting essentially of sodium salt of fatty acids" (Referring to Webster's Dictionary.) (4) The product in question can reasonably be defined as soap or as "sodium salt of fatty acids." (5)If a product can reasonably be classified under two or more items of the First Schedule to the Customs Tariff Ordinance, the Commissioner must classify it so as to made it subject to the highest

rate of duty. [East African Customs Management Act, 1952, s. 105]. (6) An official cannot be estopped from performing a statutory duty. [Citing Maritime Electric Co. Ltd. v. General Diries Ltd., (1937) 1 All E. R. 748; South end-on-Sea Corporation v. Hodgson (Wickford) Ltd., (1961) 2 All E.R. 46.] Therefore , plaintiff is estopped neither by his letter nor by the statement in the Gazette from classifying the product as soap. (7) Section 118 of the East African Customs Management Act, 1952, requires that a demand for additional duty be made within twelve months of the date on which payment was due. Therefore, the Commissioner could not in December 1966 demand an additional payment with respect to the shipment in question.

328. Mkonongo Moto v. Monjelwa Sangasi, (PC) Civ. App. 61-D-67, 4/9/67, Georges C. J

In execution of a judgment in a prior case against a third person, appellant levied upon cows and goats in respondent's possession. In deciding whether a balance was due on the prior judgment, the magistrate consulted out of court, the magistrate who had dealt with the prior case.

Held: (1) The magistrate in the prior case did not testify in this case, and the present decision should not be based upon evidence not given at the trial. (2) The cattle and goats were seized in the respondent's possession and prima facie were

His. The burden was upon the appellant to show that they in fact belonged to the judgment debtor in the prior case.

329. Shababi Mmasai v. Hassani Mcharo, (PC) Civ. App. 79-D-67, 30/8/67, Saidi J.

Plaintiff allowed defendant to occupy and cultivate a small piece of land, which was at the time all bush. Over a period of eleven years, defendant planted bana-

nas and other permanent crops, developing the land to a value of about Shs. 255/- Plaintiff then claimed possession back from defendant.

Held: Plaintiff is entitled to Shs. 272/- as reasonable compensation for the development of the land, a sum which includes the costs of his suit. (The customary law involved was not specified by the Court.)

The Court noted, Obiter: Had plaintiff's action been delayed one more year it would have been time-barred under the Customary Law (Limitation of Proceedings) Rules 1963.

330 Satima Chimbe v. Luhi Murasei, (PC) Civ. App. 67-D-67, 31/8/67, Saidi J.
Plaintiff claimed cattle and goats which he allegedly handed over to defendant in 1948 for safekeeping. He was awarded six cattle and appealed, contending that the judgment was insufficient. The action was filed on 5th December 1966.

Held: The claim was time barred and should have been rejected outright by the trial court. The limitation period was three years under the Customary Law (Limitation of Proceedings) Rules 1963. Appeal dismissed with costs.

331. Eliyaforo Hosea v. Fraeli Kimaryo, Civ. App. 2-A-67, 15/9/67, Platt J.
Plaintiff was driving from Moshi to Arusha, at night. He was passed by two other vehicles going in the opposite direction; the second vehicle's lights were not dipped. Plaintiff had dipped his own lights and having done so, was traveling at a speed too great to enable him to stop his vehicle within his reduced field of vision. Before the second vehicle passed him, he saw the defendant's unlighted Land Rover standing stationary ahead of him. He was unable to avoid it, and struck it. With the result that his own vehicle was irreparably damaged.

Held: (1)That plaintiff may have had the "last opportunity" to avoid the accident does not bar his action. Although the English rule was formerly to the contrary, the Law Reform (Contributory Negligence) Act 1945 has resulted in the treatment of such cases as matters for apportionment of blame. To the same effect is the controlling statute in Tanzania, the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360. [Also citing Thyssen v. Wakisu

Estate Ltd. (1960) E.A. 288; Panesar v. Lochab (1966) E.A. 401.] (2) Leaving an unlighted, stationary vehicle in a road at night is prima facie evidence of negligence. [Citing Hill-Venning v. Beszant (1950) 2 All E.L.R. 115; Harvey v. Road Haulage Executive (1952) 1 K.B. 120; Parish v. Judge (1960) 3 All E.R. 33.] (3) There is no rule of law that a driver must be able to stop within the limits of his lights. [Citing Tidy v. Batham (1934) 1. K.B. 319.] In this case, plaintiff's action was in fact negligent, under all the circumstances;

This view is supported by the provision of the Traffic Ordinance, s. 44(d), which require him to drive only when he has "a full view of the read and the traffic ahead of him." (4) Although there are English authorities supporting the allotment of a specific proportion of the damages to be paid to the party creating the obstruction in the road, this case will be decided on its own particular facts. Judgment for plaintiff; damages apportioned evenly between the two parties, so that plaintiff is entitled to one half of his proved damages.

332. Standard Bank Ltd. v. John Bibiano Fernandes, Civ. Case 51-D-65, 9/9/67, Hamlyn J

Plaintiff sued defendant on a secure debt on account in the name of defendant's wife, a bankrupt. The trial apparently commenced before the Acting Chief Justice, who heard the plaintiff's case. For reasons not further specified in this judgment, he refused to continue to hear the defendant's case, his action being "due solely to certain acts of the defendant himself." He was replaced by Justice Hamlyn. Defendant moved for a trial de novo, on the grounds that Justice Hamalyn had not observed the demeanor of the plaintiff's witness.

Held: "If …….. any hardship fell upon the defendant by reason of my acting under the provisions of Order 18 rule 10(10) of the 1966 Civil Procedure Code, the defendant had himself to thank for this. The plaintiff's witness's where-

about are now unknown and it clearly would place the plaintiff in great difficulty had I acceded to the defendant's application." Judgment for plaintiff.

333. Gaudensia Samwel v. Mechor Marcel, (PC) Civ. App. 47-M-67, 31/8/67, Mustafa J.

Plaintiff sued defendant of an account for goods sold to defendant's father. Defendants last cash payments had been in 1960, at which time she had also signed a written acknowledgment of liability. The present action was filed in Bukoba Primary Court in August 1965.

Held: (1) Under section 14 of the Magistrate Courts Act, it is doubtful that the Primary Court had jurisdiction to deal with this action. However, "since neither party had raised this question …. I do not propose myself to raise it, especially as the facts … are quite clear and in my view any court would have perhaps dealt with the matter in the way it was dealt with by the primary court." (2) The period of limitation in cases like this is 3 years from the date of the accrual of the cause of action. However, section 2 of the Primary Courts Customary Law (Limitation of Proceedings) Rules, G. N. 311 of 1964, provides for a period of 3 years from the accrual of the cause of action or from the day the Rules came into operation, "chic hover is later." Since the plaint was filed in Primary Court, these rules apply, and the claim is therefore not time-barred. Defendant's appeal dismissed.

334. Malolela s/o Ngwimbe v. Chisco d/o Chimali, (LC) Civ. App. 18-D-66, 16/9/67, Saidi J.

Plaintiff's father left him a number of cattle in the custody of plaintiff's aunt, the plaintiff being then too young to care for them himself. Plaintiff alleged that fifty cattle were left that these had since multiplied to seventy, and claimed.

Seventy cattle from his aunt. The woman admitted receiving twenty cattle, but claimed that she had paid nineteen of them as bride for plaintiff's wife. She did

not claim any compensation for her services. The High Court accepted her defence.

Held: "There is only one beast left in her hands, which I think should be given to her as a reward for having looked after the animals for … many years and for having administered the estate of the [plaintiff's] father in a very straightforward manner." No specific reference was made to customary law provisions or tribal practices involved.

335. Joas s/o Ernest v. R., (PC) Crim. App. 539-M-67, 7/9/67, Mustafa J.
The three accused went to the house of complainant and demanded pombe, to which request complainant replied that he had none. Accused threatened to use force if complainant did not let them into his house, and began to pound on the door. At this point neighbors came, and the accused departed. They were convicted of common assault, contrary to P.C. 240.

Held: The evidence does not disclose any assault. Appellant might have been successfully charged with "… Intent to intimidate or annoy or bread premises or some other offence of that nature." Convictions quashed.

336. R. v. Jama s/o Esmaeli, Dist. Ct. Crim. Case 156-Arusha-67, 25/8/67, Inspection Note by Platt J.
Accused was found guilty of being in possession of four leopard skins [Fauna Conservation Ordinance, Cap. 302, ss. 49 (1), 52], and fined Shs. 500/- or three months imprisonment in default. There was no evidence as to the condition of the skins.

Noted: If the skins were in good condition, the fine was quite inadequate, In cases concerning valuable government trophies, it is proper to introduce evidence as to their condition and their value, for this provides the magistrate with essential information on which to base the sentence. In the absence of such information, the sentence was not modified.

337. Samweli s/o Baruni v. R. (PC) Crim. App. 22-A-67, 30/8/67, Platt J.

Accused was the defendant in a prior case in which a judgment had been entered against him. The plaintiff in that action brought an execution proceeding which resulted in the sale of accused ‘s shamba, but accused was permitted to remain in possession for a period in order to harvest his crops. Eventually the purchaser at the execution sale reported to the court that he was unable to take possession of the shamba. As a result, accused was convicted under section 114 (1) (h) of the Penal Code which provides that any person who “wrong fully retakes possession of any land … from any person who has recently obtained a judgment from a court for the recovery of possession on such land … is guilty of a misdemeanor.”

Held: Accused had not “retaken” possession but had merely remained in possession beyond the permitted period. Moreover, the purchaser’s right to possess did not stem from a judgment granting him recovery of possession. Therefore, the charge was not proved. The Court stated, obiter, that if the purchaser had sued accused for the recovery of the land,

Accused would then have been in contempt of court if he had failed to vacate possession. The Court also stated that if accused had disobeyed any lawful orders of the Court, he “could have been charged perhaps under section 124 of the Penal Code …..”

338. Peter s/o Kasembe v. R., Crim. App. 454-D-67, 27/9/67, Georges C. J.

Accused was convicted of a corrupt transaction contrary to section 3(1)(3) of the Corruption Ordinance, Cap. 400. As a part of a police trap, a police officer sought work from accused, who was the personnel manager of a textile factory. Accused demanded money for performing this favour, and the money was allegedly given to accused by an intermediary named Abdullah during a meeting at the accused ‘s house. Other police officers then entered the house and the money was found under a table cloth in the room in which the meeting took place.

Held: (1) Abdullah was an accomplice, and the trial court erred in failing to consider the danger of accepting such evidence unless it is corroborated. (2) The police decoy who took part in the trap should not be treated as an accomplice, and his testimony need not be corroborated as a matter of law. However, he is not a disinterested witness, and his evidence must be examined closely." (T)hought corroboration would not be required as a matter of law, it would hardly ever be safe in practice to convict unless there was corroboration." (3) The finding of the notes under the table cloth does not provide corroboration since they were not found on the person of the accused and could have been placed under the table cloth by one of those taking part in the trap. Conviction set aside for insufficient evidence.

339. Alex s/o Andrea v. R., Crim. App. 494, 495-D-67, -/8/67, Hamlyn J.
Accused were convicted of burglary and stealing. The prosecution was unable to obtain transport for one of its witnesses in time for him to appear during the prosecution case. As a result, he was called as a court witness by the magistrate after the close of the defence case. The appeals were dismissed because any errors committed were not prejudicial.

The Court stated, obiter: (1) A court witness should be called only in the most exceptional circumstances after the close of the defence case in rebuttal of defence testimony. (2) An opportunity must be given to an accused to recall witnesses for further cross-examination after any amendment of the charge. (3) Where an accused who is unrepresented cross-examines a prosecution witness and asks questions the answers to which would be prejudicial to him, the magistrate should caution the accused. The question should be entered in the record only if the accused persists in asking the question after such a caution.

340. Paulo s/o Joseph v. R., Crim. App. 108-A-67, 28/8/67,
Appellant and his co-accused were charged with robbery with violence. There was evidence that the complainant had picked out accused from an identification

parade after he had been told to “point out the person who attacked him if he was on the pared.” At a second identification parade, in which the

The co-accused and several other suspects were placed among nine persons, the complainant was in doubt as to the identification of the second accused who was therefore acquitted.

Held: The officer conducting a parade should not inform a witness that a suspect is certainly on the parade. However, the statement by the officer at the first parade did not violate this rule. The Court stated, obiter: The second parade violated the requirement that an accused person ought to be placed among at least eight other persons; it is not satisfactory that several suspects be placed amongst nine persons. [Citing R. v. Mwango s/o Manaa, (1936) 3 E.A.C.A. 29] However, the error was harm-less because the co-accused was acquitted.

341. Mohamed Hemed Kakopa v. R., Crim. App. 567-D-67, 20/9/67, 20/9/67, Georges C. J.

Accused was convicted of stealing by finding. [P.C. ss. 248(4), 265.] There was evidence that one Ayubu had been hunting and had shot an elephant several times in the leg but that the elephant had escaped. Two days later accused and a guide came upon the dead body of the elephant. The guide told accused the elephant belonged to Ayubu but accused denied this and took the tusks. Prior to the trial the guide had given a statement to the police which contradicted his testimony at the trial.

Held: (1) If a witness has previously made a statement contradictory to his testimony at the trial, his testimony at the trial, his testimony should be viewed with great suspicion and should be acted upon only where the witness can offer satisfactory explanation for the change in his story.(2) Section 257 of the Penal Code states that “wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen, but their

dead bodies are capable of being stolen." To obtain ownership, a hunter cannot merely injure an animal, he must reduce it to possession. There fore, the elephant was not the property of Ayub. (3) Accused should have been charged with taking a government trophy. [Citing section 471 (b) of the Fauna Conservation Ordinance, Cap. 302.]

342. R. v. Mley s/o Kinyamali, Crim. Sass. 40-A-67, 26/7/67, Platt J.
Accused set fire to complainant's house, knowing that she was asleep inside. Accused was charged with attempted murder [P.C. s. 211]. The evidence revealed a history of accused 's frustrations in his advances toward complainant, including a futile approach on the night of the fire, the complainant's belief that she had heard the accused 's voice at her house before the fire commenced, and witness' statement that accused was running away from the house shortly after the fire had begun.

Held: It is not clear that accused intended to cause complainant's death; he may have intended "to cause grievous harm or wound the lady," or to cause the loss of her house while being "somewhat indifferent whether she was hurt." Only a specific intention to cause death will suffice to support a charge of attempted murder [Citing R. v. Gwempasi s/o Mukonzho (1943) E.A.C.A. 101.] Accused convicted of arson.

343. R. v. Alistaliki s/o Masumbuku, Crim. Sass. 4-A-67, 31/7/67, Platt J
Accused was charged with murdering the woman with whom he had lived for several months. There was evidence that

They had quarreled during the day, that deceased had threatened to return to her mother and had refused to obey accused 's demand that she wash his clothes.

She also refused to give him Shs. 20/- which he demanded, but finally relinquished it. Shortly thereafter, accused dragged deceased from a house into a plantation a short distance away and fatally wounded her with a panga. Deceases was 16 week's pregnant at the time of her death.

Held: (1) An issue is "whether the situation which faced accused as a whole, could be seen as provocation, which could cause a man of his [accused 's] position in life to lose control of himself and act in a heat of passion in this way." (2)The burden of proof is on the prosecution to disprove provocation. (3) The acts of deceased during the quarrel would merely give rise to annoyance and did not constitute provocation. Accused convicted of murder and sentenced to death,

344. Masaiti Magessa v. R. Crim. App. 294. 463, 331-M-67, 6/9/67. Mustafa J.
The three accused were tried together at one trial and were convicted of cattle theft. The first two accused were charged on one charge sheet and the third accused was charged on a second and separate charge sheet.

Held: (1) Individuals who are separately charged cannot have their charges consolidated or tried together. [Citing Uganda v. Raimondo Alindubo, (1966) E. A. 301, 303.] (2) The defect is fundamental and cannot be cured by section 346 of the Criminal Procedure Code.

345. Nyabilimo Andrea v. R., Crim. App. 269-M-67, 6/9/67, Mustafa J.
Accused was charged and convicted of "robbery with violence c/s 286 of the Penal Code." The charge correctly quoted the section of the Code appropriate to this offence, but gave wrong section number.

Held: "The number of the section was obviously quoted in error and I invoke the provisions of Crim. Proc. Code s. 346 ….. as this error cannot occasion any miscarriage of justice or prejudice to the appellant as the particulars of the offence are quite clear. He knew what he pleaded to and with what offence he was charged."

346. Fabian Maganga v. R. Crim. App. 545-M-67, 8/9/67, Mustafa J.

Accused was convicted of stealing by public servant. The single count charged that he stole Shs. 100/- However, the evidence showed that on three separate occasions he had stolen sums of Shs. 20/- Shs. 40/- and Shs. 40/- respectively. The trial magistrate had stated that if accused had been charged in three separate counts, "probably the sentence might have been different."

Held: (1) These were three separate and distinct thefts and should have been charged in three separate counts. (2) Had he been charged in three counts, "it was likely he would not have been deprived of the special circumstances provisions of Section 5 (2) of the Minimum Sentences Act." Therefore he was prejudiced by being charged in one count with an amount which made him ineligible for such a reduction in sentence. Conviction quashed.

347. John Paul v. R., Crim. App. 54, 71, 71-A-67, 28/8/67, Platt J.

Accused were convicted of conspiracy contrary to Penal Code, section 110 (a). The first magistrate commenced the trial and heard the first two witnesses. He was then transferred and the trial resumed before a second magistrate. The accused 's counsel were given the opportunity to recall the first two witnesses but declined to do so . The result turned primarily upon the testimony of one of the first two witnesses.

Held: From the record it appears that the trial could have been started de novo, and it cannot be said that accused were not prejudiced by the failure to do so. Convictions quashed.

348. Edward s/o Hamisi & 25 Others v. R., Crim. App. 623-648-D-67, 27/9/67, Georges C. J.

The twenty-six accused were convicted of riot [P.C. ss. 74, 76] and sentenced to two years' imprisonment. They were members of the Wanyisanzu tribe, A large group of Wanyisanzu had been summoned to go to Mataragwe to meet and fight

a group of Wamang'ati tribesmen, who were said to be coming to attack. It was evident that the Village Executive Officer had led some of the accused to believe that their action would have official sanction: there was testimony that he had stated that anyone who did not go to meet the Wamang'ati would be subject to a fine of one head of cattle. On the way to Mataragwe, the accused met a number of Wamang'ati; a small battle ensued, in which 12 Wanyisanzu were killed.

Held: (1) As there clearly had been time to contact the police and higher administrative authorities, "who could then have organized appropriate forces to restrain the Wamang'ati, the defence of self-defence cannot prevail. (2) That certain Wanyisanzu were able to identify certain Wamang'ati as participants in the riot does not establish the guilt of the Wanyisanzu, as it proves only their presence on the scene. Mere presence is not enough. (3) Persons whose presence at the meeting, where the decision to fight the Wamang'ati was taken, was established, but who were not proven to have participated in the subsequent fighting, cannot be convicted. (4) A person seen at the meeting and later seen running from the scene of the fighting was properly convicted. (5) It is proper to convict persons of riot on the bases of uncorroborated eyewitness testimony by co-participants. In such cases, corroboration would not be required. "Though the parties have committed an offence against the Penal Code, it is clear that they all thought that in obeying the summons to battle, they were merely conforming to custom. Later, when the law intervened, the anxiety to dissociate began. An accomplice in these circumstances, i.e., a participant in the riot, cannot be viewed in the same light as an accomplice in the generally accepted sense."

349. R. v. Hassanali H. Dewji, Crim. Rev. -------- -D-67, 7/9/67, Saidi J.

Accused were both convicted of two separate violations of section 43 (a) of the Traffic Ordinance, for having driven motor vehicles with defective footbrakes and defective handbrakes.

Held: This Court has "repeatedly held" that where both the footbrakes and handbrakes of a vehicle are defective, the accused is to be regarded as having committed only one offence under section 43 (a) of the Traffic Ordinance.

350. Paulo s/o Kihani v. R., Crim. App. 657-D-67, 14/9/67, Georges C. J.
Accused was convicted on his own plea to a charge of driving a motor vehicle on a public road without a third party insurance policy. [Motor Vehicle Insurance Ordinance, Cap. 169, ss. 4(1), 4(2).] He was disqualified from holding or obtaining a driver's licence for 12 months. He alleged that the magistrate had refused to consider the nature of his job as a "special reason" justifying withholding the disqualification order under section 4(2).

Held: The circumstances constituting "special reasons" for leniency in sentencing must be special to the offence and not the offender." This would have been a circumstance special to the offender. Appeal dismissed.

351. R. v. Donough J. Mahon, Crim. Rev. 23-A-67, 29/8/67, Platt J.
Accused, a farm manager, ordered an unlicensed employee to drive an unlicensed and uninsured tractor to a neighboring farm for repairs. To do so, the driver had to cross a bridge on a public road. As a result, accused was charged with permitting a tractor to be used on a public road without a road licence [Traffic Ordinance, s. 6], by an unlicenced driver [Traffic Ordinance, ss. 14(2), 70] and without an insurance policy [Motor vehicle insurance Ordinance, s. 4(1)].

Held: (1) A farm vehicle must be licensed and insured if it is to be driven on a public road, especially while being taken for repairs. (2) The short time the vehicle was upon the road is not a special reason which would justify the failure to impose a disqualification from holding a driver's licence, nor is the fact that obtaining a licence and insurance would have caused a delay during the planting season. (3) In the circumstances of this case, disqualification for a period of six months is appropriate.

352. R. v. Abdallah Mohamed, Crim. Rev. 99, 100, 101, 102-D-67, 4/9/67, Hamlyn J.

Accused were convicted of separate counts of (a) failing to protect foodstuffs sold by a butcher, (b) failing prevent contamination by failing to clean utensils and (c) allowing waste matter to remain in the open; contrary to section 5(a) 5(c) and 5(e), respectively, of the Dar es Salaam Municipality (Food Handling) By-laws. It was argued that these acts all constituted a single offence.

Held: Each distinct contravention of the statutory requirements furnishes a separate ground of complaint. Where a law requires members of the public to do so, or refrain from doing, a series of acts and more than one requirement is contravened, it cannot be argued that a single offence was committed.

353. R. v. Alfronce Paul, Crim. Rev. --------D-67, 12/9/67, Georges C. J.

The accused were convicted of being rogues and vagabonds

[P.C. s. 177(4)]. Maximum penalties of 3 months' imprisonment were imposed. Both were first offenders.

Held: Only in the most unusual circumstances should the maximum penalty be imposed on a first offender. Sentences reduced to result in immediate release.

354. R. v. Abdallah Selemani @ Mswahile Selemani, Crim. Sess. 108-Dodoma-67, 18/9/67, Hamlyn J.

Accused was convicted on his own plea apparently (the judgment does not specify) to charge of manslaughter. He had been involved in a pombe party.

Held: "This is another death arising from excessive drinking at pombe parties and, while the accused has a claim to leniency, yet these acts must be discouraged by the court." Accused, who had been in custody for 9 months, was sentenced to 20 months' imprisonment.

355. R. v. Joha Mdachi, Crim. Sass. 120-Dodoma-67, 21/9/67, Hamlyn J.
Accused pleaded guilty to manslaughter. She had goneto the house where her husband was staying with another woman, and killed the woman with a knife she had carried with her.

Held: Although the penalty for such an offence would usually be severe, the accused was three months pregnant and "this may well have unbalanced her mind. She has been in custody over a year and gave birth to her child in prison. Moreover, her husband has now run away her." Sentence of 1 day's imprisonment imposed.

356. Nyamato d/o Mkama v. R., Crim. Sass. 134-M-67, 28/8/67, Cross J.
The husband of the accused, an old man, was involved in a fight provoked by a much younger man. The accused, a woman of between 55 and 60 years of age, approached the struggling men, and struck the younger man with an axe, causing his eventual death. She pleaded guilty to manslaughter.

Held: In view of the accused 's age, and the fact that she had spent some 8 month in custody awaiting trial, sentences of 1 day's imprisonment was imposed, resulting in release upon the rising of the Court.

357. Amosi s/o Marwa v. R., Crim. App. 549-M-67, 15/9/67, Cross J.
Accused was convicted of stealing Shs. 2,386/- from the Tarime Wakulama Co-operative Union, and sentenced to 2 years imprisonment and 24 strokes. There was no evidence proffered as to whether this organization was a registered co-operative society.

Held: (1) The Minimum Sentences Act does not apply to unregistered co-operative societies. (2) "The penal provisions of the Minimum Sentences Act must be strictly construed and in the absence of evidence that the theft was from a registered co- operation society, the provisions of the Act cannot be held to apply. Sentence reduced to 18 months, no strokes, (3) Since the offence does not come within the terms of the Act, the magistrate could not make a compensation

order in excess of Shs. 2, 000/-. Order that accused should pay Shs. 2,368/- reduced to Shs.

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358. Marwa Nyiriga v. R., (PC) Crim. App. 71-D-67, 5/7/67, Georges C.J.

Accused was sentenced to 2 years and 24 strokes for stealing from the A.L.C., on the theory that the property stolen belonged to the Tanzania Government, and therefore this theft was covered by the Minimum Sentences Act.

Held: (1) A.L.C. is a registered body whose affairs are conducted by African Governments, including Tanzania. It does not follow, however, that A. L. C. property is that of the Tanzania Government, within the meaning of Part 1 sec. 3 of the Minimum Sentences Act. (2) The A. L.C. aids political refugees. Consequently it falls within the ambit on the word “charity” as defined in Sec. 8 of the Minimum Sentences Act, and therefore this offence is covered by the Act Sentence confirmed.

359. Juma s/o Saidi v. R., Crim. App. 873-D-66, -/-/67, Saidi J.

Accused was convicted of attempted burglary, a scheduled offence under the Minimum Sentences Act. As he took nothing, and was a first offender, the question remained whether there were “special circumstances” so as to justify a sentence of less than two years imprisonment. At the time of sentencing the accused said, “I am a first (offender and I stole nothing. My aged parents are under me (dependent on me), and they will suffer a lot for my prolonged absence from home.”

Held: “Although this not a very satisfactory statement of special circumstance, it would appear to me that what the appellant has stated…. Is sufficient ground to bring the case within the ambit of section 5(2) of the Minimum Sentences Act.” Sentence reduced to 12 months.

360. Mohamed s/o Abdallah v. R., (PC) Crim. App. 124-D-67, 22/9/67, Saidi J.
Accused was convicted of housebreaking and sentenced to 2 years and 24 strokes, pursuant to the provisions of the Minimum Sentences Act. Accused was a first offender; the value of the property taken was Shs. 10/-

Held: The smallness of the value of the stolen property is in itself a special circumstance so section 5 of the Act is applicable here. Sentence reduced to 6 months imprisonment, no strokes.

361. Mandawa Koshona v. R., Crim. App. 562-D-67, 20/9/67, Georges C. J.
Accused were convicted of cattle theft. Because both accused were first offenders and the goat they stole was worth only Shs. 60/-, the magistrate issued a sentence less that the 3 year and 24 strokes minimum required by the Act.

Held: Section 5 of the Minimum Sentences Act allows for reductions in sentence if the accused is a first offender, the value of the stolen property is Shs. 100/- or less, and if there are "special circumstances." However, this section is inapplicable to the offence of cattle theft. Sentence increased to 3 years imprison and 24 strokes.

362. Charles s/o Hizza v. R., Crim. App. 553-D-67, 30/8/67, Hamlyn J.
Accused was convicted of stealing Shs. 7,000/- from the Workers' Development Corporation, and sentenced to 2 years and 24 strokes under the Minimum Sentences Act.

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Held: "The Workers" Development Corporation … is not a Trades Union though the shares are wholly held by NUTA----- a Trades Union. This being the case, the offence appears not to fall within Part 1 of the Schedule to the Minimum Sentences Act." In view of the large amount stolen, the sentence of 2 years imprisonment was confirmed; sentence of 24 strokes was set aside.

363. R. v. Juma s/o Mfalasau, Crim, Sass. 133-Dodoma -67, 18/9/67, Hamlyn J.
Accused killed his father, "probably a cantankerous man," in the course of a struggle.

Held: The crime of patricide "is a most serious one and cannot be dealt with too leniently." Sentence of 3.5 years imposed.

364. R. v. Alli s/o Saidi, Dist. Ct. Crim. Case 21-Kisarawe-67 5/9/67, Inspection Note by Saidi, J.
Accused was convicted of obtaining credit bye false pretences. [P.C. s. 305(1)(a).] The incident was petty, involving Shs. 1/15 in bus fare. He was therefore sentenced to one month's imprisonment, with a recommendation for extra-mural labor.

The Court noted: Short-term imprisonment has little deterrent value. It introduces the accused to an economically secure environment in which he may make the acquaintance of more experienced criminals. The brief confinement does not effectively chasten the offender, nor does it afford an unskilled person the opportunity for training that may be useful in the future. In this case, then, the recommendation for extra-mural labor was a good one; however, a fine or discharge would have been most appropriate.

365. Braison s/o Sechayo v. R. (PC) Crim. App. 18-A-67, 25/8/67, Platt J.
Accused broke into a goat house with intent to steal there from. Hearing some noises, the owner of the goat house, who lived adjacent to it, came out and locked accused inside the goat house. Accused was convicted of theft, contrary to sections 294 and 296 of the Penal Code.

Held: (1) P.C. s. 296 covers any person who "breaks and enters …… a building which is adjacent to a dwelling house and occupied with it ….. and (commits) a felony therein ……" Such a building must be occupied as a human habitation. "It is not sufficient that the building is merely used for some other purpose such as keeping animals therein." (2) As there was no evidence that ac-

cused had moved any of the goats inside, the asportation requirement of the offence of theft was not established. Conviction of attempted (cattle) theft substituted.

366. Paschal s/o Nzalaniko v. R., Crim. App. 118-A-67, 4/9/67, Platt J.
Accused was convicted, inter alia, of burglary {P.C. s. 294 (1)]. The evidence established that he had broken into complainant's house, but the time of the offence was not clear. He had been seen outside the house at 6:00 P.M., and the breaking and – entering was discovered at 8:00 P.M.

Held: Burglary involves a breaking and entering during the "night," which is statutorily defined as beginning at 7:00 P.M. [P. C. s. 5]. As this was not clearly shown, the offence proved was not burglary but housebreaking.

367. Kataliche s/o John v. R., Crim. App. 519-D-67, 6/9/67, Saidi J.
Accused came across a cow with a broken leg, which he killed, leaving only the head and skin. He was convicted of cattle theft, and sentenced under the Minimum Sentences Act to three years imprisonment. (No strokes were imposed because he was over 45 years of age.)

Held: (1) Asportation is one element of the offence of theft. As there was no evidence that the whole animal had been moved, there could be no conviction for cattle theft. Conviction for killing a cow with intent to steal its carcass was substituted. (2) Section 279 of the Penal Code provides, "Any person who kills any animal capable of being stolen with intent to steal the skin or carcass, or any part of the skin or carcass, is guilty of an offence, and is liable to the same punishment as if he had stolen the animal." The sentence of three years imprisonment was upheld because "It appears that the offence falls within the ambit of the Minimum Sentences Act."

368. Andreas s/o Manabe v. R., Crim. App. 482-D-67, -/8/67, Hamlyn J.

Accused was charged with receiving stolen property under section 311(1) of the Penal Code but was convicted of retaining stolen property under that same section. He argued that the procedure was improper, citing Harji Kuverji Patel v. R., 22 E. A. C. A. 336, a 1954 criminal appeal.

Held: Criminal Procedure Code (Amendment) Ordinance, 1960, specifically empowers the court to convict of an offence of "retaining" where "receiving" is charged and vice versa.

369. Fanuel s/o Kiula v. R., Crim. App. 536-D-67, 20/9/67, Georges C. J.
Accused was convicted of stealing by servant. [P. C. ss. 271, 265.] His defence was that the money had been taken from him. The trial magistrate stated in his judgment, "If the court is to accept the evidence of the accused that he lost the money, and there was no negligence on the part of the accused towards the loss of the money, accused may not be held responsible for the loss."

Held: (1) It is not necessary to accept the evidence of the accused in order to find him not guilty. All that an accused need do is raise a reasonable doubt as to his guilt. (2) No matter how negligent accused may have been, if in fact he did lose it or if it appeared very probable that he did, he could not be held criminally responsible for the loss. Conviction quashed.

370. Jean s/o Kisila v. R., Crim. App. 548-M-67, 13/9/67, Cross J.
Accused was arrested while offering motor vehicle spare parts for sale at a railway station. He was convicted under P. C. s. 312.

Held: (1) Sec. 312 provides, inter alia, that a person who has been detained as a result of the exercise of powers conferred by Crim. Proc. Code s. 24 (relating to

Authorized searches), and who has in his possession anything which might reasonably be suspected of having been unlawfully obtained and who fails to satisfy

the court as to how he came by the articles is guilty of an offence. (2) There was no evidence that the accused was detained as a result of the exercise of powers conferred by Crim. Proc. Code. s. 24, which is one of the elements of the offence defined by P.C. s. 312. Conviction quashed.

371. R. v. Sesariu s/o Mwavela, Crim. Rev. 109-D-67, Saidi J.

Accused was detained, under the terms of Crim. Proc. Code s. 24, when he was found in possession of a bicycle which it was reasonably suspected that he had obtained unlawfully. It was found in accused 's house during a proper search for certain stolen goods, unrelated to this case, which it was suspected that accused had taken. He was convicted under P.C. s. 312.

Held: Section 312 cannot apply to a case where the property suspected of being stolen or unlawfully obtained has not been conveyed by the accused, or where the accused was not in the process of a journey at the time he was found in possession of such property. In R. v. Msengi s/o Abdullah 1 T.L.R. (R) 107 (a full Bench decision), the Court stated that this section "has no application in the case of a person having in his possession in a building property suspected of having in his possession in a building property suspected of having been stolen or unlawfully obtained. I does so apply if the possession was in a building in the course of a journey ……. It is clear, however, that the section will not apply, for example, to property found in a building solely as the result of the execution of a search warrant or other similar process."

372. Mkwe s/o Lakimoja v. R. (PC) Crim. App. 19-A-67, 29/8/67, Platt J.

Accused was originally convicted in Primary Court of stealing and assault. There was evidence that he had stolen a tin of millet from a pombe club. The owner returned and searched for the tin, but could not find it. Shortly thereafter the club watchman found accused carrying the tin, and a struggle ensued during which the watchman was assaulted. It was unclear how long after the theft this incident took place. There was evidence that the incident took place outside the pombe club. On revision, the District Court substituted a conviction for robbery.

Held: The use or threat of violence, which is an element in the crime of robbery, not only must be for the purpose of obtaining or retaining the thing stolen, but must occur at the time of the theft or immediately before or after it. In the present case, the search intervened between the theft and the assault, and the assault cannot be said to be connected with the theft. The High Court imposed convictions for theft and assault.

373. Dahaye Masaw v. Darabe Gwaidamuyi, (LC) Civ. App. 34-D-65, 19/10/67, Biron J

The appeal of this case was originally heard and decided by the High Court on 30th December, 1966. Judgment was given for defendant. Plaintiff now asserts that he did not appear at the hearing of the appeal because notice of the hearing

did not reach him until after judgment had been delivered. Plaintiff's father originally brought this action in 1962 for the return of cattle which had been delivered to defendant's grandfather in 1945.

Held: (1) A judgment given in the unavoidable absence of one of the parties offends against the elementary principle of natural justice of audi alteram partem. The appeal must be re-opened. (2) Even exercising the extreme latitude allowed by courts on the aspect of limitation in indigenous cases, the case was time barred when filed below.

374. B. A. T. Kenya Limited v. Express Transport Company Limited, Civ. Case 77-D-66; 30/9/67, Georges C. J.

Plaintiff hired defendant trucker to transship some goods from Dar es Salaam to Nairobi. The job consisted of housing one large machine and several small ones. After having picked up the goods, defendant decided to redistribute the load, so

that the large machine would be moved forward from behind the rear axle. In so doing, the machine, which was not in a crate or other protective covering, was irreparably damaged because of the faulty way in which it was moved.

Held: (1) No particulars of negligence were alleged by the plaintiff. Rather, he relied on the doctrine that under a bailment for hire contract it is incumbent upon the bailee to show that he exercised due care and that any damage occurred other than by his negligence. In this contention plaintiff was correct. [Citing Joseph Travers & Sons Ltd. v. Cooper (1915) 1 K. B. 73, 90.] Here the defendants were unable to put forth an explanation of how the accident could have occurred that was reasonably consistent with the absence of negligence on their part. (2) Both the defendant's stationary and a form signed by the plaintiff's agent contained "small print" purporting to preclude any liability on the part of defendant for any damages caused by its negligence. These clauses had no legal effect because it was not shown that hey wee ever brought to the attention of Mr. Shiel, plaintiff's agent who dealt with defendant. [Citing Curtis v. Chemical Cleaning and Drying Co. Ltd. (1951) 1 All E. R. 631.] (3) Defendant had told plaintiff that it would not insure the shipment; plaintiff said it would obtain insurance. This cannot be construed as an agreement between the parties to limit in any way defendant's common law liability. [Citing Hill v. Scott (1895) 2 Q. B. 371]. (4) Finally, defendant argued that it should plaintiff's failure to properly pack the machine. The court found that since the damage was caused both by defendant's improper handling of the machinery and plaintiff's failure to package the machine, it had to apportion the blame and assess damages accordingly. [Citing Stuart v. Crawley (1818) 2 Stark 322; Higginbotham v. The Great Northern Railways (1861) 2 F. &F. 796; Barbour v. South Eastern Railway (1876) 34 L.T.67; Gould v. South Eastern and Chatam Railway (1920) 2 K.B. 186.] The damage here was caused 2/3 by the defendant's mishandling of the machinery and 1/3 by the plaintiff's poor preparation of the machine for shipment. (5) As to damages plaintiff argued that in order to put him in as good a position as he would have been in had the contract been properly performed, the bases for measuring the damages should

be the cost of a new machine. The court used as the bases of damages the value of the machine on plaintiff's books. That is original cost less

Depreciation. (Being a highly specialized machine there was no market at all for such machines.) [Citing Halsbury, 3rd edition, Volume 4, page 151, paragraph 399.] (6) Defendant is not liable for plaintiff's lost profits since he was not in any way made aware that delay in delivery would cause any particular loss to plaintiff. [Citing Halsbury, 3rd edition, Volume 4, page 152, paragraph 402; British Colombia etc. Saw Mill Co. Ltd. v. Nettleship (1868) L.R.3 C.P. 499.] (7) Plaintiff claimed interest of 9% on the money owed it. Interest was awarded at the rate of 7%. (8) As the machine was rendered utterly useless and irreparable, the recovery granted plaintiff was 2/3 of the depreciated value of the machine, less the value of the machine as scrap metal.

375. Sarukele Kazobavako v. Ntakajela Kazobavako, (PC) Civ. App. 129-M-66, 20/10/67, Mustafa J.

Plaintiff sued defendant in Primary Court for possession of a shamba. Judgment was for plaintiff but defendant succeeded on his appeal to District Court. In his appeal to the High Court, plaintiff contended that the District Magistrate erred in hearing the appeal without assessors.

Held: A District Magistrate is not bound to sit with assessors until he is directed to do so by a proper judicial authority. There was no such direction in this case. Appeal dismissed.

376. Wambura Wantahe v. Karambo Muhoro, (PC) Civ. App. 22-M-66, 18/10/67, Mustafa J.

Plaintiff sued the father of his dead wife for the return of bride wealth. She had died while legally married to the plaintiff. Having been unsuccessful, plaintiff sought leave to appeal out of time.

Held: “The law is clear. In such a case bride wealth cannot be returned. There is no merit in any proposed appeal.” Leave to appeal out of time refused.

377. Leornard Makenya v. Nimwinda d/o Pue, (PC) Civ. App. 46-A-66, 15/9/67, Platt J.

Defendant appealed from an award to plaintiff of Shs. 55/- for loss of virginity, Shs. 40/- for maintenance during pregnancy and Shs. 8/- the customary payment of Izoka. There was evidence that plaintiff had begun to have sexual relations with defendant in May 1965 after he had promises to marry her. A child was born the following December. The court did not identify the customary law to be applied.

Held: (1) The claim for maintenance during pregnancy was brought under paragraph 189 of the Declaration of Customary Law (G.N. 279 of 1963). (2) Therefore, paragraph 183 of the Declaration which provides that a man whom a woman names as the father of her child may not deny paternity unless he proves he had no sexual intercourse with her, is applicable. (3) Paragraph 186 of the Declaration, which requires the woman to prove that the intercourse took place, is inapplicable because it only applies if the man insists he never had intercourse with the woman and produces evidence to that effect. (4) The evidence of paternity satisfied paragraph 185 of the Declaration, which states

That the period during which conception could have taken place is considered to last two months, i.e. to seven months before the birth. (5) The claims for loss of virginity and Izoka were properly brought, as the case was in the nature of a suit for breach of promise of marriage.

378. Nhombe s/o Mbulangwa v. Chibaya s/o Mbuyape, (PC) Civ. App, 87-D-67, 10/10/67, Biron J.

In 1960 plaintiff transferred one cow to defendant in exchange for which defendant agreed to give plaintiff 46 tins of millet the following year. Only nine tins of millet were over delivered, and in this action, the Primary Court of Makang'wa ordered defendant to deliver the balance of 37 tins. On appeal, the District Court found that at the time of the transaction the price of millet was Shs. 5/- per tin, and that the correct value of the cow was Shs. 100/- The court therefore ordered defendant to pay Shs. 55/-, the balance due after subtracting the value of the tins which had been delivered.

Held (1) Court do not make agreements for parties but enforce agreements which they have made. (2) Defendant is liable to give plaintiff 37 tins of millet or the current value of 37 tins, irrespective of what the price of millet was at the time the transaction occurred.

379. M. S. Mnonya v. Ali Abdallah, Civ. App. 11-D-67, 29/9/67, Saidi, J.

Plaintiff sued defendant for failure to pay a Shs. 100/- debt. Plaintiff introduced an I.O.U. signed by defendant promising to repay the debit in April 1966. Plaintiff also introduced an undated chit in which he (plaintiff) stated that defendant had failed to repay the money and as a result plaintiff seized defendant's radio as security. The chit also stated, "I give him his radio when he repays back Shs. 100/-." Plaintiff testified that he in fact returned the radio to defendant in June 1966, although the money had not been repaid. Defendant argued that the return of the radio proved the repayment of the debt.

Held: The trial magistrate correctly relied on the chit and the evidence of the return of the radio in finding that the debt had been repaid.

380. Habib Punja and Sons v. Madam Margot Agas, Misc. Civ. App. 15-D-67, 5/10/67, Biron J.

In March 1963, plaintiff let commercial premises to defendant at a monthly rental of Shs. 2,400/- for a period of three years. The agreement provided, "If the lessee be desirous of taking a new lease …. After the expiration of the term hereby granted … and …. Shall deliver ….. notice in writing not less than three (3)

months before the expiration of the said term then the lessors will … grant to the lessee a new lease ….." at a monthly rental of Shs. 3,000/-. Defendant exercised this option, but contends that the standard rent under section 4(1) of the Rent Restriction Act is Shs. 2.400/- rather than Shs. 3,000/-. That Act defines "standard rent" as the rent at which the premises were let on a prescribed date which, for commercial premises were let on a prescribed date which, for commercial premises, is let January 1965. [Rent Restriction Act, ss. 2, 4(1).] However, section 4(1) also provides that if a lease entered into before the prescribed date provides for an increase in rent during the

Term, or if it provides for a progressive rent, then the rent as so increased shall be the standard rent. Plaintiff argued that the letting of the premises with an option to renew constituted on letting for a period of six years and that the rent of Shs. 3,000/- was a progressive rent.

Held: (1) There is no authority determining whether an increased rent upon an option to renew is a progressive rent during a single tenancy. [Distinguishing Bryanston Properties Co. Ltd. v. Edwards (1943) 2 All E. R. 646; Tedman. V. Whicker (1944) 1 All E. R. 26; Wheeler v. Wirral Estates Ltd (1935) 1 K.B. 294.] (2) The intention of the parties, as shown by the ordinary meaning of the words of the agreement, governs whether a new and separate tenancy was created. (3) The words of the tenancy, which vary materially from those of the Encyclopaedia of Forms and Precedents, 3rd Edn. Vol. 8, p. 231, show an intent to create a new and separate tenancy if the option to renew is exercised. Therefore, the rent of Shs. 3,000/- is not progressive rent under the original tenancy; the standard rent is Shs. 2,400/- the rent on the prescribed date.

381. Abdi Salim v. Kheri Salim. (PC) Civ. App. 94-D-67, 6/10/67 Biron J.

The father of the parties, upon his death in 1947, left 40 children and a large estate. His property was left in a trust for all the children, and administered by the

eldest son. Appellant brought this suit on behalf of himself and some of his co-heirs, claiming for the estate two housed which respondent claims he purchased from the estate. After hearing a large amount of evidence, much of which was confusing and conflicting, the primary court found that there had been a sale by the estate to the respondent but that he had not paid all of the agreed upon price. Respondent was given the option of completing payment and keeping the houses, or of returning them to the estate and reclaiming the money he had already paid.

Held: (1) The district court upheld the decision of the primary court, on the theory that the appellant (plaintiff below) had failed to establish his claim that respondent had not purchased the house. "This is a very serious misdirection in that the burden of proof was on the respondent, who set up the sale of the two houses to him. It was therefore on him to establish such sale and not on the appellant to disprove it." This misdirection on the part of the district court was fatal. (2) Neither of the courts below took into consideration the fact that not all the heirs were present or represented at the meeting when the alleged sale was purported to have taken place. In the abidance of all the heirs being present or represented there could not have been any firm sale. (3) Respondent was ordered to return the two houses to the estate, and to account for rents received by him from the houses.

382. R. v. Salimu Hassani, (PC) Crim. Case 154-Manyamba-67, 16/10/67 Inspection Note by Hamlyn J.

Accused was fined a total of Shs. 140/- upon conviction of three counts of failure to pay his local rates. Without any further order appearing on the record, a bicycle owned by accused was seized and sold; the money obtained was applied to the back rates and the fines, and the remainder was remitted to accused.

Held: (1) The procedure adopted by the court was quite improper. There should have been a formal attachment of the bicycle, for which an order should appear in the record of the case. Had this been done, the owner would have had the opportunity of paying what was due, thereby saving his bicycle from sale. (20 As the High Court was satisfied that all monies received had been properly accounted for, and accused did not lodge an appeal, the disposition of the case by the lower court was not disturbed

383. Juma Alibax Said v. R., Crim. App. 132-A-67, 9/10/67, Platt J.

Accused was charged and convicted of one count of unlawful importation of Government trophies contrary to section 40(5), (6), (7) and (8) of the Fauna Conservation Ordinance and a second count of unlawful possession of Government trophies contrary to section 49 and 53 of the Ordinance. There was evidence that accused took delivery in Arusha of 15 boxes of what appeared to be personal effects which had been shipped from Uganda. He consigned them to an exporter for shipment to Dar es Salaam and transshipment to Aden, describing the contents as wood carvings, However, before they were shipped, they were opened by the police in the presence of accused. At the trial accused stated that when the box was opened, “I was surprised to see rhino horns.” The boxes were not produced as an exhibit, but were inspected by the magistrate. At the trial, a police inspector testified that the value of the horns was Shs. 150,000/- Photographs of the contents of the boxes were introduced into evidence, but he photographer was not identified or called as a witness.

Held: (1) Subsections (5) and (6) of section 40 deal respectively with importation from countries which are and are not parties to the 1933 convention, and the subsections should not have both been specified in the charge. (2) Subsection (7) constitutes a separate offence and should not have been joined with subsections (5) or (6) in a single count. There is “some doubt” whether the defect is curable on appeal. (3) “Import” as used in the Fauna Conservation Ordinance means to bring goods or cause goods to be brought into Tanganyika by sea air

or land.[Citing Imports Control Ordinance, Cap 292; distinguishing Sheikh Abdulla Ali Hakimi v. R., (1953) 20 E. A. C. A. 329] (4) An element in the offence of unlawful importation and unlawful possession is the knowledge of the nature of the goods in question. (5)An insufficient chain of evidence was presented to show that the goods which the magistrate inspected were the same as those seized from accused. (6) An officer of the Game Department should have testified that the goods were in fact rhinocerous horns.(7) However, the admission by accused at the trial that the boxes contained rhinocerous horns cured the defects in the evidence as to the identity of the boxes and nature of their contents. (8) The testimony by the inspector as to the value of the horns was inadmissible; an expert should have testified as to this matter. (9) A proper foundation was not laid for the admission of the photographs and they were inadmissible. As a general rule the person taking the photographs should produce them after having explained the process by which they were manufactured. (10) If accused had known that the boxes contained the horns, the onus would then have been of him to prove that the possession was lawful. (11) An appellate court is in as good a position as the trial court to draw inferences from circumstantial evidence. Convictions quashed for insufficient evidence.

384. Moshi d/o Rajabu v. R., Crim. App. 688-M-67, 13/10/67, Cross J.

Accused was convicted of causing grievous harm [P. C. s. 225]. The magistrate's judgment contained "no reference whatever to the evidence given by the prosecution witnesses," but did state the magistrate's belief "beyond all doubt' that the defence was "a pack of lies." The State Attorney urged the High Court to weigh the evidence on record for itself.

Held: (1) The magistrate 's refusal to accept a defence as truthful is not a proper basis for conviction; here, the magistrate's judgment did not give any indication the he was aware that the onus of proving the guilt of the accused is on the prosecution, or that he gave any consideration to the prosecution evidence.

(2) To review the record independently in such a case “Would be a complete usurpation of the function of the magistrate.” Conviction quashed; immediate release of accused ordered.

385. Mohamed s/o Saidi v. R., Crim. Apps. 535, 505,562-M-67, 22/9/67, Cross J. The four accused were convicted of store breaking and stealing. [P.C. s. 296 (1).]There was admitted as against the firs accused his statement to a police officer that he had received flour from the thieves. As against the second accused evidence was admitted that tyres stolen from the store were found under his bed; these tyres were not among the stolen articles specified in the charge.

Held: (1) The introduction of the first accused ’s statement to the police officer was contrary to section 27 of the Evidence Act, 1967. (2) The accused were charged with the composite crime of store breaking and stealing. Evidence, therefore, of the finding of any article in the second accused ’s possession which had been in the store before it was broken into, and was missing subsequent to the theft, is relevant to the charge and consequent to the theft, is relevant to the charge and consequently admissible whether the article was specifically mentioned in the charge or not.

386. Mwidin s/o Mohamed v. R., Crim. App. 671-D-67, 18/10/67, Biron J. Complainant believed his nephew and perhaps others had robbed him. The nephew confessed to the crime after the uncle had threatened to bring a witchdoctor to bewitch the culprits. In this confession the nephew said second accused was his confederate, and gave the uncle a letter addressed to second accused asking him to disclose the where about of the stolen property. Before the uncle could do anything with this letter the stolen property was found in the bush by a villager. At trial both accused denied participation in the theft, and first accused (the nephew) denied making the confession. There was no evidence other than the confession to implicate the two accused.

Held: (1) The magistrate believed the complainant rather than the accused, as he was entitled to do. (2) The conviction of the first accused solely on

the basis of the confession was perfectly proper. (30 “Although the confession may be said to have been induced by fear, that of witchcraft,

It is properly valid confession and the explanation for its having been made is eminently reasonable….” (4) As against the second accused the statement by the first accused to the uncle was hearsay. However, since that statement constituted a full confession, implicating second accused to the hilt, it is admissible against him. (5) In the absence of any corroboration, the confession standing alone was insufficient to support a conviction of theft. Conviction of second accused quashed.

387. R. v. Rafael Mbaga, Crim. App. 513-D-67, 27/10/67, Saidi J.

Accused was convicted of forgery and stealing by clerk. Eight allegedly forged vouchers were produced in court at the trial but were misplaced or lost before the judgment was written. Although there was ample evidence to support the conviction, the trial court refused to consider the case on the merits and acquitted accused because the documents had been lost.

Held: Once the forged documents had been produced in court, examined by the court, admitted by the accused person and properly noted on the record, the fact that they were later lost would not justify an acquittal. Record remitted to the trial court for a determination on the merits.

388. R. v. Christopher s/o Ngambilo, Crim. Sass. 150-Iringa-67, 7/10/67, Georges C. J.

Accused was charged with attempted murder of one William Mhuma. There was evidence that accused came to William’s house and while aiming a gun in the general direction of William’s knee, he said, “Today you will die.” He then shot William in the knee.

Held: Where the charge is murder, the intention to kill or to do grievous bodily harm will suffice to establish malice aforethought, but where the charge is attempted murder, the actual intention to kill must be proved. Accused could easily have aimed at a vulnerable part of William's body, and his action in aiming at the knee did not confirm his threat to kill. Accused convicted of unlawful wounding.

389. R. v. Atupelye d/o Lwidiko, Crim. Sass. 24-D-67, 17/10/67, Georges C. J.
Accused was charged with murder. She claimed the death was accidental, but her story was contradicted by a nine-year old child, the only witness to the events in question. After the victim was stabbed she was taken to a hospital where she died later. No medical evidence was presented at the trial.

Held: (1) The court believed the nine – year-old child and disbelieved the accused as to what happened, and rejected accused 's claim that the wound was inflicted accidentally. (2) In view of the absence of medical evidence as to the treatment received at the hospital, the cause of death cannot be attributed to the stab wound beyond a reasonable doubt be attributed to the stab wound beyond a reasonable doubt. The court refused to presume in the absence of contrary evidence "…… that the treatment must have been what it ought to have been, that is, treatment in good faith and according to the common knowledge current at the time. Accused was convicted of unlawfully doing grievous harm contrary to Penal Code, sec. 225

390. R. v. Usumau s/o Mpangani, Crim. Sass. 124-M-67, 18/10/67, Cross J.
Accused was charged with murder. There was evidence that accused and many others responded to an alarm and found that deceased had assaulted a woman and possibly also harmed her child. The crowd followed deceased to another house where accused and others beat him. Accused was armed with a large stick. It was not clear who had inflicted the fatal injury.

Held: (1) Since death or grievous bodily harm was a probable consequence of the attack upon deceased and the attackers acted with a common purpose, accused is liable for the death even though he may not himself have struck the fatal blow. (2) Although the defence of provocation was not raised by accused, the burden was on the prosecution to prove malice aforethought and negative a defence of provocation. (3) It is reasonable to assume that the crowd included relatives of the woman assaulted. If so, not only is accused liable for the probable consequences of the common intention which he shared but he would also be entitled to the benefit of any diminution of responsibility of the others provided by law. Thus, accused has sustained his onus of raising a reasonable doubt as to the existence of provocation. Accused convicted of manslaughter.

391. R. v. Mulengela s/o Bahombe, Crim. Sass. 95-Bukoba-67, Mustafa J.
Complainant was abducted in Tanzania and taken to Burundi, where he alleges that accused tried to murder him. Accused argued that since the purported attempted murder took place in Burundi, a Tanzanian court had no jurisdiction to hear the case.

Ruled: The case is cognizable under Tanzanian law because the alleged attempted murder was part of a transaction which began in Tanzania. [P.C. s. 7.]

392. Pius M. Mkonya v. R., (PC) Crim. App. 747-M-67, 4/10/67 Cross J.
Accused was convicted on a charge which in a single count stated that he had made and sold native liquor without a licence. Liquor was found on the premises of the accused and in a nearby open-air bar. There was evidence that servants of the accused had carried liquor from his premises to the bar and had sold it there.

Held: (1) Section 49(2) of the Native Liquor Ordinance, which deals with the vicarious liability of licence for acts of his servant or agent relates only to offences committed on licensed premises. (2) The evidence was sufficient to convict accused of selling native liquor without a licence.[Native Liquor Ordinance, s. 50.] (3) The making and selling of native liquor without a

licence are separate offences and should not have both been charged in a single count. However, the irregularity did not occasion a failure of justice. Conviction upheld

393. R. v. Belan s/o Samson, Crim. Rev. 42-M-67, 21/9/67, Mustafa J.
Accused was acquitted of housebreaking. The court, noting that accused owed money in connexion with an earlier court

Order in another case, ordered that several exhibits belonging to accused be sold and the proceeds be paid to a former employee, in whose favor the earlier compensation order ran.

Held : "…….(T)he order of compensation …. In respect of another case is a nullity." Order quashed.

394. Kipung'etich Arap Korir v. R., Crim. App. 646-M-67, 27/9/67, Cross J.
Accused was convicted of cattle theft after proceedings which had been adjourned 16 times for lack of an interpreter. Finally although the accused 's language was recorded as Kipsigis, an Mnandi interpreter was chosen to translate the testimony, which was evidently given in Kiswahili. The record further indicates that some, if not all of the translation, was from Kiswahili to Kinandi, and not to Kipsigis.

Held: The accused 's claim that the trial was conducted in a language he could not understand has merit, since the record does not show that he understood Kinandi, or that Kinandi and Kipsigis are similar languages. The requirement of section 193(1) of the Criminal Procedure Code, which calls for the use of interpreters in such cases, was not satisfied.

395. Manager, Tank Building Contractors v. R., Crim. App. 544-D-67, 4/1/67. Saidi J.

Accused ‘s advocate pleaded guilty for his client to several violations of the Factory Ordinance, Cap. 297.

Held; (1) Crim. Proc. Code s. 99 provides that an advocate can plead on behalf of an accused person only when permission has been given to dispense with the personal appearance of Accused, and appearance is by an advocate. [Citing D. P. P. v. Vincent Mtefu, Crim. App. 210 of 1965, reported in Gazette Supplement No. 1 of 1967.] Conviction quashed. (2) The court stated, obiter: “It may be argued that a plea of guilty could still be recorded against an accused whose attendance is not dispensed with under section 99 of the Criminal Procedure Code but who pleads and appears by advocate who submits the plead of the accused in writing to the court and confirms that the accused is pleading guilty. Personally I can see nothing wrong with this course being accepted by the court in the majority of cases which are not grave offences and are punishable mostly by fines. This course would not be open to grave offences which are normally punishable with prison sentences.”

396. Juma s/o Abdallah v. R., Crim. App. 662-M-67, 4/10/67 Cross J.

Accused were each convicted on one count of being found armed with housebreaking implements [P.C. s. 298(d)] and on a second count, which was expressly stated to be an alternative count, of being rogues and vagabonds[P.C. s. 177(4)]. In reply to the first count the first accused stated, “Yes, I was found in possession of these housebreaking instruments by day.” The second accused ‘s reply was almost identical. In reply to the second count, each said that he had no job in town but intended to return to the country to word. The were treated as pleas of guilty.

Held: (1) An element of the offence of possession of housebreaking implements by day is the intent to commit a felony. The particulars of the charge do not allege, nor did the replies admit, such an intent. Therefore, the replies were not

guilty pleas. (2) The gravamen of a charge of being a rogue and vagahond is the presence of the accused for an illegal or disorderly purpose. Nothing in the replies of the accused or in the circumstances suggests such a purpose. (3) When an accused person is charged on alternative counts, any conviction recorded should be on one count only and no verdict should be recorded on the other count.

397. Lekole s/o Mengwa v. R., Crim. App. 677, 678-D-67, 25/10/67, Biron J.

The two accused, a Wakwavi/Masai father and son, were convicted with three others, all on their own pleas of guilty, of cattle theft. The charge read to them simply stated that all five had stolen 39 head of cattle from a certain ranch; the charge was in Kiswahili, which the father and son do not understand well, and no interpreter was used. Their replies to the charge were: “I took 13 heads of all we stole”; and, “I divided with them ----- I got 9 heads only.” On appeal, the two accused asserted that the others had appeared at their place one night with the cattle, that the father at their place one night with the cattle, that the father had welcomed them as headman of that area, that the others claimed to the traveling to market with their cattle, and that the father and son agreed out of courtesy to fence the cattle temporarily. They said further that they had not understood the charge read to them, and had not known how to present their version of the facts.

Held: It would be “most unsafe” to uphold these convictions. “(B)efore a plea is accepted as one of guilty, it should express and contain a full and explicit admission of all the facts and ingredients which constitute the offence charged. ……. (T)he facts presented to the court, should comprehend a full account of the commission of the offence and where there are more than one accused the part played by each.” They should not, as in this case, be a mere repetition f the particulars in the charge sheet. Convictions quashed; re-trial ordered, “preferably by a different magistrate.”

398. Joseph Arab Teso v. R., Crim. App. 139-A-67, 12/9/67, Platt J.

Accused was charged with driving an unlicensed and uninsured vehicle with various mechanical defeats. [Traffic Ordinance, ss. 6, 14(1), 30(k), 43(d), 69, 70; Moror Vehicle Insurance Ordinance, s. 4(1) (2).] There was evidence that accused was the owner of the vehicle and had been in charge of the vehicle at the time of the offences. However, the evidence was insufficient to prove that he had driven the vehicle as charged.

Held: The sentences for these offences may vary depending upon whether the offender was driving or was in charge of the vehicle or permitted it to be driven. The facts proven should correspond to those charged, and the accused should not be required to defend himself against allegations other than the contained in the charge.[Citing Uganda v. Hadi Jamal (1964) E.A 294; Uganda v. Eremenjinto (1964) E.A.] Conviction quashed.

399. Daniel s/o Stephen v. R., Crim. App. 583-M-67, 27/9/67, Cross J.

On 8th February, 1966, accused were convicted of house breaking and stealing. That conviction was quashed on appeal, but upon retrial appellants were again convicted. They were sentenced to two years and 24 strokes, to commence on the date of the second conviction, 30th May 1967.

Held: (1) Crim. Proc. Code. s. 295 provides, inter alia "Every sentence shall be deemed to commence from and to include the whole of the day of the date on which it was pronounced." This section precludes commencement of the sentence before 30th May 1967, even though this will result in the appellants serving nearly 3.5 years in prison. (2) Since the offence involved comes under the Minimum Sentences Act, and the sentence imposed was the minimum permitted by that Act, the High Court could not give credit for the time already served by reducing the sentence proper.

400. Upendra Manibhai Patel v. R., Crim. App. 667-D-67, 27/9/67, Biron J.

Accused was convicted of being unlawful in Tanzania without a permit. [Immigration Act, s. 23(1) (i).] The record, although unclear, showed that the magistrate originally wrote out a sentence of a fine of Shs. 100/-or two months imprisonment in default. Thereafter, either during or shortly after the oral pronouncement of sentence, the magistrate was informed that a charge of stealing from a motor vehicle was pending against accused. Because of this information, the magistrate modified the sentence to one of imprisonment for three months.

Held: A man is presumed innocent until proven guilty. Therefore, a pending charge may not be taken into consideration in imposing a sentence,

The Court stated, obiter; Section 312 of the Criminal Procedure Code requires that a magistrate inform an accused of his right to appeal and the proceedings are not completed until this is done. Accused had not been so informed at the time the sentence was varied, and the magistrate retained the power to alter the sentence even if sentence had orally been pronounced.
[Distinguishing H. W. Lovesay v. R., V111 (1917) E.A.P.L.R. 33.] Original sentence restored.

401. Pangrss Kamandu Mbunda v. R., Crim. App. 690-D-67, 11/10/67, Biron J.
Accused was convicted of doing grievous harm contrary to section 225 of the Penal Code. He was sentenced to imprisonment for eighteen months, and twelve strokes corporal punishment.

Held: The Schedule to the Corporal Punishment Ordinance, Cap. 17, permits corporal punishment for aggravated cases of assault contrary to Chapter XX1V of the Penal Code, but does not permit such punishment for those convicted under section 225, which is in Chapter XX11 of the Penal Code. Corporal punishment set aside; Sentence of imprisonment confirmed

402. R. v. Musa Issa Mkoko, Dist. Ct Crim. Case 91-Newala-67, 24/10/67, Inspection Note by Saidi J.
The three accused were convicted of assault causing actual bodily harm [P.C. s. 241] upon evidence that they unlawfully.

Assaulted two men, one after the other, with fists at a pombe party. A sentence of 10 strokes corporal punishment was imposed on each. The accused were adults.

Held: (10 A person convicted under section 241 can be awarded corporal punishment in lieu of, or in addition to, any other punishment only if the assault is of an aggravated nature. [Corporal Punishment Ordinance, Cap. 17, clause 2 of Part 1 of the Schedule.] (2) The assault was not of an aggravated nature.

403. Chilondamu Ching'ng'a v. R., Crim. App. 692-D-67, 18/10/67, Biron J.

The accused, a postmaster, was convicted of theft by public servant [P.C. ss. 265,270] and fraudulent false accounting [P.C. s. 317(b)], because of transactions involving an amount not specified by the Court, but described as "small." The sentences on the three false accounting charges were ordered to run concurrently, but consecutively with the sentence on the theft conviction, making an aggregate of imprisonment to be served of three years. Corporal punishment was also ordered under the Minimum Sentence Act. Accused was a first offender.

Held: "In view of the fact that the appellant was a first offender, and the amounts involved were relatively small, …….. there was no justification for ordering the sentences to run consecutively." All sentences ordered to run concurrently, making an aggregate of two years imprisonment.

404. Anage s/o Temu v. R., Crim. App. 560-D-67, 29/9/67, Saidi J.

It is an offence under the Act to steal from a co-operative registered under the Co-operative Societies Ordinance, Cap. 211. Accused was convicted of such an offence, but no evidence was submitted as to the registration of the co-operative. The only issue was the propriety of the sentence of 2 years and 24 strokes imposed here.

Held: (1) The Republic argued that under the Evidence Act (1967) s. 59 (1)(b), the Court should take judicial notice of the registration of the co-operative here involved. The section provides, inter alia, "59. The Court shall take judicial notice of the following facts; ---- (b) the existence and title of societies or other bodies the registration of which has been notified in the Gazette." This section does not require judicial notice to be taken in this case, and the Court declined to do so. (2) Alternatively, the Republic requested the Court to remand the case to the trial court for the taking of evidence as to the registration of this co-operative. This request was rejected because "……. It would be unfair to the appellant to allow additional evidence to be adduced at this stage of the case." [Citing Salum s/o Alli v. R., Crim. App. No. 108 of 1964 (unreported), law J.] Sentence reduced to 12 months imprisonment.

405. Yuda Yacobo v. R., Crim. App. 589-M-67, 11/10/ 67, Mustafa J.
In separate trials held on the same day, accused was convicted of stealing Shs. 2062/- from the Shinyanga District Council and with stealing Shs. 585/- from the Tanzania Government. In each case he was sentenced to two years imprisonment and the statutory 24 strokes for a total of four years and 48 strokes.

Held: The two offences could have been charged together on the same charge in different counts. It would also appear that the offences could be said to have been committed in the course of the same transaction. The sentences of imprisonment in the two cases were ordered to run concurrently, and it was ordered that one sentence of corporal punishment of 24 strokes be imposed.

406. Benedict s/o Beatus v. R., Crim. App. 532-D-67, 27/10/67, Saidi J.
Accused was convicted on two counts of cattle theft [P.C. ss. 265,268] in one case, and on another of house breaking and stealing in another case, both on the same day in the same court. Sentence under the Minimum Sentences Act was

imposed in each case. The latter conviction was appealed, and the appeal rejected. Upon this, the appeal in the cattle theft matter, accused 's contention on the merits of the conviction was also rejected.

The Court noted, obiter: "It now appears that …..the appellant will serve a total of five years' imprisonment and undergo forty eight strokes of corporal punishment. I feel that the sentence of corporal punishment is too severe, but as this court has no power to mitigate its severity, I recommend that the records in both cases be dispatched to the office of the Director of Public Prosecutions so that he may forward them to the President with a view to the reduction of the strokes ….. to twenty four in the exercise of the President's prerogative of mercy."

407. Eliakimu s/o Zakaria v. R., Crim. App. 161-A-67, 28/9/67, Platt J.
Accused, an 18 year old first offender, was convicted of robbery and sentenced to 2 years and 24 strokes under the Act, The amount stolen was Shs. 45/70.

Held: "Although the amount stolen did not exceed Shs. 100/- and the appellant was a first offender, never the less there were no special reasons." The sentence imposed by the trial court was correct.

408. Joseph s/o Mbura v. R., Crim. Rev. 30-A-67, 7/9/67, Platt, J.
Accused was convicted of bribing a Government employee. He was a first offender; the amount of the bribe was Shs. 50/- The trial court found the small amount involved to be a special circumstance and therefore imposed a sentence of 9 months imprisonment.

Held: There is authority for the view that if the amount of bribe is minute and the character of the offence can only be said to be trivial, this can constitute a special circumstance. "……. Shs 50/- cannot be considered a trivial amount." Sentence enhanced to 2 years imprisonment and 24 strokes.

409. Hamisi s/o Mtanga v. R., Crim. App. 598-D-67, 4/10/67, Biron J.

Accused was convicted of three counts of corruption for soliciting and obtaining bribes of Shs. 20/- Shs. 15 and Shs. 5/-. Since accused was first offender, he was eligible for a sentence of less than 2 years and 24 strokes if there were special circumstances. The trial court said, "taking all this into

Consideration, that is the trifling amount of bribe coupled with accused person's good character and having regard to the circumstances of this case and the nature of the offence, I find that there are special circumstances ……"

Held: (1) "It is not …… clear what were the special circumstances found by the learned magistrate …[Never the less] I do not propose to interfere with the learned magistrate's discretion ….." (2) The court did, however, find that the sentence of 6 months imprisonment imposed by the court below was insufficient, and it was enhanced to 12 months.

410. Yusufu Mauruti v. R., (PC) Crim. App. 742-M-67, Cross J.

Accused were convicted of house breaking, and sentenced under the Minimum Sentences Act. Their appeal is against sentence only. Both accused, aged 17, were first offenders; they were apprehended before they could actually steal anything. The trial court could not find any special circumstances, so a sentence of 2 years and 24 strokes was imposed.

Held: The fact that appellants were only 17 years of age is by itself a special circumstance. Sentence reduced to 10 strokes, no imprisonment.

411. R. v. Ugweisa Mwasokwa, Crim. Rev. 8-D-67, 10/9/67, Saidi J.

Accused was convicted of contempt of court. In addition to a jail sentence, he was ordered to pay Shs. 200/- as his maintenance allowance while in prison.

Held: The order to pay Shs. 200/- was illegal. A person convicted of a criminal offence is not required to pay for his maintenance in jail.

412. Mussa s/o Saidi v. R., Crim. App. 672-D-67, 4/10/67, Biron J

Accused was convicted of six counts of housebreaking and stealing, for which he received a sentence of 2 years and 24 strokes on each count, sentence to run concurrently, under the Minimum Sentences Act. Accused had 10 previous convictions of a similar nature, the most recent of which was in 1960.

Held: Although accused had "gone straight" for several years, it is clear that he has now reverted to his previous criminal mode of life. Sentence enhanced to 3.5 years on each count, sentence to be served concurrently.

413. R. v. Patrice Matata, Crim. Rev. 42-A-67; 16/9/67, Platt J.

In a previous action accused was sentence to five strokes of corporal punishment and placed on probation for 12 months. In the present action he was charged with failing to comply with the probation order.

Held: The purpose of probation is to release the prisoner without punishment where the court regards it expedient to do so taking into account the circumstances of the case and character of the accused. It is improper to impose a sentence in addition to an order of probation. The corporal punishment having been executed, the probation order was set aside, the present proceedings quashed and accused ordered to be set at liberty.

414. Issa s/o Mwandachi v. R., Crim. App. 670-D-67, 27/10/67, Saidi J

Accused was convicted of one count of burglary and one of stealing. There was evidence that he was seen inside a house and apprehended as he tried to flee. Shs. 10/- worth of groundnuts were found wrapped in some clothes somewhere in the house and it was found that he had stolen them. He was sentenced to the prescribed term under the Minimum Sentences Act.

Held: (1) There was no evidence that the bundles of groundnuts had been moved from one place to another by accused, and the charge of stealing was

thus unsupported by the evidence. (2) Accused is a first offender and the trial court erred in failing to permit him to show special circumstances which would entitle him to a reduction in sentence under section 5(2) of the Minimum Sentences Act. Case remanded and direction given that accused be recalled to state such special circumstances.

415. Musa s/o Salum v. R., Crim. App. 689-M-67, 4/10/67, Cross J. Accused was convicted of cattle theft. There was evidence that unknown persons found the cow and gave it to one Haruna to find the owner. Haruna took it to accused, a village headman, so that he could trace the owner. Accused had the cow slaughtered and kept the proceeds from the sale of the meat. The particulars of the offence alleged that the cow was the property of Haruna or of an unknown person or persons.

Held: (1) The allegations as to ownership rendered the charge duplex. (2) the magistrate could have found on the evidence that the persons who found the cow were "special owners" as defined in Penal Code, section 258(2)(e), and he should have amended the charge accordingly. (3) The defect cannot be remedied on appeal. Conviction quashed.

416. Rajabu Abdallah v. R., Crim App. 607-D-67, 25/10/67, Biron J.
Accused was charged with housebreaking and was convicted of attempted housebreaking. The charge stated that he broke and entered a specified dwelling house "with intent to commit a felony therein," but it did not specify the felony which had been intended.

Held: (1) The accused was not informed as to what he was charged with, for the intent, which is an indispensable ingredient of the offence, was never specified. (2) The defect is not curable on appeal.

417. Simon Robert v. R. Crim. App. 675-D-67, 18/10/67, Saidi J.
Accused was convicted of burglary and stealing. There was evidence that on the night of 14th/15th June 1966, a thief entered complainant's house at about 4;30 a.

m when complainant outside the house to relieve himself and stole a radio, a shirt, a pair of trousers, and a driving licence. On 28th February, 1967, the driving licence was found in the possession of the accused.

Held: (1) There was no evidence of a breaking into the house. (2) More than six months had passed before the licence was recovered, and accused was found in possession of only a small portion of the stolen goods. In these circumstances.

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The docrrine of recent possession was inapplicable Conviction for burglary and stealing quashed and conviction substituted for receiving stolen goods knowing them to have been stolen.

418. Kondo s/o Omari v. R., Crim. App. 703-D-67, 18/10/67, Biron J.

Accused was convicted on two pairs of related counts of burglary and stealing relating to theft which took place in March an April respectively. He was convicted upon evidence that certain of the stolen goods were found in his house during a search on 15th June. Accused stated under oath that he had purchased the clothing which was found and that the hoe head had seen given to him by one Hamisi. The magistrate directed himself that he was not satisfied with these explanations.

Held: Where the only evidence against an accused the finding of recently stolen property in his possession, an accused is entitled to acquittal if he gives an explanation which may reasonably be true. He need not satisfy the court of its truth.

419. Christian Simon Briyo v. R., Crim. App. 693,694,695-D-67, 27/10/67, Saidi J.

Accused was convicted on three separate charges of theft by public servant [P.C. ss. 265,270]. As an employee of the Masasi District Council, attached to the Ma-

sasi Primary Court, he had misappropriated part of a fine paid by an accused, and some money being kept at the court for prisoners who were detained on charges. The District Magistrate substituted convictions under section 271 of the Penal Code; his grounds were that the accused had not been acting as a public servant, since he had received the money for the Judiciary and not for his employer, the District Council. Although two of the transactions involved sums of more than Shs. 100/-, the District Magistrate imposed a Minimum Sentence on only one of the three charges.

Held: (1) Accused was a person employed in the public service, and received all three sums by virtue of that fact. Whether he was working in the District Council or "In any other Government Department, …. he was being paid from public funds as a local government servant," and the proper charge is therefore theft by public servant," and the proper charge is therefore theft by public servant [P.C. s. 265, 270]. (2) "It is very clear that all of these three cases could have been tried together in one charge of three counts." This procedure should be followed where possible. (3) The minimum sentence of two years and 24 strokes was imposed on the two charges involving more than Shs. 100/-, as required by the statute; all terms of imprisonment were ordered to run concurrently. (4) Because the sentence were imposed on convictions under separate charges, the High Court could not avoid ordering two sentences of 24 strokes of corporal punishment. However, as the sentence was severe, "and the facts clearly show that the appellant would have been awarded twenty-four strokes only had these three cases been brought in one charge of three counts," the Court directed the dispatch of the records to the Director of Public Prosecutions for forwarding to the President, for the exercise of his prerogative of merely.

420. Ismail s/o Bakari v. R., Crim. App. 604-D-67, 4/10/67 Biron J.

Accused was convicted of stealing vegetable owned by the Government (part of a prison farm crop) and of criminal trespass[P.C. s. 299(1)]. He had been appre-

hended on the night of the theft, with the vegetables in his possession, by two people who had found him hiding in the ceiling of their house. Accused 's story was that he had been drinking and believed that he had seen a lion, from which he had been trying to escape.

Held: Although the accused 's story was properly rejected, his conduct disclosed no offence of trespass. Criminal trespass includes an entry upon property in possession of another "with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property ….." No such intention was proved here.

421. Huseni Kijuu v. Bura Lesso, (PC) Civ. App. 113-D-67, -/11/67, Hamlyn J.
Plaintiff sued defendant for the loss of his bull as a result of a fight with a bull owned by defendant.

Held: There was no evidence that the bull was one known to be savage or to have a propensity for attacking other animals of its own species. As the animal was of a domesticated breed, no onus lay upon defendant to guard against unforeseen attack by it. Plaintiff's appeal dismissed.

422. Mulewa s/o Chilongani v. Ngalya s/o Mulewa, Civ. App. 1-D-67,4/11/67,---------- J.
Plaintiff sued defendant in Primary Court for the return of certain cattle. On appeal to the High Court judgment was for plaintiff. Defendant then applied for leave to appeal out of time to the east African Court of Appeal. The questions raised primarily concerned the sufficiency of the evidence.

Held: The normal practice is that no appeal lies to the Court of Appeal against any decision or order of the High Court in any case originating from a Primary Court unless the High Court certifies that a point of law of general public importance is involved. [Citing section 7(2)(c) of the appellate Jurisdiction Ordinance. Cap. 451, as amended by the Magistrates' Courts Act, Sixth Schedule, Part 1V.] Not such point is involved here.

423. Dar es Salaam Motor Transport Company Limited v. Mehta, Civ. App. 16-D-67, 15/11/67, Saudi J.

Plaintiff sued defendant, the Dar es Salaam Motor Transport Company, for the price of goods delivered to defendant for transport from Dar es Salaam to mbeya. The primary legal question was whether defendant was a common carrier. Defendant called as a witness an employee of accompany which was defendant's agent in Mbeya and conducted all of defendant's affairs there. This witness testified as to the conditions of carriage and the manner of their display. The only other evidence on the issue was the conditions of carriage themselves. These stated that defendant might, in its unfettered discretion, refuse to carry any consignment of goods, and disclaimed liability for loss or damage to goods, whether or not caused by defendant's negligence.

Held: (1) The employee of the agent company was competent to testify as to defendant's affairs, but he could not testify as to defendant's affairs, but he could not testify as to transactions taking place in Dar es Salaam which were not within his personal knowledge. (2) A company had been held to be a common carrier, even though on occasion it has refused to accept goods offered by the public for transport.[Citing B.A.T. (Kenya) Ltd. et al v. Express Transport Company (Kenya) Ltd. et al., Civ. Case 77 of 1966 (Tanzania High Court Digest, case No. 374.] (3) The evidence is insufficient to show whether or not defendant is a common carrier. (4) The defendant is one of the largest transport companies in Tanzania and the issue is one of great public interest. The case should be remanded so that substantial evidence on this issue may be introduced. It was so ordered.

424. Arusha Tailoring v. Mrs. T. Pucci, Civ. App. 6-A-67, 28/10/67, Platt J.

Plaintiff sued defendant on a contract made by defendant for the making of cushions and curtains for the Kifaru Lodge. Defendant was an employee of the lodge. Plaintiff's pleading stated that the money had been first demanded from the lodge; plaintiff's evidence, however, was to the contrary. The invoice made out at the time of the contract was made in the name of the lodge. There was some indication that the contract might have been partly induced by the fact that the defendant was personally known to the plaintiff. There was also evidence that, at the time of the suit, the Kifaru Lodge had ceased to exist as a business entity.

Held: (1) Generally, an agent is not personally bound by a contract made by him on behalf of a disclosed principal.[Citing Law of Contract Ordinance, Cap. 433, ss. 182, 178.] Here, the "balance of probabilities" did not suggest that the agent was to be deemed a party to the contract. (2) Under Cap. 433, s. 182 (2)(c), an agent may be sued in a case where the principal, although disclosed, cannot be sued. According to the commentary of pollock and Mulla, 8th Edition, on the corresponding section 230 of the Indian Contract Act, this provision is intended to avoid "a total failure of remedy in cases where contracts had been made with promoters of companies not yet incorporated or where principals were uncertain bodies of persons or otherwise incapable (of) being sued by the description given in the contract." If Kifaru Lodge came within any of these situations, this should have been pleaded an evidence adduced. Otherwise, "the plaintiffs merely became creditors of a defunct organization and could claim like any other creditors for their share of the assets," (3) Here, the applicable rule is that the parties are bound by their pleadings. Nothing on the record suggests that any useful purpose could be served by remitting the case to the District Court for further trial on the issue whether the plaintiffs had been entitled to sue the defendant because the principal, though disclosed, could not be sued.

425. The Director, Jinnah's Company, Ltd. V. Francis Owino, Civ. App. 22-D-67, 22/11/67, Hamlyn J.

Respondent brought this action against appellant company for certain claims allegedly due him. Appellant, in his pled dings relied on an agreement between the parties for the payment of Shs. 2,500/- in full settlement of the claim. Respondent

Does not deny his signature on the agreement, but he raised the defence of non est factum in that he could not read English, in which language the contract was written, and that he would not have signed it had he known its contents. The trial court did not say anything about the burden of proof in a situation such as this one.

Held: (1) Once respondent has admitted his signing of the agreement, it is incumbent on him "to show that executed the deed under a substantial mistake as to its contents and that such mistake was induced by the machinations of some other person. If he can show this, then he can effectively plead that the deed is not his deed, but the onus is on him" (2) Reviewing the evidence in this light, the High Court allowed the appeal.

426. Peter S. Shirima v. Lalaito Kirikengori, Civ., App. 3-A-67, 28/10/67, Platt J.
Plaintiff orally agreed to purchase from defendant an automobile. The defendant delivered possession of the automobile against an initial payment; a receipt acknowledged the payment understanding between the parties being that the title would not pass until the price was completely paid. Some time thereafter, the car was detained by the police, and plaintiff was obliged to make certain repairs. A dispute soon developed as to the payment of the remainder of the purchase price, and the defendant repossessed the car. Plaintiff complained of this to the police, who advised that parties to settle the matter among themselves. Defendant then wrote " a humble letter" to plaintiff promising to refund the part of the purchase price which had been paid. Shortly thereafter, defendant paid back a portion of the amount promised; plaintiff gave him a receipt recording that defendant had promised the remainder by 15 October 1966 Plaintiff, on 21 September

1966, sent a letter demanding both the remainder of the refund and the cost of the repairs. Receiving no answer, he instituted this suit on 30 September.

Held: (1) Although the defendant's specific promise was for payment by 15 October, the suit was not premature. The cause of action had arisen, and indeed the defendant had admitted his indebtedness, before 30 September. The plaintiff's right to sue on that date was not affected by his agreement to give the defendant until 15 October to pay his debt. (2) The contract for purchase here was void able at the option of the defendant. Under the Law of Contract Ordinance, Cap. 433. s. 64, the party rescinding such a contract shall restore any benefits received there under from the other party. [Also citing Pollock and Mulla, Commentary on the Indian Contract Act, 8th edition, and cases cited therein at pages 383, 386 and 387; Clough v. L. & N.W.R. (1871) L.R. Ex 26; and Dies v. British and International Mining and Finance Corp. Ltd. (1939) 1 K.B. 724.] (3) While defendant might, on his part, have claimed damages occasioned by the plaintiff's non-fulfillment of the original sale contract, he has not done so. He is therefore liable to refund the full amount paid by plaintiff toward the purchase price, and the total cost of repairs by the plaintiff.

427. Nanji Trading Co. Ltd. v. Survakant & Bros., Civ. App. 13-D-67, 15/11/67, Saudi J.

Appellant required large amounts of petrol every month. Respondent agreed that appellant should have a discount of 20% on every gallon he purchased from plaintiff, provided each month's account was settled by the 10th of the succeeding month. After slightly less than a year, respondent ended the agreement and sought to recover the discount for each month in which the defendant had failed to pay by the 10th of the next month.

Held: (1) Respondent, by accepting payment as made (i.e. with 20% subtracted from the usual retail price of petrol) after the 10th of several months, had

thereby waived the original terms of payment. (2) Appellant is entitled to his discount despite the late payment n earlier months.

428. Kagabo s/o Mikaliha v. Dandila d/o Biguna, (PC) Civ. App. 57-M-66, 1/11/67, Mustara J.

Plaintiff and defendant were descended from the same great-grandfather. Plaintiff, a widow of the Waha community, claimed that she had succeeded to certain land originally owned by their common ancestor when her father died; it was not clear whether she had married, defendant inherited land from his own fore bearers, and at that time took over the land in question. The Primary Court found for the defendant, apparently accepting defendant's argument that female members of the Waha community, after being married to another family, lose their rights to inherit any part of the clan land. The Primary Court assessors agreed with this view.

429. Dausen F. Sawe v. Oforo Semu Swai, (PC) Civ. App. 4-A-67, 28/10/67, Platt J.

Plaintiff and defendant were dessended from the same grandfather, who had had 2 wives. One of these wives had borne him sons, and defendant was the son of one of these sons. The other wife had born daughters. Plaintiff claimed certain land under a will made by his grandmother. The Primary Court of Machame found for plaintiff, but the District Court, partly on the strength of new evidence that the clan had met and had rejected plaintiff's argument some time after the Primary Court proceedings found for the defendant.

Held: (1) Under paragraph 20 of the Laws of Inheritance, Government Notice 436 of 1963, a woman may inherit clan land in usufruct only. [Also citing the Laws of Wills, Rules 40 et seq.] Thus, "It seems doubtful whether (plaintiff's grandmother) was entitled to pass to her illegitimate grandson any right to clan land." (2) The Court expressed doubt as to whether the receiving of additional evidence by the District Court was "merited." However, the clan's decision seemed to have been correct, and the Court was of the opinion that "the District

Court was entitled to accept the evidence in the Circumstances." Plaintiff's appeal dismissed.

430. Magobe Mkale v. Gembe Kanoni, (LC) Civ. App. 34-D-64 20/9/67, Saidi J.
Defendant agreed to haul some oranges by dhow for plaintiff. Plaintiff brought the oranges to the agreed dock, but the dhow had gone elsewhere, and the oranges spoiled before plaintiff could find another shipper. Defendant was an employee of the owner of the dhow.

Held: The owner of the dhow is the party who should have been sued; the action against defendant was dismissed. The Court stated, "…..(Defendant) signed the agreement on behalf of the owner of the boat, and if anything went wrong as far as the agreement was concerned it was the owner of the boat who was responsible under vicarious liability."

431. Abdallah Salimu V. Ramadhani Shemdoe, (PC) Civ. App. 55-D-67 -/9/67, Saudi J.
This dispute concerns the custody of a female child as between two men, both of whom claim to be the father. The child is now seventeen years of age and has lived all her life with the respondent. Appellant divorced the child's mother eight months before the child was born; respondent married the mother some thirteen months before the birth.

Held: (1) The child looks exactly like appellant, and her blood is of the same group as his, whereas it is of a different group from that of respondent. This sustains his claim to be her father. (2) Since respondent has always maintained the girl, appellant must pay him for the costs he has incurred in raising the child. The award of the Primary Court of Shs. 300/- was manifestly inadequate, and the case was remitted to that court for it to "take evidence of the average cost of maintaining a child for a year at the village where respondent lives. If there is a dispute over the amount of such maintenance costs between the par-

ties evidence may be taken from independent and reliable village elders. Such evidence should be certified and sent to this Court to enable it to assess the proper sum to be refunded by the appellant as maintenance ….. before he can be allowed to take her.' Custody awarded to appellant.

432. Mwita Macha v. Mary Wangoi d/o Werura, (PC) Civ. App. 9-M-66, 30/10/67, Mustafa J.

Mary had been living with Mwita for several years during which time she bore two children by him. She also had two children previously, also born out of wedlock. Mary and Mwita are no longer living together. This action was brought to decide custody of the children, all girls.

Held: (1) Children born out of wedlock belong to the father of the woman. [Citing Government Notice No. 279 of 1963, Law of Persons, section 178.] (2) The eldest daughter, who is already married, could choose with whom she wants to live. Any bride wealth she was to receive goes to Mary's father, who has legal custody over her. (3) The second oldest daughter, about seven years of age and born out of wedlock but not sired by Mwita, was awarded to him, "…. On the condition that she is to be sent to school and not to be overworked in household chores." Mwita is to receive 0.25 of the bride price when the girl marries. This disposition was made because the court's primary concern was with the welfare of the child. (4) The two youngest daughters were awarded to Mary.

433. Amani Chogo Chacha v. Rioa Nyamtara, (PC) Civ. App. 115-M-66, 24/10/67, Mustafa J.

Chogo and his wife were divorced in 1947. Chogo was awarded the return of the ten cattle he had paid as bride wealth, even thought two children had been born during the marriage. The basis for the divorce was adultery and excessive drinking on the part of the wife. Riobo, the brother of the former wife of Chogo brought this action for the return of the ten cattle claiming that because children were

born, Chogo should not have had the bride wealth returned to him. The primary court held that his action was time-barred, being filed in 1965, eighteen years after the divorce. The district court, noting that Chogo, who was a local chief, had presided over the court that had granted the divorce, declared the divorce to be illegally obtained and void, because Chogo had been an interested party and should not have presided over the court. This meant that Chogo and his wife were still legally married, so Chogo never had a claim for the return of the cattle, so Chogo never had a claim for the return of the cattle, and they should be returned to Riobo.

Held: (1) The district court erred in ignoring the judgment of divorce obtained by Chogo, notwithstanding the method by which it was obtained. A judgment remains in force until upset by a superior court, and the earlier judgment had never been appealed. (2) The principle that a husband cannot recover bride wealth if there have been children born during the marriage applies only when there are no grounds for the divorce offered by either party. If the divorce is based on the wife's wrongdoing the court may, in its discretion, order return of some or all of the bride wealth to the husband despite the fact that there were children born during the marriage. (3) This action was time-barred. It is against public policy to allow matters which have been decided to be re-opened many years later, Chogo need not return the ten cattle.

434. Chibaya s/o Mbuyape v. James s/o Mlewa, (PC) Civ. App. 104-D-67, 20/11/67, Hamlyn J.

Plaintiff sued defendant in Primary Court for cattle and goats in respect of bride price. The action was governed by Gogo customary law, and the judgment for defendant was based upon the opinion of Gogo assessors as to this law. On appeal to the District Court, the magistrate, sitting without assessors, reversed the judgment and entered judgment for plaintiff.

Held: "Customary law ……. Is the law originating in the customs of a particular locality or tribe and (unless of course such law is contrary to the general law of the country or is immoral or otherwise objectionable) remains the law of

that locality until it becomes changed by general usage of the applied law. It is not for the courts to reasons." As the judgment of the primary court was based on the opinion of persons well versed in Gogo customary law, it was reinstated.

435. Benbros Motors Tanganyika Ltd., v. Ramanlal Haribhai Patel, Civ. App. 19-D-67, -/11/67, Hamlyn J

In July, 1964, a transaction occurred between the plaintiff and his employer, the defendant, which is the subject of this action. In his action, filed in District Court on 11 February, 1965, plaintiff claimed Shs. 1500/- "severance allowed."

On appeal, however, in resisting the defendant-appellant's allegation that the District Court lacked jurisdiction, he argued that his action was based upon a "suspension from labour," and not upon a "dismissal." The Security of Employment Act, which had come into operation on 5 January, 1965, provided (with exceptions not material here) that no suit or other civil proceeding could be maintained in an civil court "with regard to the summary dismissal or proposed summary dismissal" of an employee, such cases being within the exclusive jurisdiction of the Conciliation Board.

Prior to the passage of the Act, it would have been clear that the plaintiff had a period of 3 years to bring his claim. [Indian Limitation Act of 1908, Art. 7.] Cases to which the Act applies, however, must be brought within 7 days of the dismissal or proposed dismissal. Plaintiff argues that to apply the Act to his claim is to extinguish his cause of action, because of this provision. He contends that the Act is "substantive," and that it cannot be so applied because the Act contains no express indication that it should be applied to caused of action accruing before its effective date.

Held: (1) The action here must be taken to be one based upon a "dismissal," within the meaning of the Act. The claim is for "severance" allowance, which term implies " a complete and permanent cessation from employment." A sus-

pension" would be temporary, "pending some other event usually an investigation into some act on the part of the employee ---" after which reinstatement might be had; The complaint here contains "no hint of such claim …… either for investigation or for reinstatement." (2) When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away; but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, "whether commenced before or after the passing of the Act." [Citing Wright v. Hale (1860) 6 H. & N. 227; and the Ydun (1898) P.D. 236.] (3) The Security of Employment Act is, in this connection, "a matter of procedure and not one of substance, in that it merely substitutes one tribunal for another in a particular class of cases. It does not affect an alteration in the law governing the relation of master and servant, but merely provides an alternative venue for the settlement of disputes." Thus, where the plaintiff's claim accrued before the effective date of the Act, and his action was instituted after that date, the Act must apply to the case. (4) The District Court, therefore, lacked jurisdiction to entertain the plaintiff's action.

436. Masubo Karera v. Marwa Nyanokwa, (LC) Civ. App. 10-M-65, -/-/67, Erokwu J.

Appellant had been in uninterrupted possession of a piece of land for over 16 years, and had developed that land. The Village Development Committee allocated the plot to respondent who lived closer to it than appellant.

Held: "……(I)n allocating the piece of land to the respondent the V.D.C. acted on wrong and irregular principle. The piece of land was not lying just vacant. The appellant was in effective possession and had been developing the land for several years. There must be a very strong reason to justify his being disposed of the land by the V. D. C." He such strong reason exists here. Judgement for appellant.

437. Meso s/o Mwakakobe v. Lijumbete s/o Kasyama, (PC) Civ. App. 127-D-67, 4/11/67, Saudi J.

The brother of plaintiff, suffering from an incurable disease, obtained a licence from defendant to build and live in a hut on defendant's land so that he could be near the hospital where he received his treatment. This occupancy lasted for 14 years, until the licensee died there. After he had been buried in his original village, the plaintiff tried to enter on the land; defendant resisted, and these proceedings were instituted.

Held: There was no evidence showing that the licensee "had cultivated any part of the ….land or that such land had been separated by boundaries or other marks from the remaining land held by [the defendant]." It rather appeared that he had merely been given a right of occupancy to facilitate the treatment of his illness. "This style of occupation [cannot be held] to have established a permanent right to the ….. land" to which the plaintiff could succeed.

438. Lalji Makanji Karanja v. The Commissioner of Income Tax Misc. Civ. App. 13-D-66, 11/11/67, Georges C. J.

Appellant had purchased various parcels of land in Kenya and Tanzania, some of which he developed. This action involves a large tract of land which he sold in several parcels at a profit. He had not actually developed this plot.

Held: (1) This appeal was in the nature of a rehearing of a decision by the Commissioner of Income Tax, adverse to the appellant. By virtue of the East African Income Tax Amendment Act, 1958, sec. 113(c), the onus of proving that the assessment objected to was excessive rested on appellant. (2) Appellant argued that this was an isolated transaction, and that he bought the land initially to build warehouses thereon. Had this been so, the gain would not have been others, of acquiring and selling land so it was in effect stock in trade, and subject to tax if sold at a profit. He had bought and sold some 15 other parcels in the last two decades. (3) There also was evidence that appellant had attempted on several occasions to obtain building permits to develop the land for housing. Accordingly his again on the sale of the land was taxable.

439. R. v. Nicholuis David Makota, Crim. Rev. 146-D-67, 15/11/67, Biron J.

Accused was convicted of transferring a firearm to another person without a permit signed by an authorized officer contrary to sections 15 and 31(1) and (2) of the Arms and Ammunition Ordinance. There was evidence that he had loaned his shotgun to a friend who was going hunting and who accidentally killed a man while attempting to shoot a pig.

Held: A transfer contemplated by the cited section must be ejusdem generic with a sale or purchase as set out in the section, and a temporary loan does not constitute such a transfer. [Citing R. v. Mwalimu s/o Saudi, (1959) E.A. 415.] Conviction quashed.

440. Guli Tsauna v. R., Crim. App. 150-A-67, 7/10/67, Platt J

Accused was convicted of one count of assaulting a police officer [P.C. s. 243(b)], a second count of resisting lawful arrest {P. C. s. 243(a)], and a third count of using abusive language [P.C. s. 89(1)(a)]. The prosecution put forward facts showing that when a police officer attempted to arrest accused in connexion with a previous offence, accused attacked him with sticks, addressed abusive language to him and ran away. The particulars of the second count alleged that accused "did resist lawful arrest ….. by running away." The particular of the third count merely alleged that he had used abusive language. At the trial accused pleaded guilty to the charge, but he attempted on appeal to dispute the facts charged.

Held: (1) The convictions were based on accused 's admission in his plea, and he cannot now challenge the facts admitted. (2) An element of the offence created by Penal Code section 243 (a) is an assault with intent to commit a felony or to resist or prevent one's lawful apprehension. The charge was defective in that it failed to allege such an assault with such intent. (3) The third count was defective in that it failed to allege that the abusive language was used "in such a

manner as is likely to cause a breach of the peace ….. "- an essential element in the crime.

441. Oscar Mwambola v. R., Misc. Crim. Cause 3-M-67, 1/11/67, Mustafa J.
Accused was arrested on a charge of violating section 5(1)(a) of Cap. 45, the Official and other Secrets Act. He sough bail, which was denied by the District Court. Section 13 of the Act provides, inter alia, " ……. (E)very offence under this ordinance shall be ….. non-bailable." Sec. 17 provides that a prosecution under the Act may be instituted only with the consent of the Director of Public Prosecutions. However, a person may be arrested without such consent and remanded "in custody or on bail", but no further proceedings may be taken until the consent of the Director has been obtained.

Held(1) If an accused has been arrested pursuant to Cap. 45, but the Director of Public Prosecutions has not yet consented to prosecute the case, accused may be released on bail. [Sec. 17.] Once such consent has been obtained, however, the District Court no longer has authority to grant bail. [Sec. 13.] Here consent had not yet been granted, so the trial court could have granted bail, and the High Court proceeded to do so. (2) The Court noted that Crim. Proc. Code s. 123 (3) gave to it, but not to any lower court, the power to grant bail for any offence, notwithstanding the provisions of other statutes such as Cap. 45. Thus, had the Director of Public Prosecutions consented to proceedings being instituted, Cap. 45, s. 13 would have precluded the District Court from granting bail, but the High Court would not be so precluded.

442. Patrick s/o Isango v. R., Crim. App. 754-D-67, 8/11/67, Georges C. J.
Accused, a T. A. N. U. ten house cell leader, was convicted of corrupt transaction [Prevention of Corruption Ordinance. Cap. 400, s. 3(1).] The principal evidence against him was that of the complainant who testified that he paid

Accused Shs. 100/- as a reward for forbearing to arrest complainant for cattle theft. In his judgment, the trial magistrate referred to " a Presidential Order that cattle thieves be detained, even those who committed offences long ago."

Held: (1) Section 3(1) deals with a corrupt transaction by an agent "in relation to his principal's affairs or business …." A ten house leader is a party rather than a governmental official. [Citing Article 14 A of the constitution of T. A. N. U. as set out as a schedule to the Intern Constitution of Tanzania, Act No. 43 of 1965]. At law he has no powers or duties in relation to arrests other than those possessed by all citizens. Therefore, this transaction was not in relation to his principle's affairs and did not come within the terms of section 3(1). (2) With regard to the reference to the Presidential Order, a judge must base his findings on evidence led in Court, not on what may be known as common knowledge, unless they are facts of which judicial notice may be taken. (3) Had the charge been proper, the complainant would be an accomplice in the offence and the trial magistrate would have had to deal with the question of corroboration of his testimony.

443. Saudi Bakari Kionywakin V. R., Crim. App. 714-D-67, 6/11/67, Biron J.
Accused was convicted of wrongful confinement. [P.C. s. 253]. He was a divisional executive officer in charge of self help scheme. In his capacity as a justice of the peace, he issued a warrant for the arrest of complainant on a charge of obstructing the project contrary to Penal Code section 89C (1) after the complainant had refused to participate in the project. Accused accompanied a special constable who arrested and handcuffed the complainant. He and the constable fled when the complainant's uncle threatened them with a spear, but the handcuffs were not removed for some twenty hours.

Held: (1) The substantive element of an offence under Penal Code section 89C(1) is dissuading others from participating in a self-help scheme, and the mere refusal to take part does not constitute an offence under that section. Therefore the arrest of complainant was unlawful. (2) Section 60(1) of the Magistrates' Courts Act provides that "No….. justice shall be liable to be sued in any

court for any act done or ordered to be done by him in the exercise of his functions ….. as a justice, whether or not such act is within the limits of his or the court's jurisdiction, if ….. he believed in good faith that he had jurisdiction to do such act or make such order." Although this section applies specifically to immunity from civil process or liability, a fortiori such a person is immune from criminal liability for such an act. (3) 'Judicial functions' (functions of a justice) are defined as all acts emanating from, and appropriate to, the duties of the office of a judge, and includes the issuing of a warrant of arrest. [Citing Calder v. Halket, 18 Eng. Rep. 293; Ratanlal and Thakore, The Law of Crimes, 14th Edn., p. 148] (4) The trial court erred in failing to consider whether accused believed in good faith that he was acting within his jurisdiction.

The Court stated, obiter: (1) Section 16 of the Penal Code, which provides that "(A) Judicial officer is not criminally responsible for anything done ….by him in the exercise of his judicial functions, although the act done is in exercise of his judicial functions, although the act done is in excess of his judicial authority, ……" applies not only to persons

Exercising a regular judicial office, but extends to any person whose duty it is to adjudicate upon the rights, or punish the misconduct, of any given person, whatever form the proceedings may take and however informal they may be . The criterion is the nature of the act rather than the status of the actor. [Citing Tozer v. Child, 119 Engl. Rep. 1286, KBD, and Ashby v. White, cited therein; Ratanlal and Thakore, op. cit., at p. 147.] (2) This section apparently is much broader than section 77 of the Indian Penal Code, in that it extends not just to judges but of all judicial officers and does not require that they act in good faith. The court stated that the generality of the immunity was "a matter for the legislature to concern itself with", and declined to rest its decision on this section.

444. Athumani Alli v. R., (PC) Crim. App. 158-D-67, 6/11/67, Hamlyn J.

Accused were convicted of shop breaking. At the trial neither of the accused was given the opportunity to cross-examine his co-accused, and the prosecution did not choose to cross-examine this testimony.

Held: (1) An accused must be given the opportunity to cross examine any of his co-accused who testify. (2) The lack of such opportunity constitutes a miscarriage of Justice and the conviction must be quashed on appeal. [Citing Edward s/o Masenga v. Reg. 23 E.A.C.A 553; Archibald's Criminal Pleading and Practice (35th Edition) paragraph 1388.] (3) In considering whether a retrial should be ordered, it is relevant that "(t)he magistrate's error may not have been the fault of the prosecution but surely it is a more important consideration that it was not the fault of the accused." [Salim Muhsin v. Salim bin Mohamed and others (1950) 17 E.A.C.A 128; cited in Ahmedi Ali Bharamsi Sumar v. R. (1964) E.A.481.] In the present case the error in no way can be attributed to the accused.

The Court stated, obiter, that if a prosecutor chooses not to cross-examine an accused who testifies, "this can raise a presumption in the mind of the court that the version of the affair given by the accused is not raised as a matter in issue with the Republic."

445. R. v. Rutema Nzungu, Crim. Sass. 87-M-67, 1/11/67, Mustafa J

Accused was charged with murder. The deceased was stabbed about midnight in an unlit room. Another person who was sleeping in the room and deceased's mother, who lived nearby, both testified that they were awakened by the cry of the deceased that "It is Rutema Nzungu who has killed me." Both witnesses also testified that they recognized accused as he was running away. Accused presented witnesses who supported his alibi, that he was in a drunken sleep in his own house on the night of the killing.

Held: (1) It is a rule of practice that there must be corroboration of a dying declaration. [Citing Okethi Okale & others v. R., (1965) E.A. 555, 558.] In the present case it seems unlikely that either the deceased or the other witnesses had adequate opportunity to recognize accused and there is no adequate corro-

boration. (3) There is no onus on the accused to prove an alibi. All he need do is raise a reasonable doubt. [Citing Leonard Aniseth v. R., (1963) E.A. 206]. Here accused has raised more than a reasonable doubt. Accused acquitted.

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446. Nassoro s/o Mohamedi v. R., Crim. App. 745-D-67, 8/11/67, Georges C. J. Accused were convicted of burglary and stealing upon evidence that four days after the offence was committed a Kitenge shirt was found in the possession of one accused and a coat, pair of trousers and other articles were found in the possession of the other accused. These articles were identified in the charge only as “different clothes.”

Held: (1) In such cases as this the charge should itemize in some detail the property alleged to have been stolen, particularly where the accused raise the defence that it is their own property. (2) The proper procedure for identification of property in court is that the claimant should describe the item before it is shown to him, so that it can be clear to the court when the item is eventually tendered whether or not he was able to identify it. Convictions set aside.

447. R. v. Esta d/o Ikumboka, Crim. Sass. 170-D-67, 25/10/67, Georges C. J. Accused was charged with infanticide [P.C. s. 199] The child’s body had been buried for 10 days when first examined by a doctor, and decomposition had begun. A green cloth was tightly tied about its neck, and its lung were expanded; the doctor’s initial opinion was that it had been strangled. However, analysis of specimens of both lungs by a pathologist in Dar es Salaam found that the gas-spaces in the lungs were due to purification; the doctor then revised his opinion. Since it could not be determined whether the child had been born alive or not .The accused had told the doctor, during an examination of her in which he found that she was lactating and bore other signs of having recently delivered a child, that she had delivered a live child and had strangled it. Her husband was away, she said, and she was afraid of the consequences of having produced a child in

his absence. However, when first questioned by the Village Executive Officer as to what had happened to her pregnancy, before the body was discovered, she had stated that it had been born dead. At her trial, she stated that she had at first thought that the child was alive, and that she had buried it only when she discovered it was dead; she dismissed the doctor's account of his interview with her as a lie.

Held: (1) Accepting that accused 's statement t the doctor was as the doctor stated, she had a short time before given a conflicting account of the incident. Considering that she may well have been in a general state of confusion, and in the absence of direct medical evidence supporting either account, it would not be safe to convict her of infanticide. (2) However, she lived in a populated area, and could have gone to several people for help; she was, therefore guilty of concealing the birth of a child [P.C. s. 218]. Conviction accordingly; suspended sentence of 12 months' imprisonment imposed.

448. Chimanlal Chunilal v. R., Crim. App. 218-A-67, 13/10/67, Platt J.
Accused were convicted on their own pleas of carrying goods for hire without a public carrier's licence [Transport Licensing Ordinance, Cap. 373 ss. 9(1)(2)(3), 26]. They were sentenced

To Shs. 60/- or 3 weeks' imprisonment; also, the magistrate ordered the cancellation of their road licences and registrations under section 27A (2) of the Traffic Ordinance, Cap. 16

Held: (1) No power to order cancellation of licences and registrations is provided for by the Traffic Licensing Ordinance, under which the offences were committed. [Citing Cap. 373, s. 9(7).] (2)Section 27A of the Traffic Ordinance refers only to the unlicensed carriage for hire of persons, not goods. Cancellation ordered set aside.

449. Rajabu s/o Athumani v. R., (PC) Crim. App. 176-D-67, 13/11/67, Hamlyn J.
Accused was convicted of burglary and stealing. The main matter raised on appeal was his contention that the conviction should be quashed because it was based upon the finding of the stolen property in his house when he was not present. It was not contended that the search was invalid in any other way.

Held: It is desirable but not necessary that a search by police to private premises be conducted in the presence of the owner or inhabitant. "But ….. the fact that the owner was not present at the time does not invalidate the search. It is of course a simple safeguard for the searching officer to be accompanied by independent persons of the locality, who can be called to give evidence that the search was properly and fairly conducted and that no question of 'planting' any property on the premises can be raised."

450. R. v. Andreas Msafiri, Crim. Rev. 142-D-67, 14/11/67, Saudi J.
The Minimum Sentences Act and the Corporal Punishment Ordinance, cap. 17, both provide that no corporal punishment shall be imposed on a person over the age of 45 years. In this case, which involved a Minimum Sentences Act offence, accused was awarded strokes upon finding by the trial court that he was "about 45 years of age."

Held: Be caused it is impossible to say whether the accused is over 45 years of age, in which case he is not subject to corporal punishment, "….. the court should give the accused the benefit of the difficulty of assessing his exact age and hold that he is over 45 years of ago …" Order of corporal punishment quashed.

451. Samwel Mwendawano v. R., Crim. App. 658-D-67, 3/11/67, Saudi J.
Two accused were fined Shs. 300/- each for affray, contrary to P.C. s. 87. They were unable to pay the fines and were imprisoned in default.

The Court noted; "This Court has repeatedly expressed strong views on the point that the fine a court should impose on any person convicted of an offence should be one that such person would be able to pay. The idea of imposing

a fine is to keep the accused person out of prison, where he might worsen his character by making contacts with hardened criminals who are always found in the jail. With hardened criminals who are always found in jail. There is therefore no good ground for a court to impose a fine which an accused person cannot pay and in consequence has to go to jail in default of payment. It is imperative that inquiries as to the accused person's ability to pay a certain amount of fine should be made before any fine is imposed." [Citing R. v. Bison s/o Mwanga, 2 T.L.R.(R)

31; Mohamed Juma v. R., 1T.L.R. (R) 257.] "Without fixing any particular figures to be followed, it does not appear to me to be reasonable to impose a fine which exceeds one-third of the monthly income of an accused person."

452. Athumani s/o Matat v. R., Crim. App. 697-D-67, Saidi J.

Accused were charged with attempting to obtain money by false pretences [P.C. ss. 302, 381] but were convicted of attempting to steal [P.C. ss. 265, 381]. The evidence was that the two accused, who were employees of a co-operative society, prepared false produce receipts and gave them to their relatives to collect the money on behalf of the accused. When the receipts were presented, they were found to be false, and no money was ever paid.

Held: (1) What had been done by accused amounted merely to preparations to obtain the money; no steps had been instituted for taking that is asportation of, the money. Therefore, they were not guilty of attempted stealing but only of the original charge of attempting to obtain by false pretences. (2)Were the conviction to be upheld, a charge of a simple offence would be converted into a scheduled offence carrying a minimum sentence. This could only have been done in the manner prescribed in the section 189 of the Criminal Procedure code.

453. Abu A. Mwenge v. R., Crim. App. 592-D-67, 8/11/67, Biron J.

Accused was convicted on nine counts of obtaining money by false pretences [P.C. s. 302]. He had obtained money and goods in exchange for cheques which were returned unpaid; in most if not all cases, he was later found to have stopped payment. The evidence that there had been no money in his account when the cheques reached the bank was contained in a bank statement, which was produced in court by a police witness who was also the prosecutor, and who had investigated the case. After an adjournment to call witnesses, the accused had stated that he had no further witnesses, but wished to add to his statement; the magistrate refused permission to do so, although he had earlier granted a similar request by the prosecutor, who had testified first after the testimony of 8 other witnesses, Rejecting a prosecution request to alter the charge, the magistrate stated: "…..the charge needs to be altered to suit the particulars. But I am convinced that an offence would have been committed if the charge was properly framed and evidence called to support it." It also appeared, finally, that the magistrate had assisted in transporting prosecution witnesses to the court; this prompted the accused to request trial by another magistrate and another prosecutor, which request was denied.

Held: (1) The charge here would require a showing that the accused knew that he did not have money in his account sufficient to cover his cheques at the time he wrote them, or that he had stopped payment on them before writing them. The bank statement, offered by a police witness who was also acting as prosecutor, was inadmissible; thus, the conviction fails for lack of sufficient evidence. (3) The magistrate, in several respects, gave "the impression, not only to the appellant, but to the public at large, that justice was not seen to be done." One instance was his refusal to allow additional evidence by the accused;

Another was his comment in rejecting an admittedly needed alteration of the charge; a third was his alleged conduct in transporting prosecution on witnesses to the court.

454. Dengwa s/o Masiku v. R., Crim. App. 58?-D-67, 8/11/67, Georges C. J. Accused was convicted of stealing certain property which was found in a house owned by on Ali Saudi. Accused 's defence was that he did not live in the house and knew nothing about the stolen property.

Held: (1) The trial court accepted Saudi's testimony that accused had lived in his house for the last year. The court had failed to appreciate that since Saudi had an interest of his own to serve, in that if accused was innocent he was the most likely suspect, his testimony required corroboration. On examining the record the High Court found such corroboration. (2) The doctrine of recent possession was relied on to require the accused to explain how the stolen property came into his possession, which he refused to do. While 5 months had elapsed between the theft and finding of the goods in accused 's possession, the goods involved were not common articles and were specifically identified by their owner. "In the circumstances ……. Te period of five months, though long, is within the period which would be considered recent enough to justify the (accused) being called upon to explain.[Citing Shabani Juma v. R. (1953) 20 E.A.C.A. 199] Conviction upheld.

Pascal Joseph Mlay v. Anthony Phoneas, Civ. Case 16-A-66, 28/10/67, Platt J

Plaintiff and defendant agreed that plaintiff would purchase two farms held by defendant under a Government lease pursuant to the Freehold Titles (Conversion) and Government Leases Act, Cap. 523. Plaintiff agreed to deposit Shs. 10,000/- upon the signing of the agreement, (and did so in October, 1964), and to attempt to obtain credit for the remaining shs. 490000/- by January, 1965. A certain period of grace was provided for, whereupon the defendant would have the right to sell the land to another buyer; in the event of such sale, defendant would repay the deposit together with a sum to be agreed upon for the running expenses of the farm incurred by plaintiff in the interim. At the expiration of his time to obtain credit, and the period of grace, plaintiff was unable to pay, and defendant reclaimed the land. He did not resell it, however. Plaintiff entered a claim for the deposit and expenses in running the estate; on the latter claim, he alleged an understanding between the parties that such expenses would be refunded if the sale did not go through for any reason. In the alternative, he alleged that the entire agreement had been void for failure to obtain the consent to the disposition of the Commissioner, as required by section 19 of the Act; he argued that he was entitled to the deposit and expenses under section 65 of the Law of Contract Ordinance, Cap. 433, as “advantages” obtained under an agreement “discovered to be void.” The case originated in the High Court, and the defendant raised the preliminary objection that the plaint stated no cause of action.

Held: (1)”Understandings” between the parties must be included within the written contract, where an agreement is reduced to writing and executed by them. Plaintiff’s claim cannot here be based upon the alleged “understanding”, which was not so included. (2) Under the Act, “disposition” includes “assignment, sub-lease, mortgage or settlement of the term whether in the whole leased land or a part thereof …….” A disposition “shall not be operative without the consent of the Commissioner.” [Citing Cap. 523, s. 19.] Section 20 of the Act provides that a disposition “shall become void” where the Commissioner refuses his consent, or merely does not give it within six months of the application. (3) Although

the agreement here was called a "sale" by the parties, it was a transaction to dispose of the vendor's whole interest in land held on a term of years; it was thus an "assignment" within the meaning of the Act, and therefore required the consent of the Commissioner to become operative. [Citing Williams and Eastwood on Real Property, 24th ed., …. P. 112.] (4) Although the agreement here was not operative as a "disposition" --- i.e., could not operate to dispose of defendant's interest in the land --- "the contract may well exist ….. with regard to collateral matters." [Citing Patterson and others v. Kanji (1956) 23. E.A.C.A. 106; Patel v. Lawrenson (1957) E.A. 249; and Fazal Kassam v. Abdul Nagji Kassam (citation omitted), with extensive discussion.] Here, where the disposition is clearly inoperative, or "void", the issue is whether plaintiff can claim for "advantages" –the deposit and the running expenses, matters covered in a separate provision of the instrument of disposition --- under section 65 of the Contract Ordinance, dealing with an "agreement….discovered to be void ….." (5) Section 65 of the Ordinance should be read to allow recovery of the deposit in cases such as this one, albeit the collateral provision covering plaintiff's claim might in some circumstances not be "void". Pollock and Mulla's Commentary on the identical provision of the Indian Contract Act, 8th edition, states;

"A transferee of property which from its very nature is inalienable is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void." In the Court's opinion, it is Manifestly just" that there should be redress where the parties have altered their position with the understanding that the disposition may be held void or become inoperative. (6) If, upon the evidence, the running expenses amounted to an "advantage", there is no reason in principle why they should not be recoverable "for the same reasons as a deposit is recovered." Decision for plaintiff, to proceed to trial.

The Court stated, <u>obiter:</u> "(B)y making a collateral agreement, the parties may very well preserve a greater degree of reimbursement than if they merely

rely on section 65." This does not affect the holding that plaintiff, in this case, also has a good cause of action based on section 65 of the Contract Ordinance.

2. Omolo s/o Omolo v. Okengo s/o Obuto, (PC) Civ. App. 106-M-66, 20/11/67, Cross J.

Some time before 1959 plaintiff entrusted defendant with a cow which was subsequently stolen together with other cattle belonging to defendant. Some, but not all, of the cattle stolen were recovered, and defendant had received some compensation for others. This action was brought in 1965, for return of the cow.

Held: (1) The assessors advise that under Luo customary law "If only par of the beasts are recovered the person in whose custody the beasts are stolen will keep some beasts for himself but give the rest to the person who entrusted the beasts to him." (2) Rule 2 of the Customary Law (Limitation of Proceedings) Rules, 1963, provides that the period of limitation commences on the day when the right to bring the proceedings accrued or "on the day when these Rules come into operation which ever is later." The rules came into operation on 29th May, 1964, and the period of limitation is three years. Thus, the suit is not time barred. Plaintiff's appeal allowed and defendant ordered to return one cow to plaintiff.

3. Chach Gikaro v. Marwa Maroro, (PC), Civ. App. 117-M-66, 6/12/67, Seaton J.

Plaintiff, Kenyan, sued in Primary Court in North Mara for custody of a boy born in 1957, during his wedlock with the boy's mother. After their divorce, the mother married defendant, a Tanzania, and she and the boy have resided with him in the North Mara community for six years; during this time the defendant cared for the boy as his own son. During the three years between the divorce and the mother's remarriage, the plaintiff had paid Shs. 5/- monthly for the boy's support to his father-in-law; he had also left three head of cattle with his father-in –law for the same purpose, the cattle being part of the bride wealth plaintiff had originally paid.

Held: (1) Primary Court jurisdiction may be based, in personal actions, on the fact that defendant is ordinarily resident within the local jurisdiction of the

court. The court in North Mara had jurisdiction, therefore, despite the fact that plaintiff is a Kenyan. (2) The case is governed by the customary law of North Mara.

Under the Judicature and Application of Laws Ordinance, 1961, s. 9(1), customary law governs civil matters "relating to any matter of status of ……a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted ……" The boy, whose status is in issue, is a member of the North Mara community; the Local Customary Law (Declaration) Order, Government Notice No. 279 of 1963, was specifically made binding to this area by Government Notice No. 604 of 1963. (3) According to Rule 175 of the law of persons as declared in Government Notice No. 604 of 1963, children born in wedlock belong to the father. Thus, plaintiff is entitled to custody of the boy. (4) The boy's mother must be given "reasonable access" to her son, and the defendant must be compensated by plaintiff for any loss he may have sustained in providing for the boy's welfare. [Citing Government Notice No. 604 of 1963, Rules 104, 105.] Case remitted to Primary Court for further hearings as will able that court to make an order consistent with the judgment of the High Court.

4. Matinde d/o Rukonge v. Mwit Nyantumutwa, (PC) Civ. App 169-D-66, 7/2/67, Seaton J.

Plaintiff was the former wife of defendant under a customary law marriage. Four children were born while they were married. At the time of divorce custody of all four children was given to defendant. Plaintiff now seeks to recover custody over two of the children.

Held: Rule 175 of the Law of Persons, which is the law applicable by virtue of Government Notice No. 604 of 1963, clearly provides that all children born in wedlock during a customary marriage belong to the father.

5.Paulo John Iddy v. Mashauri Milanga, (PC) Civ. App. 117-D-67, 4/12/67, Biron J

Plaintiff had an affair with defendant's daughter during which three children were fathered by him. They eventually quarreled and the daughter returned to defendant's house. Plaintiff sued for custody of the children. On appeal to the District Court, the magistrate described the local customary rule that children born in any manner are the property of the woman as outdated. He also ruled that custody of the father was in the interest of the children. The local law was that of the Makonde tribe and was apparently applied although plaintiff was an Msukuma.

Held: (1) The rule that the mother should be awarded custody of illegitimate children is not outdated and, indeed, is found in "more modern sophisticated societies." (2) There was no evidentiary support for the finding that it was in the interests of the children to award custody to the unmarried father when the mother had returned to her father's house. The order of the primary court in favour of defendant was restored.

6. Nyakasara Kilimo v. Marwa Mwita, (PC) Civ. App. 171-M-66, 11/12/67, Seaton J.

Plaintiff and his wife were divorced after 14 years of childless marriage, the marriage admittedly failing due to the fault of the wife. Plaintiff sued for the return of the bride-wealth, but the North Mara District Court awarded only 7 of 22 cattle claimed and 5 of 14 goats, on the grounds that the long duration of the marriage reduced the portion of bride-wealth which could be recovered.

Held: Where the wife is the guilty party in a divorce, the husband is entitled to a return of the bride wealth given in full. [Citing Rule 58 of the Law of Persons

7. Munyaga Wagobyo v. Muling Katama, (PC) Civ. App. 177-M-66, 11/12/67, Cross J.

Plaintiff sued defendant for possession of a plot of land, which plaintiff alleged had been given to defendant "to cultivate" By plaintiff's grandfather. Defendant alleged that the inherited the land through his own father and grandfather. One of plaintiff's witnesses admitted that defendant had been cultivating the land "continuously since the time of the Germans."

Held: Whatever the circumstances of defendant's original occupation, it would be "completely contrary to the principles of equity to deprive him of the rights which he has acquired to the (plaintiff's) knowledge over his long period" of occupation. Plaintiff's appeal dismissed.

8. Kisema Ndutu v. Masholo Mishiga, (PC) Civ. App. 41-M-67, 12/12/67, Cross J.

Plaintiff had been given a plot of land to cultivate by defendant's father. He worked the land for approximately 3 years, his total period of occupation being about 5 years. The defendant expelled plaintiff from the land on the grounds that plaintiff had improperly planted certain crops and had cultivated in an area not given to him. For at least the next 8 years --- the witnesses 'accounts differ--- plaintiff filed no claim for possession of the shamba. Defendant now argues that plaintiff thereby a condoned the land, barring his present action.

Held: There is no evidence that Sukuma law would regard adverse possession for a period of 8 years as invalidating a person's claim to possession or establishing that person's intention to abandon the land. Judgment for plaintiff confirmed.

9. Kawagere s/o Mulinda v. Josephina s/o (Sic) Buhirane, (PC) Civ. App. 4-M-67, 18/10/67, Platt J.

Plaintiff and her brother inherited the property in question from their father. In 1952 the brother sold all of the property while he was a minor. However, it was redeemed by Lwamushuga, a clan elder, and in prior. However, it was redeemed by Lwamushuga, a clan elder, and in a prior case he was vested with the land as

guardian for plaintiff and her brother. In 1952 he sold the land to defendant while plaintiff and her brother were still minors. Plaintiff filed this action in 1965 for possession of the property. The parties are Haya.

Held: (1) The guardian had no right to sell the property of the minors. [Laws of Guardianship, First Schedule to Local Customary Law (Declaration) Order No. 4, paragraph 9 (G.N. 436 of 1963); applied to Huhaya in G.N. 605 of 1963.] (2) Plaintiff had 12 years from the date the Customary Law (Limitation of Proceedings) Rules, 1963 (G.N. 311 of 1964) came into operation to bring her claim. [See s.2.] As the boundaries between the plaintiff's portion of the land and that inherited by her brother had never been demarcated, the case was remanded to primary court so that the Banyaruganda decide the proper portion of the land to be given [could to a female heir and so that the land could be properly divided.

10. Jafenia s/o Shimba v. Musuka s/o Nyanda, (PC) Civ. App. 180-M-66, 22/11/67, Cross J

Plaintiff sued for possession of property possessed by defendant. There was conflicting evidence as to whether plaintiff had sold the land to defendant or had merely sold two houses on the property and given him permission to cultivate the land, accused constructed a house upon the land. The Primary Court ordered that plaintiff pay defendant Shs. 1,603/- before retaking possession. This award was reversed by the District Court.

Held: (1) Under Sukuma Law, plaintiff could not sell his holding or enter into any transaction in which the land was the subject, but could only lend the land. [Citing Cory, Sukuma law and Custom, Rules 380, 414.] (2) Defendant knew he had only a right to cultivate the land, and the construction of the house was unjustified. Sanction should not be given to this illegal act by permitting defendant to remain in possession for life as suggested by his counsel. Appeal dismissed.

11. Gervas Ngaiza Baitilwa v. Ngaiza Baitilwa, (LC) Civ. App. 20-M-65 8/12/67, Cross J.

Plaintiff sued his father, and a man who had purchased a certain shamba from his father, for return of the shamba. Plaintiff alleged that he succeeded to the shamba under a will made by his grandfather, who at the time had held the land under a "Nyarubanja" tenancy. The former landlord, however, testified that plaintiff's father had succeeded to the tenancy upon the grandfather's death, and had subsequently bought the holding from the landlord for Shs. 100/- Plaintiff was unable to produce the grandfather's will.

Held: Absent a will disinheriting his son as the primary heir, a tenant's holding passes to his son. [Citing Cory and Hartnoll, Customary Law of the Haya Tribe, paragraph 554 (ix).] Having properly succeeded to his own father's interest and dispose of the land as he wished. Plaintiff's appeal dismissed.

12. Felista Ishekanyoro v. Martin Banyuka, (PC) Civ. App. 175-M-66, 11/12/67, Seaton J.

The issue in this case concerned the distribution of the estate of deceased. Plaintiff, his widow, was childless. There was evidence that defendant, Martin, was the son of a previous wife of deceased, and that he had been born in deceased's house, had lived with deceased and been supported by him during his childhood and had been given money by deceased with which to buy a shamba. In refutation, plaintiff presented evidence that defendant, after his birth, had been taken to one Gido to be shown, and that this custom showed that the child was born outside deceased 's household. There was also evidence that defendant had later been expelled from deceased's household. In addition, there was evidence that deceased had sired a son, Ngambeki, by Plaintiff's younger sister. Buhaya customary law was applicable.

Held: (1) The burden was on plaintiff to prove that defendant was an illegitimate son an not legally entitled to the property, and she has not fulfilled this burden. (2) Under para. 77 of the Law of Persons as declared in the Local Cus-

tomary Law (Declaration) (No. 4) Order, 1963 (G.N.436 of 1963) and under para. 27 of the Second Schedule to that order, a widow has no share of the inheritance of her deceased husband but does have a right to receive a stated percentage of his movable property, and, until she remarries or dies, to use his house and receive a stated

Share of perennial crops and use a stated share of this land. Her share is to be cared for by her children. (3) The District Court correctly ordered that the estate should be distributed between defendant and Ngambeki and that plaintiff could remain in the care and protection of either of them as she chose.

13. Bi. Amina Katume v. Eustace Ndyakowa, (PC) Civ. App. 64-M-65, 16/11/67, Cross J.

Plaintiff purchased land from defendant, and created a house thereon. The land had been sold by defendant to a third party, with whom plaintiff become involved in ultimately unsuccessful litigation over possession of the land. Plaintiff was awarded Shs. 1,438/- by the Primary Court. The District Court reduced this amount, holding that plaintiff was not entitled to the costs of her appellate litigation, since it appeared that she had had no right to appeal in that case, nor to the costs of removable iron sheets she had used for the house, nor the value of crops planted during the litigation.

Held: “The …. Litigation was due entirely to the dishonesty of the (defendant) and I cannot see why the costs incurred by the (plaintiff) in the course of that litigation should not be borne by the (defendant). Until a judicial decision was handed down (plaintiff) was entitled to treat the land as her own.” Judgment for plaintiff restored in full.

14. Jacob Tibifumula v. Ntange Bebwa, (PC) Civ. App. 208-M-66, 4/12/67, Cross J.

Plaintiff had been convicted of threatening to burn premises in a trial in which defendant had been among the complainants. He served 80 days of a sentence of 4 months' imprisonment before his appeal was allowed and the conviction quashed. In the trial of the action brought by the plaintiff, the magistrate found that the defendant's action in reporting the matter to the magistrate in the previous case had been reasonable and not malicious.

Held: "In any case the …. Imprisonment was not at the instance of the (defendant) but by virtue of the judgment of the primary court …. In the circumstances the ….. civil action. … could not possibly succeed on a claim for false imprisonment."

15. Benadus Okemba v. Okoko Aran, (PC) Civ. App. 110-M-66, 16/11/67, Cross J.

Plaintiff claimed 11 cattle as part of bride wealth due to be refunded to him. He and his bride had gone their separate ways, she being "the guilty party." He had given 14 cattle for her. These had been returned, but their 11 offspring had been retained. He based his claim, at least in part, on the argument that no valid marriage had occurred. There was, however, "ample evidence that the marriage ….. in fact took place and was consummated."

Held: The offspring of bride wealth animals are the property of the person lawfully receiving the bride wealth. [Citing Government Notice 279 of 1963, paragraph 16.] Plaintiff's appeal dismissed.

16. Ngaida Msasu v. Rajabu Hanai, (PC) Civ. App. 83-D-67, -/10/67, Saidi J.

Plaintiff was married to a certain woman under customary law. Because of a misunderstanding, she left him to live with her parents for about six months; she then converted to Islam and married defendant, a Moslem, according to Moslem rites. Plaintiff sued defendant, claiming "ugoni," or damages for adultery. He was awarded Shs. 50/-, and defendant was ordered to leave the woman alone on the

grounds that she was a married woman, He did not do so. About four years later, plaintiff sued again, obtaining shs. 100/- and a similar order. On appeal, the District Court reversed, holding that the second marriage could not be annulled and that, because the plaintiff was not a Moslen, the woman could not be directed to return to him.

Held: As the woman had been lawfully married to plaintiff under customary law, that marriage could not be superseded by any other form of marriage until it was first dissolved. [Citing Local Customary Law (Declaration) Order 1963, Clause 101C.] Plaintiff's appeal allowed.

17. Andrea Wisai v. Fransiska Opong, (PC) Civ. App. 105-M-66, 15/11/67, Cross J.

Plaintiff sued for divorce in Primary Court. Defendant produced a document signed by the parish priest of the Local Catholic church, whose purport was that the parties had been "married in Paganism but were subsequently baptized as Catholics and they agree to respect the sacrament of matrimony'." The Primary Court held that it had no jurisdiction, since the document established that the marriage was a Christian marriage. The District Court reversed.

Held: "(A) customary marriage does not become a Christian marriage by the subsequent baptism of the parties." The Primary Court therefore had jurisdiction to hear and adjudicate the suit for divorce. Defendant's appeal dismissed.

18. Ale Pazi v. Hamisi Mohamed, (PC) Civ. App. 97-D-67, -/12/67, Hamlyn J.

In this action concerning the inheritance of property, the principal issue was whether appellant and deceased had been married. It was conceded that both were members of the Shafi sect of Islam, and respondent argued that within this sect every minutia of Islamic Law must be proved or the marriage was not shown to exist. There was evidence that appellant and deceased had lived together as husband and wife for several decades, but no marriage certificate was produced.

Held: (1) It is the Law of the Shafi sect of Islam, as of many codes, that there is a presumption of marriage where a man and woman have lived together

as man and wife for a considerable period of time. (2) The failure to produce a marriage certificate is not of special significance in the facts of this case. (3) The Statement of Islamic Law, G.N. No. 222 of 1967, has not yet been brought into force, and the court cannot directly apply clause 41. However, the Statement embodies the existing provisions of the law of Islam and may be referred to. Appeal allowed.

19. Laurent Ochola v. Tembo Odoyo, (LC) Civ. App. 5-D-66, 20/11/67, Hamlyn J.
Appellant and respondent both claim a certain plot of land, each alleging that it was allocated to him by the local authority. Appellant's claim goes back to 1957, respondent's only to 1963. Respondent erected a dwelling house and shop on the land. Appellant, who lives on the plot next to the one in dispute, took no action in respect of his claim until after respondent had completed the building.

Held: "Whether or not the appellant was in fact granted the plot in 1957 as he claims, he has made no effort to develop it and it was not until the respondent/completed his building that he laid claim to it. The fact that he did nothing when building that he laid claim to it. The fact that he did nothing when building commenced would point to the fact that the claim is not a bona fide one but merely made in order to reap the harvest of another man's labour." Appeal dismissed.

20. Balikulije Mpumagi v. Nzwili Mashengu, (PC) Civ. App. 84-M-66, 20/11/67, Cross J.
Plaintiff, the rightful heir of a man who originally owned a certain shamba, sued for possession of the land. Defendant's case was that he had occupied and cultivated the shamba for 23 years. The District Court assessors "advised that according to customary law the length of time the (defendant) had occupied and cultivated the shamba entitled him to possession of the shamba." Plaintiff's appeal dismissed.

21. Simeon Osita v. Adrianus Serere, (PC) Civ. App. 114-D-66, 26/12/67, Biron J.

Plaintiff had been allocated a plot of land some distance from his house by the chief of the district, and had occupied it continuously from either 1946 or 1949. The village executive officers, however, re-allocated the land, giving the plot in question to the defendant. The District Court, on defendant's appeal from a Primary Court judgment for plaintiff, held that the executive officers were justified in this action, apparently on the ground that plaintiff's house was some distance from the land.

Held: In view pf plaintiff's long-term, undisturbed possession of the land under a clearly proven allocation by the former chief, "there was no justification in law, and still less on ethical grounds, " for the District Court's judgment. "Even if the land was subsequently granted to the defendant by the village executive officers, this Court is far from persuaded that in the circumstances of the case they had any right to do so." Primary Court judgment restored.

22. Samuel Shandrack Machango v. Tulsidas Narandas Morjaria, Misc. Civ. App. 9-D-67, 30/9/67, Georges C. J.

On July 1, 1959, the date on which "standard rent" is determined under the Rent Restriction Act, the premises in issue were being let at Shs. 1,250/- per month; one month later, the rent was reduced to Shs. 700/- per month. In 1961, the respondent in this case became the tenant, paying Shs. 600/- per month; in September of 1962, he sublet the premises to the appellant here at Shs. 1,250/- per month, a sum which he now justifies by citing improvements made during his occupancy. Although it was clear that the improvements could not justify such a rent, the sub lessee was content to pay it until September of 1964 when the tenant asked for Shs. 1,500/- The sub lessee paid this sum for four months, through December of 1964, and then refused to continue. In March of 1965, the

tenant filed suit in District Court for the January and February rent; this suit was eventually transferred to the Rent Restriction Board.

During the pendency of these proceedings, in September of 1965, the sub lessee surrendered his sub tenancy to the owner of the building, who then leased it to NUTA, the present occupant; the tenant made no objection to these arrangements.

In July of 1966, the tenant made his application to the Rent Restriction Board. He incorrectly stated that Shs. 700/- had been the rent charged on 1 July 1959, arguing that Shs. 1250/- should be fixed as the "standard rent" on the grounds that this amount had been charged immediately prior to the date prescribed in the Act. His application claimed rent for January and February of 1965, and mesne profits from 1 February 1965 until the surrender of the sub lessee's occupancy in September 1965. The mesne profits claim was based upon the tenant's supposition that the tenancy had been terminated by a notice from him dated 31 January 1965.

The Board held that the standard rent was Shs. 1250/-, since records produced during an adjournment of the proceedings established that this was the amount charged on 1 July 1959. They further held that the tenancy had not terminated in January of 1965, since service of the notice of termination could not be proved. They awarded arrears of rent from January to September of 1965, allowing Shs. 1000/- for rent overpaid from October to December of 1964. From this judgment the sub lessee appealed.

Held: (1) The fixing of the standard rent at Shs. 1250/- was proper, despite tenant-applicant's apparent concession, in his application, of a lower figure. The parties to proceedings before the Board are not " confined to their pleadings;" the Board was intended to be "a body which, while judicial in its approach, will not become tied down to procedural formalism."[Citing Rex v. Brighton &Area Rent Tribunal (1950) 2 K.B.410, 419.] (2) Nor may the lower figure be accepted by op-

eration of the doctrine of estoppel; even assuming that the tenant's statement in the application was a "representation" by him, the sublessee "has not acted on this representation to his detriment." Moreover, "the standard rent once determined adheres to the property until changed in one of the methods envisaged in the Ordinance. To fix a standard rent on the basis of estoppel between two parties, neither of whom is the owner of the premises, appears …. To raise insuperable difficulties." (3) Although, as the sublessee contends, it may have been "iniquitous" of the tenant to rent the premises for Shs. 600/- and sublet at Shs. 1250/-, the tenant would not run afoul of the Act unless he sublet at more than the standard rent or attempted to increase the rent contracted for before the sub tenancy were

Lawfully terminated. [Citing Rent Restriction Act, ss. 15,17,19(d).] Under section 4(2) (a) of the Act, the Board might have fixed the standard rent at a lower figure than that charged on 1 July 1959, if such an alteration were deemed "fair and reasonably in "the special circumstances of the case;" but it was not request to do so in this case. (4) The award to the tenant of "rent" for the period for which "mesne profits" were requested was proper. Although "rent" is a contractual matter, and "mesne profits" one of damages, the distinction here is "technical" only. The figure awarded was "one agreed by the (sublessee) and paid by him over a long period without complaint." It was therefore a fair sum to be awarded "for occupation" for the period January September 1965.

23. Selemani s/o Dadi v. Lata d/o Alli, (PC) Civ. App. 108-D-67, 10/10/67, Biron J.

Plaintiff claimed title to a shamba, which he said had been sold to him by defendant's father some thirty years previously. He alleged that there had been three witnesses to the sale, two who were dead and a third whose whereabouts were unknown. He testified that the document recording the sale had burned with his

house five years previous to the suit. One of his witnesses, however, stated that plaintiff had been tapping palm wine from the trees on the premises for the past three years, during the lifetime of the defendant's father, another stated that he had been picking coconuts from these trees for the plaintiff for the past twelve years. Defendant, claiming the shamba by inheritance, stated that she had never been informed of the sale; her brother, who did not live in the vicinity, gave the same testimony. The Primary and District Courts found for the defendant, apparently on the ground that plaintiff had not produced documents or direct verbal evidence of the sale itself.

Held: The independent evidence was that plaintiff's possession had continued for twelve years, and his uncontroverted testimony was that it had continued for thirty years. "In the circumstances the absence of documentary evidence --- and the appellant's explanation for such absence is perfectly reasonable and plausible --- was by no means fatal."

24. Mzee Walipesa v. Rajabu Mgeyo, (PC) Civ. App. 128-M-66; 21/11/67, Cross J.

Defendant inherited the land in question from his father in 1948. However, in his absence the land was taken from the person caring for it and "given" by the District Council to one Kibenga. Plaintiff in this suit is a successor in interest to whatever title Kibenga had. In 1965 plaintiff discovered that defendant's servant had taken possession of the land and filed this action to recover it. On the first appeal, the District Court held that defendant should look to the district Council for remedy and also held that his claim to the land was time-barred.

Held: (1) Defendant's claim could not be time –barred, for this action was not brought by him but was brought by plaintiff for repossession. (2) Moreover, the period of limitation for any claim by plaintiff would be 12 years from 29th May, 1964, the date the Customary Law (Limitation of Proceedings) Rules, 1963, came into effect. (3) Defendant need no seek remedy in the District Council; there is no reason for a court to perpetuate the error of the Council. Primary Court judgment for defendant restored.

25. Official Receiver & Trustee in Bankruptcy of the Property of Kishan Singh Sandu – The Bankrupt v. Mokund Ram Aggarwal, Civ. Case 20-A-65, 28/10/67, Platt J.

There was provision in a partnership agreement between plaintiff and defendant for its dissolution in the event of an act of bankruptcy on the part of either party. By notice in July, 1965, the Official Receiver and Trustee for the Bankrupt terminated the partnership. The act of bankruptcy occurred in 1960 and Sandhu was adjudged a bankrupt in June, 1962. This action was filed in August, 1965. Article 106 of the Limitation Act requires actions in respect of a partnership to be brought within three years of its dissolution. The only point in question was whether the suit is time-barred.

Held: (1) Since the act of bankruptcy took place before the enactment of the Law of Contract Ordinance, Cap. 423, the relevant statute is the Indian Contract Act (1872). (2) Sec. 254 of the 1872 Act permits a suit by a partner to dissolve a partnership after a bankruptcy. But, the bankruptcy does not automatically dissolve the partnership. Consequently, the partnership came to an end when notice was given in July, 1965, and the suit is not time-barred. (3) The Court stated, obiter: under the Contract Ordinance now in force, the result in the case would have been different because the adjudication of bankruptcy would in and of itself dissolve the partnership; and an action such as this one would have been time-barred, because over three years had elapsed between the adjudication of bankruptcy in June, 1962, and the filing of this suit in August, 1965. [Citing Cap. 423, sec. 213.]

26. Kabusu Mtongori v. Wambura Nyamaisa, (PC) CIv. App. 149-D-66, 7/12/67, Seaton J.

Sometime between 1952 and 1954, plaintiff transferred an ox to defendant in exchange for a cow which subsequently gave birth to a heifer. The cow had been

stolen in 1952, and in 1954 it was restored to its owner by court order in a criminal case in which plaintiff and defendant were both acquitted of the theft. Plaintiff filed this action in Primary Court in 1963 claiming two cows in compensation for the cow and heifer which he had returned to the owner. Nothing in the record of proceedings or the Primary Court judgment indicated whether or not he applicable law was customary law, though it was clear that Islamic Law was inapplicable.

Held: (1) Section 14 of the Magistrates' Courts Act grants jurisdiction to Primary Courts to hear civil suits under customary or Islamic law as well as under "any other law" by which jurisdiction is conferred. (2) If some law other than customary law is applicable, the suit is barred by the Indian Limitation Act, 1908. under either sections 48 and 49, which prescribe a three year period of limitation for suits for specific movable property or for compensation for the wrongful taking or detaining of such property, compensation for the wrongful taking or detaining of such property, or under sections 113,114, and 115, which prescribe the same period of limitation for specific performance of a contract, Rescissions of a contract or compensation for branch of an unwritten contract. (3) If customary law is applicable, the suit is barred by the Customary law (Limitation of Proceedings) Rules, 1963 (G. N. No. 3111 of 1964) which prescribe a three year period of limitation for proceedings for damages for civil wrong and for breach or enforcement of oral contracts. It is thus unnecessary to decide whether customary or "any other law" is applicable.

27. Twentsche Overseas Trading Co. (Tanzania) Ltd. v. East African Cycle Corp., Civ. Case 3-M-67, 14/12/67, Mustafa J.

Plaintiff company obtained a civil judgment against defendant company, and filed an application for attachment under order 21 , rule 11 of the Civil Procedure Code. The District Registrar then purported to issue a warrant of attachment of movable property in terms of Order 21, rule 30 of the Civil Procedure Code

(which, at the time, corresponded to the present rule 28). Possession was taken by the court-broker, and the Registrar purported to issue a notice to settle terms of sale under Order 21, rule 65. Subsequently the defendant filed a chamber application arguing that the attachment be raised, and the execution of the decree be declared a nullity. Defendant's grounds were that the court did not decree the attachment or order it s execution, and that the Registrar's warrant of attachment was therefore of no effect.

Ruled: (1) Under Order 21, rule 15(4), when an application for attachment is submitted the court "shall …. Order execution of the decree according to the nature of the application …. " These provisions are mandatory. (2) All proceedings after the filing of the application are therefore null an void. Attachment of goods levied raised, with costs of application charged to plaintiff

28. Madole Mbichi v. Makongoro Nyamwaji, (PC) Civ. App. 82-D-67, 10/10/67, Saudi J.

Defendant had been awarded seven cattle and three goats in a prior suit against a third party for the balance of a bride price. Before payment, he was informed that the third party had hidden. Some cattle and eight goats. Plaintiff sued him for taking the animals without justification, and it was shown that in fact the third party had not hidden any of his animals on the plaintiff's land.

Held: The defendant had "no power under the law to execute the decree by himself. Even if the news he had received were correct, the only thing he could do was to move the court for an order of attachment or injunction."

29. Paulo Ferdinand v. Frugence Bigutu, (PC) Civ. App. 25-M-67, 15/12/67, Cross J.

Deceased made a will three weeks before his death which purported to revoke an earlier will. The parties contest the validity of the second will. Paulo, the disinherited heir, clears the second after testator's death. He contended that whatever the reasons for his disinheritance he should have been afforded an opportunity to

rebut them, and because such opportunity was not given to him the latter will is invalid.

Held: (1) Government Notice No. 436/1963, clause 35 provides; “The disinherited heir should be given an opportunity of clearing himself before the testator or family council.” (2) The provisions of clause 35 are not mandatory, so Pulo cannot, as a matter of right, have the will set aside. (3) A disinherited heir can also, as Paulo has done here, apply to a court for a decision as to whether the disinheritance was justified. On the basis of the evidence before the court, the disinheritance was justified.

30. R. v. Atanasi s/o Kawuwu, Crim. Rev. 161-D-67, 8/12/67, Hamlyn J.

Accused were convicted of buying controlled agricultural produce contrary to sections 13(1) and (2) of the Agricultural Products (Control and Marketing) Act, Cap. 486, as amended by section 10(b) (ii) of the National Agricultural Products Board Act, 1964 Act No. 39. In addition to the imposition of fines, confiscation of the produce which had been bought was ordered.

Held: The Agricultural Products Board (Control and Marketing Act (sic) does not provide for the forfeiture of the produce. Confiscation order set aside and order issued that produce be restored or that payment be made for its value if it has been disposed of. [But see National Agricultural Products Board Act, 1964 (Acts 1964 No. 39), s. 5(1) (i); ----Editors.]

31. R. v. Clement s/o Mbella, Crim. Rev. 139-D-67, 9/11/67, Saudi J.

Accused was convicted of buying a controlled agricultural product contrary to section 13(2) of the National Agricultural Products Board (Control and Marketing) Act, Cap. 486 as amended by section 10(b) (ii) of Acts 1964 No 39. In addition to a fine of Shs. 500/-, it was ordered that 97 bags of millet worth Shs. 2910/- be forfeited.

Held: The order of forfeiture was not authorized by the Act. Order of forfeiture set aside. [But see National Agricultural Products Board Act, 1964 (Acts 1964 No. 39), s. 5(1) (i) ---- Editors.]

32. R. v. Songo d/o Musoma, Crim. Rev. 43-M-67, 27/11/67, Cross J.

Accused was convicted of arson. When the charge was read to her she said, "I agree I unlawfully set the house on fire. I was not justified in doing so." This was recorded as a plea of guilty. The facts, as related by the prosecution, were that accused burnt some native medicine near the house of a co-wife of her husband, apparently in the hope that the medicine would increase the husband's love for herself. The fire spread and the co-wife's house was completely burnt.

Held: Penal Code section 319(a) provides that "Any person who willfully and unlawfully sets fire to any building or structure whatever … is guilty of a felony …." Accused 's plea did not admit to having willfully burnt the house, and the plea was thus equivocal and should not have been recorded as a plea of guilty. Also, nothing in the recital of facts by the prosecution indicates that the burning of the house was not accidental. Conviction quashed.

33. Azaria s/o Mbuya v. R., (PC) Crim. App. 11-D-67, 2/12/67, Seaton J.

Accused, a teacher, was convicted of assault. [P.C s. 240.] There was evidence that he had questioned the complainant, a girl of 12 years of age, concerning her relations with a boy in the school. Accused claims that she lied to him, and as a result she was caned. Complainant testified that she was caned on the thighs as well as the hands and that accused attempted to pull her pants down. A doctor testified that there were swellings on her hands and thighs. The complainant gave unsworn testimony, ad it did not appear that the magistrate had attempted to ascertain whether she understood the nature of an affirmation.

Held: (1) The caning of another person may constitute assault, but the use of force against another person is justified if exercised during lawful correction. (2) Corporal punishment may be administered for serious breaches of school discipline. However, female pupils may receive corporal punishment from male teachers only if no female teacher is at the school and such punishment is administered by the head of the school or with his written authorization. [Regulations 3(a) and 4(b) of G.N. 40 of 1965, made under section 38(p) of the Education Ordinance, Cap. 446.] In this case the manner in which the punishment was carried out exceeded the permissible bounds. (3) In primary court all evidence is to be given on affirmation "save in the case of a child of tender years who …… does not understand the nature of the affirmation." [Primary Courts Criminal Procedure Code, s. 30(2), (Third Schedule to Magistrates' Courts Act, Cap. 537).] If the child does not understand the nature of an affirmation, his evidence may still be received if he has the capacity to understand the duty to speak the truth. It should appear in the record that the court has determined that he has such capacity, but the failure to do so was not prejudicial in this case. (4) The unsworn testimony of a child must be corroborated, but there was such corroboration in the present case. Appeal dismissed.

34. Fideli Nyembe v. R., (PC) Crim. App. 654-M-67, 5/11/67, Mustafa J.
Accused was convicted of assault causing actual bodily harm [P.C. s. 241].He alleged on appeal that he had been provoked and, under the circumstances, had been justified in committing the assault.

Held: Provocation cannot justify an assault. It can only be a "matter in mitigation." Appeal dismissed.

35. Revocate s/o Pascal v. R., (PC) Crim. App. 42-A-67, 28/11/67, Seaton J.
Accused went on "a minor rampage" in complainant's pombe bar, engaging in a fight and pouring pombe on various customers. At issue is the order of the trial court that accused pay compensation of Shs. 90/- to complainant.

Held: The figure of Shs. 90/- constitutes the selling price of 9 tins of pombe which complainant would have sold had not accused 's conduct driven customers away. Apparently the pombe spoiled eventually, so the full value of the 9 tins is claimed. While it was not clear why complainant did not attempt to reduce his loss by selling the pombe later that night or the next day, even if at a reduced price, this factor does not in any way limit complainant's recovery.

36. Juma s/o Abdallah v. R., Crim. App. 789-D-67, 6/12/67, Biron J.
Accused was convicted of conduct in a public place in such a manner as to cause a breach of the peace contrary to P.C. s. 89(b) and using abusive language contrary to P.C. s. 89(a). Both charges grew out of an abusive public shouting match between accused and complainant.

Held: (1) Both convictions were quashed because there was no reasonable likelihood of a breach of the peace having arisen due to this altercation. (2) The court stated, obiter: Although the charge in two counts was proper, had accused been guilty he still should only have received one punishment as there was only one act of wrongdoing.

37 Salum Haruna v. R., Crim. App. 773-M-67, 15/11/67, Cross J.
Accused was convicted of possession of bhang. [Cultivation of Noxious Plants (Prohibition) Ordinance, s. 2(b).] The only substantial evidence was that of a police officer who testified that "I found one piece of rolled cigarette of bhang. I know bhang."

Held: "(I)t would be most unsafe to base a conviction on the bald evidence of a police constable that he knows bhang without any inquiry as to how he acquired his knowledge." Conviction quashed.

38. R. v. Wambura Makindi, Crim. Sass. 150-M-67, 9/11/67, Mustafa J.

Accused was charged with murder. A witness stated that he had seen the accused and the deceased together at 4 P.M on the day of the homicide; At about 7 P.M., the mother of the deceased, being a child of 9.5 years, raised an alarm because the deceased was missing. The same witness and several other persons went to the spot where he had seen the deceased with the accused, and they soon found the body of the deceased. He had been stabbed several times. The witness quoted him as identifying "Wambura Makindi" as his assailant; the boy's mother remembered that he had mentioned the name "Wambura." On the way to the dispensary, a Divisional Executive Officer recorded a statement in which the deceased again identified "Wambura Makindi" but placed the time of the assault at 2 P.M. Accused claimed that another man in the community also has the name "Wambura Makindi." He explained the wounds found on his body at the time of his arrest, the day after the homicide, as the result of another fight. He alleged that he had been in another place throughout the day in question.

Held: "(T)he dying declaration of the deceased needs corroboration because as a dying declaration it was not made in such circumstances as can exclude corroboration and also because it was made by a child of tender years." The prosecution did not establish that accused is the only man in the community named "Wambura Makindi"; and the deceased's own account of his murder conflicts, as to the time of the assault, with the report of the witness. Thus, there is no corroboration "sufficiently linking the accused with the person who attacked the deceased." Accused acquitted.

39. Shila s/o Mchomba v. R., (PC) Crim. App. 38-A-67, 7/12/67, Seaton J.

Accused was convicted of burg alary and theft. Evidence against him, consisting of several items found in his home which were alleged to be among the stolen goods, had been obtained during a search by a constable; the constable had no warrant for the search, was not looking for the accused himself, and, according to accused 's wife and some other witnesses who were present at the time, did not have the wife's permission to make the search. During the trial, accused 's wife

was called as a witness by the prosecution; it appeared that the magistrate did not warn her that she had no duty to testify.

Held: (1) Even assuming that the search was illegal, it does not follow that evidence obtained thereby is in –admissible. The proper test seems to be whether the evidence is "relevant to the facts in issue……"

[Citing O'Brien v. McGrath, an unreported case cited in 83 Law Quarterly Review 185.] (2) A husband and wife are competent to give evidence for or against each other, but they cannot be called except upon application of the accused. The record reveals neither such a request, nor any warning to the wife by the magistrate. The admission of her testimony was, therefore, erroneous. (3) However, since it appears that the wife's testimony "in no way assisted the case for the prosecution," and is not even referred to in the magistrate's judgment, the error occasioned no failure of justice. Appeal rejected.

40. Petro s/o Sang'undi v. R., Crim. App. 783-M-67, 22/11/67, Cross J.

Accused, a Primary Court magistrate, was convicted of corrupt transaction with an agent. [P.C. ss. 3(1), 3(3).] There was evidence that accused called complainant, who was involved in a divorce action, into his office and requested that she bring Shs. 30/- to him; he did not say what this sum was for. The matter was referred to the police, and complainant was given Shs. 5/- notes after their numbers had been copied. She later went to accused 's office and after she had left the police entered and searched the premises. They found the notes under a table leg near a chair in which accused had been sitting. The complainant testified at the trial.

Held: (1) The Complainant should not be treated as an accomplice whose testimony requires corroboration. Even if she knew the purpose of the payment, she would not necessarily be an accomplice. [Citing Rasiklal Jamnadas Davda v. R., (1965) E. A. 201.] (2) The fact that complainant may have been act-

ing as a police decoy also does not require that her evidence be corroborated. [Distingushing Alexandra Parentis v. King, 1T.L.R. 208 on the ground that that case involved professional decoys employed by the police.] (3) In the facts of this case the testimony of complainant was in any event corroborated by the finding of the notes under the leg of the table. [Distingushing Peter s/o Kasembe v. R., Crim. App. 454-D-67 (1967 Tanzania High Court Digest, case no. 338) on the ground that the ruling there stated was based on the particular facts of that case.] Appeal dismissed.

41. Ndewingia s/o Paulo v. R., (PC) Crim. App. 24-A-67, 4/12/67, Seaton J.
Accused was convicted of housebreaking and stealing. He was tried together with his brother who was acquitted. In response to questioning by the court, the brother stated that he thought goods found in their house had been stolen by his brother "because he is a thief and he goes to prison frequently." He also stated that accused had recently completed a prison sentence.

Held: It was improper for the court to admit evidence tending to prove that accused had been previously convicted of theft or had a bad character. The introduction of this evidence was prejudicial in this case. Conviction quashed.

42. Tuwati s/o Mzee v. R., (PC) Crim. App. 40-A-67, 27/11/67, Seaton J.
Accused was convicted of breaking and stealing [P.C. ss. 296, 265. The trial court sentenced accused to two years imprisonment and 24 strokes under the Minimum Sentences Act "because it is not accused 's first offence", but there was nothing in the record concerning these convictions.

The value of the goods stolen was Shs. 64/- and accused was sixteen years of age.

Held: (1) The details of the previous convictions should have been given in evidence or otherwise proved after conviction and before sentence. (2) In view of the value of the property stolen, the youth of the accused and the lack of proof that he was anything but a first offender, the sentence was excessive. Sentence reduced to twelve months imprisonment.

43. R. v. Kakengele Msagikwa, Crim. Sass. 91-M-67, 9/10/67, Cross J.

Accused and two others were charged with murder. There was evidence that a fight started between the other two accused and deceased in a house. Accused then entered the house without a weapon and told the others to leave. A witness testified that accused hit deceased twice and said he would not leave without beating deceased. However, on cross-examination he admitted that he had seen only hands and could not be sure the blows were inflicted by accused. At the close of the prosecution case, accused moved that he not be called upon to make a defence since the prosecution had not made out a prima facie case. The prosecution argued that a prima facie case had at least been made that accused had assaulted deceased.

Held: (1) A prima facie case at least must be one on which a reasonable tribunal could convict if no evidence is offered by the defence. [Citing Ramanlal Ttrambaklal Batt v. R., (1957) E.A.C.A 332, 335.] The onus is on the prosecution to prove its case beyond a reasonable doubt; and a prima facie case is not made out if it is one which on full consideration might possibly be thought sufficient to sustain a conviction. Still less is a prima facie case established by part of the testimony of a witness considered in isolation and without reference to other parts of the witness's testimony. (2) The evidence of the prosecution did not establish a prima facie case. Accused acquitted.

44. Tuhani s/o Ngura v. R., Crim. App. 846-D-67, 8/12/67, Georges C. J.

Independent evidence had established a "very strong prima facie case" against two accused persons for bicycle theft, malicious property damage and escape from lawful custody. Appellant and the co-accused took the stand, appellant de-

nying all knowledge of the matter and any acquaintance with co-accused, and co-accused giving testimony further implicating appellant in the crimes. The record does not show whether or not appellant was advised of his right to cross-examine co-accused, merely that he did not in fact do so.

Held: (1) On the facts, it is proper to conclude that "the opportunity to cross-examine was not afforded" to the appellant. The opportunity to cross-examine is "a fundamental right" of a person whose co-accused gives testimony, since such testimony, though given in defence of the witness, "becomes in fact evidence for the prosecution against the other." [Citing Edward s/o Msenga v. R. (1956) E.A.C.A. 553, where "the trial magistrate had made a positive decision not to allow" the cross-examination.] (2) However, the question in such cases is whether the irregularities occasioned " a failure of justice"; it is not reasonable to state, as a rigid proposition, that the failure to afford a co-accused the right of cross-examination is "ipse facto a fundamental irregularity necessitating the quashing of the conviction."

(3) Here, where evidence independently established a prima facie case against appellant, and where his cross-examination would evidently have attacked the co-accused 's testimony as wholly false, rather than attempting to clarify its implications, it is unlikely that a failure of justice occurred. Appeal dismissed.

45. Leornard s/o Kaseko v. R., Crim. App. 730-M-67, 8/11/67, Cross J.

Accused was convicted of arson. After making an unsworn statement, he was questioned by the magistrate and cross examined by the prosecutor.

Held: (1) An accused who makes an unsworn statement may be asked questions by the court in order to clarify any of the statements made by him. It is quite improper for him to be cross-examined by the prosecution. (2) In the circumstances of this case, the error in permitting cross-examination did not preju-

dice accused, and it is curable under section 346 of the Criminal Procedure Code. Appeal dismissed.

46. Wambura Kirangi v. R., Crim. App. 820-M-67, 24/11/67, Cross J.
Accused was convicted of unlawfully doing grievous harm. [P.C. s. 225.] In his plea he said, "I admit to have wounded the person." This was recorded as a plea of guilty.

Held: Although this may well be a plea of guilty to a charge under section 228 of the Penal Code, it was not an unequivocal plea of guilty to a charge brought under section 225, for it does not admit doing "grievous harm". Conviction quashed.

47. R. v. Sangi Manyenyi, Crim. Sass. 59-M-67, 23/11/67, Mustafa J.
Complainant was shot with an arrow, whereupon he turned around and saw only the two accused. No evidence was adduced to show which one had shot the arrow. Just before this, the accused had attached complainant and taken the bow and arrow with which he was shot.

Held: (1) In the absence of evidence as to which accused fired the arrow, they both can be convicted of attempted murder only if the prosecution could show a common intention. (2) The prosecution sought to find the requisite common intention intent in the joint attack on the complainant moments before he was wounded. When the arrow was shot, the assault on complainant had already been terminated, and there was no evidence adduced to show that accused were still acting in concert.[Citing Dracaku Afia and Another v. R., (1963) E. A. 363.] (3) As no prima facie case was made out against accused they were acquitted.

48. R. v. Rukondo s/o Kamano, Crim. Sass. 165-M-67, 17/11/67, Mustafa J
Accused was charged with attempted murder. [P.C. s. 211(1).] There was evidence that accused and several others shot a shower of arrows at complainant and his companions in an attempt to recover meat which they believed complainant and his companions had taken from them. They shot from about 40 paces

away. One of the arrows hit complainant in the buttock, causing a wound tow inches deep.

Held: (1) It was not satisfactorily proved that the arrow which hit complainant was shot by accused.

However, accused and his company were all acting in concert and with common intention, and accused is therefore responsible for the injury even if he did not himself shoot the arrow. (2)In view of the distance from which the arrows were shot and the other circumstances of the case, accused was guilty of the offence of an act intended to cause grievous harm [P.C. s. 222(2)] rather than attempted murder. Accused convicted of the former offence.

49 R. v. John Wimaana, Crim. Sass. 123-Bukoba-67, 20/9/67, Mustafa J.

Deceased was allegedly insulted by the younger brother of one of the four accused, whereupon he seized the boy and threw him down. The boy's brother set upon the deceased, and the two of them fell struggling to the ground. The other three accused then attacked the deceased, at least some of them using sticks to beat him. The deceased broke free and ran to a nearby house, not as yet having suffered any serious injury. The accused caught him, and began to beat him again with sticks and to kick him. They left him unconscious in the house, where he was treated briefly by his wife and some friends. He was taken the next day to dispensary for treatment, but died four days later from brain injuries sustained in the struggle.

Held: Both beatings were "in the course of the same transaction …… (T)he matter took a very serious turn when accused persons chased the deceased and beat him a second time, but I do not think that incident could be isolated from the first beating. When death occurs as a result of a fight as in this case, unless there are very exceptional circumstances, persons who cause death are guilty of manslaughter and not murder. In this case the offence disclosed is

on the borderline … and I will give the benefit of the doubt to the accused persons and find them guilty of manslaughter ….”

50.R. v. Amani Zephania Kimerri, Crim. Sass. 7-A-67, 18/10/67 Platt J.
Accused was charged with murder. The alleged victim had been unaccounted for, and to the best of anybody’s knowledge, absent from this world for the last three years. She was seen with accused, her husband from whom she was separated, shortly before her disappearance. There was very strong circumstantial evidence that accused had murdered his wife, but the body had never been found, and he denied killing her.

Held: (1) The fact of death is provable by circumstantial evidence, notwithstanding the fact that neither the body nor any trace thereof has ever been found, and that accused has not confessed to any wrongdoing. [Citing R. v. Onufrejczyk (1955) All E. R. 247; R. v. Horry (1952) N.Z.L.R. 111.] The ciroumstantial evidence must be “cogent and compelling.” (2) Despite the contrary view of one assessor, accused was convicted of murder and sentenced to death by hanging.

51. Mansuku Mohan Mawji v. R., Crim. App. 656-D-67, 20/12/67, Biron J.
Accused altered a cheque for Shs 100/- endorsed to him, so that it read Shs. 400/- He was convicted of stealing government property (the cheque was drawn on and cashed at the National Band of Commerce, and sentenced to two years’ imprisonment and twenty-four strokes under the Minimum Sentences Act.

Held: (1) This is a case of obtaining money by false pretences, not one of theft. Conviction was quashed because obtaining money by false pretences is not a scheduled offence under the Minimum Sentences Act. Because of this fact, it does not matter that the money involved belonged to the Government. Conviction under P.C. s. 302 was substituted and a shorter sentence imposed. (2) The Court stated, obiter; Since the banks are nationalized in Tanzania, cashing a

forged cheque in the National Bank of Commerce constitutes a taking of Government property. It is no less so because the bank may have a right of indemnity against the drawer of the cheque.

52. Shene Kimboka v. R., Crim. App. 157-D-67, -/-/67, Duff J.

The five accused were convicted on two counts of robbery, one count of malicious damage to property. A taxi driver had taken a passenger to a certain hamlet, where he waited while the passenger went to his house for money to pay the fare. When the passenger returned, a group of persons, including the five accused, had gathered about the car. They questioned the driver and passenger, indicating that they suspected them of being thieves. Dissatisfied, they set upon the pair; during the struggle, the two men were injured and property and money were stolen from them. It is not clear that any of the five accused stole any of the valuables.

Held: (1) Clearly, the accused participated in the assault. Conviction entered accordingly. (2) However, although the accused "shared a common intention to prosecute an unlawful purpose, namely, the beating of so-called thieves," it is not clear that they themselves committed any robbery directly, nor is it clear that "all of the accused shared the intention to steal." Absent such proof, the conviction for robbery must fail.

53. Edward Rwehabula v. John Rwehabula, (PC) Civ. App. 186-D-66, 28/12/67, Saudi J.

Appellant's appeal to a district court was dismissed because he did not appear in court either in person or by agent on the appointed day. Appellant had submitted a statement of his arguments to the district court. Subsequently he also presented a medical certificate to the court showing that he was ill on the date set for his hearing.

Held: (1) Rule 13(1) of the Rules of Court (G.N. No. 312 of 1964) entitles a party to have his appeal heard without his presence if he submits a written statement of the arguments supporting his appeal. (2) Additionally, the district

court should have heard the appeal because appellant had a reasonable explanation for his failure to appear on the appointed day. Case remanded to the district court for hearing on the merits.

54. Lameck Bundala v. R., Crim. App. 707-M-67, 15/11/67, Cross J.
Accused was convicted of stealing by servant. The particulars of the offence stated that "The person charged …. Did steal cash Shs. 2,882/- the property of his employer ……" The only evidence of theft was that 8.5 cartons of tea were missing.

Held: In the absence of an amendment of the charge, the prosecution is bound by the particulars, and these particulars were not proved. Conviction quashed because of this matter and the general insufficiency of the evidence

55. Edward Opiyo s/o Auguro v. R., Crim. App. 893-M-67, 5/11/67, Mustafa J.
Accused was convicted on two counts of obtaining money by false pretences. The first count alleged that he had taken money "with intent to defraud" on a promise to "forbear the arresting" of a certain person and to "stand and refuse removal" of that person for "detention as a cattle thief following the President's order of January, 1967." The second count alleged a promise to "forbear the support of returning" another person "who had been sent in detention following the President's order of January 1967." The evidence on the first count revealed a promise to be a witness for the named person against those who were charging him with cattle theft.

Held: (1) As to the second count, the generality of the particulars and the absence of the words "with intent to defraud" are fatal to the conviction, since the accused may not have understood the charge against him. "The false pretence must be set out in the charge with sufficient certainty." (2) The difference between the false pretence alleged in the first count and that revealed by the evidence is fatal to the conviction on that count. Convictions quashed.

56. Nyaku s/o Ntandu v. R., Crim. App. 805-D-67, 6/12/67, Biron J.

Accused was convicted of doing grievous harm. [P.C. s.225.] In answer to the charge he originally pleaded that the complainant had come to accused 's house at night and refused to identify himself, and accused thought he was an enemy. This was recorded as a plea of not guilty. However, he later stated, "I want now to change my plea to one of guilty because I injured this man. I agree that I did wrong." This was recorded as a plea of guilty. After the prosecutor had recited the facts, the accused made a statement substantially identical to his first plea.

Held: (1) In the circumstances, and considering that the facts recited by the prosecution were not inconsistent with the accused 's statement, if accused thought, as he had reason to believe, that the man who came to his house late at night was "an enemy," this would be a defence to the charge. (2) Accused did not unequivocally plead guilty to the charge. Conviction quashed.

57. Haki s/o Nangwalanya v. R., (PC) Crim. App. 204-D-67, 30/11/67, Hamlyn, J.

Accused was convicted of retaining stolen property. His appeal was found to be without substance.

The Court stated, obiter; (1) The trial court should not have appended exclamation marks to the record of testimony of accused, an act which presumably was done to indicate disbelief. It is only when the magistrate writes his judgment that he may comment on the truthfulness of testimony. (2) On the first appeal to the District Court, the magistrate should have "dismissed" the appeal; he is not entitled to "reject" it. Appeal summarily rejected.

58. R. v. Edward Michael, Dist. Ct. Crim. Case. 44-Mpwapwa-67, 2/12/67, Inspection Note by Biron J.

Accused were charged with stealing groundnuts. After the first prosecution witness had testified, they objected that the trial magistrate had previously convicted them of offences and requested that the trial be held before another magistrate.

The case was referred to the High Court for a ruling on this request.

Noted: The magistrate has absolute discretion in such circumstances to continue with the case or to transfer it under section 78(a) of the Criminal Procedure Code. The fact that the bench or prosecutor is aware of a previous conviction, or even that the magistrate has previously convicted accused, does not require that the case be transferred, though the position may be different if the magistrate sits with lay assessors.

59. R. v. Messrs. J. M. Kika, Crim. Rev. 130-D-67, 22/11/67, Duff J.

The accused firm was convicted of permitting a vehicle to be used without an existing policy of insurance [Motor Vehicles Insurance Ordinance, Cap. 169, ss. 4(1), 4(2)] after the manager of the firm appeared and pleaded guilty. The trial court suspended the licence of the manager.

Held: A firm or company cannot be disqualified from holding a licence in such circumstances, and it does not appear that the licence of the manager should have been suspended. Case remanded for clarification of the status of the accused firm or person.

60. R. v. Saudi s/o Yusufu, Crim. Rev. 147-D-67, 15/11/67, Biron J.

Accused carelessly drove off a road and ran into a dwelling house. He failed, inter alia, to report this accident to the police, for which he was fined Shs. 75/-, under section 61 of the Traffic Ordinance.

Held: Section 61 requires the driver of a vehicle involved in an accident to report it to the police only if injury is caused to a person or certain specified animals or to another vehicle. Since damage to adjacent property is not covered by the statute, the conviction was quashed.

61. R. v. Amiri s/o Juma, Crim. Rev. 155-D-67, 25/11/67, Biron J.

Accused were convicted of being rogues and vagabonds [P.C. s. 177(4)] upon evidence that they were found sleeping in buses at a bus depot. Those considered adults were sentenced to imprisonment for 15 days, and those considered juveniles, including a sixteen-year-old boy, were sentenced to six strokes corporal punishment.

Held: (1) Section 177(4) defines as a rogue and vagabond "every person found in or near any premises …. At such time and under such circumstances as to lead to the conclusion the such person is there for an illegal or disorderly purpose." The tort of civil trespass is not such an illegal purpose. (2) An element of the offence of criminal trespass [P.C. s. 299(1)] is the intent to commit an offence or to intimidate, insult or annoy the possessor of the property. There is no evidence of such intent here. (3) A juvenile is a person under the age of sixteen years and does not include a person of the age of sixteen years. The Court stated, obiter: No purpose could have been served by the short terms of imprisonment of the adult accused. "(I)t is not only a waste of public monies to send them to prison for such a short spell, but it defeats the very object of reformative punishment, in that it exposed these youths to contacts with, and the influence of, criminals, including hardened ones, and possibly to even worse dangers." Convictions quashed.

62. Leshalon s/o Ncosha v. R., (PC) Crim. App. 10-A-67, 2/12/67, Seaton J.

The two accused were convicted of cattle theft and sentenced to punishment as provided in the Minimum Sentences Act. In addition to the imprisonment and corporal punishment, it was order that "After their term of imprisonment, they will have to pay the complainant his cattle."

Held: (1) The trial court should have assessed the value of the missing cattle. (2) The court should have also determined the share which each of the accused was allocated in the proceeds of theft. Appropriate orders for compen-

sation should then have been made against each accused for the value of his share of the proceeds, as provided in section 6(2) of the Minimum Sentences Act.

63. Ali Mohamed v. R., Crim. App. 504-D-67, 6/12/67, Biron, J

Accused was convicted, in two separate trials, of two different burglaries, committed three weeks apart, and received respectively sentences of three years imprisonment plus 24 strokes, and two years imprisonment plus 24 strokes. This was an appeal from the second conviction.

Held: (1) When a court does not specify whether sentences are to run consecutively or concurrently, they are to run consecutively unless a higher court orders otherwise. Here the High Court ordered the two sentences of imprisonment to run concurrently. (2) There is no authority for the Court to order sentences of corporal punishment in two separate cases to be executed concurrently.

64. R. v. Paul T. Msilu, Crim. Rev. 138-D-67, 6/12/67, Biron J.

Accused was convicted of five counts of stealing Government property, and sentenced to ten strokes of corporal punishment on each count, sentences to run concurrently. The only question before the High Court was that of sentence.

Held: There is no authority for ordering awards of corporal punishment to run concurrently. The Corporal Punishment Ordinance, Cap. 17, Sec. 10, provides; "When a person is convicted at one trial of two or more distinct offences, any two or more of which are legally punishable with corporal punishment, only one sentence of corporal punishment may be passed in respect of all the offences." Accordingly, the sentences were set aside and a single sentence of 10 strokes was imposed in respect of all the convictions.

65. R. v. Kitila s/o Tintina, Crim. Rev. 164-D-67, 12/12/67, Biron J.

Accused was convicted on his own plea of doing grievous harm [P.C. s. 225], and sentenced to 15 months' imprisonment. During a quarrel with his wife, when

he had taken offence at the way she had helped herself to a portion of meat, accused had struck her with a the stick on hand, fracturing a joint of one of her fingers.

Held; The offence was “a domestic one.” The magistrate failed to consider that, by imposing “such a long term of imprisonment, he was in fact causing the complainant to suffer more.” By depriving her of her breadwinner. Sentence altered to result in immediate release.

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66. R. v. Zakaria s/o Kasanga, Crim. Rev. 160-D-67, 24/11/67, Biron J.

Accused was sentenced to fines of Shs. 100/- and Shs. 150/- or imprisonment for three months and four months, respectively, in default, for creating a public disturbance and assaulting a police officer. The sentences of imprisonment were ordered to run concurrently.

Held: (1) Terms of imprisonment imposed in default of payment of fines may not be ordered to run concurrently. [Citing P.C. s. 36] (2) The magistrate intended that accused serve only four months, which the High Court agreed was the proper sentence. The sentences as imposed were set aside, and two terms of peremptory imprisonment of three months and four months, respectively, to run concurrently, were substituted.

67.R. v. Limango s/o Shomari, Dist. Ct. Crim. Case 210-Kilosa-67, 30/11/67, Inspection Note by Duff J

Accused was convicted of entering dwelling house with intent to steal and with stealing. [P.C. ss. 295,265.] There was no breaking or attempted breaking, and the property stolen belonged to a private individual. The trial court directed that accused receive ten strokes of corporal punishment under section 5(2) of the Minimum Sentences Act.

Noted; The provisions of the Minimum Sentences Act were inapplicable to this case and the sentence was improper

68. R. v. Rajabu s/o Mohamedi, Crim. Rev. 1963-D-67, 12/12/67, Hamlyn J

Accused, who fit under the exception to the Act allowing a sentence of less than two years and 24 strokes, was sentenced to nine months imprisonment and ten strokes;

Held: Section 5(2) provides for a sentence of "…. Either ten strokes of corporal punishment or such term of imprisonment as may appear to the court to meet the requirements of the case." (Emphasis added.) Since accused had received another sentence of nine months imprisonment at the same trial, which was to run concurrently with the sentence here in question, the ten strokes of corporal punishment were set aside, while the sentence of nine months imprisonment was allowed to stand and to run concurrently with the other sentence.

69. R. v. Nyasi s/o Aloys, Crim. Rev. 165-D-67, 18/12/67, Seaton J.

Accused was convicted of giving Shs. 6/- to a police officer as an inducement to forbear entering charge for the offence of affray. In view of the small sum involved, the magistrate invoked section (5(2) of the Minimum Sentences Act, which permits an order for "ten strokes of corporal punishment or such term of imprisonment as may appear to the court to meet the requirements of the case." The sentence ordered was "ten strokes of corporal punishment or four months' imprisonment."

Held: In applying section 5(2), a court cannot impose sentences in the alternative. The choice of sentence is for the magistrate not the accused. The sentence here is bad for vagueness. In such cases where it is proposed to inflict corporal punishment, courts should be particularly careful; should the accused opt for corporal punishment, "there is often no practical appeal."

70. Selemani Rashidi v. R., Crim. App. 840-D-67, 8/12/67, Hamlyn J.

Accused was convicted of shop breaking involving a “considerable” amount of property and of assault causing actual bodily harm. Seven previous convictions were alleged against him at one point or mother during the proceedings, but the record did not show “that these were agreed to by him and they certainly were not proved against him.” Sentence of 36 months’ imprisonment was imposed on the first count; a statutory minimum sentence, with corporal punishment and an order for compensation, was imposed on the second count. The record did not disclose the basis of the sentence on the first count.

Held: As it is possible that “the sentence passed had been assessed upon the un-admitted previous record” of convictions, the sentence cannot stand. Sentence upon the first count reduced to 2 years’ imprisonment.

71. R.v. Daudi James, Crim. Rev. 148-D-67, 14/11/67, Duff J.

It is alleged that accused has three relevant previous convictions. Accused denied these convictions. The prosecution sought to prove these by tendering a certificate of comparison of fingerprints which had been sent by the authorities in Dar es Salaam. The court accepted this proof, and took the previous convictions into account in assessing sentence.

Held: The mere production of a certificate of comparison of fingerprints” …… does not constitute prima facie evidence of all the facts set out in the document,” unless it is produced by the person who took the fingerprints of the accused.

72. Hamisi Salum Muejori v. R., Crim. App. 854-D-67, 6/12/67, Biron J.

Accused was convicted of giving false information to a person employed in the public service, and of obtaining by false pretences Shs. 27/60. The trial court, noting that the accused “has proved impervious to former sentences” and that he was an ”incorrigible criminal,” gave him sentences of five months and two years, respectively, to run concurrently.

Held: “Whilst previous convictions are certainly a relevant factor in the assessment of punishment, in that they disentitle an accused to any claim of le-

niency, the determining factor in the assessment of punishment is the intrinsic offence which has been committed." It is not "ethical or just" to punish a man over and over again for previous offences. While accused deserves no leniency, the offences of which he stands convicted were trivial. Sentence on second count reduced to five months.

73. Augustino Brown Chanafi v. R., Crim. App. 832-D-67, 15/12/67, Biron J.
Accused was convicted of forgery and obtaining money by false pretences[P.C. ss. 337, 302]. He had obtained money from the complainant upon a note which he represented to be a valid interim insurance cover note, evidently with the intention of using part of the money to obtain a genuine insurance cover for the complainant's vehicle.

Held: The evidence supports a finding of "intent to defraud." "(T)o deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action." [In re London & Globe Finance Corp. (1903) 1 Ch. 728, 732. Also citing R. v. Wines, 37 Cr. App. R. 197; Welham v. D.P.P. (1960) 44 Cr. R. 124; and Wood gate v. R. (1959) E.A.525.]

74. Miderege s/o Bemeye v. R. Crim. App. 799-M-67, 22/11/67, Cross J.
Accused was convicted of robbery with violence. [P.C. s. 286.] There was evidence that accused, while drunk, assaulted a number of persons in a pombe shop. After assaulting complainant, accused took complainant's coat and walked away with if

Held: Penal Code section 285 provides that any person who steals anything an uses violence to obtain or retain the thing stolen is guilty of robbery. Here, the actions of accused were not in order to obtain or retain the coat, but rather were part of generally belligerent behaviour which had no rational connection with the theft. Conviction for simple theft substituted.

75. Tom Abraham Salema Mandara v. R., Crim. App. 707-D-67, 6/12/67, Biron J. Accused was convicted of stealing government property and of unlawful possession of Government trophies. There was evidence that one Shabani, a Divisional Executive Officer, was storing at his house two elephant tusks which had been shot by a Game Warden in the course of his duties. Accused, who was an Area Secretary, brought two smaller tusks to Shabani's house and told him that he had been authorized by the Game Warden to exchange them for the larger ones which Shabani was storing. The exchange was effected. At accused 's first trial the magistrate held that accused had no case to answer. On appeal by the prosecution, the High Court stated that there had been a case to answer, but that the trial had been a nullity because accused had not been allowed to plead after new charges had been substituted.

Held: (1) Since the first trial was a nullity, accused could be retried for offences in respect of the same transaction. [Distinguishing Akberali Walimohamed Damji v. R., 2 T.L.R (R) and cases cited in Rosen and Stratton, Digest of the East African Case Law, P. 285.] (2) In evaluating the evidence, the failure of accused to testify under oath is not without significance in view of his position and advanced education. (3) The possession of the tusks by Shabani was merely custody as opposed to owner-hip or possession with authority to pass ownership or title. Therefore, the taking of them by accused constituted theft and not obtaining by false pretences.

76. Ibrahim Ahmed v. Halima Guleti, (PC) Civ. App. 128-M-67, 18/12/67, Cross J. On appeal of a civil judgment from a primary court, the district court reversed the decision for respondent below because; "On a balance of probability, I find appellant's evidence before the primary court carries more weight than that of the respondent."

Held: The District Court erred. The question for a court on appeal is whether the decision below is reasonable and can be rationally supported: if so the lower court decision should be affirmed. The appeal judge may not in effect try the case de novo, and decide for the party he thinks should win. “Surely, when the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence.” Judgment of the primary court restored.

77. Lehman’s (East Africa) Ltd. V. R. Lehman &Company Ltd., Civ. Case 92-D-64, -/2/68, Hamlyn J.

In this action plaintiff company alleges that defendant company, which was a shareholder in plaintiff company, failed to account in the balance sheet for discounts which it received while acting as agents for plaintiff. In an application for dismissal of the suit prior to trial, defendant argued that the balance sheets constituted settled accounts between the parties and that plaintiff could not ask that they be reopened.

Ruled; (1) Not every balance sheet amounts to an account stated, and each case must be decided upon its particular facts. (2) In the facts of this case, the balance sheet was an account stated. (3) Although it is a general basic proposition that settled accounts are final, the Court has equitable power to depart from this rule in instances where accounts are drawn up under a common mistake or where fraud has operated with respect to principal, agent, trustee or beneficiary. Such matters are raised by the pleadings in the present case. Defendant’s application for dismissal rejected.

78. Lesindamu Kinawanawa v. Ngobani Shila, (PC) Civ. Rev. 3-D-66, 2/2/68 Hamlyn J.

The parties entered into an agreement under which defendant occupied plaintiff’s land and agreed to develop it. Plaintiff later sought the return of the land, which he had a right to do, whereupon defendant requested compensation for the im-

provements he had made. The primary court assessed the improvements at Shs. 6,000/- and ordered defendant to quit the land upon receiving payment from plaintiff. Although not appealing against this decision, plaintiff made an application to the district court in respect of this action, to the effect that he could not raise Shs. 6,000/- and seeking to drop his suit for recovery or possession of his land. The District Court did this, and also vested the land in defendant, at the same time extinguishing plaintiff's debt to defendant.

Held: The district court on an ex parte application by one of the parties without any proper appeal before it. Defendant had neither notice nor knowledge of this "appeal" to the district court. Order of primary court restored.

79. Sheikh Kasim Suleman v. Ayubu Kamgila, (PC) Civ. App. 71-M-67, 27/12/67, Mustafa J.

Plaintiff and defendant were members of a community of Muslims. A plot of land was held by the community, whose affairs are generally looked after by a committee which was controlled, at the time of this action, by a faction led by the defendant. The land was held under a grant to "all the Muslims" which apparently had been made for the erection of a mosque.

A mosque and a school had been built, but a group led by plaintiff wanted another school to be built. Plaintiff sued unsuccessfully in Primary Court for possession of a portion of the land; this judgment was reversed by the District Court. Defendant argued to the High Court; that only the committee could decide what to do with the land: that plaintiff had no personal right to deal with it, albeit for the benefit of the public; that neither the village authorities, TANU nor the Ministry of Education had authorized the building of a school on the land by plaintiff, and that the District Court should have held that "whatever was done in the interests of the community was to be done according to the constitution and procedure of the community organization.'

Held: "This appears to be a dispute between two factions of a community as regards administration of its affairs. The land issue is but one aspect of such dispute. A dispute of this kind, by its very nature, could not possibly be dealt with in the primary court. This is not a matter over which a primary court has jurisdiction …." [Citing section 14, Magistrate's Courts Act.] The whole are, therefore, a nullity.

80. Edward Kalemela v. Muyebe Rwenjenge, (PC) Civ. App. 105-M-67, 26/1/68, Mustafa J.

In an action in a primary court for recovery of a loan of Shs. 250/- evidenced by a document, defendant acknowledged the debt and judgment was entered by consent. Defendant later appealed on the ground that the loan was conditional on the performance of work, which work had not been done. The district court magistrate took further evidence, upon which he set aside the judgment of the primary court.

Held: (1) A judgment entered into by consent should not be upset by another court, and the district court was wrong in taking further evidence. (2) The primary court had no jurisdiction to hear the case, as the law applicable was not customary law or Islamic law, nor was this an action for the recovery of a civil debt by the Government. [Citing Magistrates' Courts Act, s. 14(1).]

Consequently, the whole proceeding was a nullity.

81. Walimu Jilala v. John Mongo, (PC) Civ. App. 144-M-67, 25/1/68 Mustafa J.

Plaintiff sued defendant in Primary Court and sought damages of Shs. 5240/- The claim arose out of a contract by which defendant agreed to transport bags of millet for plaintiff. Judgment was for plaintiff, and defendant appealed, first to the District Court, and then to the High Court.

Held: (1) Primary Court has no jurisdiction to try civil cases unless customary law or Islamic law is applicable or the proceedings are for the recovery of civil debts or interest due to the Republic, Government or any municipal, town or district council. (2) The Magistrates' Courts Act, section 14(i),(ii) provides that a

Primary Court Magistrate has jurisdiction in respect of civil suits no exceeding shs. 2000/-. This section does not confer the power to hear civil suits other than those mentioned above, but merely places a monetary limit on the jurisdiction of the court in those cases in which it has jurisdiction to hear the subject matter of the suit.(3) Plaintiff (respondent) argued that costs should not be allowed because it is the practice of Primary Courts to hear cases involving private civil debts even though they have no jurisdiction to do so.

The Court is aware of this practice. Taking all these factors into consideration, appellant should be awarded costs of Shs. 400/- as costs in the appeal. Appeal allowed.

82. Mtatiro Mwita v. Mwita Marianya, (PC) Civ. App. 12-M-67, 16/1/68, Georges C. J

Plaintiff received one bullock from defendant in exchange for some finger millet. The bullock died two months later of unknown causes. Both parties belong to the Kuria tribe, and this type of contract is well known in tribal custom. The custom is that if an animal so exchange for millet dies within one year, the meat and skin may be returned to the other party who is then obliged to replace the animal. Plaintiff followed this procedure and then brought this suit for another bullock. The primary court failed to follow the customary rule and decided for the defendant citing Tarime. District Court Civil Appeal No. 4 of 1966, in which district court refused to follow the custom.

Held: (1) "If persons of the same tribe enter into an agreement well known to tribal custom under which the terms are prescribed, these persons must, in the absence of evidence to the contrary, be understood to be contracting in accordance with these terms." (2) Relevant customary law must be applied if it is"……applicable and is not repugnant to justice or morality or inconsistent with any written law." The rule in question here is a simple one; it does not take ac-

count of the fact that death may be due to the fault of the person receiving the animal But this is not to say that it is repugnant to justice or morality, and it certainly is not inconsistent with any written law. No evidence was presented to indicate that plaintiff was in any way at fault in the death of the bullock. Decision for plaintiff.

The Court stated, obiter; If it were proved that the animal had died due to the neglect of he person receiving it, "….. the Court, while upholding the rule, could find that the facts did not fall within its purview, as good faith and the customary standards of animal husbandry must be implied as the basis of the agreement."

83. Makafu Nyamrunda v. Muga Okanda, (PC) Civ. App. 151-M-66, 22/12/67, Mustafa J.

Makafu is the former husband of Muga. During their marriage two children were born. Muga subsequently remarried and until now kept the children. Makafu brought this action to obtain custody of the children. The district court, noting that Makafu was poor and had no wife whereas Muga's new husband was "a man of means", awarded custody to Muga because "the first thing to be considered is the welfare of children" and they would be better off with Muga and her present husband.

Held: (1) The law of Persons, Government Notice No. 279/1963, sec. 175, provides that children born in wedlock belong to the father. The two children here were born in wedlock, and consequently Makafu has an absolute right to custody of children the paramount consideration is the welfare of the children."

84.Sungwa s/o Fumbuka v. Manyanda Kasalucha, (PC) Civ. App. 79-M-67, 3/1/68, Cross J.

Plaintiff sued his wife's father for return of bride wealth paid at the time of his marriage. He said his wife had left him one the time of his marriage. He said his wife had left him one year previously, and that he did not know where she was. His witness.

However, said that the two were still married, as far as he knew. The Igusele/Nzega Primary Court found that "claimant ….. is rejecting his wife," rather than that she had deserted him; still, it awarded half of the bride wealth, citing Government Notice 279 of 1963, paragraph 59. Plaintiff appealed to the District Court, which ordered repayment of the entire bride wealth on the ground that the wife had become pregnant by another man. This evidence was evidently obtained at a Primary Court hearing after the District Court had begun to hear the case; at the hearing, the wife said that the plaintiff was the father; and the plaintiff "baldly said that he was not responsible."

Held: (1) Paragraph 59 of Government Notice 279 deals with repayments of bride wealth in case of divorce. The evidence indicates that the parties to this marriage have not been divorced, and no refund whatever is allowable. (2) Without directly disapproving the method by which the wife's evidence was taken in these proceedings, the Court further held that there was "nothing like sufficient evidence on which the district magistrate could base the finding referred to."

85. Maswi s/o Wambura v. Ryoba s/o Muhono, (PC) Civ. App. 189-M-66; 20/12/67, Duff J.

Plaintiff gave 16 cattle as bride wealth when he married. The marriage was brief, as he contracted a serious disease. Under Bakuria law, he was entitled to 15 of the cattle upon the termination of the marriage; for some reason, these were not recovered at the time. His wife thereafter married defendant, who gave her parents 21 cattle as bride wealth. Plaintiff sued defendant for 30 cattle, including 14 estimated as the number of the offspring of the original 16.

Held; A suit between successive husbands would only lie "where the woman was living in concubinage with the second 'husband.' Plaintiff's remedy, if any, is against his former wife's parent, and not against defendant "who did not benefit in any way from the price paid" by the plaintiff to them.

86. Karoli Kanwa v. Yustinian Mpinzire, (PC) Civ. App. 182-M-66, 18/12/67, Duff J.

Plaintiff claims a piece of land in Bukoba district for a five –year-old girl. (The report does not indicate the legal or familial relationship between these two.) It is claimed that the girl inherited the property from an aunt, who in turn had obtained the property upon the death of the aunt's father in 1934.

Held: Inheritance of land by females in Bukoba district was not possible before 1st September, 1945 when the Rules Governing the Inheritance of Holdings by Female Heirs came into effect. Since the aunt could not have inherited the land, the chain of title of the girl was incomplete and the action failed.

87. Martin Bikonyoro v. Celestin Kaokola, (PC) Civ. App. 99-M-67, 3/1/68, Cross J.

Plaintiff sued to recover a clan shamba which his sister, having inherited it from her uncle, had sold to defendant (she was also named as a defendant). The record showed two "mortgage" arrangements between the sister and defendant, with plaintiff's knowledge, in consideration of sums advanced by defendant to the sister. The second of these gave the defendant an option to purchase, for an amount equal to the difference between the sums.

Advanced and to be advanced by him and the true value of the shamba, should the sister be unable to pay her debts to him. Another document showed an "outright sale" of the shamba to defendant by the sister, which plaintiff alleged had occurred without his knowledge, for an amount including the sums advanced and an additional payment. The Primary Court ordered plaintiff to pay defendant the small consideration for the original mortgage, whereupon be might take possession of the land; it advised defendant bring an action for the remainder of the sums actually advanced to the sister on the strength of the second mortgage-

instrument. The District Court ordered plaintiff to repay the entire amount advanced by defendant, citing paragraphs 561 and 562 of Corry & Hartnoll's "Customary Law of the Haya Tribe."

Held: (1) Paragraphs 561 and 562 of Cory & Hartnoll refer to a "sale without reference to the family." Whether or not plaintiff knew of the actual sale, he did acquiesce in the arrangement which gave defendant an option to purchase. (2) The applicable provision is paragraph 574 dealing with pledges of clan land which transfer the land to the creditor upon failure to repay the debt within an agreed time. "a relative has the right to redeem it, even after the time limit has expired, as in invalid sale; in which case it follows that the plantation becomes the property of the man who redeems it." Therefore, plaintiff may redeem the land, not for the amount advanced by defendant to the sister, but for the entire "purchase price" ---- i.e., the sums advanced and the additional amount actually paid. (3) Should plaintiff fail to redeem the land for this amount within 3 months, it will remain the property of defendant.

88. Kapasyu s/o Mwaipinga v. Mwendilemo s/o Mwakyusa, (PC) Civ. App. 149-D-67, 8/11/67, Duff J.

The dispute between the two relatives involved a parcel of land, each claming it by inheritance. The assessors in the district court suggested that as the parties are related the dispute could be brought to an amicable solution by dividing the land equally between the two claimants. Such a verdict is consistent with Nyakyusa customary law, and the magistrate accepted the advice of the assessors, and held accordingly.

Held: "It is clear that any customary law which dispossesses an owner would be contrary to the principle of natural justice …. The 'Solomon' ruling must be disturbed." On the facts before the court, including an earlier litigation involving the same plot of land, the disputed plot was awarded to Mwendilomo, the respondent.

90. Marwa Kebahi v. Thomas Nyangi, (PC) Civ. App. 161-M-66, 26/1/68, Mustafa J.

Defendant, a headman, seized cattle belonging to plaintiff, sold then at public auction, and applied the proceeds to the payment of local rates by two person alleged to be plaintiff's brothers and for whose local rates plaintiff was allegedly responsible. Plaintiff sued for return of the cattle, contending that one of the persons for whose local rates he was assessed was not his brother at all, and that the other, while admittedly his brother, was a school boy at the time of assessment and consequently not subject to local rates.

Held: Defendant has the burden of showing that plaintiff is liable for the local rates of the person concerned, which burden he failed to discharge here. Defendant was ordered to pay the value of the cattle which were assessed at Shs. 100/- each.

91. Peter Mashauri v. R., Crim. App. 292-A-67, 22/1/68, Seaton J.

Accused admitted cutting and damaging trees in Pare District without lawful authority. The issue was whether he had violated the Forests Ordinance (Capl 389), sections 18(1) and 26(1).

Held: (1) G.N. 73 of 1959 declared the prohibition of cutting trees of the type cut by accused to be "in respect of all unreserved land in the Tanga Province." Since the administrative reorganization of 1963, it would seem that Pare district is not within the Tanga Region. (Citing Cap. 461 and G.N. 450 of 1963.) (2) There was no investigation by the magistrate of the accused 's assertion that the trees were in fact on his own land, and therefore not on "unreserved" land. For this reason alone, the conviction could not stand. Conviction quashed.

92. Hussein Adam v. Asili Abdallah, (PC) Civ. 62-D-66, 30/1/68, Hamlyn J.

Plaintiff had been lawfully divorced by defendant according to Islamic law but was assigned to a room in the defendant's house as she was pregnant at the

time of the divorce. The plaintiff later left the room and went to live with her parents, whereupon she brought this suit for the cost of maintenance during pregnancy. Defendant refused to pay because he had given her a room, which she chose to abandon without his permission.

Held: According to the consensus of several authorities on Islamic Law consulted by the High Court, the rule is that during a woman's period of legal retirement the husband has neither the right to remain with her, nor to enter the house where she is retiring except with her consent. In the instant case, the house which the defendant assigned her was not of the sort to which she was entitled, it being part of the house where he resided, and thus her leaving the room was justifiable. Defendant was ordered to pay maintenance to plaintiff for the period of her pregnancy.

93. Halima Mgaya v. Saada Juma, (PC) Civ. App. 100-D-67, 31/1/68, Saudi J.
Mgaya and Juma owned adjoining shambaa. It was not disputed that two trees an mango and a coconut, which were growing on Mgaya's land belonged to Juma, having been planted there by his father, although it was not clear how this had come about. Mgaya sought an order restraining Juma from picking the fruit from his trees.

Held: Juma should be compensated for the trees which he owns at the Government rate and then they will belong to Mgaya, thus giving fair treatment to both parties and precluding further disputes from arising concerning these trees. The compensation should be paid in annual installments out of the sale of the fruit from the trees.

94. Nyamhanga Chacha v. Chacha Mang'asa, (PC) Civ. App. 148-M-66, 16/1/68, Georges C.J.
Plaintiff sued successfully in Primary Court for return of bride wealth given by his mother, when he was a small boy, to arrange a marriage for him. The case was brought many year after the transactions in question during which time the prospective bride had married and her parents had died; the named defendant was

the son of the girl's father, who was not involved in the transaction, and who claimed not to be the eldest son. On appeal to the District Court, the plaintiff gave evidence and the

Defendant-appellant cross-examined him. The Court notes that the "appellant is not recorded as having said anything."

Held: At the hearing of an appeal, the appellate court, after hearing any additional evidence that it may require or permit, "shall first hear the appellant or his agent and then unless it forthwith dismisses the appeal, the respondent or his agent, and the appellant or his agent shall have a right to reply." [Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules 1963, s. 14.] Defendant-appellant was "prejudiced" by the failure of this procedure. Case remitted to the District Court for rehearing "preferably by another District Magistrate." Costs to respondent.

95. Hilarius Karario v. Sabaya Kirahi, (PC) Civ. App. 101-M-66, 16/12/67, Hamlyn J.

In summarily dismissing an appeal, the High Court discussed appellant's claim that the trial court failed to summon his witnesses.

The Court noted; The Primary duty is on the party to a suit to arrange for the attendance of his own witnesses. If for any reason a party thinks the witness will not appear, it is open to him to request the court to issue a summons. "If, however, the party desiring the witness to give evidence takes non steps to secure the witness' attendance (other than merely asking him to come to the court) he cannot of right request an adjournment of the matter for the missing witness to be sought and brought before the court."

96. Koba s/o Joseph v. R., (PC) Crim. App. 181-D-67, 22/1/68, Hamlyn J.

Accused was fined for having uttered words taken to be abusive of authority. During the course of the case accused was set free on the bond of his father in the amount of shs. 200/- He failed to reappear at the proper date for continuation whereupon his father forfeited the money and was imprisoned as well. Upon accused 's return a few days later, he was detained in remand prison The abusive language charge was quashed on appeal to the District Court, and the only issue before the High Court concerned the forfeiture of the bond and imprisonment of the father.

Held: (1) The Shs. 200/- cannot be recovered. They were forfeited because of the fault of accused in not appearing at the proper time. (2) In any event, accused is not the proper person to seek recovery of the bond. (3) It was most improper on the part of the lower court to have imprisoned the surety

97. R.V. Mukeku Mtiso, Crim. Rev. 49-D-67, 29/12/67, Biron J.

Accused was convicted on one count, of obstructing the working of a train [East African Railways and Harbours Act, 1950 s. 69 (a)], and on three counts of driving a motor vehicle with defective equipment. He was sentenced to a fine of Shs. 150/- or imprisonment for two and one-half months on the first count and to smaller fines and terms of imprisonment in default on the other counts.

Held: (1) The penalty for an offence contrary to section 69 of the East African Railways and Harbours Act, 1950, is a term of imprisonment not exceeding ten years. (2) Offences under term of imprisonment not exceeding ten years. (2) Offences under laws other than the Penal Code which are punishable with death or imprisonment for ten years of more are triable by the High Court only.

[Criminal Procedure Code, First Schedule, Part B.] Therefore the magistrate had no jurisdiction to try the offence charged in the first count.(2) Although the convictions in respect of the other counts could be sustained, these offences were interconnected with that charged in the first count and should be heard together

with it. Conviction quashed an preliminary inquiry ordered in respect of all the offences.

98. Salum s/o Mohamedi v. R., (PC) Crim. App. 22-D-67, 4/1/68, Saudi J.
Accused was convicted of housebreaking and stealing. His alleged accomplice, who was acquitted, stated that the radio found in his house had been brought there by accused. He also said that accused was a notorious thief, and that no one but accused could have broken into complainant's house to steal the radio. He called two witnesses in corroboration of his testimony. They said they had seen accused playing the radio on the verandah of the accomplice's house. The discovery of the radio there was the only other evidence linking either the accused or the alleged accomplice with housebreaking.

Held: (1) The testimony of an alleged accomplice requires corroboration, and cannot itself be relied upon to convict an accused. (2) Here, the corroboration was insufficient. Upon the evidence, "it could be said that the appellant was or had been seen using the radio when it was already in the house of (the accomplice). The real issue is who brought it into that house …. Without a satisfactory answer to this question, it is unsafe to let (the accomplice) go Scot free and convict the appellant." Conviction quashed.

99. Omari s/o Musa Msusa v. R., Crim. App. 839-D-67, 4/1/68, Duff J.
Accused was convicted of robbery. [P.C. s. 286] At the trial the prosecution introduced a confession allegedly made by accused to a District Council messenger who had arrested him and escorted him to the police station.

Held: (1) The messenger was exercising the duties of police officer, and as such a confession made to him by accused was inadmissible. (2) The error in admitting the confession occasioned no failure of justice. Appeal dismissed.

100. Issa s/o Jakala v. R., (PC) Crim. App. 228-D-67, 29/1/68, Hamlyn J.
Accused was convicted of cattle theft. At the trial, the magistrate did not give accused an opportunity to cross-examine the prosecution witnesses.

Held: (1) The failure to extend to accused the right of cross examination was a fundamental error, and the conviction cannot stand despite the apparent strength of the prosecution case. (2) If an 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. Conviction quashed.

101. Martin Mlasani v. R., Crim. App. 288-A-67, 26/1/68, Seaton J.

Accused was convicted of burglary and robbery. There apparently was evidence that a prosecution witness, who was one of the victims of the crime, had given his name to the police the day following the crime, but none of the policemen who were witnesses testified as to this matter.

Held: (1) The fact that the witness had identified the accused the day after the crime would have been admissible under section 166 of the Evidence Act if the testimony had been given by an "authority legally competent to investigate" the matter. [Citing Shabani bin Donaldi v. Rex, (1940) 7 E.A.C.A. at P. 60; distinguishing Wario Wako Kella v. R., E.A.C.A Crim. App. 106 of 1967.] (2) The other evidence of identity in the present case was sufficient to support the conviction. Appeal dismissed.

102. Rajabu s/o Mahanza v. R., Crim. App. 830-D-67, 22/11/67, Duff J.

Accused were convicted of arson. There was evidence that they had verbally made indecent advances towards complainant. This was corroborated by a neighbour of complainant. Complainant said that when she refused them, accused threatened to burn her house down. The neighbour did not hear this alleged threat. Three nights later, complainant's house was set on fire. At that time complainant alleged that she now at a distance of 40 paces two people running way; whom she identified by their figures and clothes as the two accused.

Held: While a fact may generally be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such a witness respecting identification, especially when it is known that the conditions under which the identification took place were far from ideal. In such circumstances other evidence, direct or circumstantial, pointing to guilt is required. [Citing Abdallh s/o Wendo v. R., 20 E.A.C.A. 166] Conviction quashed.

103. R. v. Francis s/o Ngumbo, Crim. Rev. 47-D-67, 29/12/67, Biron J.

Accused was convicted of stealing from the person of another. [P.C. ss. 269(a), 265.] There was evidence that accused had snatched from the chairman of a co-operative society a bag containing Shs. 21,460/-; he was immediately apprehended. In an unsworn statement at the trial, accused said, "I know it was Co-operative money. I was annoyed at the way Abdallah (the Chairman) was underpaying the cashew nut sellers and so I snatched the money from him …." In the appeal hearing, accused further stated that his mind was disturbed at the time of committing the crime and that he had acted on impulse without any intention of stealing or keeping the money. During the proceedings accused was transferred to a hospital for observation of his mental condition. The medical report stated n part, "He is a case of chronic schizophrenia. At the time of committing the offence he was aware of the nature and quality of the act. He is fit to stand trial and follow the proceedings in court ..No insight in to his inappropriate behavior. Not psychotic yet."

Held: (1) Theft is defined as "(a) an intent permanently to deprive the general or special owner of the thing of it; …. (d) in the case of money an intent to use it at the will of the person who takes or converts it although he may intend afterwards to repay the amount to the owner."

[P.C. s. 258.] (2) "In this particular case, in view of the accused 's mental condition and the state he was in at the time, at the very lowest, there is a reasonable

doubt as to whether in snatching the money he intended to steal it within the meaning of the definition of theft." Conviction quashed.

104. R. v. Mohamed s/o Selemani, Dist. Ct. Crim. Case 2415-D-67, 16/1/68, Inspection Note by Hamlyn J.
Upon convicting accused petty theft, the district judge made the following order; "Both accused person are given the choice either to undergo 10 strokes corporal punishment …. Or two months imprisonment if they so wish."

Held: (1) This Order was incorrect. A court must set a specific sentence; no where does the law provide that accused should or may be given a choice of punishments. (2) Both accused "elected" to receive 10 strokes, which punishment had already been administered and the accused released before this case reached the High Court. Consequently no order in respect of sentence was made.

105. Mackreyo Kingu s/o Nakala v. R., Crim. App. 788-D-67, 20/12/67, Duff J.
Accused was convicted of assault occasioning actual bodily harm and sentenced to 9 moths' imprisonment. The complainant, his wife, had angered him by her tardiness in preparing his supper. Her injuries, hemorrhages in both eyes, were not serious.

Held: "In cases of this nature between husband and wife and where the injuries inflicted are not serious, recourse should be had to the provisions of section 134 of the Criminal Procedure." Sentence reduced to result in immediate release.

106. Daniel Sinsirimwezi v. R., Crim. App. 786-D-67, 22/11/67, Duff J.
Accused was charged with house-breaking and stealing goods worth Shs. 149/- Upon proof that one of the stolen items, a patched shirt, had been found in accused 's possession, the magistrate convicted him of receiving stolen goods, invoking the doctrine of recent possession The magistrate felt obliged to impose

the minimum sentence of 2 years and 24 strokes, since the value of the property involved in the charge exceeded Shs. 100/-.

Held: Notwithstanding the charge, the magistrate should base the sentence upon the value of the goods actually shown to have been received by accused . As this was clearly less than Shs. 100/-, the magistrate should have applied section 5(2) and permitted the accused to adduce any "special circumstances" which might warrant leniency. Record returned for such hearing.

107. Gordon Masita v. R., Crim. App. 785-D-67, 20/12/67, Duff J.

Accused, a first offender, appealed against a sentence of two years imprisonment and 24 strokes for theft by a person employed in the public service. [P. C. ss. 270, 265.] The amount involved did not exceed Shs. 100/- When asked to state any special circumstances, the accused replied. "I have no father. I have two brothers who are schooling, they depend on me. I have got three children. They also depend on me."

Held: Having dependants can be a special circumstance, even though "It is true that in most criminal cases dependants are involved and suffer as a result of the incarceration of the convicted person." This particular plea was one which could have been accepted by the trial court as constituting special circumstances. The expression "special circumstances" is used in an extremely wide sense in the Minimum Sentences Act. [See Cap. 526, ss. 5(2), 5(4).] Sentence reduced to four months imprisonment.

108. Musa s/o Mgojwa v. R., Crim. App. 870-D-67, 20/12/67, Biron J.

Accused was charged with stealing but convicted of conveying property reasonably suspected to have been stolen, contrary to Penal Code section 312. There was evidence that accused had sold two buckets and a cooking pot belonging to complainant, who identified the goods as those belonging to him. The District

Magistrate held that accused could not be convicted of stealing since the heft had not been reported. The State Attorney submitted that he could not be convicted of theft because the property was not found in his possession.

Held: (1) A conviction of conveying under Penal Code section 312 does not lie where it has been established that the property definitely has been stolen, and also that it has been stolen from an identified person. (2) The fact that the crime had not been reported does not preclude a conviction for stealing.(3) The fact that accused was not found in possession of the property also does not preclude a conviction for stealing Conviction for stealing substituted.

109. Juma s/o Masudi v. R., Crim. App. 750-D-67, 22/11/67, Duff J.
Accused, posing as a police officer, induced complainant to place Shs. 360/- in his custody by saying that it was the subject of a police investigation. Accused then disappeared. He was subsequently convicted, inter alia, of obtaining money by false pretences. [P. C. s. 302].

Held: "It is clear that the complainant had no intention of parting with his money (permanently) ….(Q)uite clearly these facts support a charge of theft and not of obtaining by false pretences." Conviction under P.C. s. 265 substituted.

110. Ramadhani s/o Athumani v. R., Crim. App. 872-D-67, 20/12/67, Biron J.
Accused was charged with 10 counts of forgery [P.C. ss. 333, 337], 10 counts of uttering false documents [P.C. ss. 342, 337] and 10 counts of stealing [P.C. s. 265]. He was convicted as charged on the first twenty counts but convictions for stealing by a person employed in the public service [P.C. ss. 270, 265] were substituted with respect to the last 10 counts. There was evidence that accused, who was a village executive officer, wrongfully issued permits to brew pombe and appropriated the shs. 5/- fee for his own use. He had no authority to issue such permits, but gave each applicant a receipt from a receipt book which he had wrongfully retained. The charges in the first twenty counts alleged that he had forged and uttered false receipts

Held: (1) Accused could properly have been convicted of forging an uttering false pombe permits. However, the receipts which he issued were unequivocally what they purported to be receipts for the payment of Shs. 5/- and were not false documents within the meaning of Penal Code section 335. (2) The defective charges on the first twenty counts are not curable. (3) The monies never came into the possession of the Government, nor were they received on behalf of the government since accused had no authority to issue pombe permits. (4) For the foregoing reason, and because the offence was not charged, the convictions for stealing by public servant cannot be sustained. (5) The persons paying the fees did so willingly and voluntarily. Therefore, the offence against them was obtaining money by false pretences rather than theft. Convictions for forgery and uttering quashed. Convictions of obtaining by false pretences substituted for the theft convictions.

111. Cosmas Patrick Chanda v. R., (PC) Crim. App. 5-D-68, 18/1/68, Hamlyn J.
Accused was convicted of housebreaking and stealing. He admitted that he had stolen the goods and said that he had opened the door of the house with a key.

Held: The opening of a door with a key constitutes a “breaking” at law and the conviction was proper. Appeal dismissed.

112. Ladislaus s/o Lukasi v. R., Crim. App. 915-D-67, 11/1/68, Biron J.
Accused was convicted of stealing b servant [P.C. ss. 265,271]; since his employer was the TANU Youth league, he was sentenced under the Minimum Sentences Act. A check of accused ’s accounts by the Area Commissioner had revealed a shortage, which accused admitted was due to an appropriation of T.Y.L. money for his personal purposes. A similar statement was made to a police offic-

er, and both statements were entered in evidence. Yet another witness confirmed and admission by the accused that he had taken the money for his personal use, but that he "was prepared to refund it."

Held: (1) Accused 's intention to refund the money, if believed, does not alter the fact that "his taking constitutes theft as defined in section 258 of the Penal Code …." (2) The testimony by the police officer as to accused 's admission, which constituted a confession, was inadmissible under section 27 of the Evidence Act of 1967. Nonetheless, the remaining evidence produced by the prosecution clearly established the accused 's guilt. Appeal rejected.

113. R. v. Kasula & Densi s/o Sanziki, Crim. Rev. 8-M-68, 10/1/68, Mustafa J.
Accused was charged with being in possession or property reasonably suspected of having been stolen or unlawfully obtained. [P.C. s. 312.] The property was found as a result or a police search of the house accused and the house of a friend in which accused was staying. There was no evidence that accused was arrested in the course of a journey.

Held: (1) A conviction under Penal Code section 312 arises out of a search conducted under Criminal Procedure Code, section 24. (2) Criminal Procedure Code, section 24 refers to searches of "any person who may be reasonably suspected of having in his possession or conveying …. Anything stolen or unlawfully obtained." The word "possession" in this section is ejusdem generis with "conveying," and the section does not apply to the search of an accused 's house [Citing R. v. Misengi s/o Abdullah, T.L.R. ®, 312.]

114. Hamidu s/o Udu v. R., (PC) Crim. App. 169-D-67, 26/12/67, Biron J.
Accused was arrested as a tax defaulter. In making an inventory of his property at the lock-up, a purportedly stolen radio was found among his possessions. Accused told two different and inconsistent stories at different times about how the

radio came to be among his belongings. He was convicted of receiving stolen property.

Held: (1) It is not the rule that there must be independent evidence of a theft. The circumstances in which an accused receives goods may of themselves prove that the goods were stolen, and further may prove that he knew that fact at the time when he received them. [Citing R. v. Sbarra, 13 Cr. App. R. 118, Darling J.] (2) In the instant case, however, there was neither evidence that the radio was stolen, nor evidence as to the circumstances under which the accused received the radio. Conviction quashed.

115. Juma s/o Muhumpa v. R., Crim. App. 738-M-67, 15/11/67, Cross J.

Accused had stolen the bicycle of complainant while two other persons had restrained complainant by force. Accused was convicted of "robbery with violence" under section 285 and 286 of the Penal Code, and sentenced to 2 years and 24 strokes, the minimum prescribed by law. Section 286 provides that where an offender is in company with other persons, and is armed with a dangerous weapon, or uses personal violence upon the victim, he is liable to life imprisonment. Accused 's appeal on the merits of the conviction was dismissed.

The Court stated, obiter: Although the accused was rightly convicted of robbery, and properly sentenced, the appeal was admitted to clarify the magistrate's misunderstanding of the purpose of section 286. He "seems …. To have regarded section 286 as creating a separate offence of robbery with violence. This is not so. Section 285 creates the offence of robbery and section 286 provides firstly a penalty for that offence and secondly an increased maximum penalty if there are present the circumstances of aggravation set out therein."

116. William Alfred v. Stephen Alfred, (PC) Civ. App. 83-A-67, 24/2/68, Seaton, J.

Plaintiff applied for leave to appeal from a Primary Court judgment for defendant in a land dispute almost a year after the judgment. He claimed that he had been ill and hospitalized, but could produce no receipts or other proof of his illness.

Among the reasons for the Primary Court judgment, moreover, had been that plaintiff had waited nearly 10 years, after the death of the relative under whom he claimed the land, to institute the action. The District Court refused the application.

Held: Appeals under section 16 of the Magistrate Courts Act, Cap. 537, are within the discretion of the District Court. This discretion must be exercised "judicially." Under the circumstances it "would seem that tardiness or laches is the appellant's weakness", and that the court's discretion was exercised properly. Appeal rejected.

117. Estates Ltd. v. Naran Mistry, Civ. App. 11-A-68, 12/2/68, Seaton J.

Plaintiff was employed by defendant from month to month at a salary of Shs. 1,000/- per month under an oral contract. There was no provision made in the contract for leave or pay in lieu of leave, or as to how the contract might be terminated. Plaintiff left the employ of defendant after one year, without giving any notice that he was quitting.

Held: (1) It is an implied term in this sort of contract that a "reasonable period of leave" be granted annually. Such period was set at 18 days, and plaintiff was allowed Shs. 600/- in lieu thereof. (2) Reasonable notice of termination of the employment relation was also an implied term of the contract. (3) As defendant failed to adduce any evidence of specific damages occasioned by plaintiff's quitting without giving notice, general damages of shs. 40/- were awarded.

118. C.K.Matemba t/a Matemba & Company v. Jumanne Yamulinga t/a Citizen Club, Civ. 1-M-67, 25/1/68, Mustafa J.

Plaintiff sued defendant in Resident Magistrate's Court. The summons instructed the defendant to file a written statement of defence within 21 days after receipt of the summons. Judgment ex parte for the plaintiff, however, was entered only 15 days after defendant received the summons. More than 30 days later, defendant

applied to have the ex parte judgment set aside, along with an order for proclamation of sale which by then had been made; the application was granted, and the order rescinded. Plaintiff then applied by way of revision to have the High Court set aside these latter actions by the Resident Magistrate.

Held: (1) The original ex parte judgment for plaintiff was premature, since defendant's time within which to file his defence had not elapsed. (2) In an application for revision, the High Court has not power to interfere except where the subordinate court has exercised a jurisdiction not vested in it by law, where it has failed to exercise a jurisdiction so vested, and where it has acted "in the exercise of its jurisdiction illegally or with material irregularity". [Civ. Proc. Code, ss. 79(1).] This section applies "to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." [Quoting Balakrishna v. Vasuda (1917) 44 I. A. 261); and citing Amir Hassan Khan v. Sheo Baksh Singh (1885) 11 I A. 237; both Privy Council cases.] The High Court, on revision, will not interfere merely because a lower court allowed an application which was time-barred, as this is not a matter going to jurisdiction.

The Court noted, obiter: The validity of an order setting aside an ex parte decree may be attacked under section 75 of the Code, in an appeal from the final decree. [Citing Mulla's Civil Procedure Code, 10th Edition, P. 605] Plaintiff's application dismissed.

119. Mrisho s/o Pazi v. Tatu d/o Juma, (PC) Civ. App. 69-D-67, 23/2/68, Saudi J. This case concerned the inheritance of property as between appellant, the husband of deceased, and respondent, deceased's daughter by a previous marriage. The property in question included a shamba at Kibaha and gold ornaments and Khangas. There was some doubt as to whether the gold ornaments and Khangas. There was some doubt as to whether the gold ornaments and Khangas existed. Although both parties live in Magomeni where there is a Primary Court, the case was brought in the Primary Court of Ilala.

Held: (1) Under section 4 of the Magistrate's Court of Ilala. Cap. 537, each Primary Court within a district has jurisdiction within the whole district. As a result, a party may file an action in any Primary Court within the district even though his choice causes inconvenience and expense to his opponent.

The Court characterized this result as "unfortunate". (2) The Primary Court had no jurisdiction to deal with the shamba at Kibaha which lies outside the district in which the court is located (3) Even if the ornaments and Khangas exist, in the absence of evidence to the contrary it must be presumed that they were purchased by the deceased with money given her by husband, appellant. Therefore, they should not have been awarded to respondent. (4) The remainder of the inheritance should be divided between appellant and respondent according to Muslim law.

120. Mariambai Rajali and John P. Curtis, Matr. Cause 5-D-66, 23/2/68, Biron J.
The parties are Mustims, and were divorced under Islamic law before the Primary Court of Lindi. Petitioner now is claiming maintenance (kohr) due to her during the subsistence of her marriage to respondent. Petitioner is an Asian, but not respondent. The Magistrates' Courts act, section 14 (1) provides that primary courts have jurisdiction over all proceedings of a civil nature where Islamic law is applicable but then certain exceptions are set out, among them disputes "(b) in which Islamic law is applicable by virtue of the provisions of the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance", in which instance jurisdiction is expressly conferred on, and therefore limited to, the High Court.

Held: (1) The jurisdiction of the Primary Court to grant a divorce in this case was at best doubtful. The parties cannot confer jurisdiction on the Primary Court merely by appearing before, it. (2) However, the practical position cannot be ignored; the parties have in fact been divorced by the Primary Court. The par-

ties, or either of them may have remarried and begotten children. To interfere with the divorce would meant to bastardise the children, if any, of petitioner. (The remarriage of respondent would not have this effect, as he is permitted polygamous unions.) The parties are of limited resources, and thus might be unable to appear before the High Court. The divorce was upheld. (3) This petition for maintenance, being ancillary to the divorce proceedings, was transferred to the Lindi Primary Court for hearing under the Magistrates' Courts Act, section 42.

121. Wankuru d/o Kisuku v. Kiraba s/o Zwaku, Civ. App. 54-D-67, 16/2/68, SaudiJ.

Deceased died in 1951 or 1952, survived by two wives and two daughter, both of whom are now adults. After deceased's death, respondent, the son of deceased's sister, raised the daughters and paid for their support. In this action, the question to be decided was whether respondent or appellant, who is the daughter of deceased's sister, should be awarded custody of the daughters. The court noted that the real dispute was as to which party should receive the bride price payable when the girls married.

Held: As between the two claimants, respondent should receive the bride price "On the sole ground that he took custody of these girls and brought them up from 1951 or 1952 when their father died". Appeal dismissed.

122. Mwaja s/o Mkomawanyu v. Mazengo s/o Ndungu, (PC) Civ. App. 105-D-67, 10/2/68, Saudi J.

Appellant sued his father-in-law for the return of bride wealth, after having obtained a divorce from his wife because she had left him. There was evidence that the wife had given premature birth during the marriage. There was also evidence that she had deserted appellant because he had tally failed to support her.

Held: Paragraph 52(b) of the restated Customary Law, G. N. No. 279 of 1963, provides, "In cases in which no grounds of divorce are offered by any of

the two parties…. (i)f a woman has a premature birth and the existence of a foetus is proved by a female relative of the husband, the wife is considered as having has a child." It further provides that if children have been born, no bride wealth shall be returned to the husband. Therefore, appellant is not entitled to the return of any part of the bride wealth.

The Court stated, obiter; Even had no children been born, appellant would not have been entitled to the return of any substantial part of the bride wealth because he had caused his wife to leave by failing to support her.

123. Wandwi s/o Chacha v. Nyanganane Makere, (PC) Civ. App. 223-M-67, 21/1/68, Mustafa J.

Plaintiff and defendant were living in concubinage, jointly cultivating shambas and raising cattle and sheep. Apparently, plaintiff, the man, had originally followed defendant to her holding to live. [When defendant drove plaintiff away, he sued her, in [these Primary Court in North Mara District, for a number of the cattle and sheep, some wheat, and a cassava shamba.

Held: (1) Under section 96 of the Law of Persons, Government Notice No. 279 of 1963, a man who follows a woman to her holding to live in concubinage is entitled to "a quarter of all properly which has been obtained with his help, apart from his individual properties ….. " (2) As only the animals were clearly obtained by defendant "with his help", plaintiff is entitled to one-fourth of the monetary value of the animals.

124. Josephat Kabiyengo v. Laurian Kyoba, (PC) Civ. App. 43-M-67, 16/1/68, Mustafa J.

Plaintiff sued to recover a clan shamba sold by the second defendant to the first defendant without clan consent. The Primary Court conditioned its order for redemption on payment by plaintiff to the first defendant of Shs. 600/-, purchase money. On appeal. The District Court in Bokoba took further evidence, visiting the shamba, and allowed the first defendant Shs. 2,000/- the value of coffee and banana trees he had planted on the shamba. This allowance was based on the

finding that plaintiff had known of the sale for a considerable time, and had waited until the shamba had been improved before filing his action. Plaintiff was allowed two months from the date of the District Court judgment to redeem the shamba.

Held: "(T)he district magistrate was right to add on to the purchases price the value of the improvements … See section 564, Cory & Hartnoll at page 139. I cannot say that shs. 2,000/- for two acres of coffee trees and banana plants is excessive." Time for redemption was extended by approximately 11 months, failing which the shamba would be the property of first defendant. Plaintiff's appeal dismissed.

125. Constantin Hamanya v. Elias Kayoza, (PC) Civ. App. 33-M-67, 27/1/68, Mustafa J.

Plaintiff was the successor in interest, by bequeath, to a shamba formerly owned by an old lady. Before her death, second defendant, also a descendant of the lady, had incurred a debt to first defender, which he had honored by permitting his creditor to pick 100 debes of coffee from the shamba. The lady learned of this arrangement, and gave her verbal approval. After her death, plaintiff sued both defendants, in Primary Court in the Bukoba District, for the value of the coffee removed from the shamba. However, he was unable to show how much had been picked before her death, and how much after.

Held: (1) Plaintiff was not he owner of the shamba until after the lady's death, and therefore has no right to the value of coffee removed from it during her life-time. (2)Plaintiff would be entitled to compensation for coffee picked subsequent to her death; however; without evidence as to the quantities picked before and after her death, his claim is "bad for uncertainty". Plaintiff's appeal dismissed.

126. Gabriel Nzizula v. Rooza d/o Muyungi, (PC) Civ. App. 49-M-66, 5/2/68, Mustafa J.

Plaintiff's close relative borrowed a sum of money from defendant, pledging a certain shamba as security. The borrower did not pay on the date specified, and defendant took possession of the shamba. Plaintiff sued to redeem the land.

Held: Under Haya Law, if a shamba has been pledged on the condition that it will become the property of a creditor failing repayment of a debt on an agreed date, relative has the right to redeem it even after the time limit for repayment has expired. Upon payment of the sum due, the relative becomes the owner of the property. [Citing Cory & Hartnoll, Customary Law of the Haya Tribe.]

127. Ndewawiosia d/o Ndeamtzo v. Imanuel s/o Malasi, (PC) Civ. App. 80-D-66, 10/2/68, Saudi J.

Plaintiff, the youngest daughter of deceased and the only unmarried daughter, appealed against a judgment awarding deceased's land to defendant, the nephew of deceased. Deceased died twenty years ago survived by his five daughters, four of whom had married, and by the illegitimate son of plaintiff, whom he had recognized. Defendant bases his claim to the land on the fact that females are not entitled to inherit clan land and on the assertion that shortly before his death the deceased had asked defendant to take charge of the land. Both plaintiff and defendant are Wachagga.

Held: (1) Traditionally, among the Wachagga and various other tribes of Tanzania, women were disabled from inheriting the property of their fathers in order that such property would stay within the clan. (2) The provisions of the Restatement of Customary Law [G.N. 436 of 1963, Cap. 333 of the Laws] are some what contradictory and do not appear to terminate this disability. Paragraph 29 declares a daughter to be a principal heir if the deceased has left no sons, but paragraph 20 provides, "Women can inherit, except for clan land, which they may receive in usufruct but may not sell". (3) The disability preventing females from inheriting has been abolished in other areas of Tanzania.

[Citing Bi-Mwana Amina Mukubali v. Severini Shumbusho, Digest of Appeals from Local Courts 1955-1956, No. 88; Saidina d/o Angovi v. Saiboko Mlemba, Digest of Appeals from Local Courts, 1961 Vol. V111(No. 205.] The Court stated, "It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex. Creed, race or colour. On grounds of natural justice daughters like sons in every par of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality." (4) In any event, the claim of plaintiff's illegitimate son is superior to that of defendant, for an illegitimate child is a member of his maternal family. [Citing G.N. 279 of 1963, Cap. 333 of the Laws.] Appeal allowed and direction given that plaintiff and her son be put in possession of the Kihamba.

128. Athman Lusaju v. Sadiki Athumani, (PC) Civ. App. 134-D-66, 10/2/68, Biron J.

Plaintiff, apparently the lay leader of a mosque, sued eight members of the mosque for defamation. Defendants has written a letter to plaintiff complaining about his actions as a leader and warning that if plaintiff did not desist from spreading slander and disturbing the peace, the writers would resort to superior authority. Copies of this letter were sent to the local sheikh, the local T. A. N.U. branch, two branches of the East African Muslim Welfare Society and to the Village Development Committee.

Held: (1) The letter addressed to plaintiff could not form the basis of a claim for libel, but the copies sent to other could amount to publication. (2) If the letter is defamatory at all, it "hardly exceeds the bounds of fair comment, and was published to persons and bodies having an interest in either the mosque itself or in the preservation of the peace, which according to the (defendants) the (plaintiff) was threatening." The publication was thus privileged, and to succeed in this

action plaintiff would have to establish malice. There is no evidence of such malice. Appeal dismissed.

129. Abdallah Salimu v. Ramadhani Shemdoe, (PC) Civ. App. 55-D-67, 15/2/68, Georges C. J.

An earlier High Court judgment in this custody case awarded respondent "all the expenses incurred in the upbringing and maintenance" of a certain child, who was at the time aged 17 years, including the costs of her education for 4 years. The judgment directed the Primary Court, which had originally assessed these expenses at Shs. 3000/-, to take evidence from the parties and from village elder as to "the average cost of maintaining a child for a year at the village where the parties lived." Arguing upon the very conflicting evidence thus gathered, respondent put the figure at shs.600/- per year, making a total (including education costs) of Shs. 10, 800/-. Appellant continued to argue for a total of shs. 300/- as a maximum. He submitted that even this amount, which had already been paid, would be an overpayment, since Sambaa customary Law permits only the award of "mtonge" ---- one cow --- in such cases, The these village elders who testified strongly supported his view, also agreeing that the value of one cow would be about Shs. 150/- Appellant was also supported by respondent's wife, the mother of the child, who stated that respondent had "not fairly treated" the child.

Held: (1) "This court does not seek to interfere with the customs of any particular tribe in Tanzania. What the court seeks to do is to ensure that any customary practice does not operate unfairly against any party. 'Mtonge' might have been a very good custom within the tribe when it came into operation, but I think that must have been a very long time ago, when a cow would have a very high value …… It is abundantly clear that no parent could bring up a child to the age of seventeen, and also make provision for the child's education, on the sum of as they are, rather than take shelter under an old customary practice." (2) The High

Court is obliged to proceed in this case, without the vital assistance from the locality where the dispute arose which it requested in its earlier order. (3) Considering the relatively low costs of village life, and attempting to account for inevitable variations from one year to another, "the fairest, if not he lowest, estimate" of the sum due would be, in this case, Shs. 100/- per month, for a total (including education costs) of Shs. 1,940/- This sum must be refunded to respondent before appellant may take custody of the child.

130. Mugaya Marwa v. Shoma Goro, (PC) Civ. App. 222-M-67, 24/1/68, Mustafa J.

The husband of defendant's daughter brought this action to regain some or all of the bride price he had paid. The spouses had lived together for 5 years, she bearing him two children. Their divorce was grounded on the fault of the wife. The District Court awarded plaintiff the return of 30 cattle and Shs. 135/-, which represented about half the original bride price.

Held: When neither party is guilty of wrongdoing in the breakup of a marriage, and there are live off-spring of the marriage, no refund, or only a nominal one, of the dowry is made. Here, however, the wife was the guilty party, and consequently her former husband is entitled to the return of a substantial amount of the bride price he paid to her father. Order of the District Court upheld.

131. Leonard Karomba v. Mustafa Buberwa, (PC) Civ. App. 199-M-67, 3/2/68, Mustafa J.

Plaintiff borrowed Shs. 200/- in October, 1964, putting up a shamba leld under Nyarubanja tenure as security. Repayment was originally due in October, 1965, which due date was extended by mutual consent to March, 1966. Plaintiff had not sought to prevent him from living on or using the shamba. Defendant refused the tendered repayment, preferring title to the shamba (the redemption period having expired), whereupon plaintiff filed this action seeking an order requiring defendant to accept repayment of the loan.

Held: The district magistrate found that defendant was trying by devious means to obtain the piece of land. The judgment of the District Court was upheld and defendant was ordered to accept repayment of the Shs. 200/- thus extinguishing any and all claim he had to the shamba.

132. Andrea Rafael v. Antonia Masakuya, (PC) Civ. App. 51-D-66, 5/2/68, Biron J.

Plaintiff entered into a contract to sell a shamba to defendant. Defendant went into possession and had, at the time of the action, remained so for five years.

Plaintiff refused to complete the sale and claimed possession. Defendant did not dispute the claim to possession, but claimed compensation for improvements she had effected on the land(banana trees, coffee trees aged 2 or 3 years, and a house for cattle). The District Court of Kilimanjaro awarded her compensation for the improvements, and also for "trouble created by the (plaintiff)."

Held: (1) Defendant is entitled to compensation for the improvements, at the rates of She. 10/- for each banana tree, She. 3/- for each coffee tree, and She. 200/- for the cattle house, if she gives up possession. (2) Alternatively, the defendant could insist upon completion of the contract and, upon payment of the purchase price, become entitled to possession of the land. (3) The defendant is not entitled, in fact or in law, to compensation for "trouble created" by plaintiff.

133. Daniel Marwa v. Surati Mwita, (PC) CIF. App. 113-D-66, 8/2/68, Saudi J.

Two neighbors disagreed as to which one of them had the right to an adjacent piece of land which had recently become vacant. Respondent moved on to the land, claiming the former owner had given it to him, though he did not produce the former owner as a witness, or other credible evidence to establish his claim. Appellant's claim rests on the fact that he went to the local VDC which allocated

the plot to him, notwithstanding (or perhaps in ignorance of) respondent's occupation of the land.

Held: In view of the respondent's inability to clearly establish his right to the land, and appellant's inability to show that he had a superior claim to the land, the District Court divided it equally between the parties. The High Court could see no good ground for interfering with this decision, and accordingly dismissed the appeal.

134. Jacob Tibifunukula v. Daud Justinian, (PC) Civ. App. 211-M-66, 5/2/68, Georges C. J.

Plaintiff pledged a portion of his shamba to secure a loan of Shs. 130/- The evidence conflicted as to whether he had made a timely offer to repay the debt, the finding being that he had not. Several months after the debt, came due, defendant entered upon the land and twice cut bananas, whereupon plaintiff instituted as action to redeem his shamba. There was not showing that the land, located in the Bukoba area, was held under family tenure. However, plaintiff won in District Court, on the grounds that defendant had not obtained a court order enforcing the pledge.

Held: (1) If the land were held under family tenure, a right in the pledgor to redeem "cannot be said to be logically deducible from the existence of such a right in his relative"; no such right appears to exist. (2) Where money is loaned upon a pledge of property, on condition that the property becomes the property of the pledge if the loan is not repaid on time, the property does not pass unless there is a court order to that effect. Although there is no clear evidence of any such custom obtaining in this area, the scheme of land transactions in Bukoba "shows that publicity is an essential part of any transaction intended to pass property in land". [Citing "Section 929", requiring all conditions of a sale to be specified before six witnesses, and "Rule 930", providing that a sale without witnesses is void, though both parties may agree that it has taken place.} This rule "will ensure the proper amount of publicity. In appropriate cases, the Court would

be empowered to order sale of the property instead of its transfer to the pledge, particular where the sum secured is much less than the value of time property."

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The Court stated, obiter: even if the land had been clan land, and even if a pledgor's right to redeem could be inferred from the rights of relatives, the pledgor would be bound by the same period of limitations governing actions by the relatives in pledge cases ---- i.e., three months after notice of the pledge; plaintiff's action in this case, thus, would have been barred. [Citing Cory & Hrtonoll, Customary Law of the Haya Tribe, paragraphs 572, 573, 574; and Bi. Paulina for Leornard Nestor v. Issa Kamala, Appeal No. 10 of 1959, Digest of Appeals from Local Courts No. 152.

135. Simon Kashumala v. Leonard Mutajwaha, (PC) Civ. App. 16-D-67, 16/2/68, Saudi J.

This was an action to recover money loaned, plus interest at the rate of 25% per annum, the interest rate requested being part of the contract between the parties. The High Court quashed the lower court Judgment and ordered a trial de novo.

The Court stated, obiter; "(I)nterest at 25% p. a is excessive and the respondent should not be allowed more than 9% interest or the loan until 15/7/66 when the first judgment was pronounced, and 6% interest on the decretal amount, if any, after the date of judgment.

136. Damas Sabi v. John Kisika, (PC) Civ. App. 80-D-67, 2/2/68, Saudi J.

Plaintiff and defendant were engaged in selling local pombe jointly. After 1965, they had a dispute and defendant worked the business by himself. Apparently having concluded a settlement for capital invested in the business, plaintiff sued for his share of the profits. He could not substantiate his estimate of the profits due him. Defendant admitted that the profits for the year 1965 were Shs. 700/- but the District Court ruled that he was entitled to the entire sum.

Held: Each party to a two-man joint business is entitled to half of the profits. Appeal allowed to extent that defendant will have only half the profits, with costs on that amount.

137. Cleophace Anatory v. Paul Edward, (PC) Civ. App. 91-M-67, 13/1/68, Mustafa J.

A judgment creditor, on a loan of Shs. 7,000/- sought execution of the decree. The Primary Court ordered the sale of the debtor's shamba. Applicant, the son of the judgment debtor, brought objection. Proceedings against the sale, on the ground that he and his brother were in possession of the shamba. Objection proceedings were dismissed in the District Court.

Held: Applicant is not competent to bring this action, since he was not a party to the original dispute.

138. Joseph Kimalando v. Philemon Mshiu, (PC) Civ. App. 111-A-67, 7/2/68, Seaton J.

Plaintiff's deceased wife was a member of the All Christian Association of Moshi, whose purpose is to assist in the burial expenses of its members. Upon the death of plaintiff's wife, eight other women contributed a total of Shs. 160/- to the Association for her burial. Defendant, the chairman of the Association, paid only Shs. 40/- to plaintiff, insisting that the

Balance should be kept for future deaths of members. The suit was filed in Primary Court.

Held: (1) "It would appear that this suit is not concerned with customary law but arises out of some contractual right or obligation incidental to membership of the All Christian Association." As such, it would not fall within the jurisdiction of the Primary Courts. [Citing Magistrates' Courts Act, Cap. 537, s. 14.] (2)The action was summarily dismissed by the High Court. The District Court,

finding for defendant, had held that, since only the women subscribed money to the Association here, only they are entitled to sue the Association for failure to carry out its obligations to its members. Further, the proper party to sue would be the Association itself, not its chairman or any individual member.

139. Ismael s/o Rashidi v. R., Crim. App. 889-D-67, 16/2/68, Biron J.
Accused, who now stands convicted of cattle theft [P.C. ss, 268, 265], was detained by Presidential order under the Preventive Detention Act, Cap. 490. After being charged with cattle theft, accused sought bail. Section 3 of Cap. 490 provides; "No order made under this Act shall be questioned in any court." Since the detention order had not been rescinded, the District Court held that it had no power to grant bail, although it would have liked. To do so. This question was raised in the High Court by accused as part of a general appeal from conviction of cattle theft, which appeal was rejected on the merits.

The Court stated, obiter: (1) Although the state attorney informed the Court that the Presidential order for the arrest of suspected cattle thieves such as accused was not made pursuant to the Preventive Detention Act, the Court dealt with the point raised about bail on the footing that the District Court was right that accused was so detained. (2) "(W)here a person is detained under the Preventive Detention Act and subsequently handed over by the authorities, acting on behalf of the President, to the judicial arm to be dealt with for the very same act or omission for which he was detained, thereby being brought under the jurisdiction and custody of the court, the original detention order is rescinded, if only implicitly. In other words, in such case, although there is no evidence to the effect that the original detention order was expressly rescinded by the President, a court can assume that it has in fact been rescinded." Therefore, the District Court could have granted bail.

140. R. v. Mrisho s/o Seffu, Crim. Rev. 10-M-68, 15/2/68, Mustafa J.
Accused was convicted by a District Magistrate of the offence of incest by males. [P.C. s. 158(1).]

Held : This offence is triable only by the High Court. [Crim. Proc. Code, First Schedule.] Therefore, the trial was a nullity. Conviction quashed and case remitted to the subordinate court for a preliminary inquiry at the option of the Republic.

141. Silverster s/o Malicel v. R., Crim. Rev. 7-M-68, 12/2/68, Mustafa J.
Accused, a temporary revenue collector, was convicted, inter alia, of destroying evidence. [P.C. s. 109.] He was give a receipt book, which he was later unable to produce, and he accounted for no money. Subsequently, eleven receipts were recovered from persons who had paid accused, in aggregate, shs. 660/-

The other receipts were never recovered, and he was charged with willfully hiding or destroying them, "knowing that they would be required as evidence in a judicial proceeding."

Held: It is not possible that the accused could have known that the receipt book was required as evidence before a case against him was filed, or perhaps even contemplated. It is likely that the receipts were destroyed before such action was contemplated but in all events the contrary has not been proved beyond a reasonable doubt.

142. Salum s/o Salum v. R., Crim. App. 12-D-68, 14/2/68, Georges C. J.
Accused was convicted of shop breaking and stealing on evidence which the High Court characterized as "somewhat thin." Accused denied having been at the scene of the crime but did not say where he had been. The trial magistrate stated in his judgment that "as the accused was raising a defence of alibi, it is required of him to raise some evidence which should satisfy the court that his alibi is reasonably true."

Held: "The accused does not have to establish that his alibi is reasonably true. All he has to is to create doubt as to the strength of the case for the prose-

cution. 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 guilty of the accused." Conviction quashed.

143. Athumani s/o Kassim v. R., Crim. App. 923-D-67, 12/2/68, Biron J.
Accused was convicted of stealing by public servant. There was evidence that the stolen local rate stamps were found in the possession of accused during a search of the office staff made under the supervision of the Divisional Executive Officer. Accused then confessed to the Divisional Executive Officer, and led a messenger to his house where he disclosed other stolen stamps. The trial court refused to admit the confession but permitted the production of the stamps found on accused.

Held: "(O)n a comparison of [section 29 of the Evidence Act, 1967] with the repealed section 24 of the Indian Evidence Act, the door has now been opened much wider for the admission of confessions." The confession to the Divisional Executive Officer was admissible under the new section. The Court stated, obiter, that the confession would also have been admissible under the repealed section 24 because there was no indication that it had been obtained as a result of any inducement, threat or promise. Appeal summarily rejected.

144. Emmanuel Tumbotele v. R., Crim. App. 189-A-67, 2/2/68, Seaton J.
Accused were convicted of shop breaking, malicious damage to property and robbery with violence [P.C. ss. 297, 326(1), 285, 286.] They were picked out at an identification parade at the police station, as the men who had approached a disabled car at night to rob the passengers, by one of the passengers. He said he had seen them in the light of the headlamps. He and he other passengers all testified that they recognized the accused at the trial as the men who had attacked their car; their testimony conflicted, however, as to whether they had all attended the identification parade and there identified the accused.

Held: It has been held that, where the evidence implicating an accused is "entirely of identification", it must be "absolutely water-tight to justify conviction."

[Citing R. v. Sebwato (1960) E.A.C.A. 179.] In the present case, the evidence re-garding identification is “unsatisfactory”, so that sustaining the con-viction would be “unsafe.” Convictions quashed.

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145. R. v. James s/o Yohana, Crim Rev. 51-A-67,-/1/68, Seaton J.

Accused and three others were convicted of burglary and theft. The trial court found accused to be above 20 years of age on the bases of his appearance. A petition was filed on his behalf with an affidavit from his brother, stating that he was only 14.5 years old, and should therefore be dealt with according to the Children and Young Persons Ordinance [Cap. 13] Subsequently, a certificate was obtained from a medical officer and presented to the High Court on appeal, indicating that the medical officer though the accused to be between 16-18 years of age.

Held: (1) There is nothing in the Act which would make a certificate by a registered medical practitioner conclusive evidence as to accused ’s age. The real purpose of section 16(2) is to make such certificates receivable as evidence while dispensing with the need to call the doctor as a witness. (2) A finding as to accused ’s age by a subordinate court, under section 16(1), and an order based thereon, may be set aside by the High court under the appeals provisions in Part V of the Act. The Court accepted the affidavit of the accused ’s brother.

146. R. v. Ally Mohamed, Crim Rev. 8-A-68, 6/2/68, Seaton J

Accused, aged 7,8 and 10 years, respectively, were convicted of indecent as-sault upon a 6-year-old boy, put on probation and ordered to pay compensation of Shs. 10/- each to the complainant. The Magistrate did not appear to have asked the accused to show cause why they should not be convicted, or to have cross-examined the witnesses against the accused, as is provided for by the Children and Yong Persons Ordinance [Cap. 13, ss. 9, 12]. Nor did he direct

himself as to the presumptions of incapacity of children under 12 years of age laid down in section 15 of the Penal Code.

Held: "The omission to comply with the procedural formalities is serious but even more is the failure of the learned magistrate to direct himself regarding the presumed incapacity." Convictions quashed, sentences set aside.

147. Juma s/o Ramadhani v. R., Crim. App. 22-D-68, 14/2/68, Georges C. J.
Accused was convicted, inter alia, of disorderly conduct in a police station and Malicious damage to property. After accused was brought to a police station, he resisted being put in the lock-up, and during the struggle he tore the uniform (valued at Shs. 60/-) of one of the officers.

Held: (1) The conviction of disorderly conduct in a police station was upheld. (2) "To support a charge of malicious damage, there must be evidence that the act was done deliberately and intentionally." This was not clearly established her. Conviction of malicious damage to property quashed.

148. R. v. Mohamedi s/o Mzee, Crim. Rev. 9-D-68, 27/2/68, Biron J.
The two accused, whose ages are given in the charge sheet as 13 years and 12 years respectively, were convicted on their own pleas of being rogues and vagabonds. [P.C. s.177(4).] The wording of the particulars of the charge were as follows; "on the 12th day of December 1967 at about 03.30 hrs., at New Bus stand, within the Municipalty and District of Tanga, in Tanga Region, were found wandering upon such highway at such time,

Under such circumstances, as to lead to the conclusion that such persons were there for an illegal or disorderly purposes [sic], thus were stopped and arrested by one Juma s/o Ally."

Held: (1) "From these particulars it is impossible to ascertain the circumstances which would lead to the conclusion the accused were at the bus stand for

an illegal or disorderly purpose …… (T)here is not sufficient material on the record on which to sustain the convictions……" Convictions quashed. (2) "Although the sentences will have been executed by now, the is order is not merely academic, as it will have the effect of expunging the convictions and sentences from the records of the two accused." (3) The magistrate should have made a finding as to the age of the accused juveniles, and medical evidence should have been adduced to this end. [Citing the Children and Young Persons Ordinance, Cap. 13,]

149. Peter s/o Mutabuzi v.R., Crim. App. 1-M-68, 12/2/68, Mustafa J.

Accused, a microscopist working in a government hospital, demanded payment from complainant for performing tests; he was charged with corrupt transaction with agent [Prevention of Corruption Ordinance, Cap. 400, s. 3(1)]. On the grounds that he was a public servant and received the money "through his official functions" as such, the Magistrate substituted a conviction under section 6 of the Ordinance. At the trial, the Magistrate refused to hear one of the defence witnesses, because the witness had been present in court during the trial.

Held: (1) Neither the Prevention of Corruption Ordinance nor the Criminal Procedure Code authorizes the substitution of a conviction under section 6 of the Ordinance for a charge brought under section 3(1). (2) "(N)o sanction in terms of section 14 was obtained which is necessary before any further proceedings in respect of an alleged offence contrary to section 6 of Cap. 400 can be taken against any person." (3) The presence of a witness during proceedings may affect the weight to be given to his testimony, but not its admissibility. (4) Regarding re-trials, each case must depend on its own particular facts; re-trials should be ordered only "where the interests of justice require it an should not be ordered where it is likely to cause an injustice to an accused person. The trial magistrate seriously misdirected himself in this case". [Citing Ahmedi Ali Dharamsi Sumar v. R. (1964) E.A. 481, 483.] Re-trial not ordered.

150. R. v. The Manager of Chambogo Magnesite Co., Ltd,. Crim. Rev. 5,6-A-68, 2/2/68, Seaton J.

Accused were convicted, in each or two cases, on separate counts of driving and permitting to be driven a motor vehicle on a public road without efficient had-brokes and foot-brakes [Traffic Ordinance, Cap. 168, ss. 43(a), 70].

Held: "The failure to have efficient had and foot brakes constitutes one offence, not two separate offences under section 43(a) of the Traffic Ordinance, although the fact that both hand and foot brakes are inefficient may be an aggravating circumstances when assessing sentence." Convictions on second counts in each case quashed.

151. Mohamed Salim v. R., Crim. App. 944-D-67, 9/2/68, Georges C. J.

Accused was convicted of driving a motor vehicle on a public road while his efficiency was impaired by drinks or drugs. In pleading to the offence, accused said, "It is true. I had taken 2 bottles

Of beer." This was entered as a plea of guilty. The facts stated by the prosecution were that accused had been under the influence of liquor.

Held: (1) It is not enough that the accused was under the influence of liquor. It must be proved that his efficiency was impaired by reason of such influence. (2) The plea was equivocal and should not have been entered as a plea of guilty. Conviction quashed.

152. Mrs. G. A.H. Adat v. R., Crim App. 932-D-67, 9/2/68, Georges C. J.

Accused was convicted of failing to report an accident. [Traffic Ordinance, s. 61 as amended by Acts 1962 No. 55.] While driving an automobile in Dar es Salaam, accused struck a child. She stopped at the scene of the accident but then left thinking that the child had suffered no injury. There was evidence, however,

that the child was later found to have broken two toes. Accused never reported the accident to the police.

Held: (1) No offence is committed under section 61 unless the accident involves injury to a person other than the driver, and the trial magistrate erred in failing to consider this issue. However, the error was not prejudicial since there was clear evidence of injury. (2) Once a driver knows that there has been an accident with the livelihood of personal injury to a third party, the obligation to report the accident is absolute, and he is guilty if he fails to report even though he believes that an injury has not occurred. Conviction sustained.

153. Dr. M. H. Iskander v. R., Crim. App. 44-M-689, 8/2/68, Mustafa J.
Upon conviction of assorted driving offences, accused 's licence was revoked for 12 months. (He was also fined.) When asked if there were any special reasons why he should not lose his licence, he replied that he was a medical doctor, that he used his car for the benefit of the people, and that he needed to drive if he was to carry out his duties effectively.

Held: There are many authorities for the proposition that "special reasons" must be special to the circumstances of the case and not to the offender. "The fact that an accused 's livelihood depends on motor driving or that he has a very good driving record is not a special reason." [Citing Whittall v. Kirby (1947) K.B.194; R. v. Hohn Gedeon and Simon Jeremiah (1957) E. A. 664.] Revocation of licence by the trial court upheld.

154. Recentinato Totinati Mangisto v. R., Crim. App. 812-D-67, 26/1/68, Biron J.
Accused was convicted of stealing by public servant [P.C. s. 265, 270], and fraudulent false accounting [P.C. s. 317(c)]. The District Court magistrate ordered the two sentences to run consecutively.

Held: (1) "The fraudulent false accounting was part and parcel of the stealing offence. In such cases, unless there is good reason to the contrary, it is customary to order the various sentences in respect of the several convictions which are all part and parcel of the same transaction to run concurrently." (2) "The of-

fences of false accounting were acts of omission. As opposed to commission, which deserve more lenient treatment. Sentences were ordered to run concurrently.

155. Isaya s/o Magige Sasi v. R., Crim. App. 127-A-67, 9/2/68, Seaton J.

Accused was convicted inter alia, of false accounting [P.C. s. 317(b)], on evidence that he had falsified a record of a journey he had taken with a Government Transport vehicle. As officer-in-charge of a Police Station, he went with one of his subordinates on a three-day trip to apprehend two women. He said that he had done this to assist the local Magistrate, in connection with a civil matter involving the women. He recorded the trip in the Motor Log Book, however, as a journey to cities other than those actually visited in connection with a criminal case then being investigated.

Held: An intention to defraud is essential to the offence of false accounting. An intention to conceal previous dishonest or fraudulent acts, either for personal financial gain or toe protect an accused ’s employment security, is such a fraudulent intention. [Citing George Woodgate v. R.,, (1959) E. A. 525; Rex v. Sayed Hadi Husseing Shah, (1941) 8 E.A.C.A. 36] Appeals on false accounting charges dismissed.

156. T. C. Harby v. R., Crim. App. 196-A-67, 2/2/68, Seaton J.

Accused was convicted on 4 counts of obtaining credit by false pretences [P.C. s. 305(1)]. Accused had had his private automobile repaired on two occasions, had chartered an airplane on another occasion, and had purchased to bottles of perfume, in all cases signing invoices made out to his employer, the New Arusha Holel. The Hotel had not authorized him to incur such debts on its behalf.

Held: In order to obtain a conviction under section 305(1), three elements of the offence must be proven: the incurring of a debt or liability, an obtaining of credit by false pretences, credit”, in the ordinary meaning of the words, signifies

that a person is entrusted with money or goods on the faith of future payment by himself. Convictions quashed.

157. Musa Alli Mahambi v. R., Crim. App. 26-D-68, 21/2/68, Georges C. J.

A search of accused 's home revealed his possession of a radio which had been stolen, during the night, from complainant's home one month earlier. Complainant's testimony, as to the original taking, was that she had awakened during the night to see the thief "standing inside the house"; she could not identify the intruder. Accused was convicted on a single charge of burglary and stealing.

Held: (1) Under the doctrine of recent possession, in such circumstances "It is fair inference ….. that the appellant had either stolen (the radio) or received it knowing it to be stolen." (2) "The interval seems short enough to support the conclusion that he was the thief." (3) However, the complainant's testimony does not indicate that any part of the house was found broken, nor does it assert that the premises had been properly shut the night before. Therefore there can be no conviction under the charge for burglary and stealing. Conviction for stealing substituted.

158. Saudi Juma v. R., (PC) Crim. App. 13-D-68, 10/2/68, Saudi J.

Accused was convicted of criminal trespass on the land of complainant, but he conviction was quashed on appeal to the District Court on the ground that the land did not belong to either party.

Held: When, in a case of criminal trespass, a dispute arises as to the ownership of the land, the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership. Parties directed to start a civil action before the District Court of Kondo to settle the issue of ownership.

159. Eliud s/o Kuzwa v. R., Crim. App. 921-D-67, 16/2/68, Biron J.

Accused was convicted of forgery, uttering and stealing. There was evidence that accused had been given shs. 100/- with which to purchase a butcher's licence for a relative. Accused improperly obtained the licence for Shs. 50/- The was a direct conflict between the testimony of accused, who said that he had returned the remaining Shs. 50/- to complainant's clerk, and the testimony of the clerk, who said that the money had not been returned. One Saudi Habib had witnessed the transaction, but he was not called as a witness at the trial.

Held: (1) The English rule is that a witness may be called by the judge after the case for the defence has been closed only if some matter has arisen ex improvision in the course of the case. The court may depart from this procedure only in special circumstances. [Comparing R. v. Tregear, 51 Cr. App. R. 280, with R. v. Cleghorn, 51 Cr. App. R. 291.] (2) The limitations in the English Law have not been incorporated into Crim Proc. Code section 151 which provides, "Any court may, at any stage of an inquiry, trial, or other proceeding under this Code, summon any person as a witness …… and the court shall summon …. Any such person if his evidence appears to it essential to the just decision of the case." The High Court stated that "the court … has an unfettered discretion in the recalling of a witness, or the calling of a witness of its own motion, and, where it appears essential to a just decision in the case before it to have the evidence of some witness, it is mandatory on the court to call such witness." This rule is applicable though the testimony may weaken the defence. [Citing Manyaki d/o Nyaganya v. R., (1958) E. A. 495; Kulukana Otim v. R., (!963) E.A.253.] (3) In the present case the court had a duty to call the witness to the transaction. (4) However, even if an inference unfavorable to the prosecution is drawn from the failure of the prosecution to call the witness, there is sufficient evidence to support the conviction. Appeal dismissed.

160. Hasani Abdalla Mbaga v. R., Crim. App. 6-A-68, 9/2/68, Seaton J.

Accused was convicted in same of stealing by servant. The prosecution called witnesses from widely scattered parts of Tanzania. When accused requested that a witness be called from Morogoro, the court agreed to do so only on condition

that accused first deposit funds in court to meet the expenses of this witness. The witness appeared and testified.

Held: (1) There is no authority for imposing such a condition upon the calling of a witness. Section 173 of the Criminal Procedure Code permits costs to be ordered against accused after conviction, but his power is exercised only in exceptional circumstances. [Citing the Municipal Council of Dar es Salaam v. A. B. de P. Almeida, (1957) E. A 244.] To permit such a condition to be imposed prior to conviction might inhibit an impecunious accused in the conduct of his defence. (2) The procedure did not prejudice accused. Appeal summarily rejected.

161. D.T. Dobie & Company (T) Ltd. v. Manji's Ltd., Civ. Case 86-D-65, 7/3/68, Biron J.

Plaintiff claimed a sum in excess of Shs. 32,000/- for goods sold and delivered. The defence was that the claim was time-barred. Plaintiff's action is in 3 counts representing 3 "separate accounts" between the parties, though his claim is that they constitute one running account, being separated only for purposes of his internal accounting system. Of these account, one was on a cash basis, one on a 60 day credit basis and the third on a yet longer credit period basis. A receiver was appointed for plaintiff over three years before this action was filed, after which time all transactions between plaintiff and defendant were on a cash basis. Plaintiff's contention is that although the debts be seeks to collect were incurred over three years ago, they are still collectable because there was an open and running account between the parties.

Held: (1) The legal significance of an account being a "running" one is that "where payments are not specifically appropriated to a debit item they can be applied as payment in the principle of first-in, first-out". (Citing Ismail's Stores Ltd. v. M.A. Lone, Civ. App. 38-D-59, Cranshaw, Ag. C.J.) (2) Even if there at one time was a running single account between the parties, an unlikely thing in view of the separate credit arrangements, it came to an end when the receiver was

appointed and he put relations on a cash basis. Consequently, it cannot be argued by plaintiff the payments in the last three years covered debts incurred earlier. Action dismissed.

162. Bituro d/o Msiba v. Magero Naguguri, (PC) Civ. App. 197-D-66, 16/3/68, Duff J.

Plaintiff, a relative of deceased, claimed ownership of a house which had been registered in the name of deceased. The house had been built with the lab our of defendant and deceased on the land of a third party, but it had been registered in deceased's name alone. Deceased had been destitute and defendant had cared for her for ten years, whereas plaintiff had provided no aid for deceased.

Held: In order to do justice in the case, the value of the care which defendant provided for deceased should be equated with the value of the labour of deceased in building the house. Defendant was awarded ownership of the house, subject to any claims of the owner of the land, and plaintiff was awarded Shs. 270/- belonging to deceased out of which costs of the suit were to be paid.

163. Thomas Ngarumau v. Stephen Ngarumau, (PC) Civ. App. 74-A-66, 18/1/68, Seaton J.

This case concerns the inheritance of a cow from deceased. Deceased was survived by a widow and a son, Thomas, who is the plaintiff. The widow was inherited by deceased's brother, and defendant, Stephen, was born while this relationship existed. Plaintiff sued defendant for a cow which was given by the widow, the mother of both plaintiff and defendant, as dowry for defendant's wife; he contended that defendant had no right to any part of deceased's estate.

The case is governed by the law of the Kilimanjaro District.

Held: Under paragraphs 66A and 70 of the Law of Persons [G.N. 279 of 1963, applied to Kilimanjaro District by G. N. 475 of 1963], a widow is free to

choose a relative of the deceased husband and live with him as his wife; and if a child is sired by a relative of the deceased husband, he is always accepted in to the family. Therefore, defendant is legally a child of deceased and has full rights of inheritance from him. Plaintiff's appeal rejected.

164. Balyehaila Mulagilwa v. Bwami Mulagilwa, (PC) Civ. App. 90-D-66, 13/12/67, Duff J.

At issue is the validity of a will which purports to disinherit a son of the testator. The will was witnessed by on person, who was not of deceased's clan. The will was not signed by the testator.

Held: Because the will was not signed, and because adequate reasons for disinheriting the son were not disclosed, the will was invalid [Citing Sisa Bukungua v. Angelo Mulakozi, case 211, per Murphy J.

165. Deusdedit Kashaga v. Bi. Baite Rwabigene, (PC) Civ. App. 90-M-67, 19/2/68, Mustafa J.

The parties both claim a shamba. Plaintiff, a full sister of deceased, claims by way of intestate succession. Defendant, a distant relative of deceased, based his claim on an oral will. Defendant called two witnesses who heard deceased say at a pombe party that she wanted defendant to succeed to her property and another witness who had heard deceased make a similar statement at another time.

Held: G. N. No. 436/63, Schedule 1, section 11, reads; "An oral will must be witnessed by at least 4 person, at least 2 of whom must be kinsmen and at least 2 unrelated to the testator. The wife or wives of the testator are additional to the minimum of 4 recognized witnesses." Since this requirement was not complied with, the allege oral will has not been proven. Plaintiff is entitled to the shamba by intestate succession.

166. John Hamisi v. Boniface s/o Paul, (PC) Civ. App. 69-D-66, 2/2/68, Hamlyn J.

Defendant allegedly called plaintiff a thief. The Primary Court found that defendant had uttered the words complained of, but that such word were justified in that they were true. Defendant had seen plaintiff leaving a strange house in the early hours of the morning, and upon asking him what he was doing, plaintiff ran away. Plaintiff never was convicted or even charged, with theft, and indeed there is no evidence that he stole anything from the house.

Held: "(T)he term 'thief' was probably used in a colloquial sense as meaning a person who was intent on stealing rather than one who was actually carrying the goods of another away. It seems a fairly reasonable assumption by one who finds a person silently coming out of the house of another in the dark hours of the early morning, when that person flees, for the discoverer to chase him with a shout of 'Thief, thief'. And in the absence of any explanation by the (plaintiff) as to what he was in fact doing at that time, the Court seems to have been justified in reaching the

Conclusion that it did – that the appellant was not entitled to compensation for defamation ……" Appeal dismissed.

167. H.S. Mangat v. B. Sharna, Civ. Case 83-D-67, 20/3/68, Georges C. J.

Defendant had engaged plaintiff, an advocate, for the sale of certain land. After a rather careless handling of defendant's affairs, characterized by the High Court as "offhand" and "indifferent", plaintiff secured the signature of a purchaser on a transfer deed. Defendant also executed this deed. The property had been pledged with the National Bank of Commerce in Dodoma, by notice of deposit of title deeds This bank handed over the deed to plaintiff, who sent it for registration to the Commissioner of Lands. Defendant, however, feeling that the value of the transaction had been seriously impaired by plaintiff's handling of it, sent two letters to the Commissioner of Lands; one was marked as copied to both the bank and purchaser, and one marked as copied to the bank only. These letters ac-

cused the plaintiff of “grave breach of trust”, and requested that the Commissioner withhold his approval of the transaction. There was no dispute as to whether the letters were defamatory; the High Court rejected the defence of justification, finding insufficient evidence of “breach of trust.” The remaining issues were “qualified privilege” and “malice.”

Held: (1) “The authorities are clear .. that a privileged occasion arises where the defendant has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving,, it ….. (T)his reciprocity is of the essence of the matter …. Here, defendant’s interest is clear. The Commissioner is sufficiently “interested”, since the transaction depends upon his consent. The bank is “interested”, since the property had been pledged with it, and since it had had to surrender the deed for registration. The purchaser was “interested” as a party to the transaction which the defendant was seeking to avoid, and because plaintiff had been acting for both the defendant and the purchaser in seeking to have the transaction registered. (2) Since all of the defendant’s communications were made under “qualified privilege”, malice must be proved. (3) Malice in such cases is not established merely by showing that the words used were not “reasonably necessary to protect the interest .. which is the foundation f (the) privilege; (the defendant) will be protected, even though his language should be violent or excessively strong if ……he might honestly and on reasonable grounds have believe that what he wrote … was true and necessary for the purpose of his vindication, though in fact it was not so.” [Quoting Adam v. Ward (1917) A. C. 309] Also, “the question is whether (defendant) is using the occasion honestly or abusing it ……But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held .. to have abused the occasion. It has been said that anger would be such a state of mind.” [Quoting Royal Aquarium and Summer & Winter Garden Society v. Parkinson (1892) 1Q.B. 431, 443]. If, through anger, defendant were “reckless” with the truth, he may be said to have abused an occasion of qualified privilege. (4) On the facts, the defendant here did abuse the occasion, and so loses his

qualified privilege. (5) The plaintiff himself provoked the state of anger which led to the defamatory outburst. The “area of publication “ was very narrow, and

No specific financial or other detriment to plaintiff has been shown. The defendant’s allegations were serious, but this it not a case for substantial damages. Shs. 1,000/- awarded to plaintiff, plus taxed costs.

168. Sylvester Laurent v. Katambeki Ndyema, (PC) Civ. App. 212-M-67, 14/3/68, Mustafa J.

This case concerned a dispute as to the boundaries between the forest land of plaintiff and that of defendants. The Primary Court gave judgment for plaintiff after visiting the site and consulting with village elders. On appeal the District Court Magistrate reversed the judgment relying on his inspection of the disputed land and on Buhaya customary law that a resident under the rule of one headman cannot acquire forest land beyond the boundaries of his headman ship, unless he has another shamba there. The District Court Magistrate gave plaintiff no opportunity to dispute his findings of fact concerning the nature of the land or his conclusion as to the customary law. He also did not consult with villagers when he visited the land.

Held: The District Court Magistrate wrongly based his judgment on his personal knowledge. He should have given plaintiff the opportunity to challenge his conclusions of fact and findings of customary law. The Court stated, obiter that when visiting the site, the better practice would have been for the Magistrate to consult with the village development committee and other villagers rather than relying entirely on his personal observations. Primary Court judgment for plaintiff restored.

169. Emanuel Paulo v. Daudi Tibendelana, (PC) Civ. App. 51-M-67, 20/3/68, Mustafa J.

Plaintiff sued defendant for the return of land mortgaged as security for a loan of Shs. 500/- The agreement called for the repayment of Shs. 1,000/- within one year ------ i.e., specified an interest rate of 100% per annum. Plaintiff alleged that, upon his failure to pay the money, defendant ha claimed two shambas instead of the one pledged. The Primary Court found for defendant, and plaintiff's appeal to the District Court was dismissed for non-prosecution. On appeal to the High Court, the Court was satisfied that the land mortgaged did include the shamba claimed by defendant. Further evidence obtained from the District Magistrate indicated that the shamba was worth between Shs. 2,000/- and Shs. 2,500/-

Held: "(T)he whole transaction appears to be highly inequitable. This is usury with a vengeance. I find it unconscionable ….. In such circumstances the Primary Court Magistrate should have given judgment….. for either Shs. 500/- or at most Shs. 1,000/- which the defendant could have recovered by selling the shamba, the balance to be returned to plaintiff. Judgment for defendant entered, for Shs. 1,000/- the land to be sold at public auction if the judgment is not paid within 30 days, proceeds in excess of the judgment to be refunded to plaintiff. Defendant will have the right to bid at the auction; if proceeds fall short of Shs. 1,000/-, defendant will be entitled to sue plaintiff personally for the remainder.

170. Riddoch Motors Ltd. v. Ahmed Okash, Civ. App. 12-A-67, 9/3/6-, Seaton J.

Plaintiff sued defendant for accounts which became due prior to December 1956. The case was filed in July 1966, and defendant claimed that it was time-barred. Both parties agreed that the period of limitation is three years, and they apparently agreed that it was extended by some transaction in 1957. Plaintiff contended that a new period started in January 1961 under the terms of section 19 of the Indian Limitation Act, 1908, which provides that if the debtor makes a written acknowledgement of the debt, a fresh period of limitation begins. Plaintiff did not

introduce the written acknowledgement itself; instead a draft of the acknowledgement was introduced, and plaintiff gave oral testimony that a copy of the draft had been made and had been signed by defendant, but that this document had been lost. Plaintiff claimed that still another period started in September 1961 when defendant signed his name beside an entry which had been made in plaintiff's ledger in 1956 showing the amount of the debt. Plaintiff argued that this constituted an account stated and that it made the debt enforceable even if the period of limitation had previously lapsed. [Citing Bishun Chand Frim v. Girdhari Lal, (1934) P.C., 61 Law Reports, Indian Appeals]. Plaintiff further argued that a new period started in November 1963 when he received a cheque in partial payment of the debt, relying on section 20 of the Indian Limitation Act, 1908. However, the cheque was not introduced and there was no evidence as to who had signed it. Finally, plaintiff argued that a debt of Shs. 200/- incurred in 1964 was in no event time-barred. This debt was not specified in the plaint, but was contained in particulars requested by defendant. Plaintiff offered no proof of this debt but relied on Order 8, rule 5, of the Civil Procedure Code, which provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated not to be admitted shall be taken to be admitted.

Held: (1) Sections 66 and 67(1) (c) of the Evidence Act provide that secondary evidence of a written document is admissible when the original has been destroyed or lost. The trial court admitted the draft letter of the January 1961 acknowledgement under this section " and this Court is loath to hold that it was wrong". [Citing Read v. Price, A. E. R. Reprint (1908-19100 599]. (2) The written acknowledgement of September 1961 kept the account of defendant alive and enforceable. (3) A cheque, proved to be signed by a debtor and given in payment, and which is accepted and duly honored, is an acknowledgement of payment within the meaning of section 20 of the Indian Limitation Act, 1908. even a third party cheque endorsed by the debtor could well have sufficed.[Citing Ismail's Stores Ltd. v. Lone, Tanganyika L. R., Supp. No. 3 of 1961, 6; The Fifty Years' Digest (1901-1950), Part X, p. 982]. However, it cannot be presumed hat the cheque was signed or endorsed by the debtor. Therefore, section 20 was not

satisfied and the period of limitation lapsed.. (4) No proof of the Shs. 200/- debt was required, for the provisions of Order 8, Rule 5, of the Civil Procedure Code extend to claims specified in particulars demanded by the defendant. Judgment for plaintiff for Shs. 200/-.

171. Salada Tofiki v. Hamisi Waziri Mwenda, Civ. App. 225-M-67, 29/2/68, Mustafa J.

A firm to whom a debt was owed filed a suit personally against plaintiff and recovered Shs. 2,821/- Plaintiff then sued defendant, one of his partners, to recover part of the money he paid out. After hearing all the facts, the trial court concluded that the debt was a partnership debt rather than a personal obligation incurred by plaintiff, which finding was accepted by the High Court.

Held: Each partner is liable to contribute equally to the losses of the partnership. Accordingly, defendant was ordered to pay Shs. 403/- to Hamisi, being 1/7 th of the Shs. 2,821/- paid out by Hamisi, [Citing section 194 of the Law of Contract Ordinance, 1961].

172. Zubaira Mussa v. Saudi Selemani, Civ. App. 140-D-67, 14/2/68 Duff J.

One partner had advanced by way of a loan (his full partnership share having been paid), Shs. 1,200/- to the partnership for which he had been repaid only in part, whereupon he brought this suit seeking to recover the balance.

Held: (1) The relation between partners is not one of debtor and creditor, unless and until the partnership has been dissolved. (2) Furthermore, the loss here claimed would have to be aggregated with all other partnership assets and liabilities and then the profit (or loss) he determined, and divided, absent a contrary agreement between the partners, equally among the partners.

173. Ujagar Singh v. The Mbeya Co-operative Union, Civ. Ref. 2-D-67, 6/2/68, Biron J.

This proceeding concerned the costs to be awarded to plaintiff, who, in the main action, recovered Shs. 38,500/- for breach of contract. In the pleadings in the contract action, defendant put plaintiff to strict proof of all aspects o his claim. Plaintiff prepared the case accordingly and appeared in court with his witnesses, who had traveled from Arusha. The case was then settled. Plaintiff claimed an instruction fee of Shs. 5,000/- of which the Deputy Registrar taxed off Shs. 3,000/- In taxing off this amount, the Deputy Registrar stated that the case was not "by any means long or tedious"; he also stated at one point that "the policy of this court (is) to reduce the cost of litigation so that justice does not become the privilege of the rich." With regard to the witnesses' travel expenses, the Deputy Registrar reduced the award from Shs. 3,110/- the price of air travel, to Shs. 867/50, the price of first class train travel, relying on the fact that the witnesses had not testified.

Held: (1) An instruction fee is for work done in preparing a case before trial; it is irrelevant whether the trial itself would or would not be long and tedious. (2) It would be improper to consider a policy of reducing court fees in assessing the instruction fee to be awarded. (3) In view of the fact that the case was not settled until the time of trial, the fact that the witnesses did not testify should not affect the travel expenses awarded. The Court refused to lay down any general principle as to whether

Travel expenses should be based upon air or train fares, but relied upon the uncontested statement of plaintiff that the fare and incidental expenses of train travel would be equal to the air fare. The Court awarded an instruction fee of Shs. 3,000/- and witnesses' expenses of Shs. 3,110/-

174. Hassanali Walji v. R., Crim. App. 127—68, 22/3/68, George C. J.

Accused was convicted of using insulting language likely to cause a breach of the peace and of a corrupt transaction [Penal Code s. 89(1); Prevention of Cor-

ruption Ordinance, Cap. 400, s. 3(2)].The first count was based on evidence that he had used insulting language about TANU, annoying persons in a shop. It was further alleged that he had offered the local TANU Chairman Shs. 50/- as an inducement not to report the matter to the Area Commissioner. In applying for bail pending appeal to the High Court, accused alleged "special circumstance", in that he suffered from a urinary affliction requiring long treatment and possibly hospitalization; the Prison Mekical Officer, however, had certified that he could be treated while in custody, and hospitalized if necessary. Accused also argued that his appeal was very likely to succeed on the second count, and cited cases with argument that the High Court found fairly persuasive.

Held: (1) Illness, in this case, is not a "special circumstance", because of the availability of facilities for accused 's treatment while in custody. (2) While accused 's arguments are not without merit, "it is only where the strongest possible case for success is made out that the Court ought to grant bail ….." Where " a short and simple point of law" seems likely to be dispositive of an appeal, bail may be granted. But the test is always whether an appeal "has an overwhelming chance of success", and the test is not met "(W)here an argument of the facts needs detailed references to the text of the evidence or the judgment to support it ….. Application denied.

175. Christopher s/o Lucas v. R., Crim. App. 194-A-67, 21/2/68, Seaton J.
Accused were convicted of store-breaking and stealing [P.C. ss. 265, 296(1)]. The evidence was that complainant had secured his store before leaving by placing a drum against the inside of the door, that this door had been forced open or removed, that both accused were discovered in possession of skins stolen from the store the following evening, and that one accused was arrested with the skins that evening, while the other, who fled, was arrested on month later.

Held: The evidence supports the conviction. Complainant's testimony suggests that he must have left his store, having secured the door from the inside, through a window, or by some similar exit. This is "possible, but preposterous." The evidence is nonetheless sufficient to sustain the conviction.

176. R. v. Hamisi Simbano, Crim. Rev. 22-A-68, 14/3/68, Seaton J.

Accused was convicted of failing to renew the licence on a gun which he owned [See. Cap. 223, ss. 13 (1), 31(2)], and fined Shs. 100/-

Held: No offence is created by the failure to renew one's licence, although, under section 13 of the Arms and Ammunition Ordinance, one may be liable to pay an increased fee for a tardy renewal. Conviction quashed.

177. Abdalla Mohamed v. R., Crim. App. 894-D-67, 15/3/68, Georges C. J

This case alternative counts of stealing by agent (larceny by trick) and obtaining money by false pretences. Accused was convicted on the second count and acquitted on the first count. Conviction below was quashed by the High Court because of insufficient evidence.

The Court stated, obiter: "(T)he learned magistrate should have stated that having found the appellant guilty on the count of obtaining money by false pretences, he would enter no verdict on the stealing count. This is preferable to acquitting the appellant. The line between obtaining by false pretences and larceny by trick is often fine. If the accused person is formally acquitted on the alternative count, a court of appeal may (think) that that was the count of which a conviction should have been entered and be unable to act because of the acquittal."

178. R. v. Pangaras s/o Liprima, Crim. Rev. 13-D-68, 11/3/68, Biron J.

After convicting accused of causing death by dangerous driving [Cap. 168, sec. 44A] the district magistrate doubted whether he had jurisdiction to ever have heard the case. Accordingly, he forwarded the proceedings to the High Court for necessary action in revision.

Held: Section 44A(2) provides for the hearing of cases such as this one by resident magistrates; this term embraces only resident magistrates and senior resident magistrates. As the district magistrate had no jurisdiction to hear the

case, the proceedings were declared a nullity and the purported conviction quashed.

179. Msengi s/o Kiula v. R., Crim. App 101-D-68, 20/3/68, Hamlyn J.
Accused was convicted of attempting to escape from lawful custody. After being arrested he suddenly bolted from the police station where he was being booked. A policeman chased accused and recaptured him almost immediately.

Held: "The trial magistrate was perhaps a little over-cautious in regarding this sudden dash for liberty by the (accused) as an attempted escape only. I would have though that the fct that he gained liberty from restraint constituted the matter an "escape' in the fullest sense of the word. There is no necessity, so far as I know, for the escaper to be at liberty for any length of time, and the fact that he attains such liberty free from restriction (albeit he is being chased during that period) does in fact constitute the full offence. An attempt to escape, on the other hand, would seem to apply to an instance where a prisoner in handcuffs was found to be opening these instruments prior to decamping, or a person confined in a locked cell was discovered opening the door,

The lock of which he had picked, but had not put the whole of his intention into effect by absconding through the open door." Accused received a sentence of three months imprisonment for escaping from lawful custody.

180. Abraham s/o Lanjon v. R., Crim. App. 10-D-68, 14/3/68, Saidi J.
Accused was convicted of bicycle stealing, primarily upon evidence that the stolen bicycle was found at this house. His defence was that the bicycle had been left there by his brother-in-law, whose whereabouts were unknown. There was evidence that the theft took place in June 1967 and that the brother-in-law had disappeared the preceding February from the area.

Held: (1) Accused need not prove his innocence or prove his defence to the same extent that the prosecution must prove the charge; it is enough if he raises a reasonable doubt as to his guilt. (2)"(T)he question of estimates of dates as with estimates of time and distance, is not to be taken too seriously with African villages, as they may and often do give wrong dates without intending to do so because they really do not have very much to do with dates in their daily lives." Conviction quashed.

181. Nwiroma Alli Hussein Nyamakaba v. R., Crim. App. 47-D-68, 15/3/68, Georges C. J.

Accused was convicted of theft by public servant. A statement written and signed by accused acknowledging a shortage of funds was admitted in evidence. Accused testified that this statement was induced by fear after an accountant had threatened to " make things worse for him" unless he signed. Accused also claimed that a trial within a trial should have been held as to the admissibility of this statement. The prosecution also introduced the testimony of accused 's assistant who had had access to the funds.

Held: (1) The statement acknowledging the shortage did not constitute a confession to theft since many explanations of the shortage not involving criminal conduct are possible. Therefore, the sections of the Tanzania Evidence Act, 1967, concerning confessions are not applicable to the statement. The court stated, obiter, that even if the statement had constituted a confession, it would have been admissible. In contrast to the Indian Evidence Act, section 29 of the Tanzania Evidence Act, 1967, does not prohibit evidence of a confession merely because it resulted from a threat, inducement or promise. The confession is inadmissible only if the inducement was of such a nature as was likely to cause an untrue admission of guilt. The Court also noted that the evidence did not support accused 's contention that the statement was induced by fear. (2) There was no objection at the time of the introduction of the statement, and so no trial within a trial was possible. In any event, the procedure of a trial within a trial is "highly artificial" where no assessors take part in the trial. It may be convenient to hear all

of the evidence, including that of the accused, which concerns the admissibility of the statement at that stage of the trial, but it is not necessary to then re-record such evidence. If, as in this case, the objection comes at the end of the case, the magistrate can with equal facility rule then on the admissibility of the statement.

(3) Although the rules concerning retracted confessions do not strictly apply to mere admissions, a court should examine the circumstances of an incriminating admission with great care before relying upon it. The trial court did so in this case. (4) The testimony of the assistant could be considered that of a person with an interest of his own and as such would require corroboration. [Citing R. v. Parater, (1960) 1 All E. R. 298]. However, on the evidence in this case it can reasonably be held that the assistant was not a suspect an thus had no interest of his own.

182. Thabiti Ngalile v. R., Crim. App. 902-D-67, 7/2/68, Biron J.

Accused was charged in two separate counts with shopbreaking [P.C. s. 296(1)] and stealing [P.C. s.265] and was convicted on both counts. Both counts referred to the single act of breaking into complainant's shop. A confession which accused made to a TANU ten house leader was admitted into evidence. A second confession, which was made to police officers after accused had been cautioned, was also admitted officers after accused had been cautioned, was also admitted.

Held: (1) The offence of shopbreaking and stealing created by Penal Code section 296(1) is a composite offence in itself. The second count of stealing was therefore superfluous. (2) The confession to the Police Officers was inadmissible under section 27 of the Evidence Act, 1967 even though accused had been cautioned. (3) "Although there appears to be a not infrequent practice of ten-cell leaders exercising powers of arrest, they have in fact no greater powers of arrest, they have in fact no greater powers of arrest than those of an ordinary citizen." Therefore they should not be equated with police officers for the purposes of sec-

tion 27 of the Evidence Act, and the confession made to the ten house leader was admissible. (4) The introduction of the confession to the Police Officers did not prejudice accused. Conviction on first count affirmed; sentence on second count set aside.

183. Wilson s/o Ollo v. R., Crim. App. 79-M-68, 11/3/68, Mustafa J.

Accused was convicted of arson, which conviction was based entirely on an identification by complainant of accused as the arsonist. It was night time and complainant only saw the arsonist from the back as he was running away, but complainant said she recognized that person as accused because of the clothes he wore. Accused, under oath, denied setting the fire.

Held: "Where the evidence which implicates an accused is entirely that of identification, that evidence must be water-tight before a conviction could be founded thereon." (Citing R. v. Eria Sebwato, 1960 E.A. 174). Conviction quashed.

184. Ramadhani Tendwa v. R., Crim. App. 166-A-67, 16/3/68, Seaton J.

Applicants were convicted of purchasing 50 bags of maize without a licence from the National Agricultural Products Board, and the grain was forfeited by court order. The High Court quashed that conviction, whereupon applicants sought to reclaim their grain, only to find that the

Police had since sold it at public auction, for shs. 1,126/80. Applicants claim the maize to have been worth Shs. 1,900/- and seek either that amount of money, or else 50 bags of maize. At issue is the question of whether the trial court should have allowed applicants to adduce evidence as to the market value of the maize at the time it was sold by the police, or whether, as the district court held, recovery was limited to Shs. 1,126/80.

Held: “In resolving these problems, it may be helpful to refer to the Government Proceedings Act, 1967. That Act provides remedies against the Government for liability in contract, quasi-contract, detinue, tort and in other respects as if it were a private person. The applicants’ substantive rights against the Government, therefore, are the same as if they had suffered damages or loss through a quasi-contractual breach or tortuous act of any private citizens.” Applicants were awarded Shs. 1,126/80 but without prejudice to the applicants right to bring a civil suit against the Government for recovery of the difference, if any, between the amount recovered here and the market value of the maize at the time of sale.

185. R. v. Stanslaus Joseph Sinyangwe, Crim. Rev. 12-M-68, 11/3/68, Mustafa J. Accused sent a letter to complainant threatening to kill him. He was convicted in district court of doing an act likely to cause a breach of the peace. [P.C. s. 89(2)(b)].

Held: (1) These facts constitute a specific offence, that of threatening in writing to kill another. (P.C. s. 214). (2) Since homicide offences, including a violation of section 214, are triable only by the High Court, the proceedings below were declared a nullity.

186. R. v. Mahumudu s/o Kibwana, Crim. Sass. 230-D-67, 15/2/68, Hamlyn J. Accused ’s only possible defence to a murder charge was that shortly before the killing he heard deceased say to someone else that he (deceased) had signed a paper authorizing the police to beat accused.

Held: “As a general rule … spoken words alone cannot be the basis for provocation… but variations of (the rule) may arise by virtue of the application of section 200 of the Penal Code in special instances among particular communities. Where spoken words are accepted in customary view as constituting provocation, the words must be of so devastating a character, of such over-bearing force, as to shatter the self-control of a normal person of that community.” Accused was convicted of murder and sentenced to suffer death by hanging.

187. R. v. Elieza Sangwa, Crim. Rev. -/D/68, 16/3/68, Biron J.

Accused was charged with failing to comply to with the conditions of a removal order. After the close of the prosecution case, the prosecution stated that accused was a recluse, and the trial magistrate noted in the record that accused appeared to be of unsound mind. On the basis of accused 's conduct it was ordered that he be detained in safe custody, and a copy of the order was sent to the Second Vice-President. No medical examination was carried out.

Held: (1) Criminal Procedure Code sections 164(3) (4) and (5) provide that if at the close of the prosecution case it appears that a charge has been made out, the court should inquire into the fact of unsoundness of mind and may order that accused be detained for the purpose of a medical examination or that bail be granted on condition that accused submit to such an examination. If, after considering the medical report and other evidence the court is of the option that the accused is of unsound mind and is incapable of making a defence, it shall order that accused be detained in safe custody and transmit a copy of the order to the Minister. (2) Pursuant to these provisions, a medical report is a condition precedent to an order of detainment. The order in the present case was thus ultra vires. The High Court ordered that accused be medically examined as to his mental condition and that the case then the remanded to the trial court.

188. Yusufu Kabong v. R., Crim. App. 64-D-68, 20/3/68, Biron J.

Accused was convicted of an offence covered by the Minimum Sentences Act. Whether the Act applies to accused depends on whether he is a juvenile ---i.e., whether he is under 16. The charge sheet listed his age as 16; a medical examination found his age to be 16 or 17. The record contained no mention of the qualifications or experience of the medical officer.

Held: “However high (the medical officer’s) qualifications and the extent of his experience, I am very far from persuaded that a doctor, particularly having regard to the equipment here (the case originated in Tukuyu, Rungwe District,) could give a definite assessment in respect of age, that is, whether a person has reached the age of 16 or not, with that degree of certainty required in a criminal case.” Accused to be treated as a minor.

189. Chacha s/o Matiku v. R., Crim. App. 891-D-67, 15/3/68, Georges C. J.
Accused was convicted for a crime involving theft (the exact charge was not specified) Two extra-judicial statements made by the accused were apparently introduced as part of the prosecution case. Accused chose to make an unsworn statement. The record on this point reads, “Towards the end of July 1966. (Both statements of accused adopted and is informed to add on what he has already stated).” The Court stated, obiter; If accused adopted his earlier statements, he should be recorded as having said so as part of his unsworn statement at the trial. “It may seem a tedious waste of time to record again faithfully matter already noted elsewhere, but the exercise must be carried out unless the accused person says otherwise . He is then in a position to explain inconsistencies, and in any event differences between his account in court and his previous account may be of great significance.

190. R. v. Vendelin s/o John Costa, Crim. Rev. 16-A-68, 21/2/68, Seaton J.
Accused were convicted of shop-breaking and stealing [P.C. s. 296(1)]. They broke into a shop where they stole Shs. 88/50 and bottles of liquor valued at about Shs. 250/- The liquor was dropped when

Accused were discovered by a prosecution witness. It is not clear how many bottles were salvaged, or what the value was of those that were broken. An order for

compensation was made as follows; “Accused to refund to P.W.1 Shs. 88/50 and price of the other drinks distress in default.”

Held: (1) Section 6(1) of the Minimum Sentences Act, applicable here, requires an order for compensation where the accused has obtained property as a result of a scheduled offence. The word “obtained”, however, means more than that the accused has “had possession” of goods; it means that he must have made some gain on the transaction, since the purpose of the provision is to “ensure that the offender does not receive any benefit from the offence but is made some gain on the transaction, since the purpose of the provision is to “ensure that the offender does not receive any benefit from the offence but is made to disgorge ……” all gains. Here, accused made no such gain. [Citing Sajile Salemulu v. r. (1964) E. A. 341]. (2) Compensation may also be ordered under section 176 of the Criminal Procedure Code, upon the showing that some person has suffered some material loss or personal injury because of the offence. The Code specifies that the liability be determined as in a civil case. Such order is not justified here, as it would not be in a civil case, “without more precise proof of damages.” (3) Under the compensation provision of the Minimum Sentences Act, compensation is recoverable as a civil debt and “an order for distress in default of payment … is bad in law.” [Citing Mwakapesile v. R., (1965) E.A. 407]. Compensation reduced to Shs. 88/50.

191. R. v. Ramadhani Alli, Dar es Salaam Crim. Case No 3881 of 1967,29/3/68, Inspection Note by Saudi J.

Accused was convicted of assaulting a police officer [P.C. s. 243(b)], and sentenced to receive 12 strokes of corporal punishment. Such a sentence would be proper only if the assault was of an aggravated nature.

Held: “(A)ny form of assault that caused serious impairment or disability to the victim, such as disfigurement, maiming and the like, e.g., cutting off the victim’s fingers, hand, ear or nose, or causing him to sustain serious injury such as a fractured arm or leg or any other part of the body by violent or wild attack would constitute an assault of an aggravated nature.”

192. Adija Malifeza v. R., (P.C) Crim. App. 12-D-68, 1/3/68, Saudi J.

Accused was convicted of selling native liquor [Cap. 77, s. 32], and fined Shs. 350/- or distress. She was a first offender, and there was no evidence on the record showing her financial position; it did appear that she was "a village woman without any regular income." After she appealed to the District Court, the Primary Court which had convicted her ordered the sale of her house in an attempt to levy distress. The sale was completed by the time the District Court partly allowed her appeal, lowering the sentence to Shs. 175/- or distress.

Held: (1) Because the accused is a first offender, and because the record is devoid of information as to her ability to pay a large fine, a fine of only Shs. 50/- was imposed. (2) Once an appeal against its order is lodged, the Primary Court is not entitled to levy distress on accused 's house. (3) The sale is null and void, and the sale proceeds must be refunded to the purchaser of the house at the purported auction.

193. Amiri Salehe v. R., (PC) Crim. App. 23, 24-D-68, 1/3/68, Saidi J

Accused was convicted of using abusive language, brawling and threatening violence, conduct likely to occasion breach of the peace, and damage to property [P.C. ss. 89(1)(a) and (b) and 326] as a result of a fight in a pombe shop. He was given a sentence not specified in the High Court judgment.

Held: Although the accused had behaved in " a very reckless manner toward the complainants", sentence should be reduced in view of the facts that accused "appeared to have been drunk and …… was a first offender …." Sentences of shs. 25/- or one month's imprisonment (abusive language, conduct likely to occasion breach of peace) and shs. 20/- or one month (brawling, property damage) were imposed.

194. R. v. Juma Swalehe, Crim. Rev. 6-D-68, 26/1/68, Duff J.

Accused was convicted in Primary Court of stealing by servant [P.C. s. 265,271], and received two sentences, both under the Minimum Sentences Act. The District Court, hearing the matter on confirmation of sentence, held that only one sentence should have been imposed and the Minimum Sentences Act did not apply to the offences charged. An order for 15 month's imprisonment was substituted.

Held: (1) Although the charge involved two sections of the Penal Code, only one sentence may be imposed for the offence of stealing by servant. (2) This offence is not among the offences scheduled in the Minimum Sentences Act, and a sentence there under is improper. (3) The sentencing power of an appellate court ---i.e., "a superior court exercising its revision jurisdiction" --- is "measured by the power of the court from whose judgment or order the appeal before it has been made or is being revised ….." The District Court is therefore limited to imposing the maximum sentence that could have been imposed by the Primary Court, 12 months' imprisonment. Sentence of 9 months imposed, on consideration of other factors.

195. Issa s/o Amri v. R., Crim. App. 40-D-68, 13/3/68, Biron J.

Accused was discovered squatting in a doorway late at night. Found in his pocket was a set of keys which he claimed to have found earlier. He was convicted of being in possession of housebreaking implements [PC s. 288(c)] and being a rogue and vagabond [PC s. 177(4)].

Held: (1) Although the possession of the keys by accused is suspicious, it does not establish that accused was intending to use them for housebreaking purposes. Conviction quashed. (2) A vagabond is a suspected person who has no visible means of subsistence and cannot give a good account of himself. [Citing 2 T.L.R. 40]. Accused fitted this description, and thus was properly convicted. (3) The charge should have been laid under sub-section (3) and not sub-section (4) of section 174 of the Penal Code, but this defect was curable by section 346 of the Criminal Procedure Code.

196. Paskale s/o Stephano v. R., (PC) Crim. App. 126-M-68, 15/3/68, Mustafa J.
Accused, a servant of complainant was convicted, inter alia, of entering a dwelling house with intent to commit a felony therein [PC. S. 295}, and stealing [P.C. s. 265}.

Held: Accused had free access to the house of his employer. Thus it cannot be inferred from the theft of goods alone that accused entered the house with intent to commit a felony. Conviction quashed. (Conviction of theft upheld.)

197. Juma s/o Athumani v. R., Crim App. 915-D-67, 9/2/68, Biron J
Accused was convicted of simple theft [P.C. s. 265]. He had presented a cheque for payment at a bank, and was alleged to have received Shs. 300/- more than the amount indicated thereon, due to a cashier's mistake. He denied having received the additional amount at all. When questioned on the same day at his office, he was found to be in possession on only shs. 110/-.

Held: Accepting that accused did receive the additional amount, it is not clear that he discovered the mistake at the time he received the money. The point of law raised is "not free from difficulty and it is a hoary old one. There are numerous --- and not all of them reconcilable --- cases as to whether money legitimately and innocently received by mistake …. And subsequently converted by the receiver constitutes theft." The same as the English Larceny Act, under which "there must be an animus furandi at the time when the defendant takes the property ……" [Quoting Moynes v. Cooper (1956) 40 Cr. App. R. 20]. The case of Russell v. Smith (1957) 41 Cr. App. R. 198, apparently to the contrary, is distinguishable; in that case, which involved sacks of coal, the defendant could "not be said to have received and been in possession of (the goods) until he discovered their presence, and ….. there and then misappropriated them …." The evidence in this case does not show a taking or misappropriation with animus furandi.

198. Saudi Ally v. R., Crim. App. 211-A-67, 21/2/68, Seaton J.

Accused was convicted of stealing from a motor vehicle. [P.C. s. 269 (c)]. He entered a truck and sorted through its contents picking out what he desired. Just as he was about to depart, the owner arrived and locked him in the truck.

Held: The asportation requirement for a conviction of simple theft is fulfilled by any movement of the item involved. Here, however, the charge was the graver one of stealing from shown not merely that the items were moved, but that they were removed from the vehicle.

199. Keya Iddi s/o Hassani v. R., Crim. App. 37-D-68, 13/3/68, Biron J.
The magistrate, upon being convinced that the child being offered as a witness understood the duty to speak the truth, swore him as a witness.

Held: The child should not have automatically been sworn. The matter is governed by section 127(2) of the Evidence Act. First it must be determined whether the child is possessed of sufficient intelligence to justify receiving his

Evidence, and that he understands the importance of speaking truthfully. If this requirement is fulfilled the child may testify, but before he is sworn it must be determined whether he understands and appreciates the nature of an oath, a far more complex matter than knowing that one should not lie. Only if the child understands both these concepts should he be sworn.

200. Kiboga s/o Mahenga v. R., Crim. App. 47-D-68, 22/3/68, Mustafa J.
Accused was charged with taking part in a corrupt transaction. [Cap. 400, Prevention of Corruption Ordinance, sec. 3(2)]. P.W.3 made a statement favorable to accused which was allegedly contrary to an earlier written statement that he had made, whereupon the prosecution asked that he be treated as a hostile witness, which request was granted. The witness' earlier statement was not produced in court, nor was accused given an opportunity to cross-examine the witness.

Held: The statement should have been produced in court, and accused should have been given the opportunity to cross-examine the witness. The magistrate treated the witness' earlier statement as substantive evidence, accepting it as the truth rather than the statement made in court by the witness. This was unwarranted and highly prejudicial to the accused. Conviction quashed.

201. Sila s/o Mayoyi v. Mululu s/o Nhambali, (PC) Civ. App. 168-D-67, 3/4/68, Hamlyn J.

The parties disputed as to the number of cattle agreed to as bride-price. One of appellant's grounds of appeal was that he had some new witness who would testify for him.

Held: "It is only in very exceptional circumstances that this court will make an order sending back a case for additional evidence to be taken; …. When a case is called …. Each party is expected to attend with his witnesses … Facilities are at the disposal of the parties to ensure the presence of reluctant or laggard witnesses .. Having taken no steps to ensure the presence of the persons whom the appellant now names, he cannot ask to reopen the matter". Appeal dismissed.

202. Masenha Musile v. Sabe Balalu, (PC) Civ. App. 206-D-67, 16/4/68, Saudi, J.

At issue is the repayment of bridewealth to the husband upon the dissolution of a customary marriage which had lasted " a long time" and which union produced three offspring . Both the primary and district courts ordered the return of part of the original bride wealth to the husband.

Held: The husband was entitled to the return of none of the bridewealth which he had originally paid because of the long duration of the marriage and the fact that there were children. [Citing Customary Law Declaration, para. 52(b)]. Ordered that no bride wealth be refunded to appellant.

203. Nyungwi s/o Nhambali v. Bozzi s/o Lyamgholo, (PC) Civ. App. 166-D-67, 10/4/68, Biron JH.

Plaintiff, upon the dissolution of his marriage to defendant's daughter after 14 years and 7 children, sought the return of the bride wealth he had paid. No evidence was adduced as to who was the guilty party. The primary court awarded plaintiff 11 cattle and 7 goats. The district court reduced this award to 7 cattle and 6 goats, because of the long duration of the marriage and the birth of children. Plaintiff suggested that these were irrelevant factors.

Held: The Law of Persons [G.N. No. 279/63] specifically provides that both the number of years of married life, and the number of children borne by a wife to her husband are material and relevant factors in determining the amount of bride wealth to be returned to the husband upon dissolution of the marriage. Decision of the district court was upheld.

204. Henock s/o Mtoi v. Frida d/o Yafeti, (PC) Civ. App. 155-D-67, 1/4/68, Biron J.

Plaintiff sought Shs. 100/- as maintenance for her child, which she alleges that defendant sired. Defendant admitted that he lived with plaintiff for 10 years and was the father of four previous children born to plaintiff. He claimed that he had not had sexual intercourse with plaintiff since July, 1965. The child was born in September, 1966. The primary court, while tending to believe that defendant was the father of the child, decided against plaintiff because there was no independent evidence of inter course between the parties after July, 1965.

Held: The primary court misdirected itself as to the burden of proof. "If a woman is living with a man in concubinage, he is held responsible for her pregnancy. If the man wants to deny paternity, it is up to him to prove his claim. [G.N. No. 279/63, s. 188. Also citing s. 183]. Judgment for plaintiff, relief as prayed.

205. Bigwomunda Mulaula v. Bahanda Rwojo, (PC) Civ. App. 135-D-67, 25/4/68, Saudi J.

Deceased made a will in which he made plaintiff the guardian of his daughter; his property to pass to plaintiff upon the daughter's death, thus disinheriting deceased's brother, the defendant. The will was not signed by the testator or the four witnesses; no clan members were called, and no reason was given for the disinheritance. Upon the daughter's death defendant took possession of a shamba which was part of deceased's estate, and plaintiff then sued for possession.

Held: Where a testator intends to disinherit the members of his family by means of Kubachwa, at least ten witnesses must be called, including either close relatives of the testator or the head of his clan or clan sub-division. The testator must give an explanation for his actions, and the prospective witnesses are to refuse to witness the will if not satisfied with his reasons. [Citing Zelamura Kanyamajugo v. Mtungi Katabazi, Civ. App. 2 of 1960, Local Digest No. 39 Cory, Customary Law of the Haya Tribe, paras. 41, 42, 44, 46, 48]. The Court stated, obiter, "I personally feel that 'kubachwa' is a practice that should not be encouraged as it takes its roots from the base nature of man and fosters hatred." Defendant's appeal dismissed.

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206. Miss Asia d/o Amiri v. Ahmed s/o David, (PC) Civ. App. 67-A-66, 21/3/68, Seaton J.

Plaintiff, the former wife, sued defendant, the former husband, for custody of a child. Plaintiff and defendant eloped in 1961 after defendant, a Christian, had agreed to adopt plaintiff's Muslim faith. At that time, dowry was paid according to Pare customary law, but they were not married until over a year later, and the child was born in the interim. The marriage was performed according to Islmic law after defendant conversion. The parties were divorced in 1966. At the time of the suit, defendant had remarried but plaintiff had not, and the child was living with defendant.

Held: (1) According to Islamic law if a man commits zinaa (fornication or adultery) the child is considered to be the child of the mother only. However, a

child is legitimate if born as a result of a regular or irregular marriage (the latter being a marriage prohibited because of difference of religion) or by "acknowledgement." [Citing Mulla Principles of Mohamedan Law, (15th ed. 1961) p. 282]. (2) According to Pare customary law, "A father has the right to legitimate his illegitimate children at any time by marrying their mother." [S. 181 A of the Law of Persons, G. N. 279 of 1963, as applied by Local Customary Law (Declaration) (No. 2) Order, G. N. 130 of 1964]. (3) Since it appears that defendant has legal custody under both Islamic law and Pare customary law, and because it is in the best interests of the child, plaintiff's appeal must be dismissed. The Court stated, obiter, that had defendant not remarried, considerations concerning the welfare of the child might have warranted a different result.

207. William Rubai v. Majura Ebwabi, Civ. App. 231-M-67, 25/4/68, Hamlyn J.
Plaintiff sued defendant for Shs. 1,336/-, the value of goods allegedly given as dowry when plaintiff married defendant's daughter. There was evidence that plaintiff's wife had been driven from the matrimonial home after one year because of the actions of plaintiff.

Held: Since the wife was in no way at fault in leaving the matrimonial home and returning toher parents, any dowry paid is not returnable. Plaintiff's appeal dismissed.

208. Terewaeli W. Swai v. Elingaya w/o Terewaeli, (PC) Civ. App. 1-A-68, 25/3/68, Platt J.
Plaintiff brought claims against her husband for maintenance, on behalf of herself and her apparently illegitimate child, both for the period in which she and defendant had lived together in the matrimonial home, and for a period after he had left her. The judgment of the District Court included an award of Shs. 300/- for the latter period. An award for the earlier period was not contested in the appeal.

Held: There having been no divorce, the husband remained responsible for the maintenance of his wife during the latter period. Defendant's appeal dismissed.

209. Barthazar Barongo v. Mary Benedicto, Dist. Ct. Civ. App. 5-Shinyanga-66, 23/3/68, Mustafa J.

Plaintiff husband obtained a divorce in the Primary Court of Shinyanga. There was evidence that plaintiff and defendant had been married for fifteen years and had six children, but that no bride wealth had been paid at the time of the marriage. The primary court heard the case without assessors, and the appeal to the district court was heard with assessors, but the magistrate did not obtain their opinion before giving judgment. The case was referred to the High Court by the supervisory magistrate.

Held: (1) Section 5 of the Law of Persons [G.N. 279 of 1963] provides; "The payment of bride wealth is not essential for the validity of a marriage." There was other evidence of a marriage here, and therefore the granting of a divorce was proper. (2) The primary court should hve sat with assessors and the district court should have taken the opinions of the assessors. No order of revision made.

210. Kasunga Mwakitalima v. Kitindisya Mapata, (PC) Civ. App. 217-D-67 11/4/68 Saudi J.

Plaintiff sued for the value of trees cut by defendant, his neighbour. Defendant argued that the former owner of the shamba in question, plaintiff's younger brother, had abandoned the land in 1955, and that the village headman had allotted it to defendant in the same year. Defendant claimed to have planted several trees since that time. The dispute between plaintiff and defendant originated in criminal proceedings brought in 1966 by plaintiff.

Held (1) The allotment, if any, by the village headman, could not be considerer lawful, as it was made in the same year as the alleged abandonment; the District Council by-laws require a waiting period of 2 years. (2)Defendant cannot

claim the land by virtue of adverse possession, because 12 years had not passed since he occupied it.

211. Akilimali Rumisho v. Kaunara Kisamo, (PC) Civ. App. 98-A-66, 21/3/68, Seaton J.

Plaintiff sued for possession of a shamba which he had inherited from his father and which his father had in turn inherited from the plaintiff's grandfather. Defendant, the half-brother of plaintiff's father did not claim a right of possession, and the principal issue concerned compensation for unexhausted improvements. Defendant had originally been given possession by plaintiff's father in 1930. The primary court found that the shamba was under cultivation in 1930 but had fallen into neglect at that time. It awarded defendant Shs. 2,315/-, being half the value of 643 banana trees valued at Shs. 10/- each, which were assessed with the aid of agricultural experts at the time of the trial. On appeal, the district court, without the aid of experts, found that the land was uncultivated in 1930 and awarded Shs. 4,630/-, the full value of the banana trees plus Shs. 230/- for pineapple and sugar cane crops which were found on inspecting the shamba.

Held: (1) Under Chagga law, usufructuary rights over unoccupied lands were distributed by the Chief and were thereafter called a "kihamba cha asili". Such land could, as in the present case, be given out on lease upon payment of "Masiro". However, the original holder or his successor has a right of repossession without time limit, although his burden of proof increases with the length of the time interval. [Citing Chief Willibald Kirita v. Salema Fumba and Ex-Chief Joseph Kirita, Moshi Appeal No. 9 of 1946; Yohanes Matsindiko v. Yohanes Moruwera, Moshi Appeal No. 5 of 1953; Joseph Andrea v. Ndebyaukina Kitumanga, Moshi Appeal No. 53 of 1959; Phillip Mtusha v. Stephen John, Local Courts Appeal No. 59 of 1962 (see Digest of Appeals from Local Courts, Vols. 1, 11, V and

X)] This was a “kihamba cha asili” and it is clear that plaintiff has a right of possession despite the delay in making his claim. (2) An appellate court should not, without good reason, upset the findings of fact on which a trial court bases its estimates of damages, and no such good reason has been shown in the present case. Judgment of primary court restored.

212. Izaak Sempanama v. Leokadia Mwombeki (PC) Civ. App. 29-D-67, 20/4/68, Saudi J.

The parties, members of the Haya tribe, ran a partnership business whose assets consisted of 5 head of cattle. Disagreement between the parties was hampering the operation of the business.

Held: In view of the fact that the business could not have continued without further disagreement between the partners, the Court ordered the partnership to be wound up and the assets distributed equally between the partners. Each was to get two head of cattle; the fifth cow was to be sold and the proceeds divided between the partners.

213 Mwananchi Engineering & Contracting Co. v. S. N. Teja, Misc. Civ. App. 17-D-67, 25/4/68, Biron J.

An employee of appellant company was housed in the ground floor of a building of flats owned by respondent. Respondent sought to convert the ground floor of his building into commercial premises, to which end he had obtained the necessary permission from the Minister that the re-development of the ground floor was in the public interest. The Rent Restriction Board granted respondent possession of the ground floor.

Held: (1) Section 19(1) of the Rent Restriction Act provides that no order for the ejectment of a tenant shall be made unless “….. (n) the landlord requires possession of the premises for the purposes of re-development otherwise than as a dwelling house, and the Minister has certified that such re-development is in the public interest.” Section 19(11) makes such certificate admissible before the Board or a court. However, section 19(2) of the Act provides that recovery of

possession of premises shall granted only if the Board is convinced that "…. Having regard to all the circumstances of the case it is reasonable to make such an order." (2) The certificate from the Minister is conclusive on the issue of the public interest. The Board or a court may not make a separate inquiry as to whether converting premises to business use would be in the public

Interest. (3) However, before an order of ejectment is made the court (or Board) must be affirmatively convinced that it is "reasonable" to eject the tenant. (4) As there was sufficient material before the High Court it proceeded to determine the question of reasonableness. (5) The landlord was granted vacant possession, but such possession "…… is not to be delivered up until reasonable alternative accommodation is available to the tenant, that is, the person in actual possession, as opposed to his company."

214. Shabani s/o Ismael v. R., (PC) Crim. App. 10-A-68, 11/4/68, Platt J.
Accused and one Tabu were charged jointly with affray. [P.C s. 87]. Accused pleaded guilty and was convicted. Tabu pleaded not guilty and at her trial there was evidence that she had taken no part in any fight but had been assaulted by accused. The trial court held that there was no case for her to answer. It is undisputed that no person other than accused and Tabu took part in the transaction.

Held: (1) The elements of the offence of affray are (a) that there was a fight, (b) that the accused took part in it, and (c) that the fight occurred in a public place. (2) With regard to element (b), the word 'fight' implies a combat of two or more persons in such a manner as to cause a breach of the peace. Thus, if only two person are involved and one of the two remains passive or acts in self-defence, the other person cannot be guilty of affray, although he may be guilty of assault. [Citing Sharp & Johnson v. R., (1957) 41 Crim. App. Reports 86]. (3) No other conviction can be substituted in this case. The Court stated, obiter: Where

one of two persons charged with affray pleads not guilty and the other pleads guilty, it would be proper to enter a plea of not guilty on behalf of both accused. Conviction quashed.

215. Romani Alfred v. R., (PC) Crim. App. 60-A-67, 3/4/68, Platt J.
Accused asserts that he was not permitted to call certain witnesses, or to produce certain physical evidence. He seeks to have his case reopened so he can fully defend himself.

Held: "There is nothing on the record to show that (accused) was given the opportunity to call witnesses and that he declined to do so. As there may be some merit to (accused 's) complaints …. and as such evidence may affect the merits of this case …. the Court ordered that the record of the case be transmitted to the district court for the hearing of further evidence. (Emphases added in both instances.)

216. William Msaka v. R., Crim. App. 78-D-68, 8/4/68, Hamlyn J.
Accused were convicted of corrupt transaction with agent [Cap. 400, s. 3(1)]. The district magistrate's judgment briefly summarized the prosecution's evidence, but was overwhelmingly devoted to a critical analysis of the defence.

Held: (1) While the Court may overlook errors in trial court proceedings which do not occasion a failure of justice, the Court must be convinced that such errors "did not materially affect the conclusion … that despite such error the trial court would inevitably have reached the same finding." (2) The magistrate's failure to analyse the

Prosecution case makes it impossible for the Court to analyse his finding. It is thus necessary to allow the appeals, "…… for the record of the trial does not disclose …. That the correct principles of justice were observed."

217. Monanka Nyamweli v. R., Crim. App. 205-M-68, 11/4/68, Mustafa J.
Accused pleaded guilty to brawling (P.C. s. 89(1)(b)]. The particulars of the offence were that he created a disturbance at a public meeting" …. By making excessive noise and shouting while the meeting was going on."

Held: P.C. s. 89(1)(b) makes it an offence to "….. create a disturbance in such a manner as is likely to cause a breach of the peace." There was neither averment nor evidence here that the accused 's shouting was likely to cause a breach of the peace. Consequently the plea of guilty was a nullity. Conviction quashed.

218. Jairosi Yohane v. R., Crim. App. 74-D-68, 8/4/68, Hamlyn J.
The district court, in hearing this case on appeal from a primary court, summarily rejected the appeal.

Held: Section 17 of the Magistrates' Courts Act, Cap. 537, sets out the powers of district courts in dealing with appeals from primary courts; now here is the power granted to summarily reject appeals from primary courts. The power of summary rejection of appeals is granted to the High Court alone. [Citing Cap. 537, s. 24 (1)]. The district court should have "dismissed" the appeal from the primary court, confirming the conviction and sentence of that court.

219. Enock s/o Shombe v. R., Crim. App. 119-D-68, 27/3/68, Biron J.
Accused was convicted of robbery with violence. Complainant's wife identified him at the trial; otherwise, the evidence was entirely circumstantial; that accused was arrested in possession of some cigarettes (which were identified as stolen from the serial numbers on the packets) and some cash, and that shortly after the robbery he had behaved in a some what spendthrift manner.

Held: "(T)he learned magistrate very properly directed himself on the circumstantial evidence; 'the inculpatory facts were inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt'." Conviction upheld.

220. Hasoni Abasi s/o Mohamed v. R., Crim. App. 27-M-68, 23/3/68, Mustafa J.
Accused was convicted of stealing from the person of another, leaving a moving train at an unappointed place, and escaping from lawful custody. He was given a single sentence of 3 year's imprisonment and 4 years' police supervision, covering all charges. During the trial, after the prosecution had closed its case and accused had given his own evidence, the magistrate recalled three prosecution witnesses "….. to fill a gap in the prosecution case as regards the identification of the (accused)." Having convicted accused, the prosecution presented a certificate of previous conviction, all of which

The accused denied. After an adjournment to permit the prosecution to prove the convictions, the magistrate admitted the certificate and on that evidence alone proceeded to pass sentence.

Held: (1) The omnibus sentence was improper, but the error is curable under section 346 of the Criminal Procedure Code. (2) The calling of prosecution witnesses to "fill a gap in the prosecution case," after the appellant had given evidence, was a "fatal" error by the magistrate. (3) The admission of the challenged certificate of prior convictions without further proof was improper, under Section 143(2) of the Criminal Procedure Code. Convictions quashed.

221. R. v. International Trading and Credit Company or Tanganyika, Ltd. Crim. App. 722-D-66, 5/4/68, Duff J.
This was an appeal by way of case stated. Accused (Intrata) was charged with selling food unfit for human consumption [Food and Drugs Ordinance, Cap. 93, ss. 12 (1), 26]. The sole question was whether the three transactions in question amounted to "sales". In each case Intrata transferred adulterated cassava belonging to the Kigoma Co-operative Union to the complainants. Invoices were sent in Intrata's name and contained no reference to the co-operative, and pay-

ment was to Intrata, which then remitted the funds to the Co-operative, subtracting a small commission fee.

Held: "…. (T)he contracts were made between the merchants and the respondent company, no reference whatsoever being made to the co-operative union, and these contracts disclose a sale …." [Citing Hotchin v. HIndmarsh (1891) 2Q.B.189; Preston v. Albuery (1963) 3 All E. R. 897; Lester v. Balfour (1953) 2Q.B. 168].

222. R. v. Musua d/o Shumbi, Crim. Sass. 188-Dodoma-67, 22/2/68, Hamlyn J.
Accused is a witch doctor. Deceased, a one year old child, was sick, whereupon the parents brought the child to the accused. She put some herbs in almost boiling water and then poured the hot mixture over deceased, who died two days later of shock due to burns. Accused pleaded guilty to manslaughter, saying in mitigation: "I did not think the hot water would kill the child."

Held: "The act of which [accused] is guilty is on of the grossest negligence and any ordinary person must know that to pour nearly boiling water over anyone, particularly a small child, must result in grave injury…." Taking into account that accused was a first offender and had been in remand for 6 months, sentence was set at 18 months imprisonment.

223. R. v. Hussein s/o Hamza, Dist. Ct Crim. Case 470-Korogwe-67, 23/4/68, Inspection Note by Biron J.
Accused, who was charged with arson, was sent by the trial magistrate for a mental examination, He was found to be of unsound mind, whereupon the record of the case was forwarded to the Minister of Justice.

Held: (1) Before sending the record to the Minister of Justice, the trial magistrate should have made a finding that the accused is of unsound mind and consequently incapable of making his defence. [Citing Crim. Proc. Code.

s. 164(6)] (2) "The court should also …. Before making any finding as to an accused 's mental condition, consider and rule as to whether a prima facie case against him has been established." If not, the case should simply be dismissed.

224. Athuman Kitalama v. R., Crim. App. 76-D-68, 5/4/68, Biron J.

Accused was convicted on his own plea of giving false evidence at a trial.

Held: P.C. s. 102(1) provides: "Any person who ….. knowingly gives false testimony touching any matter which is material to any question then depending in the proceeding … is guilty of the misdemeanor termed 'perjury'." To constitute perjury, the testimony must be material to the case. As there was no proof that the false evidence given here was material to the case, one of the elements of the offence was not established. Conviction quashed.

225. Sephen s/o Munga v. R., Crim. App. 186-D-68, 17/4/68, Hamlyn J.

Accused was initially charged with attempted murder, to which he pleaded not guilty. After the prosecution had presented its evidence, the magistrate, finding that the evidence did not show an intent to murder, altered the charge to one of causing grievous harm. The appellant was not required to plead to this charge, nor was he given the opportunity of recalling the prosecution witnesses for cress-examination. After making his defence accused was convicted of causing grievous bodily harm and sentenced to 18 months imprisonment.

Held: The trial was a nullity. "Until a charge is put and an accused 's plea recorded there can be no basis for a trial to proceed and the accused person is not properly before the court for trial and determination of his case." The proper course for the court to have taken, upon altering the charge was to so inform him of its action and have him plead to the new charge. Then it should inform him that he had the right to recall any or all of the prosecution witnesses for cross-examination. [Citing Crim. Proc. Code s. 227]. Conviction and sentence set aside; case remanded to trial court for re-trial.

226. Lucas s/o Gangaya v. R., Crim. App. 129-D-68, 10/4/68, Hamlyn J.
Accused was charged with being in possession of property suspected to have been stolen [P.C. s. 312]. He pleaded not guilty, and two prosecution witnesses gave their evidence. The prosecutor then applied to withdraw the charge, and substitute one of "conveying" such property, under the same section. The magistrate accepted the new charge, without taking a plea to it and proceeded with the trial.

Held: If an accused is not given the opportunity to plead to a charge, the proceedings are a nullity. Accused in this case may be charged and tried again, if the prosecution so desires.

227. Moshua s/o Mduna v. R., Crim. App. 922-D-67, 19/1/68, Georges C. J.
Accused was convicted of assault and causing actual bodily harm. The evidence left no reasonable doubt as to his guilt, but a fine of Shs. 400/- was imposed without enquiry by the court into the financial means of the accused. Further, the case had been transferred from primary court to resident magistrate's court upon complainant's statement that she wished to retain an advocate. Accused alleged that this was done to permit prosecution by an advocate who was related to complainant, before a magistrate who was of complainant's tribe. The magistrate, in fact, was a member of complainant's tribe, but the prosecutor was not related to her.

Held: (1) The fact that the magistrate may have been of the same tribe as complainant cannot affect the conviction, since that fact "… does not appear in any way to have influenced the matter …" (2) "Before imposing fine a court should make enquiries of the financial standing of the accused, and this should form part of the record." [Quoting R. v. Bison s/o Mwango, 2 T. L. R. (R) . 31,32]. This should be done to ensure that the fine is one "which is within the means of the accused person to pay." (3) A man convicted of striking a woman should pay

compensation even though there is no permanent injury, since striking a woman "is not a manly act." Fine reduced to Shs. 200/-

228. Gamaiyo s/o Melau v. R., Crim. App. 36-A-68, 19/4/68, Platt J.

Accused was convicted of attempted rape. There was evidence that accused threw complainant to the ground, threatened her with a knife, and tore off her underpants, She then caught hold of his private parts and prevented him from unbuttoning his pants. At this point an alarm was raised and accused ran away.

Held: [Quoting from Adamu s/o Mulira v. R., (1953) 20 E.A.C.A. 223]: "(T)o constitute an attempt to rape there must be evidence of an attempt to have sexual connection with the woman not with standing her resistance … (I)n the instant case, we feel some doubt whether the learned trial judge fully appreciated the necessity of finding an intention to have intercourse at all costs not with standing any resistance on the part of the woman, plus an attempt to put this intention into effect." Under this test accused 's actions did not constitute attempted rape. Conviction of indecent assault [P. C. s. 135] substituted.

229. R. v. M. S. Lemki, Crim. Rev. 10-D-68, -/4/68, Hamlyn J.

Accused, a resident of Zanzibar, brought his car, which was registered in Zanzibar, to mainland Tanzania. He was fined Shs. 100/- for failing within fourteen days to report to the licencing authority to obtain temporary vehicle licence. [G.N. 390/64, sec . 5(c) (iii) (1c)]. Such a licence issues of right and without charge for vehicle duly licenced in certain other countries, including Zanzibar. The marginal not to section 5 reads: "Vehicles licenced in neighboring African countries …."

Held: (1) Accused argued that because of the union between Tanganyika and Zanzibar, Zanzibar is no longer a "neighboring country", and thus, although the rule has never.

Been formally amended, it is inapplicable to him since he is now a Tanzanian. This argument was rejected. The Traffic Rules are framed not only for the convenience of international travelers, but also for the assistance of the local licencing authority in dealing with such persons. Since the temporary licence is free, the purpose seems to be to assist the traffic authorities, not a revenue measure, or one of traffic control in the narrower sense. Zanzibar has its own vehicle registration, and mainland vehicle records do not include Zanzibar vehicles. The purpose is to obtain information about "foreign" vehicle of which the authorities would otherwise have no information, and on that basis Zanzibar must be deemed to be covered by the Traffic Rules until they are specifically amended. (2) "The side – note …. Is not a part of the rules and it has frequently been held that such marginal annotations are so placed to show the 'drift' of the section --- that is, a reference to its general contents; it is certainly no part of the law embodied in the rule in question."

230. Semdoup s/o Melita v. R., (PC) Crim. App. 34-A-67, 11/4/68, Platt J.

Accused was convicted of cattle theft. During the trial and prior to his conviction, evidence of previous convictions was introduced. There was also evidence that the complainant had spent Shs. 256/- to pay expenses of persons who had searched for the cattle. The cattle were found and returned to complainant, apparently as a result of the search.

Held: (1) Evidence of previous convictions should not be accepted until after the conviction, but the error did not prejudice accused in the facts of this case. (2) The award of compensation for expenses incurred by complainant in the search was proper. [Par. 5 of Primary Courts Criminal Procedure Code, Third Schedule, Magistrates court Act, Cap. 537] Appeal as to conviction dismissed.

231. R. v. Ngobili s/o Mpulula, Crim. Rev. 27-D-68, 9/4/68, Duff J.
Accused was convicted of a corrupt transaction [Prevention of Corruption Ordinance, Cap. 400, ss. 3(2), 3(3)(a)], having given forty shillings to a Primary Court clerk. The sentence include an order of forfeiture of the amount to the Government.

Held: Under section 3(3)(b), forfeiture can be ordered only when the accused was the receiver, rather than the giver, of money. Order of forfeiture set aside.

232. R. v. Shendakaji s/o Makwayo, Crim. Rev. 29-D-68, 10/4/68, Biron J.
Accused was sentenced to fines of Shs. 30/- or imprisonment for three months in default, on two counts of violating the Fauna Conservation Ordinance. The warrant of commitment stated: "Fines cumulative, sentence to run concurrently."

Held: Sentences imposed in default of the payment of fines may not be ordered to run concurrently with each other. [See P.C. s. 36] Sentences of imprisonment ordered to run consecutively.

233. R. v. Selemani Alfani, Crim. Rev. 16-D-68, 16/4/68, Hamlyn J.
Accused was convicted of stealing by servant, and sentenced to pay a fine of Shs. 2,000/- or 9 months' imprisonment in default.

Held: Where a fine exceeds Shs. 400/-, imprisonment in default of payment may not exceed 6 months. Term of 6 months substituted.

234. Juma s/o Iddi v. R., (PC) Crim. App. 67-D-68, 10/4/68, Biron J.
Accused, a first offender alleged to be 18 years old, was convicted of housebreaking and of stealing goods valued by complainant at Shs. 101/-.The items, all used and some damaged clothing and household goods, were valued individually in the charge sheet, but not in complainant's testimony. No finding was

made by the magistrate as to accused 's age. Accused was sentence to 2 years 24 strokes, under the Minimum Sentences Act.

Held: The magistrate was obliged to make a specific finding as to accused 's age, to be sure that he was not a young person and thus outside the ambit of the Act. (2) A specific finding is also required, in such cases, as to the value of the goods. Here, complainant's valuation was Shs. 1/- more than the amount which would have enabled the court to grant leniency. (3) The accused 's age, in this case, is itself "special reasons within the meaning of the ….act." Sentence reduced to result in immediate release. Alexander s/o Ngimna v. R., Crim. App. 95-D-68, 5/4/68, Biron J. Accord, that specific finding must be made on all grounds of leniency specified in section 5(2) of the Act.

236. Jesa Ibrahim v. R., Crim. App. 202-A-67, 22/3/68, Platt J.

Accused was convicted of burglary and two counts of stealing. He was a 21-year-old first offender, and the value of the property involved was Shs. 86/- Without making specific findings as to his reasons for granting leniency, the magistrate imposed a sentence of 18 months' imprisonment.

Held: There is nothing on the record to show any special reasons why the sentence of two years' imprisonment was not imposed. Upon the State Attorney's request for enhancement of the sentence to two years and 24 strokes, there is no alternative but to accede. Sentence enhance.

237. R. v. Jonathani s/o Chamade, Crim. Conf. 65-M-68, 22/4/68, Seaton J.

Accused was convicted of possessing "moshi", a prohibited liquor, and sentence to two years imprisonment. [Local Liquor, Ordinance, Cap. 77, sec. 36 (1), (2); G.N. 229/41] Maximum penalty for this offence is a fine of Shs. 4,000/- or two years imprisonment, or both. The district magistrate, in imposing sentence, remarked; "Severe sentences have always been recommended for this prevalent

murderous stuff." Accused was a first offender, with several dependants. The case came to the High Court for confirmation of sentence.

Held: (1) "The fact that the Legislature has expressly provided for the imposition of a fine at the discretion of the trial court is an indication that the offence may not always be so heinous as to require imprisonment. It should also be observed that if the maximum term of imprisonment is imposed on every offender, the trial court is left with little sanction to deter second or chronic offenders." (2) "Having said all of the above, however, it is borne in mind that this court will not interfere in a matter in a matter of sentence unless it is so excessive as to be unsustainable. The sentence imposed in this case, although severe, cannot be said to fall into such a category as would clearly require revision by this Court. The sentence is accordingly confirmed.

238. R. v. Mabula Masota Charles, Dist. Ct. Crim. Case 58-D-68, 3/4/68, Inspection Note by Saudi J.

Accused, a first offender, was convicted of traveling on a railroad without a valid ticket, which would have cost Shs. 7/10, and was sentenced to 1 month's imprisonment.

The Court noted: In this case, a conditional discharge order accompanied by an order to pay the fare to the Railways would have "met the justice of the case." The Court called attention to High Court Circular No. 2 of 1961, where the Court's views on this problem are elaborated.

239. Musa s/o Bakari v. R., Crim. App. 37-D-68, 24/4/68, Biron J.

Accused was convicted of stealing [P.C. s. 265] and housebreaking [P.C. s. 294(1)], and given consecutive sentences of good reason to the contrary, to order the sentences for the related offences of housebreaking and stealing to run concurrently with each other. The fact that the appellant had a previous conviction for theft – whereon, incidentally, he was sentenced to imprisonment for eight month --- does not constitute such good reason to justify a departure from the general practice. The order that the two sentences are to run consecutively to

each other is accordingly set aside and there is substituted there for an order that the two sentences are to run concurrently with each other."

240. Ali Simba v. R., Crim. App. 249-A-67, 27/3/68, Platt J.
Accused was convicted of cheating [P.C. s. 304]. He had persuaded complainant to write out a receipt in a book produced by accused, gave a copy to complainant, and then ran away with the book containing the duplicate.

Held: Accused may have enable himself to put complainant in some difficulty, at a later date, by producing the receipt showing a payment by him to complainant. However, the receipt book was his own, and there was no showing that by his trick he had obtained anything capable of being stolen. Conviction quashed.

241. Alex Godfrey Mungumbele v. R., Crim. App. 20-D-68, 19/4/68, Biron J.
Accused, a clerk employed by the National Agricultural Products Board, was charged in a single count with two separate commissions of theft by public servant. [P.C. ss. 265, 270}. He was convicted on his own plea of theft by clerks and servants [P.C. ss. 265, 271] and was sentenced to nine months imprisonment. The property was that of Rawajani Mills, which had been nationalized prior to the thefts and to which accused had been assigned by the Board.

Held: (1) The two separate commissions of theft should not have been charged in a single count. However, the error did not prejudice accused and is curable under section 346 of the Criminal Procedure Code. (2) Person employed in the public service is defined as "any person holding any of the following offices … namely; (i) … any office the power of appointing a person to which or of removing from which is vested in President or in any public Commission or Board." [P.C. s. 5, as amended by Part 1 of the Fourth Schedule to the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962].

(3)An employee of the Board, accused was a person employed in the public service [Citing ss. 3(1), 3(2), 4(2) an para. 8 of Part (b) of the First Schedule to the Agricultural Products (Control and Marketing) Act, 1962; G.N. 550 of 1962] The theft therefore constitutes theft by public servant irrespective of whether the property of the mill was government property, a question which the Court left open. Sentence enhanced in accordance with the Minimum Sentences Act.

242. Awali Mlanga v. R., Crim. App. 205-A-67, 20/3/68, Platt J.
Accused was convicted of house breaking and stealing [P.C. ss. 265, 294 (1)], in a prosecution based on his "recent possession" of goods identified as stolen. The High Court quashed the convictions because of the weakness of the evidence identifying the goods.

The Court stated, obiter: "It is to be observed that in a case of recent possession the proper test to be applied is whether the defence could reasonably have been true."

243. Sayale s/o Seliani v. R., Crim. App. 15-A-68,. 3/4/68, Platt J.
The three accused were convicted of robbery. They were in the process of beating complainant when his watch fell or was torn off his wrist, whereupon one of the accused pocketed it.

Held: Robbery is defined by P.C. s. 285 as using actual or threatened violence "…. To obtain or retain the thing stolen or to prevent … resistance to its being stolen…." The purpose must be to steal something. Here the taking of the watch was incidental to the assault. Conviction of causing actual bodily harm [P.C. s. 241] substituted, pursuant to the provisions of Crim. Proc. Code, s. 181.

244. Hassan Ramadhani v. R., Crim. App. 257-A-67, 5/4/68, Platt J.
Accused was convicted of stealing from a motor vehicle contrary to Penal Code section 269(c) upon evidence that he had taken the gear box of the vehicle itself.

Held: (1) Section 269 (c) provides for thefts in which "the thing is stolen from any kind of vessel or vehicle or place of deposit …" This wording refers to

things being conveyed by or deposited in vessels or vehicles rather than to parts of the vessels or vehicles themselves. (2) In interpreting a statute, marginal notes may be referred to for assistance. In the present case the relevant portion of the marginal note reads "stealing goods in transit" suggesting that portions of vehicles themselves were not included. Conviction of simple theft [P.C. s. 265] substitute.

245. R. v. Ndesario s/o Yose Kaaya, Crim. Rev. 13-A-68, 9/4/68, Platt J.
Accused was convicted of theft. [P.C s. 265]. There was evidence that a water furrow traverses complainant's shamba. Accused had no water right, but by a gentlemen's agreement he was permitted to take water from the furrow between 6 a. m and 9 a.m. It was charged that accused had taken water during the night and used it for irrigation. The conviction was quashed for insufficient evidence.

The Court stated, obiter; (1) So long as fluid such as water can be sufficiently appropriated to the user, it can be stolen. [Citing Archoold, Criminal Pleading Evidence and Practice, 36th edn., para. 1532 and authorities cited therein, which held that water supplied by a water company to a consumer and standing in his pipes may be the water passing over his farm, and for accused to extract water except during the permitted hours and to use it for irrigation would be to take a moveable object which did not belong to him with the intent to permanently deprive the holder of the right of it.

246. Faustin Joseph v. R.,(PC) Crim. App. 3-A-68, 3/4/68, Platt J.
A village executive officer was trying to settle a dispute, which resulted in hot words being exchanged and accused being charged with using abusive language. Accused was convicted, largely on the basis of a letter written by the executive officer to the trial magistrate. The executive officer never appeared in court.

Held: However well-meaning the action of the executive officer, "It is a cardinal rule that evidence put before the court should be by witnesses giving testimony on oath and prepared to face cross-examination." If this were not the

rule, a person might (as here never know on what the magistrate based his judgment. And justice would not be seen to be done, and if the evidence given were incorrect or biased, justice would not be done at all. Conviction quashed.

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247. The City Council of Dar es Salaam v. Taj Mohamed, Civ. Case 64-D-67, Georges, C. J.

Defendant contracted to contracted to construct a market for plaintiff for Shs. 78,830/- and to complete the work within 30 weeks from 31st July, 1965 the date of commencement. The contract provided for liquidated damages of shs. 500/- per week for late completion of the market. There was evidence that defendant delayed in constructing the building an that much of the work which he completed was defective. Exercising its contractual rights, plaintiff ejected defendant from the building site in February, 19066. The dispute was referred to the City engineer as provided in the contract and his findings, which favoured plaintiff, were served on defendant on 10th May, 1966. The contract specified that after such findings defendant could demand arbitration by giving notice within 28 days. Such notice was posted on 7th June but was not received until 8th June by plaintiff and was rejected because it was late. The market was completed by another contractor 48 weeks after the date specified in the contract with plaintiff. Plaintiff paid a total of Shs. 77,100/- to the two contractors, or Shs. 1,730/- less than the original contract price. However, it seeks damage of Shs. 3,417/- for payments to watchman after defendant was ejected and Shs. 24.000/- liquidated damages for the 48 week delay in completion. At the trial defendant requested that the Court order arbitration but no prayer for a stay to permit such arbitration was filed prior to the trial.

Held: (1) Defendant was in breach of contract at the time of his ejection, and the ejection was proper. (2) The relevant date for the service of statutory notice is the date of receipt, not the date of posting, though considerations may be

different where notice is posted early enough to reach the other party in the normal course of events but is delayed though no fault of the party who posted it. Thus the notice of arbitration was tardy. (3) The High court may order a stay of proceedings to permit arbitration only if application is made “at any time after appearance and before filing a written statement or taking any other steps in the proceedings.” [Quoting Arbitration Ordinance, Cap. 15, s. 6; citing New Zealand Insurance Co. Ltd. v. Andrew Spyron, (1962) E.A.74]. The procedure set forth in section 18 of the Second Schedule of the Civil Procedure Code does not apply to the High Court. [Citing Civ. Proc. Code, s. 64]. The Court doubted whether the latter procedure would permit a stay if it were applicable. (4) Section 74 of the Contract Act provides that where a contract specifies liquidated damages the aggrieved party “is entitled, whether or not actual damage or loss is proved to have been caused there by, to receive from the party who has broken the contract reasonable compensation not exceeding the

Amount so named …” Under the terms of this section, a liquidated damage clause operates only to set the maximum limit of damages and does not excuse a plaintiff from proving his actual damage. [Citing Saleh Shaher Absi v. Naider Naced Kassim, (1956) 23 E.A.C.A.382]. Thus, in effect, all damages are unliquidated. However, in cases where damage is clear but the quantum difficult to prove, the Court should give regard to the parties’ estimate where it appears reasonable, and in such cases detailed proof of specific items of damage will not have to be produced. In this case it is not clear that plaintiff has suffered any such damage. (5) The cost of employing the watchman should be allowed as damages. Damages of Shs. 1,687/-, the cost of the watchman less the difference between the contract price and the price which plaintiff paid to the two contractors, allowed.

248. Bi-Baikiliza Kamugisha v. Bi-Kyobalychwa Kamugisha, (PC) Civ. App. 226-D-67, 27/4/68, Hamlyn J.

In 1966 defendant purported to sell her share in family land to one Felician. Plaintiffs, members of the family, then filed this action in a primary court in the Bukoba District to recover the land Felician, the purchaser, was not made a party to the suit. The primary court ordered that the land be confiscated and returned to the family without compensation to the purchaser.

Held: (1) "The purchaser was entitled to be heard and to Endeavour to establish title to the land. If (as seems to be the case) the seller had no title to pass to the purchaser, then he was clearly entitled himself to be compensated ….." (2) The Court stated, obiter: Defendant had no title to transfer to the purchaser, the property being a family land and she being a female. In any event, the transaction appears to be ultra vires because no consent of defendant's near relatives was obtained. Plaintiffs advised to attempt to obtain the return of the land by amicable settment or, failing that, by instituting a new action.

249. Khadija d/o Abdallah v. Saidi Omari, (PC) Civ. App. 89-D-68, 2/5/68, Biron J.

Plaintiff, a nephew of the father of an eight-year-old female child, filed this action against the mother for custody of the child. Plaintiff had written authorization from the father to take custody. The parents for the child had been divorced after the father left Tanzania for Arabia and remarried and the child has at all times lived with the mother.

Held: It is doubtful whether the father himself would have a right to custody. [Citing Mulla, Principles of Mohamedan Law, Ninth edn. P. 212 to the effect that under Islamic law the mother is entitled to custody of her female child until the child has attained puberty, even though she has been divorced.

By her husband.] (2) The only parties who have any claim to custody of a child are its parents and this claim cannot be delegated to another relative. Therefore, plaintiff has no locus standi in the case. (3) The primary consideration is the welfare of the child: In the present case the mother has remarried, her second husband is of sufficient means, the child has lived with the mother since birth, and she appeared well cared for when seen in court. Defendant's appeal allowed.

250. Paul Joseph v. Nkoba Kulwa, (PC) Civ. App. 119-M-67, 14/5/68, Seaton J. Plaintiff, claiming to be the father of a child born during the period when defendant's daughter lived with him in concubinage, sued defendant for custody. The daughter had left the child with defendant when, having left plaintiff for a time, she returned to live with him. At the primary court hearing, the defendant admitted that plaintiff was the child's father, and expressed willingness to have plaintiff as a legitimate son-in-law. At the district court hearing, the daughter testified that plaintiff was not the father, and defendant changed his story to agree with hers. She named another man, who did not testify.

Held: (1) Children born in concubinage belong to the man with whom the mother is living unless he wishes to and can disprove paternity, under section 183 of the Law of Persons, F. N. 279/63, made binding in Maswa district by G. N. 474/63. Section 183, stating that the man nominated by the woman as the father cannot deny paternity unless he can prove he had no sexual intercourse with her, does not mean that such man should be entitled to the child's custody where another man claims it. Once birth during concubinage is established, "a presumption was created in favour of the appellant's paternity." With the evidence amounting essentially to plaintiff's word as against that of the child's mother, the presumption is not displaced. (2) Plaintiff is married with two other children; the child's mother lives with her parents and is unmarried. "It is well established that where the status of children is concerned, their welfare is the paramount consideration." This test is best served, apart from other legal considerations, by awarding custody to plaintiff. Plaintiff's appeal allowed, with an order that he pay defendant Shs. 100/- plus reasonable compensation for maintenance to defendant.

251. Maria Theresa Chin v. Yan Shui Ming. Mat Cause 13-D-67, 20/5/68, Saudi J.

Petitioner has lived in Tanzania for the last 7 years. She was married to respondent in Bombay, India, in 1959. Petitioner came to Dar es Salaam, and respondent was to follow shortly.

Instead he went to Hong Kong. The only word respondent has ever sent was about 4 years ago, to the effect that he had gotten himself another lady, and that he was no longer interested in petitioner.

Held: “Although the marriage was not celebrated in Tanzania, and the respondent does not live and has not lived in Tanzania, and the respondent does not live and has not lived in Tanzania, this Court has Jurisdiction under section 4 (1) (a)(ii) of the Matrimonial Causes Ordinance, Cap. 364, for the reason that the petitioner wife has lived in the country for a period extending beyond three years.” Petition for divorce granted.

252. C.K. Matenba v. Mary Matenba, Mat. Cause 1-D-66, 10/5/68, Georges C. J.

Petitioner husband applied for a divorce on grounds of cruelty. Respondent wife originally prayer for judicial separation on the grounds of petitioner’s adultery but later substituted a prayer for divorce, and a decree nisi was granted on that prayer. During these proceedings the Court granted leave to withdraw the original petition though this was merely noted in the record and was not signed or mentioned in the judgment or order granting the decree nisi to respondent. It is also alleged that other errors occurred in the proceeding: (a) that the answer was not served on a person who apparently was the woman involved in the alleged adultery; (b) that no affidavit of service on her was filed; (c) that the application for amendment submitted by respondent was not in writing and was not accompanied by and affidavit stating that there was no collusion; and (d) that the appli-

cation by petitioner to withdraw his petition was not in writing or accompanied by and affidavit denying collusion. In the present proceedings petitioner applied to have respondent's decree nisi made absolute. Respondent opposed the application and prayed that the decree nisi be rescinded. She stated that she is a Roman Catholic, that her religion does not permit divorce, and that she is greatly distressed because of her sin in seeking a divorce, a step which she says she took in a state of confusion.

Held: (1) An answer cannot survive the withdrawal of a petition. [Citing Schira v. Schira (1865) L.R. 1 P. & N 465; Sandler v. Sandler (1934) P. 149. (2) The order granting leave to withdraw the petition constituted a judgment. (Citing Tharman Din V. Cabal Das, A.I.R. 1933 Oudh 385; Chitaley & Pac, 2nd edition, p. 50. (3) In the circumstances of these proceedings, the order should be treated as if it had been signed on the day pronounced. (4) However, the Court has the power to alter an order before it is drawn up, passed and entered; until that time it is only provisionally effective and may be altered. (Citing Raichand Lakhamshi v. Assanand & Sons, (1957) E. A. 82; Re Harrisons

Settlement (1955) 1 All E.R. 185]. The order was altered to one staying the petition so that the decree to one staying the petition so that the decree nisi given on the answer could be given effect. (5) The failure to serve the woman named in the answer made the proceedings voidable but not void and may be cured. [Citing Watts v. Watts (1959)2 All E. R. 687; obiter; of Lord Denning M. R. in Balloqui v. Balloqui (1964) 1 W. L. R. 83]. (6)The application for leave to amend by respondent was made in petitioner's presence without objection. In these circumstances there was a tacit direction by the Court to follow a procedure other than that prescribed by Rule 14(2) of the Matrimonial Causes Rules, and the Court has the power to make such variation. (7) No affidavit denying collusion was required to accompany the amendment since the amendment merely modified the prayer and alleged no new facts. (8) For similar reasons, the application for leave

to withdraw the petition did not require an affidavit denying collusion. (9) The Court has jurisdiction to rescind the decree nisi which it granted. [Citing s. 3 of the Matrimonial Causes Ordinance, Cap. 364, which with exceptions grants the Court the same jurisdiction as the High Court of Justice in England as of 1st April, 1936; Rutter v. Rutter (1921) P. 421; Daglish v. Daglish (1935) P.49]. (10) There is precedent for the rescinding of a decree nisi because a party objected on religious principle. [Citing Griffiths v. Griffiths (1911) 29 T.L.R. 281]. However, the most important considerations are whether there is nope of reconciliation and whether the financial interests of the wife are adequately protected. In this case there is no hope of reconciliation, the wife is protected financially, and to rescind the decree nisi would be to deny the husband the right to be heard as to the remedy which should be awarded to his wife. Ordered that a copy of respondent's answer be served on the woman named and that the decree nisi be set aside if she intervenes; if she does not intervene, the matter to be placed before the Court for making the decree absolute unless cause is shown for not doing so.

253.Hulda John v. Stanley Mnzava, Civ. App. 2-D-68, 29/4/68, Hamlyn J.
This is an appeal from judgment for defendant in an affiliation proceeding under the Affiliation Ordinance, Cap. 278 as amended by the Affiliation Ordinance (Amendment) Act, 1964. Plaintiff lived out of wedlock with the male defendant between 1956 and 1964, having two children by him. During 1966 defendant took up word in Magamba, leaving plaintiff and the two children in Dar es Salaam. Plaintiff gave birth to twins in March, 1967, and claims defendant is the father. Defendant admitted to having met plaintiff in 1966, but stated that no sexual intercourse took place

Between them and therefore he denies paternity. The only evidence on the record is that of the two parties; however, plaintiff contends that she had further

evidence to support her allegations but that the trial magistrate denied her the right to bring her witnesses.

Held: (1) Under s. 5 of the Affiliation Ordinance, plaintiff was required to present evidence other than her own to corroborate her claim, and since she failed to do so, her claim could not succeed. (2) Since the plaintiff had no assistance from counsel in bringing her action, an action which would have been far more likely to succeed if brought in the primary court (see The Law of Persons, Government Notice 279/63, para. 183, which is applicable in primary court and puts the burden of proof on the defendant of her corroborative evidence, the Court ordered the case hear de novo in the district court before a different magistrate. The former proceedings were quashed.

254. Kirisa s/o Kitentera v. Patiri d/o Magesa, (PC) Civ. App. 147-D-66, 7/2/68, Duff J.

Plaintiff sued for custody of two children, claiming them as the issue of his marriage with defendant. The evidence, when the defendant appealed an adverse judgment o the district court, established that plaintiff and defendant had never married, and that defendant was in fact married to plaintiff's mother i.e according to a custom of the Wangurime people. She alleged that her two children were fathered by her lovers, and it seems not to have been clearly established that plaintiff was the father of either of them. Defendant and plaintiff's mother are now divorced.

Held: Since no marriage between plaintiff and defendant ever existed, plaintiff has no right to custody of the children. The Court stated, obiter; if the marriage between the two ladies were still subsisting, some rights of inheritance might eventually benefit the plaintiff; but as the ladies are now divorced, no such question can arise. Plaintiff's appeal dismissed.

255. Christina Ndege v. Daudi Wankanya, (PC) Civ. App. 162-D-67, 29/4/68, Saudi J.

Appellant and her husband had occupied the disputed land for thirty years. In 1959 her husband contracted an illness and she thereafter took him to Kenya for treatment. When she returned in 1964, she found that the land had been re-allocated to respondent by the Village Development Committee.

Held: "It is quite obvious that the re-allocation of the land illegal and amounted to abuse of power by the Village Development Committee." The original owner, the husband who had died, left behind his widow and five children. Appeal allowed and direction given that appellant and her children be put in possession of the land forthwith.

256. N.J. Amin Ltd. v. V. B. Patel & Company Ltd., Civ. Case 38-D-67, /5/68, Hamlyn J.

This is an application by plaintiff to amend his reply to the defence which has been filed. The case arose out of the failure of plaintiff to accept goods delivered by defendant, and the proposed amendment alleged that there was no contract because plaintiff's offer was withdrawn before it was accepted by defendant.

Held: The amendment would not set up a new cause of action, or introduce a new case, or change the subject matter of the suit. "Amendments to pleadings should freely be allowed where they can be made without injustice to the other side, and there is no injustice where the other side can be compensated by costs." To refuse to grant the application "would be to make an order which might prevent this court at trial from determining the real matters at issue between the parties. Litigation is intended to resolve outstanding disputes between parties and not merely to disregard them." Application allowed.

257. Isidori s/o Caspar v. R., Crim. App. 166-D-68, 10/5/68, Georges C. J.

Accused was charged with abduction (P. C. s. 133) and indecent assault (P.C. s. 135). There was evidence that accused seized complainant as she was walking to her house, carried her t his house, stripped her of the clothing and beat her

when she refused to have sexual intercourse. The trial magistrate convicted accused of abduction but made no explicit finding that accused had intent to commit sexual intercourse. He dismissed the charge of indecent assault on the ground that the charge was duplicitous.

Held: (1) An intent to have sexual intercourse is an element of the crime of abduction. However, in the facts of this case, it seems that the magistrate inferred such a finding though it was not stated explicitly. (2) Abduction does not necessarily involve an indecent assault. In the present case, stripping the complainant of her clothes constituted an indecent assault separate from the original abduction. However, since the crimes normally result in concurrent sentences, nothing need be done about the acquittal. Conviction of abduction affirmed.

258. Njole Sandanda v. R., (PC) Crim. App. 91-D-68, 3/4/68, Hamlyn J.
Accused was convicted in primary court of cattle stealing. On appeal to the district court, the magistrate found that the appeal had been lodged without sufficient ground of complaint and ordered that it be summarily rejected.

Held: "The district court has no powers to reject (whether summarily or otherwise) appeals made to it by an appellant from a conviction in a primary court. The duty of the district court is to hear the appeal and either to allow it or to dismiss it. The power of summary rejection is reserved to the High Court alone." The Court added, for the guidance of the magistrate, that Form J/PCF. 22 is inappropriate in cases where an appeal is anything but of the simplest nature. Case remitted to district court for hearing of appeal.

259. R. v. V. B. Patel & Company (Mwanza) Ltd., Crim. App. 985-M-67, 11/4/68, Mustafa J.
This is an appeal by the Republic by was of case stated. Accused company was charged with failure to register with the National Provident Fund contrary to section 38 (1) (f) and Regulation 6 (made under section 48) of the National Provident

Fund Act, Cap. 564, and with failure to pay a contribution due, contrary to s. 38(1)(d) of the Act. The agreed facts were that on Dilip Patel, who was in charge of the Mwanza shop of the company, signed a form stating that the firm has nine permanent employees and one temporary employee, and as a result of this information the firm was registered as a contributing employer. However, Mr. Patel later refused to complete the form regarding registrable employees on the ground that the temporary employee was a casual laborer and that the company therefore did not have ten registrable employees.

Held: (1) Section 11 (1)(b) of the Act provides that the Minister may order that temporary employees be registrable as members of the fund, but there is no evidence that such an order has been made, and thus temporary employees are not registrable as members. (2) However, in determining whether a private employer has ten employees and is thus subject to the act, exempt and temporary employees shall be included; a distinction is made between the registration of the company itself and the registration of its individual employees.[Schedule to G. N. 566 of 1964, as amended by G. N. 39/68, sec. 2]. The company was thus subject to the act. (3) Although he was clerk, Patel was the only person found at Mwanza office and was in apparent control of the company, and his action in giving the information was binding on the company. The question whether the notification constituted conclusive proof of the information contained therein does not arise. (4) Although the company is guilty of failing to register its eligible employees, the duty to contribute to the fund arises only after such registration has been completed. Thus, the company is not guilty of the second count of failing to contribute. Appeal by republic allowed as to first count only and case returned with direction that there is case to answer on the first count.

260. William s/o Petro v. R., Crim. App. 32-D-68, 21/2/68, Georges C. J.

Accused was convicted of burglary [P. C. s. 294(1)] and inde as-
sault (P.C. s. 135). The burglary charge did not specify the felony which accused intended when he broke into the house, but here was evidence that the indecent assault had taken place after the breaking. The prosecution case rested primarily

on the testimony of complainant; a child of 11 years, and her sister who was nine years of age. During voir dire examination, complainant testified that it is wrong to tell a lie, and the magistrate relied upon this in finding that she understood the nature of an oath. Complainant's sister, who did not testify under oath, was not examined as to her understanding of the duty to speak the truth. The magistrate relied upon the testimony of the sister to corroborate that of complainant as to the indecent assault.

Held: (1) The burglary charge should have set out the felony which accused had intended to commit, but the failure to do so may be cured on appeal if not prejudicial. [Citing Crim. Proc. Code, s. 346; R. v. Bakari bin Yusuf, 7 E.A.C.A. 63]. In deciding whether the error was prejudicial, "one should be guided not by the under fined possibility of the accused having been prejudiced, but by some suggestion which a reasonable man could accept that there had been prejudice to the accused." Here the felony was specified in the second count and there was no prejudice. (2) When a child is called as a witness, two separate questions arise: First, does the child understand the nature of the oath; and second does the child understand the duty to speak the truth, and is the child of sufficient intelligence to justify reception of the evidence not on oath. The second question arises only if the first is answered negatively, and the two should not be confused. (3) It is a general rule that corroboration is required of a complainant's evidence of a sexual offence, but corroboration is not required as a matter of Law if the relying on such testimony and gives his reasons for so doing. (4) The unsworn testimony of a child itself requires corroboration an cannot be used as corroboration of the testimony of the complainant of a sexual offence. (5) In this case, the magistrate did not properly consider the matter of corroboration and the error was prejudicial. (6) Evidence of burglary need not be corroborated even though the felony intended was a sexual offence which by itself would nor-

mally require corroboration. Conviction for indecent assault quashed, conviction for burglary confirmed.

261. Meshilieki s/o Modiri v. R., Crim. App. 268-A-67, 25/4/68, Platt J.

Accused was convicted of cattle theft. The primary issue on appeal concerned identification of the cattle. The trial court rejected photographs of the cattle because the negatives were not produced and neither the photographer or any person present at the time the photographs ere taken was called as a witness. Accused argued that the cattle should have been exhibited or viewed by the court. However, there was evidence that complainant had identified the cattle and that they had been freshly branded by accused long after the normal age for brandling.

Held: (1) The photographs were properly excluded from evidence for the reasons stated by the trial magistrate. (2) The trial magistrate correctly observed that as a general principle the property should be produced as an exhibit if available, but that this procedure is not essential if there is other sufficient evidence of identification. [Juma allibux v. R., 1967 High Court Digest, case No. 383 distinguished]. In the present case, the other evidence of identification was sufficient to support the conviction.

262. Mohamed s/o Issa v. R., Crim. App. 1-D-68, 21/2/68, Georges C. J.

Accused was convicted of burglary, stealing, and assault with intent to prevent lawful apprehension. The events out of which these convictions arose took place on 25th

July, 1966, but no attempt was made to apprehend accused until 21st February, 1967, although during this time accused lived at his house which was near the police station and complainant had allegedly identified accused both to a neigh-

bour and in a police report shortly after the crime took place. The police report was not introduced into evidence.

Held: "It is important that the police should produce the statements made by the witnesses at the time to support their allegations that they did identify the appellant. Such statements are clearly admissible under section 166 of the Evidence Act, Act No. 6 of 1967." [Citing Mario Wako Kella v. R., Court of Appeal for Eastern Africa, Crim. App. 106 of 1967] Without such evidence, the delay in attempting to apprehend accused casts doubt on complainant's identification and the evidence is insufficient to support the convictions. Convictions quashed.

263. Masika s/o Nusurupia v. R., Crim. App. 31-A-67, 2/12/67, Seaton J.
Accused was convicted of cattle theft. During the course of the trial the accused responded to a query by the court: "Yes, I have been charged with the offence of stealing of coffee in 1960, I was found guilty and was imprisoned for 6 months in jail. (The trial record records the testimony given by participants, but not the question asked.)

Held: (1) "It would appear from this reply that the court asked the appellant a question tending to show that he had committed or been convicted of a previous offence or that he was of a bad character." [Citing Evidence Act, sec 56(4).] (2) The Court then had to decide whether this irregularity or error had in any way occasioned a failure of justice. [Citing Magistrates' Courts Act, sec. 32 (2).] Because other irregularities had also taken place during the trial, conviction was quashed.

264. Robinson s/o Pili v. R., Crim. App. 41-D-68, 15/5/68, Georges C. J.
Accused, a plumber at a mission hospital, was convicted of stealing by servant. There was evidence that various tools including a spanner, screwdriver, iron cutter and wheelbarrow were found at accused 's house. Accused 's defence was that some of the tools were his personal property and that he had received permission to borrow the wheelbarrow and iron cutter, which he admitted were the

property of the mission. The trial court rejected the defence on the ground that he did not believe it to be true.

Held: (1) One could expect to find tools such as a spanner and screwdriver at the house of any craftsman, and in the absence of any identifying mark, accused should not have been expected to give any account of his possession other than to say that they were his. (2) With regard to accused 's explanation that he had borrowed some of the tools with permission, the proper test is whether the explanation was a reasonable one which could possibly be true; if so, it should have been accepted even though the magistrate had doubts as to its truthfulness. Conviction quashed.

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265. R. v. Mipaa @ Masanja s/o Mananjimia, Crim. Rev. 158-A-67, 21/2/68, Seaton J.

Accused was convicted of assault causing grievous harm [P. C. s. 225] on evidence that he hit complainant with his fist causing her to lose one tooth.

Held: The loss of one tooth in the circumstances of this case did not cause such permanent or serious injury or disfigurement as to amount grievous harm. [Citing Reg. V. Ali s/o Fakili, 2 T. L. R. (1954) 44; Russell on Crime, 10th edn. (1950) p. 690]. Conviction for assault causing actual bodily harm. (P. C. s. 241) substituted.

266. Joaquin Gregory D'Silva v. R., Crim. App. 167-D-68, 6/5/68, Hamlyn J.

Accused was convicted of failing to comply with a notice from the Principal Immigration Officer ordering him to leave Tanzania [Immigration Act, Cap. 534, s. 23 (1) (j)]. The Prohibited Immigrant Notice, issued on 14 November 1967, stated that the Minister for Home affairs had declared accused to be an undesirable immigrant; it directed accused to leave the country within 14 days. Accused admittedly overstayed the period. The Minister did not testify at the trial. The Principal Immigration Officer testified that he was informed of the declaration by tele-

phone, and on that bases issued the Notice. The Principal Secretary to the Ministry of Home Affairs also testified that the Minister had indeed issued the order in writing, and that the order was in the Minister's possession.

Held: The Principal Secretary "normally communicates ministerial decisions to both the public and members of the Ministry serving under him." It is therefore proper that he should communicate the Minister's order to the officer charged with putting such an order into effect. Further, the Notice specified that such an order had been made; without some positive indication to the contrary, "the court was entitled to assume that every necessary administrative act leading up to the issue of the Notice had been duly carried out." Finally, there was no contention that the Minister's order had been improperly obtained, or that the Minister's signature thereon was not genuine. Under the circumstances, the defence was not entitled to call the Minister himself. Appeal dismissed.

267. Zephirine s/o Kipande v. R. Crim. App. 109-M-68, 22/5/68, Seaton J.
Accused was convicted of indecent assault, though the evidence indicated the "….. the complainant neither struggled nor raised an alarm when the (accused) dragged her to his house (and that) complainant had ample opportunity to escape…."

Held: There is a strong inference from the evidence that complainant consented to the acts of accused. "As the complainant was a mature woman, consent was material and the onus was on the prosecution to prove that she was not a willing party to the appellant's acts. This onus the prosecution cannot be said to have discharged in this case." Conviction quashed.

268. R. v. Chanungu Chipaeni, Crim. Rev. 14-A-68, 12/2/68, Seaton J.
Accused was charged with an offence contrary to section 84 (a) and 96 of the Prisons Ordinance. There was evidence that while

Visiting a prison, accused threw or let fall cigarettes, allegedly in order to give them to prisoners. Accused stated that if any cigarettes fell, it was accidental.

Held: (1) Section 84 of the Prison Ordinance creates no offence. (2) Section 96 prescribes punishment for prisoners convicted of offences against prison discipline and is not applicable to accused. (3) If warranted, a conviction for bringing or throwing tobacco to a prisoner (Prison Ord. s. 119) could be substituted. However, the facts of the case do not prove any offence beyond reasonable doubt. Conviction quashed.

269. Mbushi s/o Maganga v. R. Crim. App. 25-M-68, 22/5/68, Seaton J.
Accused was charged with cattle theft, but was ultimately convicted, without the original charge ever having been amended, of criminal trespass (P.C. s. 299) (1)(a)).

Held: The learned magistrate convicted accused of an offence with which he was not charged on the basis of section 181 (2) of the Criminal Procedure Code. "(F) or section 181 to be effective in this respect, the minor offence must be cognate to the offence of which the (accused) was charged." [Citing Alli Mohamed Hassani v. R., (1963) E.A. 294]. "The (accused) could not be deemed to have been given notice, upon a charge of theft, of all the circumstances which would constitute the minor offence of criminal trespass." Conviction quashed.

270. R. v. Anyandulile s/o Mwaikusa, Crim. Rev. 39-D-68, 22/5/68, Georges c. J.
Accused was charged with housebreaking [P.C. 294(1)] but was convicted of malicious damage to property [P.C. s. 326(1)]. It was proved that he broke a padlock and entered the house, but the charge failed to specify the felony which he intended to commit within the house and the magistrate found that no such intent was proved.

Held: There are no specific provisions empowering a court to convict under section 326(1) where a charge has been laid under section 294(1). "It cannot be said either that section 294(1) creates an offence consisting of several parti-

culars, a combination of some only of which constitutes the offence created under section 326(1).” Conviction quashed.

271. R. v. John Kennethe Peterson, Dist. Ct. Crim. Case 634-Tanga 68, 22/4/68, Inspection Note by Hamlyn J.

The accused was charged with causing death by dangerous driving [Traffic Ordinance, s. 44A(1)], and other minor and technical offences under the same Ordinance. He applied for a separate trial on the dangerous driving count, and the court so ordered, although opposed by the prosecutor on the ground that “It is difficult for me to prove negligence if these other counts are stayed.” The record of the case was sent to the High Court for “comments”.

Held: (1) The record of the proceedings are before the High Court prematurely the correct procedure is for the case to go through to completion, and then the matter can be brought on appeal should the Attorney-General so desire. (2) The Court stated, obiter, with respect to the prosecutor’s opposition to a separate trial on the dangerous driving count: “It is a little difficult to understand how

Proof of an alleged fact can be prejudiced by the presence or absence of other counts in the charge”.

272. R. v. Hashimu s/o Mohamed Mfaume, Misc. Crim. Cause 9-D-68, 25/5/68, Saidi J.

Accused was charged with stealing a bicycle. Complainant was the third of the prosecution witnesses; when called upon to cross-examine, accused asked that the case be transferred to another magistrate, saying “I do not see why this witness did not give evidence first as he appears to have been the complainant.” Having doubts as to the proper course, the magistrate forwarded the case file to the High Court for direction.

Held: Transfer of a case to another magistrate is covered by section 80 of the Criminal Procedure Code. Where the grounds for transfer are that it is necessary to secure a fair trial, " a clear case must be made out that the accused person has a reasonable apprehension in his mind that he will not have a fair and impartial trial transferred." It is enough that the accused 's apprehension itself is reasonable, whether or not the High Court believes that transfer is necessary for any other reason; but his fears must be grounded in "the proved existence of distinct events giving rise to a reasonable apprehension …." [Quoting Wilson, J. In Miscellaneous cause No. 10 of 1937, 1 T.L.R. (R) 129; citing Baktu Singh v. Kali Prasad (1900) 28 Cal. 297, 301; and Bhag Singh v. Rex, 1 T.L.R. (R) 135.] Neither the order in which the witnesses were called here, nor any other aspects of the conduct of the trial, would cause the accused to reasonably fear that he would not receive fair treatment. Continuation of trial by same magistrate ordered.

273. Jeremiah s/o Mhindi v. R., Crim. App. 108-D-68, 10/5/68, Georges C. J.
Accused was convicted of causing death by dangerous driving [Traffic Ord., Cap. 168, s. 44A(1)(a)] There was evidence that the accident took place at night and that accused failed to dim his headlights and struck the other lorry on the wrong side of the road. Accused made an uncautioned statement to a police officer before it had been decided to charge him with an offence. In this statement he admitted that his vehicle had been on the wrong side of the road, but stated that he had dimmed his own lights and had crossed the road because he was dazzled by the bright lights of the other lorry. Accused was sentenced to two years' imprisonment, and he was disqualified from driving for one year.

Held: (1) The statement to the police officer was an attempt to explain the accident and was properly admitted in evidence since it did not constitute a confession of guilt. (2) Since the police had not decided to charge accused at the time the statement was made, no caution was required. (3) Even if accused was dazzled by the one coming lights, it was his duty to moderate his speed and if necessary to stop. In any event, his being dazzled would not have prevented him

from pulling to the left-hand side of the road. (4) The disqualification from driving should not have been of such a length that it would expire while he was still in prison. Disqualification modified to one of three years and appeal otherwise dismissed.

274. John Michael Msekwa v. R., Crim. App. 150-D-68, 27/4/68, Hamlyn J.

Accused was convicted of six counts of burglary and house breaking an ten counts of stealing. The total value of the property stolen was Shs. 326/10, but in none of the individual counts did the value of the property reach Shs. 100/-. In these circumstances the trial magistrate held that section 5 (2)of the Minimum Sentences Act prohibited the imposition of the normal minimum sentence. Accused was a first offender.

Held: Section 5(2) permits a sentence less than the prescribed minimum where the accused is a first offender, the value of the stolen property is less than Shs. 100/- and there are special circumstances. A lesser sentence could have been imposed after finding that special circumstances exist, but no inquiry as to special circumstances was made. The Court stated, for the guidance of the trial magistrate "(I)t may be that the trial magistrate may consider that a person convicted of a series of such serious offences committed over a period on months may have some difficulty in showing the special circumstances which would entitle him to leniency." Case remitted for determination as to special circumstances.

275. Inosence s/o Pangras Nsunguru v. R., Crim. App. 56-D-68, 6/4/68, Georges C. J.

Accused was convicted of housebreaking and stealing. The evidence showed that exactly Shs. 100/- had been stolen in the house, and the trial magistrate did not consider whether special circumstances would warrant the imposition of less

than minimum sentence. The housebreaking charge had not specified the felony that accused allegedly intended to commit upon entering the premises.

Held: (1) The particulars of a housebreaking charge should always specify the felony that accused intended to commit on breaking and entering. However, the error was not prejudicial in the present case. (2) Section 5 (2) (b) of the Minimum Sentences act gives the court discretion to impose a lesser sentence where "the value of the property obtained … does not … exceed one hundred shillings." This language clearly gives the court discretion where the amount is exactly shs. 100/-. Case remitted for a determination of special circumstances.

276. Rashid s/o Mashaka v. R., Crim. App. 202-D-68, 21/5/68, Georges C. J.
Accused was convicted of burglary, and sentenced to 2 years and 24 strokes, the minimum sentence allowable for this offence under the Minimum Sentences Act. This appeal was summarily rejected, both as to conviction and sentence.

Held: The Court stated, obiter; "The appellant had four previous convictions, two for housebreaking – one in 1966, for which a minimum sentence had been imposed. Learned magistrates should make more frequent use of their powers to remand persons to the High Court for sentence so that appropriately long terms of imprisonment may be imposed on persons who break into houses an also terrorise residents. The type of conduct must be seen to be heavily punished

277. Alli Mohamed v. R., Crim. App. 233-A-67, 24/4/68, Platt J.
Accused entered into a contract to buy complainant's motor vehicle, agreeing to pay the purchase price after he had approved the vehicle. He took delivery after certain defects were rectified, but made no payments (a subsequently offered part payment was refused), and kept the vehicle. accused was charged with theft (P.C. s. 265), and obtaining goods by false pretences (P.C. s. 302); he was convicted of theft, the magistrate dismissing the alternative count. On appeal, the

Republic conceded that the theft conviction could not stand, but contended that the dismissed count would support a conviction.

Held: (1) The Republic properly conceded that the facts would not support a conviction for theft because the property in the vehicle had passed by sale under the contract to accused when he accepted delivery and voiced no disapproval (Cap. 214 s. 20 rule 14) He could not steal his own property (2) The count of obtaining goods by false pretences was properly dismissed by the lower court. “A promise to do something in the future is not by itself a false pretence. But, such a promise may be coupled with a false pretence. Of existing fact, and where a promise in future expressly or impliedly contains a false statement of existing fact, the offence can be proved.” (Citing R. V. Dent, (1955) 39 Cr. App. R. 131) In Dent’s case it is made clear that the state of a man’s mind is not a fact a misrepresentation of “(1)t is a well known principle that in charging this offence the particulars of the charge must set out with sufficient particularity the existing statement of fact which is alleged to be false.” It is not sufficient to allege, as was done here, that appellant committed the offence “ by pretending that he was going to buy [the said vehicle].”

278. John s/o Elirehema v. R., Crim. App. 25-A-68, 3/5/68, Platt J.
Accused was convicted of stealing from the person of another. (P.C. ss. 265, 269 (a).) Complainant had done some work for accused, and came to accused in a bar to collect his wages At accused ‘s request, he obtained change for a Shs. 100/- note from his mother. Accused took the change but retained the Shs. 100/- note at all times and did not give either it or the wages to complainant. On appeal, the Republic argued for conviction of cheating or taking by false pretences (P.C. ss. 304, 302).

Held: Arguably, accused insinuated that he intended to give complainant the Shs. 100/- note and to pay his wages upon receiving the change, which might be considered a “trick” or “device” within the meaning of section 304. However, “cheating” and false pretences” are offences involving a complainant’s parting with the “property” in a thing rather than the mere possession of it. [Citing Hollis

v. R., (1883) 12 L.R., Q.B.D.; R. v. Williams, 6 Car. & P. 390]. Here the complainant and his mother did not intend that the property should pass permanently to accused except in exchange for Shs. 100/- note and complainant's wages. Thus, they parted with possession only, and the offence committed was larceny by trick, dealt with in Penal Code section 265, the general theft provision. The fraudulent deception was not evidence of cheating so much as evidence of the animus furandi. Conviction for theft substitutes.

279. Nuru s/o Ayubu v. R., Crim. App. 35-M-68, 15/5/68, Seaton J.

Accused 's were convicted of robbery with violence. (P.C. ss. 285, 286) There was evidence that they went to complainant's house and threatened to shoot him unless he gave them Shs. 600/- Complainant's son, without a request from complainant, got the money and handed it to a third accused (who was acquitted) who gave it to the accused involved in this appeal. The issue before the Court was whether the crime amounted to robbery with violence or demanding property with menaces (P.C s. 293).

Held: (1) Robbery involves a taking of property Demanding property with menaces, if it does not succeed, requires that the property could be said to have been stolen if the menaces had succeeded. [Citing John Raymond Vaz v. R., (1961) E.A. 320]. (2) In the present case, there was a taking of the property even though it was delivered into accused 's hands [Citing Gathuri Njuguna v. R., (1965) E. A. 583]. Thus, the menaces succeeded and it seems that this element of both offences was fulfilled. (3) A second distinction is that robbery involves an immediate threat of injury to person or property. On the other hand, demanding property with menaces may involve a veiled threat which is of such a nature that an ordinary reasonable man would read menace into the demand. (It is not necessary that the victim have subjectively felt such menace). [Citing John Raymond Vaz v. R., supra.] In addition, demanding property with menaces need not involve a threat of violence, but may involve a threat to accuse the victim of mis-

conduct . [Citing John Raymond Vaz v. R., supra; Rex v. Fulbhai Jethabhai Patel, (1946) 13E.A.C.A.179] In the present case it seems that this element of both offences was fulfilled. (4) A third distinction is that for a conviction of robbery the property must be handed over by the person threatened or at his request [Citing R. v. Edward (1833) 1M. & Rob. 257, C. & P. 518; cf. R. v. Donolly, 2 East P.C. at 718] whereas demanding money with menaces may involve a taking from some other person [c.f. R. v. Cheshire (1864)3 N.S.W.S.C.R. 129 (Australia) English and Empire Digest, Vo,. 15, p. 875]. In the present case the money was not taken from complainant or at his request, but was given by his son. Convictions for demanding money with menaces substituted.

280. Harnam Singh v. R., Crim. App. 97-D-68, 2/5/68, Biron J.

Appellant, the second accused, was convicted of receiving stolen property; the first accused, who was convicted of stealing and fraudulent false accounting has not appealed. The evidence was that the first accused, who was a teller at the National Bank of Commerce, City Drive Branch, would cash checks for the second accused drawn on the Masdo House Branch. The first accused would hold a check until a subsequent check was drawn, and the proceeds of the second check or a part thereof would then be deposited in the Masdo House Branch to cover payment of the earlier check. There was some indication that these transactions were intended by the accused to operate as unauthorized short – term loans, and in fact all of the money was repaid.

Held: (1) Even if there was an intent to repay, the payments amounted to stealing by the first accused. Penal Code Section 258(2) provides, “A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with … (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.” (2) In order to be convicted of receiving stolen

property, an accused must know or have reason to believe that he property was in fact stolen. [Citing P.C. s. 311(1); D.P.P v. Nieser (1959) 43 Cr. App. R. 35. (3) Ignorance of this rule of law would not be a defence of the first accused on the maxim ignorantia juris non excusat. "(I)n the case of the second accused, as the requisite guilty knowledge is an essential ingredient of the offence receiving, his ignorance of the law would constitute a defence, as in his case the maxim ignorantia facti excusat would apply." As such "borrowing" is not within the normal conception of theft held by laymen, and as the trial magistrate did not consider the point, it cannot be said on appeal that the requisite guilty knowledge existed. Conviction of second accused quashed.

281.Safiani s/o Shabani v. R., Crim. App. 9-D-68, 21/2/68, Georges C. J.
Accused was convicted of stealing postal matter. [P.C. s. 267]. The facts as stated by the prosecution were that accused obtained Shs. 30/- by presenting a stolen Post Office Saving Book. Accused agreed with the facts and when asked to plead to the charge stated, "It is true." This was recorded as a plea of guilty.

Held: The money was not stolen but was obtained by false pretences since the postmaster voluntarily paid the money thinking since the postmaster voluntarily paid the money thinking that accused was the owner of the savings book. Conviction quashed and accused ordered to be re-charged.

282. Sisti Nganga Ami v. R., Crim, App. 265-A-67, 3/5/68, Platt J.
Accused was convicted of theft by public servant. (P.C. s. 270). He was sentenced to two years imprisonment but no corporal punishment was ordered. There was evidence that accused, a Government Co-operative Inspector, gave advice as to the formation of a cooperative and received money for the purpose of registering the cooperative and received money for the purpose of registering the cooperative and depositing the remainder in a bank. The cooperative was never registered and no bank deposit was made. Several witnesses testified that they had seen accused sign receipts for the money and identified his signature on the receipt s when they were presented in court. Accused argued that testi-

mony as to handwriting may only be given by experts and that the Minimum Sentences Act did not apply because the formation of cooperatives was not within his duties and the cooperative was not registered.

Held;(1) Section 49 of the Evidence Act declares that the testimony of any person who is acquainted with a person's handwriting in one of the prescribed ways is admissible to identify the handwriting. The weight attached to the testimony may vary with the qualifications of the witness and expert testimony may be required in some cases. However, this

Is not such a case. (2) Although the cooperative was not registered and the formation of cooperatives is not within accused 's normal duties, the transaction was closely related to his proper duties and was gained "by virtue of his employment" (P.C. s.) Therefore, the Minimum sentences act was applicable. Twenty four strokes corporal punishment ordered in addition to the two-year prison sentence.

283. Leornard s/o Fue v. R., (PC) Crim. App. 6-A-68, 3/4/68, Platt J.

Accused was convicted in the Primary Court of forcible entry as a result of having built his house partially upon the complainant's land. There was some evidence of negotiations between accused and complainant for permission to so build, but such permission was not in fact granted.

Held: (1) "The appellant did not build his house partially upon the complainant's land by using violence in any of the ways provided by P.C. s. 85 "Conviction quashed. (2) "Strictly speaking the order for compensation ought to be set aside, but as there will no doubt have to be civil proceedings to verify the boundary and require the accused to remove back to his own land, I shall allow that order to stand and to be taken into consideration in any such civil proceeding."

284. Stephano James v. Fabian Nkani, (PC) Civ. App. 47-M-68, 29/5/68, Seaton J.

Plaintiff obtained a judgment in Primary Court in June 1965 for recovery of a shamba. In August 1967, defendant applied to the District Court for leave to appeal out of time. The magistrate disbelieved defendant's explanation that he had not been present when the Primary Court judgment was delivered and that he was waiting to hear the disposition of the case. The magistrate cited Amani Chogo Chacha v. Rioba Nyamtara, High Court Digest, Vol. 1, No. 10, case No. 433, in which Mustafa J. commented that it is against public policy to allow matters which have been decided to be re-opened many years later.

Held: In the case cited, the High Court's comment was with reference to a judgment which had been given 18 years earlier, whereas in this case the appeal was only tow years after the judgment. Nevertheless, the same principle is applicable. Appeal dismissed.

285. Gokar Damji & Sons v. Gulamhussein Saleh Haji, Civ. App. 30-D-67, 3/6/68, Georges C. J.

On 4 May, 1967, a decree was entered in favour of plaintiffs for approximately Shs. 20,000/-. On 7 September, 1967, an order was made under Order 20, Rule 11, of the Civil Procedure Code 1966, allowing defendants to pay by installments of Shs. 250/- per month, interest at 6% per annum. In the trial court's second order, reference was made "in the introductory part" to the decree of 4 May, 1967, but "there is no reference to it in the substantive part," according to the High Court's summary. Plaintiffs appealed the lower court's disposition of the case, saying there were aggrieved by the "order made by the learned Senior Resident Magistrate on the 7th September 1967."

Held: (1) The order of 7 September cannot be considered as part of the original decree in the suit, on the facts of this case. (2) An order under Order 20, Rule 11 may not be

Appealed to the High Court. Section 74 of the Procedure Code specifies the orders of Resident Magistrates and District Courts from which appeals to the High Court are allowed. A further specification, of orders "under rules from which an appeal is expressly allowed by rules," is contained in Order 40, Rule 1. In neither place, nor in any other law brought to the attention of the Court, is an order under Order 20, Rule 11, made appeal able. Plaintiffs' appeal dismissed.

286. Ingra v. Frixoz Costas Meimaridis, Civ. Case 95-D-67, 6/6/68, Hamlyn J.
This is an application for relief under the Business Names Ordinance, section 15, for failure to register in accordance with provisions of the Ordinance. Plaintiff had filed a contract action and defendants claimed that it was not maintainable because of the plaintiff's failure to register. Plaintiff registered two months later, after learning of his oversight from defendants' pleadings.

Held: (1) Plaintiff is entitled to relief because his non-registration was "accidental, or due to inadvertence" [Business Names Ordinance, s. 15(a)], and the two-month delay after learning of his mistake did not indicate otherwise. (2) Although relief will not be granted under section 15 of the Ordinance if it would prejudice defendants, they must show that they would not have entered in to the contract with plaintiff if he had complied with the provisions of the Ordinance. [Citing Nandala v. Lyding (1963) E.A. 706]. As defendants submitted no evidence to that effect, the plaintiff's prayer for relief is granted.

287. City Council of Dar es Salaam v. Taj Mohamed, Civ. Case 64-D-57, 3/6/68, Georges C. J
This was a hearing on costs to be paid in action brought for breach of contract. Plaintiff proved the breach, but presented no evidence as to damages. His claim for agreed liquidated damages was rejected for lack of proof of damage.

Ruled: (1) Liquidated damages cannot be awarded, because plaintiff failed to prove damages suffered from breach of the contract. (2) Plaintiff is entitled to costs, having substantially proved what it undertook to prove, the breach

of contract. (3) Costs should be awarded on the High Court scale not that of the District Court, in view of the “substantial” sum claimed. (The Court did not specify the amount).

288. Ephraim Obongo v. Naftael Okeyo, (PC) Civ. App. 98-M-68, 21/5/68, Seaton J.

Defendant, a lorry owner, used to collect cassava from plaintiff for selling. On one occasion, his lorry – driver and turn boy went to plaintiff to collect some bags of cassava; plaintiff refused to deliver the goods, demanding that they first produce some empty cassava bags which they had evidently taken another day, or some money. They returned to defendant’s wife, who gave them 24 bags and Shs. 190/-, and sent a not promising that everything would be taken care of when her husband returned from a journey. Plaintiff received no more money, and sued in Primary Court for the value of the cassava he had given them, and for some other.

Empty bags not returned, less the money and bags received. It was not disputed that the suit involved less than Shs. 2000/-, the jurisdictional maximum for suits in Primary Court. The court held that the claim should be against the wife and dismissed the suit; the District court, on appeal, gave judgment against defendant. On appeal to the High Court, defendant argued that the Primary Courts’ jurisdiction was limited to civil proceedings turning upon customary or Islamic Law, or civil proceedings to recover in the words of the Magistrates Courts Act, section 14(1) (a)(ii) --- “civil debts, rent or interest due to the Republic”, or to the government or any municipal, town or district council. He argued that plaintiff ’s was a claim in contract which had to be brought in District Court. Plaintiff replied that the words of the Act should be read “disjunctively,” giving the Primary Courts jurisdiction in all cases of “civil debt” where the amount involved is within the jurisdiction limit.

`Held: (1) The present case involves an issue of privity of contract, “a rather subtle and technical point which perhaps Primary Courts could not deal with. This may have been a reason for excluding civil suits based on principles of contract from the jurisdiction of the Primary Court,” if that is in fact the effect of the Act. On the latter question, however, the Court made no further finding. (2)However, “(i)t has not been established to my satisfaction that a claim of this nature could not have been brought under customary law.” It is a simple case of a claim for goods delivered, “not … for breach of contract as such.” Also, despite the difficulty of determining whether the wife, the lorry-driver and the turn boy were acting “in the course of their employment” for defendant, “In suits between Africans living within a local community and doing business amongst themselves on a basis of trust, I consider it would not be in the interests of justice to import technical notions of privity of contract and other such notions, unless clearly required by the law to do so.” (3)_ There being no apparent reason why such a case could not be settled under customary law, there is no reason not to accept the District Court’s finding, supported by the evidence, that plaintiff had dealt with servants of defendant whom defendant had probably authorized to act as they did. District Court judgment for plaintiff upheld, with a minor variance as to amount.

289. Adamu Mtondo v. Likuna Omari, (PC) Civ. App. 11-D-68, 10/5/68, Hamlyn J.

Appellant orally pronounced a divorce from his wife. Somewhat less than a month later, presumably in a period of “tuhr”, he orally revoked the divorce. The Primary Court held that the divorce was complete and, on appeal, the District court affirmed acting on the advice of an assessor that the revocation was of no effect because the dowry had not been fully paid at that time. Neither court specified the school of Muslim law to which the parties adhered.

Held; Under the more common interpretations, divorce is effected only by three pronouncements and was not effected here, where only one pronounce-

ment was given. Trial courts should specify the school of Muslim law which is applicable; in the absence of any indication to

The contrary, it should be presumed that the more common interpretation applies. (2) Even if the single pronouncement was effective, the fact that the dowry had not been fully paid did not affect the validity of the revocation and the oral divorce was rescinded. Appeal allowed and respondent declared to be still the lawful wife of appellant.

290. B. Sirley & Co. V. Tanganyika Tegry Plastics Ltd., Civ. Case 42-D-67, 5/1/68, Saidi J.

Plaintiff an advocate, sued defendants to recover Shs. 23,486/- plus interest, alleged to be due on a promissory note drawn by defendants in favour of Polypen Ltd. and endorsed by the latter to plaintiff. The day before the making of the note, Polypen Ltd. had issued a pro-forma invoice for a large number of ball – pen refills to be supplied to defendants in consideration for the amount of the note; the words “Pro-Forma Invoice of 3. 10. 66. for 3355 gross refills” appeared on the note itself after the words “for value received.” The note was discounted to plaintiff in consideration of a cheque for Shs. 18,000/- drawn on his clients account. Plaintiff denied that the funds had come from the account of Polypen Ltd. itself, which was one of his clients, and said that he had previously transferred funds from his personal account to his clients account to cover the cheque. Defendant gave notice for production of the relevant books of account, but plaintiff refused to produce them on the ground that they weighed forty pounds, and that their production might jeopardise his work. There was also evidence that in addition to being the advocate for Polypen Ltd., plaintiff formed the company, was one of the two subscribers to the memorandum and articles of association, and had for a considerable time been one of its directors.

Held: (1) Plaintiff was the holder of the note and had duly presented it for payment. (2) Although consideration was originally given for the note by Polypen Ltd., to defendants, it eventually totally failed, due to the non-delivery of the goods for which it had been given. (3) Every holder of a note or bill of exchange is prima facie deemed to be a holder in due course and the onus of establishing otherwise is on the person challenging such allegation. [Bills of Exchange Ordinance, Cap. 215, s. 30 (2)]. However, the presumption may be negatives by the relevant surrounding circumstances of the particular case or the admissions and conduct of the holder. (4) Considering the close connection of plaintiff with Polypen Ltd., as its founder, a shareholder, a director for a considerable time and its advocate; and further, considering the fact that the note contained the words "Pro-forma Invoice … for 3355 gross refills," that plaintiff's cheque to Polypen Ltd., was drawn on the account in which the kept clients' funds, and that plaintiff refused to produce his books of accounts, there is a preponderance of evidence in favour of defendants. "Viewing the evidence as a whole, I am not persuaded that the plaintiff is a holder in due course for value without notice of the defect in the title of Polpen Limited …." Plaintiff's claim dismissed.

291 Bi Bagonza d/o Kasindo v. Raphael Kasindo, (PC) Civ. App. 38-M-67, 17/5/68, Seaton J.

Plaintiff, a daughter of deceased, sued defendant, her elder son, for a share in deceased's estate. She based her claim on the fact that she was a daughter, that she cared for her father and that she was the beneficiary of an been distributed.

Held: (1) The suit was premature. The head of the clan is entitled to distribute the estate. After he has done so she may file a suit if she has a grievance at that time. (2) The Court stated, obiter: An oral will naming plaintiff sole heiress of his immovable property would not necessarily be given effect for the reasons set out in the Law of Wills [G.N. 436/63, applied to the jurisdiction of the Buhaya District Council by G. N. 605/63]. Plaintiff's appeal dismissed.

292. Surjit Singh Toor t/a Frank Sestito & Co. v. Babla & Gajjar Auto Garage, Civ. Rev. 2-D-67, 22/4/68, Hamlyn J.

This was an application by plaintiff for relief from a ruling setting aside an ex parte judgment in his favour. Plaintiff had filed an action and defendant was served with the summons in Mbeya. Although defendant forwarded the defence and later the fees, there was apparently a mis-delivery and subsequent confusion as to whether defendant had filed his defence. As a result of this confusion, and through no fault of the defendant, the court was unaware that a defence had been filed when it made an ex parte judgment in favour of plaintiff on 18the May, 1967. On 22 June, 1967, defendant first became aware of the ex parte judgment when he was ordered to show cause why execution should not be ordered. On 19 July, defendant filed an affidavit to set aside the judgment and the judgment was set aside. Plaintiff contended that under Article 164 of the Limitations Act, the defendant had thirty days from the date of the ex parte judgment to file his application, and that as he had not done so within that time, the order setting aside the decree was improper.

Held: Article 164 of the Indian Limitation Act refers to the date of the decree which (under Indian procedure can usually be ascertained from the summons. This not the case where, as here, the summons originates under Rule 7 (1) of the Subordinate Courts (Civil Procedure – Summonses and Pleadings) Rules, 1955, and therefore the provisions of Article 164 must be interpreted to mean that the 30-day limitation period runs from the date when such decree became known to defendant.

The Court stated, obiter, "In cases where the summons is for disposal, of course, the ordinary wording of the Article obtains." Application dismissed.

293. Kantibhai C. Patel v. Gulammusein Bros. Misc. Civ. App. 12-D-68, 24/6/68, Georges C. J.

This case arose out of previous proceedings in which respondent landlord had filed suit for vacant premises against applicant tenant. A consent order was filed

in July 1966 requiring applicant to vacate the premises on or before 31st December 1966. However, the landlord

Did not immediately enforce the order and applicant remained in possession and continued to pay what he called "rent. On 21st November 1967, the landlord gave applicant notice to enforce the consent order and applicant thereafter applied to the Senior Resident Magistrate for a stay of execution of the order or its discharge. [Rent Restriction Ordinance Cap. 479, s. 19(5), that the landlord had agreed to a month-to-month tenancy after the consent order to vaca, and that the consent order was no longer valid; (b) that the landlord was stopped from enforcing the consent order by his subsequent action; (c) that there had been no jurisdiction to entered the consent order; and (d) that in any event it would be unjust and inequitable to enforce the order. The Senior Resident Magistrate refused to grant a stay and an appeal of his refusal was filed with the High Court. In addition, applicant applied for a stay of order pending the High Court appeal, and it is this application which the High Court considered in this judgment.

Held: (1) Despite the fact that Order XXXIX, Rule 5 (3) of the Civil Procedure Code contains no provision on the matter, the High Court must consider the merits of the appeal in order to decide whether to grant a stay of enforcement of the original order pending appeal. In is an arguable case, not whether there are substantial merits to the appeal. (2) The order of the Senior Resident Magistrate denying a stay of the original consent order was itself appealable under section 11 D of the Rent Restriction act which provides that every order, decision or judgment of the court in any matter of a civil nature arising out of that Act is appealable. The appeal is not barred by section 70(3) of the Civil Procedure Code which bars appeals from consent decrees, for this appeal is not from the original consent order but from the refusal of the Senior Resident Magistrate to stay enforcement of that order. (3)The Court cannot consider whether their was jurisdiction to grant the original consent order, because the time for appealing that order

has passed. The Court stated, obiter, that were it possible to consider the matter there would be great doubt as to whether such jurisdiction existed, because section 19 of the Rent Restriction Act permits a judgment for recovery of possession only if the court finds that there are alternative accommodations, that the order is reasonable, etc. “The procedure … should more nearly follow the acceptance of a plea of guilty in a criminal case than the recording of a consent order in a civil case.” (4) It is arguable that a consent order for possession of property may be varied [Citing Hegarry’s Rent Act, 9th edn., p. 227], and the scope of section 19(5) of the Rent Restriction Act has not been authoritatively defined. It can also be argued with force that the magistrate refused to stay the consent decree because he was not aware of his discretion to do so. Thus, the appeal must be said to be arguable. Stay of execution ordered pending the appeal.

294. Kitenge s/o v. R., (PC) Civ. App. 84-M-68, 11/6/68, Seaton J.
This suit was brought to recover bridewealth paid by plaintiff who applied to the court for seizure of the defendant’s

Cattle pendente ite. The court ordered seven head of cattle placed in plaintiff’s custody, purporting to act under section 17 of the Magistrates Courts (Civil Proceeding in Primary Courts) Rules, 1964, G. N. 310/1964.

Held: The order was improperly made. Under section 17, the Primary Court only has a discretionary power to order property to be placed in its own custody or that of an officer of the court.

295. Attilio s/o Mosca v. R., Misc. Crim. Cause 12-D-68, 3/6/68, Georges C. J.
Accused was convicted of being in possession of uncustomed goods and of violating section 3(2) of the Prevention of Corruption Ordinance. The latter offence is scheduled under the Minimum Sentences Act. In applying for bail pending ap-

peal of the convictions, accused argued that absence from his business – a hotel – would mean financial ruin, since accused operated the business by himself.

The Court ruled; (1) Bail is not granted after conviction, "particularly for an offence scheduled under the Minimum Sentences Act," unless there are "exceptional circumstances" or unless "the appeal has an overwhelming probability of success." (2) Accused's financial predicament was "a contingency which could be foreseen. Anyone facing trial for a scheduled offence, even though convinced of his own innocence, should contemplate the possibility of a conviction and his enforced absence from normal affairs." Finding the appeal to lack overwhelmingly good prospects of success, the Court refused bail.

296. Rashidi M. Omari v. R., Crim. App. 259-D-68, 7/6/68, Saidi J.

Accused was convicted of defamation. (P.C. s. 187) Accused had requested that the Area Commissioner make a removal order against a neighbour who was having an affair with his wife. Complainant, a probation officer then interceded on behalf of the neighbour. Accused then wrote an excited letter to the Principal Probation Officer in Dar es Salaam, protesting complainant's intercession in the matter. The prosecution concerned the contents of this letter.

Held: Penal Code section 192 provides that publication of defamatory matter is privileged on condition that it is published in good faith if the person publishing it has a legitimate personal interest in publishing it, and the publication does not exceed that which is reasonably sufficient for the occasion "and in following cases, namely …. (3) If the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other capacity, or as to his personal character so far as it appears in such conduct." The letter written to complainant's superior officer came within the terms of this section. Conviction quashed.

297. Makasi German v. R., Crim. App. 173-M-68, 24/5/68, Seaton J.

Accused and another were convicted of rape. Complainant and a girl-friend had gone to graze cattle in the bush. They were joined by accused and his friend, and the four of them drank a can of local liquor called “moshi.”

Complainant lay on her back to relax, whereupon accused had sexual intercourse with her; he then invited his friend to take his turn, which the friend did. Complainant said she was aware of what was happening, but that she was too tired and intoxicated to prevent it. Her girl girl-friend told essentially the same story; but she admitted that she had agreed, that morning , with accused and his friend that she would meet them that afternoon, and bring a friend willing to have intercourse with them.

Held: “It is not every participation in a crime which makes a party an accomplice in it, and … where a witness is an accomplice in a very secondary sense or has acted from relatively innocent motives, corroboration of such a witness’ evidence whilst desirable is not essential. In the present case, the girl friend is not in the same category as those participants of offences who may likely to swear falsely in order to shift guilt from herself, or in the hope of obtaining a pardon, although it might be inferred that she was not a person of blameless character.” [Citing Rex. v. Wangirwa (1944) 11 E.A.C.A. 93] In the present case, the real difficulty is that the magistrate did not direct himself to the problem of corroboration in sexual matters. “This is a rule of practice, if not in law,” and it is not clear that accused would have been convicted had the magistrate attended properly to the issue. Conviction quashed.

298. Sangwa Ngedelele v. R., Crim. App. 198-M-68, 31/5/68, Seaton J.

Accused was convicted of stealing upon evidence that he had misappropriated funds which he had collected, purportedly in payment of local rates. There was introduced into evidence a statement which accused made to a police officer. In this statement he admitted having received the money. He further stated that he

had not returned the money and asked for time in which to refund it. The prosecution conceded that the last portion of the statement was inadmissible but contended that the first portion was properly introduced.

Held: (1) A confession to a police officer is inadmissible under section 27 of the Evidence Act, but a mere admission is admissible. "A confession is a direct acknowledgment of guilt on the part of the accused … (A)n admission … is a statement by the accused, direct or implied of facts pertinent to the issue and tending in connexion with proof of other facts to prove his guilt, but of itself is insufficient to authorize a conviction." [Quoting Gopa s/o Gidamebanya v. Reg., (1953) 20 E.A.C.A. 318 and authorities cited therein]. (2) In the circumstances of this case, it is not permissible to separate the first portion of the statement from the latter in order to admit part of the statement from the latter in order to admit part of the statement; the prohibition of section 27 of of the Evidence Act extends to both portions and the entire statement was inadmissible. Conviction quashed because of this misdirection and for insufficient evidence.

299. Abdala s/o Siki v. R., Crim. App. 301-D-68, Biron J.

The two accused, after being interrogated at length and thoroughly beaten by an assistant head man and a TANU Youth League member, confessed to a theft, of which they were suspected.

Held: "(i)f the convictions rested and depended only on these confessions made under duress, (this Court) would not have the slightest hesitation allowing the appeals and quashing the convictions." (2) Because of the presence of other evidence, independent of the confessions, which was sufficient basis for a conviction, the convictions were affirmed.

300. R. v. Jairi s/o Mwipopo, Crim. Rev. 46-D-68, 27/5/68, Georges C. J.

Accused was convicted of defilement of a girl aged ten years. There was medical evidence that the girl had been sexually assaulted, and her mother testified that the child had promptly complained to her, but here was no evidence linking the accused to the assault except that offered by the girl herself. There was no examination by the court to discover whether she understood the nature of an oath, nor was there any examination to discover if she was sufficiently intelligent and understood the duty of telling the truth so that her unsworn evidence could be admitted.

Held: (1) In case of this nature it is vital to consider the need for corroboration, and failure to do so is a fundamental error. If the magistrate "had examined the child, concluded that she could give evidence on oath, then in his judgment pointed out that there was no corroboration, warned himself of the danger of convicting when there was no corroboration, and then decided that despite that danger, he was so completely satisfied with the evidence of the complainant that he would convict, then his judgment would not have been faulted." (2) "Corroboration, it must be stressed, is independent evidence connecting the accused person with the offence." Neither evidence of a complaint by the girl, nor medical testimony that an assault has taken place, are corroboration; the former is not independent, and the latter does not connect accused with the violation.

301. R. v. Magibo Makaba. Crim. Rev. 30-M-68, 5/6/68, Seaton J.

Accused was convicted of cattle theft. During the cross-examination of one of the prosecution witnesses, accused requested to see a statement which the wife of that witness had made at the police station, or to have that statement read to him. The wife had not been called as a prosecution witness.

Held: The statement might have been admissible under section 8 of the Evidence Act as part of the res gestae, " i. e., as accompanying facts and constituent incidents which reveal the true nature of the fact in issue and disclose the motives of the parties or establish their connection with the fact under inquiry. Accused also might have used it in deciding whether to call the wife as a defense witness or in cross-examination of other witnesses. In these circumstances, it

was prejudicial error for the magistrate to deny accused access to the statement without investigating the possibility that it would be of aid to him. Conviction quashed.

302. R. v. Amiri s/o Rashidi, Crim. App. 234-D-68, 29/5/68, Georges C. J.

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"; he himself testified that pombe was there in a barrel to be sold but denied that he had sold any of it. Accused contended that there was no certainty as to what was sold, since the charge sheen referred to "mbege"; that the items taken from the scene of the alleged crime were taken during an illegal search, and were therefore not admissible in evidence; and that the trial magistrate had not directed himself that the witnesses were accomplices, whose testimony needed corroboration.

Held: (1) The High Court takes judicial notice of the fact that "mbege" is pombe brewed from bananas. (2) Although there was no scientific evidence, and no opinion evidence as such the police constable and purchasers identified the substance as pombe, and the accused admitted that the substance in the barrel was pombe. The facts do not necessitate scientific or expert testimony as to the nature of the substance sold, and there was clear enough evidence of the sale itself. (3) 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. (4) Although the witnesses were "accomplices" and the magistrate did not advert to the matter of corroboration, there was adequate corroboration of their testimony from the other facts in evidence. Appeal dismissed.

303. John s/o Mtandara v. R., Crim. App. 448-M-68, -/-/68, Seaton J.

Accused was convicted of unlawful possession of moshi [Cap. 77 s. 36(1)(2); G.N. 228/41]. He was found in the company of the co-accused (who was convicted but did not appeal), who was carrying a Fanta bottle on-quarter filled with a liquid subsequently identified as moshi Both men's breath smelled of moshi. When the law officers attempted to arrest the men on a charge of possessing moshi, accused produced a knife and attempted to stab them. The co-accused were then one or two paces apart.

Held: (1) It is not a necessary conclusion that accused must have been in possession of the bottle of moshi, merely because his breath smelled of it and he attempted to defend his companion and himself from arrest; therefore, the accused must be given the benefit of the doubt. (2) The interpretation of "possession" in section 5 of the Penal Code, which is wider than the common law definition, includes "joint possession", but applies only to the Penal Code. [Citing Kaman s/o Njerage v. R., (1954) 21 E.A. 257]. Therefore, to establish joint possession of the bottle, there must be evidence that accused had a power of control over his companion who had actual possession. Conviction quashed.

304. Jumanne Juma v. R., (P. C) Crim. App. 206-M-68, 17/6/68. Seaton J.
Accused were convicted of being in possession of moshi [Cap. 77, s. 36(2)]. Police witnesses established that a search had uncovered implements and vessels associated with moshi, and also established the arrest, the

Identification of accused and " all the other requisites to sustain a conviction ….. except what the liquor was."

Held: The prosecution bears the burden of showing that the substance found is in fact moshi. "Attached to every Police Station in this country are usually one or two officers who, by virtue of their experience, are qualified to identify this liquor by sight and smell, it not by taste. They should so state when called to give evidence for the prosecution. " Convictions quashed.

305. Francis s/o Kanyuka v. R.,Crim. App. 191-M-68, 24/5/68, Seaton J.
Accused was convicted of theft by public servant. At some time during the course of tax collections in which accused and several others were engaged, the key to accused's cash box was lost; subsequently, a sum of money was discovered to be missing. The magistrate refused accused's request to call as a defence witness a person who had already testified for the prosecution; he also directed himself that it was for accused to show that the cash box had seen tempered with by someone other than himself.

Held: (1) "Even if the learned magistrate was disinclined to call P.W. 5 as a defence witness … it would not have been improper …. To have himself recalled P.W. 5 to elaborate on the circumstances in which the cash box key had been lost and the money stolen." [Citing Rev. Deria Hussein Dolbahanta Juma Said v. R., 20 E.A.C.A. 181] (2) As for the showing required of accused, "all that was necessary was that the possibility of tampering (by someone other than accused) could have been reasonably inferred from the evidence". Conviction quashed.

306. R. v. Geofrey Mallamia, Crim. Rev. 29-A-68, 29/5/68 Platt J.
Two juveniles were convicted of stealing, whereupon they were sentenced to 8 strokes corporal punishment [Corporal Punishment Ordinance, Cap. 17, sec. 6] They were also ordered repatriated to their home areas [Children and Young Persons' Ordinance Cap. 13, sec. 23(b)].

Held: Cap. 17, sec. 6 empowers a court to impose corporal punishment in lieu of other punishment where the offence charged is under the Penal Code, other than an offence punishable by death. Cap. 13, sec. 23 permits repatriation as an alternative, or in addition to, other punishments which may be awarded under Cap. 13. The trial magistrate therefore had to choose between punishing accused under Cap. 13 or Cap. 17. The orders of repatriation were set aside.

307. Elgeyo Border Wheat Farms Ltd. V. R., Crim. App. 129-A-67, 22/5/68, ---------- J.

Accused companies were convicted of failing to pay certain contributions to the fund under section 38(1)(d) of the National Provident Fund Act, Act No 36 of 1964. There is no dispute as to accused 's permanent employees. The dispute concerns additional persons who picked coffee for the companies during harvest season. These persons were paid according to the number of tins of cherry coffee they picked and were not required to word for any specified

Period of days or number of hours per day. They were paid at the end of the day or the end of the week as they chose. Some were women and children. Accused argued, in the alternative, that (a) no employment relationship existed between the companies and these people, or (b) that they were not "temporary employees" as defined by section 2 of the Act.

Held: (1) There is doubt as to whether any employment relationship existed between the companies and some of these persons, such as some of the women and children who worked only occasionally. However, no evidence was taken on this issue, and it will be assumed that they were all employees. (2) Section 17 (2) of the National Provident Fund Act provides that a special contribution shall be made to the fund for temporary employees. "Temporary employee engaged on a daily contract of service who has not been employed by that employer for a continuous period of three months ….." It is conceded that the persons in question were not employed for more than three months. "Contract of Service" is defined with reference to the Employment Ordinance, Cap. 366 which, as amended, provides that it "means any contract, whether in writing or oral, … to employ or to serve as an employee for any period of definition of "contract of service" has been incorporated from the Employment Ordinance, it is appropriate for the court to examine other relevant provisions of that Ordinance Section 34, as amended by the Security of Employment Act, No. 62 of 1964, provides that

where there is a “contract of service under which a task or piece work is to be executed, …. Such contract shall … for all purposes be deemed to be a contract of service for the performance of work of the kind envisaged in such first-mentioned contract of service or a period of time which, in the absence of any agreement between the parties for a lesser period, shall be deemed to be a month.” This section is subject to varying interpretations, and it is unclear whether the employees should be treated as persons employed for period of a month or persons for whom there was no specified period of employment. However, in neither case would they be engaged on a daily contract of service, and therefore, the charge was not proved. (4) By the proviso to section 39(1) of the National Provident Fund Act, there shall be annexed to he complaint schedule setting forth information as to each individual employee. Such a schedule was not presented in the present case. Convictions quashed.

308. Abilah s/o Daid v. R., Crim. App. 258-D-68, 7/6/68, Saidi J.

Accused had been sued in a shamba dispute, the plaintiff obtaining a judgment for possession of the shamba and costs of Shs. 529/50. The plaintiff moved the court for execution of the decree. The court’s action was unclear from the records. The court did write a letter asking accused to pay the costs by 7 October, 1967. A reminder was sent on 29 January, 1968. Following his failure to pay or to reply to the court, the magistrate ordered the arrest of accused, who was subsequently charged with disobedience of lawful orders [P.C. s. 124].

Held: (1) Failure to pay a debt is not an offence in law, and section 124 of the Penal Code must not be used to convert a civil case into a criminal matter. (2) The Court stated, obiter; The proper procedure here would have been to attach accused ’s property under Order 21, rule 42. with a view to ward its being sold, or to attach his salary under.

Order 21, rule 47, or to issue notice under Order 21, rule 35 for accused to show cause why he should not be arrested and detained in civil prison for failure to pay the costs as ordered. A debtor is sent to civil prison if the court, having inquired into his financial standing, is convinced that he can pay the debt and is simply refusing to do so. Civil imprisonment is not intended as punishment, but as an attempt to force payment; it would be unlawful if the debtor were found to be without means. [Citing Lala Das v. Mina Mal and Chajju Mal (1922) 4 Lah. L.J. 266; Barrett v. Hamond (1878) 10 Ch. D. 285; Morris v. Ingram (1879) 13 Ch. D. 338]. Conviction quashed.

309. Alfred Bazila v. R., (PC) Crim. App. 381-M-68, 30/5/68, Mustafa J.
Accused, a messenger employed by the Bukoba District Council, was in charge of prisoners held at a Primary Court. He let two prisoners out of their cells and ordered them to wash his clothes while he went for a walk. The prisoners escaped, and accused was charged under section 117 (1) of the Penal Code which applies to "any person who aids a prisoner in escaping or attempting to escape from lawful custody ……"

Held: "(T)he word 'aid' would import .. an element of positive assistance and/or an intention of helping the prisoners to escape. The evidence led only establishes that [accused] was extremely negligence and careless." Conviction quashed.

310. R. v. Halifa Ibrahim, Crim. Rev. 40-A-68, 12/6/68, Platt J.
Accused was convicted of attempting suicide and placed on probation for twelve months. During this period, he was convicted of possessing moshi and sentenced to nine months' imprisonment. Shortly before his release from prison, the probation officer informed the District Magistrate by sworn complaint that accused had violated the terms of his parole, by being convicted of a further offence. A "charge" was drawn stating that accused had thereby committed an offence against section 6(1) of the Probation Ordinance, Cap. 247. The day before his release, accused was brought before the District Magistrate, where he admit-

ted having committed the liquor offence during the probation period. This was taken as a plea of guilty, and he was sentenced to three months' imprisonment. By the time the case came before the High Court on revision, accused had completed this sentence and been released.

Held: The conviction for violating the terms of a probation order must be quashed although it is too late for this to be of benefit to the accused. Section 6 of Cap. 247 "does not of itself create an offence punishable with imprisonment in the case of a probationer committing an offence during the period of his probation." It merely empowers the court, upon receiving information in writing and on oath that the probation terms have been violated, to summon the probationer to court. If he has been convicted of a further offence, the court may then pass any sentence for the original offence which it could have passed at the original proceedings; or, if the probationer was not convicted during the original proceedings, the court may convict him on the original charge and pass sentence

Accordingly.

The Court stated, obiter (1) In cases of attempted suicide, just as it is undesirable to impose sentences of imprisonment, so is it inappropriate to order an accused placed on probation, which may result in imprisonment. (2) Section 7 of Cap. 247 does provide for a fine for violation of certain terms of probation.

311. R. v. Joshwa s/o Motiya @ Motiya @ Mangiti s/o Motiya,
Resident Magistrate's Court Crim. Case 878-Moshi-67, 8/6/68, Inspection Note by Platt J.
Accused was convicted of burglary and sentenced to 2.5 years imprisonment. The Resident Magistrate's judgment noted that the sentence had to be confirmed.

The Court noted; "A subordinate court presided over by a Resident Magistrate need not seek confirmation of a sentence in the case of a scheduled of-

fence unless the Minimum Sentence is exceeded by more than six months". Since the sentence was exactly six months in excess of the minimum, no confirmation was required.

312. Andrea s/o Kimbulu v. R., (PC) Crim. App. 277-M-68, 3/6/68, Seaton J.
Accused was charged in Primary Court with housebreaking, theft, and assault. At the close of the prosecution case, the magistrate substituted a charge of robbery [P.C. s. 286], and accused was duly convicted of that offence. The record indicates that after the original charges were read and the accused was addressed in terms of section 41(2)(b) of the Magistrates Courts Act, he stated that he did not wish to be tried by the court. The record also indicates that after the charge was altered and read to the accused, he denied guilt and was altered and read to the accused, he denied guilt and was put upon his defence.

Held: (1) The requirement of transfer under the Magistrates Courts Act, section 41(2)(b), is not discretionary. If the Accused is charged with an offence punishable with imprisonment for more than 12 months or by corporal punishment, and elects to be tried in the District Court, the Primary Court Magistrate "shall transfer" the case. (2) "The alteration or substitution of the charge at the end of the case for the prosecution should have been followed by the appellant being given the option recalling and previous witnesses and cross-examining them – the procedure outlined in s. 21 of the Third Schedule to the Magistrates Courts Act." (3) The irregularities of procedure might not have been fatal to the convictions of accused had the evidence clearly indicated that he was guilty of the offence charged. As it did not, the conviction could not stand.

313. Masika s/o Nusurupia v. R., Crim. App. 31-A-67, 2/12/67, Seaton J.
Accused, charged in Primary Court with theft of one head of cattle, was convicted of being in possession of stolen property. On appeal to the District Court, the conviction was quashed and a conviction on the original charge was substituted, resulting in the imposition of the statutory minimum sentence. During the original

trial, the court had questioned accused to bring out evidence of a prior conviction. Furthermore, when accused claimed innocence.

And testified that another man had sold him the cattle, the court had the other man charged with theft and took evidence which was then used in the case against accused.

Held: (1) The Primary Court erred in opening the second case and using evidence obtained there against accused. The court should have used its powers under section 15(3) of the Magistrates Courts Act, Cap. 537, to call the other man to testify. (2) It would appear that the court asked the appellant a question tending to show that he had committee or been convicted of a previous offence or that he was of bad character. This prohibited by section 56(4) of the Evidence Act. The court allowed the appeal despite the fact that it was out of time.

314. Ngulila s/o Mwakanyemba, Crim. Rev. 48-D-68, 31/5/68, Duff J.

Accused was convicted of buying a specified agricultural product contrary to section 13 (2) of the Agricultural Products (Control and Marketing) Act, Cap. 486. In addition to a fine imposed, it was ordered that the produce involved be forfeited.

Held: “Every forfeiture order should specify the authority under which it is made and should contain sufficient reasons to show that the magistrate applied his mind judicially to the question whether or not the order should be made.” In this case there was no provision authorising the forfeiture. Ordered that the value of the produce be refunded to accused. [But, of. National Agricultural Products Board Act, 1964, Acts 1964 No. 39, s. 5(1) which applies to the National Agricultural Products Board but not to other Boards and which provides: “In relation to the Board …. The principal Act shall have effect … (i) as if it were provided in section 13 thereof that … where a person is convicted of any offence contrary wither to that Act or to this Act, the court may order that any produce in respect of

which the offence was committed shall be forfeit to the United Republic. " --- Editors].

315. R. v. Rashidi Shimie, Crim. Rev. 36-A-68, 26/6/68, Platt J.
Accused was convicted of unlawful wounding [P. C. s. 288(1)] and sentenced to a term of three months imprisonment, the sentence was imposed on 16th January, 1968, but back-dated to begin running as of 19th October, 1967.

Held: (1) The back dating of a sentence is "improper and without the authority of law. "An absolute e discharge under P.C. s. 38 was substituted. (2)The Court stated, obiter: "(I)n a case where there is considerable mitigation, the learned Magistrate has a number of ways by which he can take such mitigation into account. He can exercise his discretion under section 3 of the Penal Code, he may impose a fine, on he may impose a term of imprisonment which he may suspend under section 294A of the Criminal Procedure Code.

316. Isaya s/o Longai v. R., Crim. App. 73-A-68, 15/6/68, Platt J.
Accused was convicted of stealing Shs. 1,500/- from his father. He was sentenced to strokes and imprisonment under the Minimum Sentences Act, and ordered to repay Shs. 1,500/- to his father by way of compensation. Shs. 900/- deposited in his Postal Saving Account by accused was ordered to be paid to

Complainant, and accused was ordered not to withdrawn any money from that account.

Held: (1) The compensation order itself was confirmed, but the orders involving the Postal Saving Account were set aside. Sec. 179 of the Criminal Procedure Code permits restitution of property but , in the case of money, restitution is limited to the money "actually found upon a person charged with an offence at the time of his apprehension". The money in the Postal Savings Account was not taken from accused at the time of his arrest and thus it cannot be subject to a

compensation order. (2) This does not mean that complainant is without a remedy. The Minimum Sentences Act, sec. 6(2) makes monies ordered to be paid by way of compensation recoverable in the same way as a civil debt. “Therefore the [complainant] could have obtained judgment against the [accused] in a Civil Court, and attach the property belonging to the [accused] in the Post Office. [Complainant] should have been advised to take this course.

317. Ramlal Pandit v. R., Crim. App. 71-A-68, 29/5/68, Platt J.
Appellant reported to the police that he had been assaulted, and the police instituted a prosecution, but the District Court held that the accused had no case to answer. The magistrate went on to order appellant to pay the accused compensation at Shs. 60/- per day for seven days, under Crim. Proc. Code s. 175, which gives the court power to order the “complainant” to pay compensation to the accused if the charge has been frivolous or vexatious.

Held: (1) Appellant had reported the matter to the police and was the main witness for the prosecution, but was not he “complainant” within the meaning of this section; this refers to the police officer or private person who actually institutes the prosecution. [Citing R. v. Kassameli Jaffer and others, 1 T.L.R. 176]. (2) There seems to be no reason why compensation cannot be ordered even against the Republic, in the appropriate circumstances, under this section. (3) However, this was no a frivolous or vexatious charge; it would not have been surprising is the magistrate had held that there was at least a prima facie case to answer. Appeal allowed, order for compensation set aside.

318. R. v. Xaver s/o Janda, Crim. Rev. 46-D-68, 27/5/68 Duff J. Five separate criminal case files were opened in respect of accused, containing three counts of housebreaking, one of shop breaking and stealing, four of simple theft, and one of burglary. Accused pleaded guilty to all charges. Sentences of imprisonment in four of the cases were ordered to run concurrently, the fifth sentence being made consecutive, resulting in a sentence of 5 years’ imprisonment. Sentences of Corporal Punishment were involved in the sentence ordered to run consecutively,

the total being 48 strokes. The severity of the sentence was due in part to the magistrate's concern at the accused 's substantial record of previous convictions.

Held: In view of the previous convictions of accused, the imposition of 5 years' imprisonment was not excessive. However, "there was no need to open five separate cases,

And … the nine counts could have been made the subject of one case file …. I do not consider it fair or proper .. that forty-eight strokes of corporal punishment should have been imposed, and had the charges been preferred in on case only, one sentence of corporal punishment would have been imposed having regard to the provisions of section 10 of the Corporal Punishment Ordinance, Cap. 17." Sentences of imprisonment upheld: directed that only one sentence or corporal punishment, or 24 strokes, be imposed.

319. Chababila s/o Kakobe v. R., Crim. App. 166-M-68, 17/5/68, Seaton J.
Accused, 42 years old, was charged and convicted of common assault. Accused had stabbed one person in the neck and had fractured the arm of another with a stick. A sentence of 2 years and 12 strokes was imposed by the magistrate.

Held: Accused was not charged with attempted murder or grievous harm, but with common assault. A sentence of corporal punishment on an adult for a misdemeanor should be imposed sparingly and in cases where the heinousness of the offence is attended with aggravating circumstances such as gross brutality or the age and sex of the victim. Corporal punishment order set aside; imprisonment reduced to 18 months.

320. William Kibona v. R., (PC) Crim. App. 439-M-68, 13/6/68, Mustafa J.
Accused was convicted in Primary Court of housebreaking and theft, and sentenced to a fine of Shs. 50/- on each count, or two months' imprisonment in default. Realising that he had erred in imposing fines, the magistrate forwarded the

record for revision. The District Magistrate asked accused whether he wished to appeal against conviction and accused replied that he did not. The District Magistrate, in a revisional order, found that the articles involved were worth Shs. 200/- set aside the sentence and substituted one of two years and twenty-four strokes for burglary, and six months for theft, to run concurrently.

Held: A District Court, exercising revisional jurisdiction under section 18 of the Magistrates Courts Act, if it wishes to enhance a sentence, must, under the proviso to section 17 (b) of the Act, give specific notice of enhancement of sentence. It is not enough to inquire whether accused wishes to appeal. Case remitted to the District Court for service of notice of enhancement of sentence and disposition according to law.

321. Daniel Mtunze v. R., Crim. App. 245-D-68, 7/6.68, Saudi J.

Accused was convicted of fraudulent false accounting [P.C. s. 317(c)] and stealing by public servant [P.C. ss. 265, 270]. He had sold radio licences on behalf of he E.A.P.T.A. to nine individuals each of whom paid the sum of Shs. 20/-; he retained for his own purposed the money so collected. In order to conceal his actions, he omitted to enter correctly these nine separate transactions, Accused was given two consecutive sentences of 2 years and 24 strokes under the Minimum Sentences Act, though he claimed exemption from its provision by virtue of his age, which he alleged to be 47 years.

Held: (1) The convictions of false accounting and theft by public servant were supported by the facts. [Citing R. V. Sefu Salum @ Ngomba, Crim. Rev. No. 72 of 1965]. However, the charges ought to have been brought in nine separate counts. Thus, since the sum involved in each such count would have been

less than Shs. 100/-, and accused was a first offender, the court should have considered section 5(2) of the Act, the provision for leniency. (2) The court may not impose a sentence of corporal punishment upon an accused who claims exemption by reason of age without first obtaining the findings of a medical examination. (3)The sentences on the two counts here were incorrectly made to run consecutively. As they arose out of the same transaction, they should be concurrent. Original conviction quashed and sentence passed thereon set aside; conviction on nine separate counts of each offence originally charged substituted, and concurrent sentences of 6 months' imprisonment imposed.

322. John s/o Silanda v. R., Crim. App. 242-D-68, 26/6/68, Biron J.
Accused was charged with stealing goods in transit [P.C. ss. 265, 269 (c)], but was convicted, consistent with the facts, of stealing by a public servant [P.C. ss. 265, 270].

Held: A person charged with stealing goods in transit, a non-scheduled offence, cannot be convicted of stealing as a public servant, a scheduled offence, and thus subjected to punishment under the Minimum Sentences Act. "The Minimum Sentences Act, 1963, is a penal statute of a very serious nature, and must therefore be construed strictly. There are many cases (in which) it has been held that, unless a person is expressly charged with a scheduled offence under the specific relevant section set out with precise particularity, he cannot be convicted of a scheduled offence." Conviction varied to stealing goods in transit and sentence reduced.

323. Rashidi s/o Ramadhani v. R., Crim App.163-D-68, 29/5/68, Georges C. J.
Accused presented a cheque for Shs. 420/- at the National Bank of Commerce in Iringa. The words on the cheque clearly stated the amount, but the numbers appeared to be "Shs. 4,210/-." Accused replied to a question by the clerk, stating that this was the sum to be paid, and was then given this amount. He was convicted of theft, and sentenced under the Minimum Sentences Act on the ground that the funds were Government property, and ordered to pay compensation.

Held: (1) Accused 's action here constitutes larceny, as defined in section 258 of the Penal Code, "because quite clearly he had fraudulently converted the excess paid to him to his own use," with the intention to steal being fully formed at the time he received the money. (2) As a corporation, the National Bank of Commerce has an independent existence. "Even though the corporation is owned by the Government, its property cannot be said to be Government property any more than can the property of a company be called the property of its shareholders, no matter own few they may be." Thus, the case is one of simple theft, and the Minimum Sentences Act does not apply. (3) Accused did not plan to rob the Bank, but instead "was subjected to a sudden temptation and he yielded. There was gross carelessness on the part of the employee of the Bank which created the situation." A sentence of 2 years' imprisonment is too severe. (4) Since the case does not fall under the Minimum Sentences Act, the power of the High Court to order compensation is limited to an

Order for Shs. 2,000/- It is therefore preferable to allow the Bank to pursue its civil remedy. Sentence reduced to 6 months; order for compensation quashed.

324. Abdi s/o Omari . R., Crim. App. 271-D-68, 11/6/68, Hamlyn J.

Accused were convicted on six counts of stealing by servant, the total amount involved in the six offences being Shs. 170/-. The sums involved in each count, however, were each less than Shs. 100/-. Both accused were first offenders. Sentences under the Minimum Sentences Act were imposed.

Held: The court is not entitled to aggregate the value of the property stolen in each of several thefts charged in separate counts, so as to arrive at a total sum of over Shs. 100/- and there by deprive the accused of consideration for leniency under section 5(2) of the Act. [Citing R. v. Aloys Kapande (1964) E.A. 287]. Here, since each count involved less than Shs. 100/-, and since accused were first offenders, the record must be returned to the trial court for an inquiry

into the special circumstances, if any, which might justify imposition of less than 2 years' imprisonment and 24 strokes.

325. R. v. Angasisye s/o Mwaikuga, Crim. Rev. 12-D-68, 6/4/68, Duff J.

The day after the Water Development Department had hired several workers, accused offered Shs. 10/- to the Department agent charged with hiring, to obtain similar work. The High Court's summary of the situation is that "it was clear by then that [the agent] was in no position to assist the accused, it also being apparent that [the agent] was not a man to succumb to temptation." Being convicted on his own plea of guilty to a charge under section 3 (2) of the Prevention of Corruption Ordinance, accused did not request leniency, and was therefore sentenced to 2 years and 24 strokes under the Minimum Sentences Act. Forfeiture of Shs. 10/- to the Government was also ordered.

Held: (1)The High Court may, on revision, consider the question of "special circumstances" which might warrant leniency under section 5(2) of the Minimum Sentences Act, despite the fact that the issue was not considered at all by the lower court. To do otherwise, in this case, would be unfair to accused, in view of the punishments already endured. (2) Accused pleaded guilty in his first appearance in court and "this fact alone entitled him to some leniency." (3) Accused 's conduct was "pathetic and, if anything, silly. It would not be stretching matters too far to say that the accused was desperate to obtain employment and hence his attempt at corruption. These facts amply constitute special circumstances in my view and to think otherwise would be to made a mockery of Cap. 526 and its implications." (4) The forfeiture order was illegal under section 3(3)(b) of Cap. 400. Sentence reduced to result in immediate release; Shs. 10/- ordered refunded to accused.

326. R. v. Mshamu Omari, District Court Crim. Case 2-Nachingwea-68, 16/5/68, Inspection Note by Hamlyn J.

Accused was convicted of a corrupt transaction [Prevention of Corruption Ordinance, Cap. 400, s. 3(2)], an offence scheduled under the Minimum Sentences Act, Cap. 526. A sentence of only

6 months' imprisonment was imposed, most of which had been completed by the time the case came before the High Court. The magistrate had based the sentence upon the facts that the accused was a first offender and that the amount involved was only Shs. 20/-, saying "I consider this constitutes a special circumstances (sic) described in section 5(2) of the Act.

The Court noted: The requirements for leniency, under section 5(2) of the Act, are three: that the accused must be a first offender, that the money concerned must not be in excess of Shs. 100/- and that there be "special circumstances" warranting leniency. These three requirements are set out in separate subsections. "It is clearly quite incorrect to admit as special circumstances matters which are the requisites of the earlier sub-sections … In other words, the 'special circumstances' cannot be either the fact that the accused is a first offender, or the fact that sum involved is less than Shs. 100/- These are separate requirements …."

327. Daniel s/o Sindirimwesi v. R., Crim. App. 786-D-67, 8/3/68, Duff J.

Accused was first convicted of housebreaking and stealing goods worth Shs. 149. The High Court altered the conviction to one of receiving a patched shirt, which was part of the property stolen from the complainant. The record was returned to the lower court for a specific finding as to "special circumstances" which might warrant leniency under the Minimum Sentences Act. There, accused said that he had no such claim to made, and a sentence of 2 years and 24 strokes was imposed.

Held: "(W)hilst poverty is not an excuse for committing crimes of theft or receiving stolen property, it appears to me that the possession of a patched shirt

and the wearing of it by the accused was a special circumstance which could have been taken into consideration by the learned magistrate." Since the accused had served 6 months of his sentence, a sentence was substituted so as to result in his immediate release.

328. Jayantilal Lavji Kara Shah v. R., Crim. App. 231-D-68, 28/6/68, Georges C. J.

Accused, an advocate, was convicted of two counts of forgery, one count of uttering a false document, one count of stealing by agent and one count of obtaining money by false pretences. The facts were that he had been holding a certificate of title for a client. He forged another certificate, which he gave to the client, and then used the genuine certificate to negotiate a mortgage. He then forged the client's signature on the mortgage and obtained Shs. 60,000/-. He was sentenced to four years' imprisonment - one year on the forgery counts, and three years' on the other counts which were to run concurrently with each other, but consecutively to the forgery counts.

Held: (1) All of the counts refer to a single transaction, and consecutive terms of imprisonment should not have been imposed. "In such cases, the best method of sentencing is to arrive at an appropriate punishment for the entire transaction and award concurrent terms to meet each

Separate count, taking into consideration the maximum punishment fixed for each by law." (2) The jurisdiction of the Senior Resident Magistrate is limited to passing a sentence of imprisonment for a term not exceeding three years for any single offence. Sitting on appeal, the High court cannot pass a sentence higher than that which the trial magistrate could have passed. Although the term of four years' imprisonment is not in itself excessive, the imposition of concurrent terms of imprisonment will result in a total term of imprisonment of three years. Sentences ordered to run concurrently.

329. Amri s/o Ahmed v. R., Crim. App. 277-D-68, 6/6/68, Hamlyn J.

Accused was convicted of rape [P.C. ss. 130, 131]. The version of the matter offered by the accused was that accused and complainant, a virgin of 15 or 16 years of age, had agreed to undress and to engage in some sexual intimacies with each other, the girl saying from the start that there would be no intercourse. After some time together, accused did in fact have intercourse with the girl, apparently having to overcome some resistance on her part with force.

Held: (1) "If the girls …. Laid down any condition … however foolish she was in allowing any sexual intimacy at all, the breach of such condition and penetration would constitute rape. That a woman may allow some form of sexual liberty to a man (be it little or great) does not entitle that man to proceed to have intercourse with her against her will." The conviction must therefore stand. (2)In the matter of sentence, accused should have the benefit of his "not wholly unsupported version of the mater." The Court must consider the fact that accused may have been "entrapped by desires which may have been inflamed by the recklessness and foolishness of the complainant …." Sentence reduced to 6 months' imprisonment, an order for corporal punishment being set aside.

330. Lulu s/o Titu v. R., Crim. App. 207-D-67, 8/6/68, Saidi J.

Accused was convicted of cattle theft. The only evidence was that the day after the theft of a sheep, one sheep's leg was found at accused's house. Accused's wife was arrested and detained in an attempt to coerce the husband into appearing so that he could be arrested.

Held: (1) In the absence of any other evidence, the possession of the sheep's leg, which accused said he had bought at the market, was insufficient to support the conviction. (2) The Court stated, obiter, that the arrest of a wife of an accused is illegal unless she has taken some part in the commission of the offence and could subject those arresting her to a claim for damages. Conviction quashed.

331. Kishorilal Dhaniram Aggarwal v. R., Crim. App. 238-D-68, 7/6/68, Saudi J. Accused was convicted of seven counts of obtaining goods b;y false pretences. [P.C. s. 302]. Three of the counts referred to transactions which took place on 27th November 1964; two referred to events taking place on 28th November; and two referred to events taking place on 29th November.

He was sentenced to a total of five years imprisonment, the counts referring to each single day to run concurrently with each other but consecutively to the counts referring to the previous days. There was evidence that for many years accused had purchased goods from Mwanza merchants on credit. He then distributed the goods to smaller towns in the area and paid the Mwanza merchants by post-dated cheques. In the transactions in question, he issued post-dated cheques totalling Shs. 108,000/- and then flew to Bombay without depositing any funds in his bank account, which at the time had a balance of Shs. 88/95. The appeal was against the severity of sentence only, and it was alleged that accused was in poor health.

Held: (1) Accused had for years purchased goods with post-dated cheques which he had regularly paid until the events in question, an in the circumstances he should have been charged with obtaining credit by false pretences [P.C. s. 305] rather than obtaining goods by false pretences [P.C. s. 302]. (2) As accused was represented by counsel both at the trial and on appeal, and as the matter of the error in the charge was not raised at the trial an the appeal is against sentence only, the complaint against the conviction cannot be entertained, but the error may be considered in assessing sentence. (3) The trial magistrate acted properly in ordering that the sentences on the counts referring to each single day run concurrently with each other the issuance of several cheques on the same day could be considered to be one transaction because the offences were of the same nature. It was also proper to order that counts referring to each successive day run the offences on separate days constituted sepa-

rate transaction. (4) The total sentence should be reduced, “not necessarily on the grounds of … ill health,” but because the maximum sentence for obtaining credit by false pretences is one year, whereas the maximum sentence for. Obtaining goods by false pretences is three years. This does not constitute interference with the conviction itself. Sentences reduced to a total of three years imprisonment, the maximum that would have been permissible if accused had been convicted under section 305, and if the counts referring to a single day are to run concurrently.

332. Paulo Kulola v. R., Crim. App. 396-M-68, 1/6/68, Mustafa J. Accused met two persons in a bus station, and convinced them that they should hide the money they were carrying, last it be taken by customs officials He persuaded them to give him Shs. 20/- and 50/- respectively, whereupon he purchased envelopes in which he suggested he would put the money. He instead put paper in the envelopes and proceeded to show his victims how to hide the envelopes on their persons. Accused was convicted of obtaining money by false pretences.

Held: Since the victims at no time intended to part with more than the temporary possession of their money, the offence committed was not obtaining money by false pretences, but larceny by trick. Conviction of theft {P.C. s. 265] substituted.

333. R. v. Daniel Kambegwa, Crim. Rev. 170-D-67, 6/4/68, Duff J.

Accused was charged with theft by public servant [P.C. 265, 270]. The prosecution stated that a bonnet stand was missing from a motor vehicle, and that accused was seen some days later using it as a walking stick. Accused answered the charge by saying “It is true.” When asked if there were special circumstances which might warrant leniency under the Minimum Sentences Act, he stated that

he had not know that the bonnet stand was of any use, and that he had taken it to use as a stick.

Held: (1) In a prosecution for larceny, it is irrelevant that the property taken may be of no value, or that the owner may intend no further use for it. (2) In this case, the "plea of guilty" was equivocal, since the gist of accused's position was that the bonnet stand had been abandoned. Conviction quashed.

334. Nassoro s/o Sadiki @ Moshi s/o Sadiki v. R., Crim. App. 219-D-68, 12/6/68, Georges C. J.

Accused was convicted of possession of property suspected to have been stolen. [P.C. s. 312.] There was evidence that he had been apprehended fleeing from a railway station with a handbag which contained a post office savings book bearing the name of the owner.

Held: The charge was in respect of the savings book, and section 312 is inapplicable in the case of property which can be identified as that of a known individual. Where the identity of the owner is known, the matter is no longer one of suspicion only, and the charge should be laid under one of the sections dealing with stealing or feloniously receiving stolen property. [Citing R. v. Shabani Seidi, (1943) 1T.L.R. (R) 77; R. v. Zubsili s/o Katakuhakwa, (1963) E.A. 17, 19]. Conviction quashed.

335. Elikana s/o Mekijanga v. R., Crim. App. 45-A-68, 15/6/68, Accused was convicted of burglary and stealing. The goods were taken from a tailor's house and included some of the tailor's clothing, some clothing belonging to other persons left with him for repair, a piece of cloth, and a lady's wristwatch. Although accused was found 1.5 months later in possession of several items which the tailor and another witness said were among the goods stolen, the only satisfactorily identified item was gown, which the tailor recognized from his own workmanship.

Held: "Having in mind that the appellant had a very small proportion of the stolen property in his possession … and the time that had elapsed since the theft, the inference of theft does not seem to me to be certain. In all the circums-

tances … the better inference from the facts would be one of receiving stolen property." Conviction for receiving stolen property [P.C. s. 311(1)] substituted.

336. South India Corp. (T) Private Ltd. v. H. J. Stanely & Sons. Ltd. Misc. Civ. Application 1-D-68, 30/1/68, Georges C. J.
Respondents' advocate went on overseas leave after the High Court trial of the case between appellants and respondents, and after appellants' application for extension of time for

Appeal had been served upon his firm. He had not, at that time, seen the record. He returned some 2 months later, and 3 weeks after that the firm approached the appellants' advocated to discuss the argument of certain grounds of cross-appeal. The latter firm did not consent, and respondents' advocates filed an application for extension for time for filing notice of cross-appeal.

Held: Rule 9 of the East African Court of Appeal Ruled, 1954, provide that time for taking any step in connection with an appeal to that Court may be extended for "sufficient reason." It has been held that the "mistakes of a legal advisor" may amount to "sufficient reason. [Citing for the principle (but distinguishing the result) Shah H. Barmal v. Santchi Kumari (1961) E.A. 679.] This would also include "default of a legal advisor," each case being dealt with on its facts "to produce a result consistent with justice and the overriding consideration that cases should be dealt with on their merits." Here, where the delay was relatively brief, the absent advocate was the member of his firm "especially familiar" with the case, and the other side was notified within 3 weeks of his return that a cross-appeal was desired, there was "sufficient reason" for granting the extension. Extension granted.

337. Sosthenes s/o Kagyabukama v. Theobald Kuyungulima, (PC) Civ. App. 94-M-68, 24/7/68, Seaton J.

Plaintiff sued defendant in Primary Court for the refund of the purchase price of a shamba. Defendant did not appear after being duly summoned. Judgment was given for plaintiff after proof ex parte in accordance with section 23 (a) of the Magistrate Courts (Civil Procedure in Primary Courts) Rules 1964. Defendant appealed to the District Court, which investigated the merits of the case and reversed the decision of the trial court.

Held: The proper way for defendant to challenge the Primary Court's decision on the merits was to apply to the trial court under section 29, Magistrates Court (Civil Procedure in Primary Courts) Rules 1964 to set aside its judgment and commence the hearing afresh. The District Court could not reinvestigate the merits of the case on appeal, but could only make use of the evidence on record, none of which supports a reversal of the trial court's decision in this case. Plaintiff's appeal allowed.

338. Hassani abdallah v. African Bazaar, Misc. Civ. App. 6-D-68, -/7/68, Hamlyn J.

Plaintiff claimed for wage arrears. When his claim originally arose, plaintiff complained to the Branch Secretary of NUTA, and after a conference with the employer, plaintiff withdrew the complaint upon receiving a cash settlement and an increase in wages. Two years later, plaintiff lodged a complaint based on the same facts with the Ministry of Labour. This complaint was rejected, and plaintiff thereupon filed this action.

Held: Plaintiff abandoned his claim at the time of settlement; since consideration for this was paid by defendant to plaintiff, there was an accord and satisfaction with respect to the claim.

339. Bartholomew Ndyanabo v. B. Petronida Ndyamukama, (PC) Civ. App. 112-M-68, 19/7/68, Seaton J.

Appellant sold land to the respondent. In the written document attesting the sale, the land was described by appellant as being 40x60 feet. The action originated in a Primary Court in the Bukoba area.

Held: As the respondent's consent to the contract was induced by fraud she was entitled to repudiate on discovering the true position.

340. Kulthum Ally Kara v. Yassin Osman, Misc. Civ. Cause 32-D-68, 14/6/68, Georges C. J.

Applicant, a divorced Muslim wife, applied for custody of their children in District Court. The Senior Resident Magistrate ruled that Islamic Law was applicable and that, therefore, the case must begin in Primary Court. Applicant then applied for a High Court order that the case proceed in District Court.

Held: (1) Under section 57(1) of the Magistrates Courts Act, proceedings "in respect of marriage, guardianship or inheritance under customary law, or the incidents thereof " must ordinarily begin in Primary court, unless the High Court grants leave for their commencement in some other court. However, this section does not apply to this case, since the law involved is Islamic law, which is not included within the term customary law."(2) The Primary Court's jurisdiction over civil proceedings under Islamic law is not exclusive; the concurrent jurisdiction of the District Court is secured by sections 36 and 35 (2) of the Act. (3) Section 13 of the Civil Procedure Code 1966 requires all suits to be instituted "in the court of the lowest grade competent to try it"; but section 57 provides that section 13 shall not be read to require any proceedings of a civil nature to be commenced in Primary Court. "It would appear, therefore, that once a District Court has jurisdiction and prior permission is not required under section 57, a party can file an action in the District Court if he so chooses, even though the Primary Court would also have had jurisdiction …." Ordered that action be remitted to District Court.

341. Francis s/o Mwijage v. Boniface s/o Kabalemeza, Civ. App. 84-M-68, 31/7/68, Seaton J.

Plaintiff sued defendant in District Court for refund of brideprice allegedly paid by him to defendant. The trial court found that no brideprice had been paid and dismissed the suit. On appeal, a question arose as to the jurisdiction of the District Court to try the suit.

Held: (1) The law applicable to the suit is customary law, which under section 14 of the Magistrates Courts Act, Cap. 537, is justifiable in Primary Courts. Under section 13 of the Civil Procedure Code, every suit shall be instituted in the court of the lowest grade competent to try it, which was, in this case, a Primary Court. Section 13, however, is a rule of procedure, not of jurisdiction [Citing Mulla, 1934 10th Edition, pp. 98- 100], and does

Not deprive higher courts of jurisdiction which they already possess. Further, under section 35 (2) of the Magistrates Courts Act, District Courts have limited original jurisdiction in proceedings save where it is conferred exclusively on some other court; and section 14 of that Act "does not appear to give primary courts exclusive jurisdiction over suits involving customary law." Thus the District Court had jurisdiction to try the suit. (2) Under section 57 of the Magistrates Courts Act, all civil proceedings in respect of the incidents of marriage must be taken in the Primary Court, unless the Republic or the President is a party or the High Court gives leave. Brideprice is one of the incidents of marriage under customary law, and none of the exempting conditions stated above has been fulfilled. The proceedings in the District Court were therefore ultra vires. Appeal dismissed.

342. Kanipius Odero v. Nolous Ong'ina, (PC) Civ. App. 126-M-68, 20/7/68, Seaton J.

Plaintiff was beaten and injured by defendant, who wa subsequently convicted by the District Court, fines Shs. 200/- and ordered to pay Shs. 100/- compensation. Plaintiff then brought this action in Primary Court for Shs. 1000/- damages.

Against the advice of assessors that the amount was too high according to customary law, the magistrate, without any reasons given, allowed the claim for the entire amount, being Shs. 686/- for bodily injury and Shs. 314/- for car and hospital charges. On appeal the District Court reduced the award to Shs. 900/-, with advice to plaintiff to apply for the Shs.100/- paid into court by defendant pursuant to the order to pay compensation.

Held: (1) The order for compensation made upon conviction in a criminal case does not oust any court's jurisdiction to award additional compensation in a subsequent civil suit, but such an order shall be taken into account in affixing damages in civil suit. [Citing Cr. Proc. Code. ss. 176, 178(3)]. (2) The Primary Court's ward was excessive. The amount of Shs. 314/- is proper, because there are receipts supporting those claims. In additional, plaintiff is entitled to Shs. 60/- for fifteen lost days of work, although there is no indication of his occupation on the record, and to Shs. 124/- as a rough measure of recompense for injuries (bad bruising of right side of the chest and bleeding into the right lung) and for wounded feelings.

343. Ramadhani s/o Saidi v. Gati d/o Magori, (PC) Civ. App. 68-M-67, 15/7/68, Seaton J.

Plaintiff and defendant were living together while plaintiff was married to another man. Sometime thereafter, plaintiff left the defendant to attend a funeral, leaving him with their child, and never returned; she is presently re-united with her husband. The Primary Court held that defendant was entitled to the custody of the child upon payment of Shs. 100/- to plaintiff's father, but the District Court of Musoma reversed.

Held: The Primary Court judgment was sound and is therefore restored. [Citing Law of Person, G. N. 279/1963,s. 178; Salum s/o Rashid v. Hadija d/o Abdallah, Tanzania High Court Digest, Vol. 1, No. 5]. "Where the natural father is prepared to legitimize his child and there are no reasons adduced why he should not have custody of her, he should be allowed to do so."

344. Shauri s/o Dighis v. Mohe s/o Dighs, (PC) Civ. App. 125-A-66, 4/7/68, Platt J.

The parties were half-brothers, plaintiff being the son of the junior house and defendant the son of the senior house. When defendant was married, plaintiff's mother gave him a wedding present of one cow. After some years, during which the cow produced six offspring, plaintiff's marriage was arranged, and his mother then asked defendant for a wedding present for plaintiff of one cow. Defendant refused, denying that there was any duty under the customary law (which was not identified in the High Court judgment) to exchange wedding presents, and saying that in any event he had already given a suitable present to plaintiff's family in recompense for the cow he had received. Plaintiff sued in the Endasale Primary Court for the return of the cow given to defendant, along with its six offspring. The assessors agreed with his position, and the magistrate gave judgment for him. The District Court at Mbulu, again in agreement with its assessors, hel that no customary law duty to exchange presents had been established, and gave a judgment for defendant. The High Court called further assessors for assistance, and their opinion was that the District Court had been correct.

Held: "In these circumstances, the balance of opinion is in favour of the judgment of the District Court, which seems …. To be a more sensible opinion than that expressed by the Primary Court." Plaintiff's appeal dismissed.

345. Doto d/o Sweya v. Mhinda d/o Sweya, (PC) Civ. App. 187-M-67, 4/6/68, Seaton J.

Defendant was the eldest and plaintiff the youngest of three sisters. Their parent died when they were young. Defendant acted as mother of the other two sisters up to the time of their respective marriages, receiving the bridewealth for both of them. After twenty years, plaintiff brought this action demanding return to her of the eight head of cattle paid as bridewealth upon her marriage, together with thirty-two others which she claimed as their offspring.

Held: (1) The Law of Person, G.N.279/1963, which is applicable to the Nzega District by virtue of G. N. 13/1964, contains no express provisions on this question; but section 7 confirms that the person entitled to receive bridewealth is the father or his main heir. [Citing also ss. 34, 35]. (2) It is not clear whether bridewealth was customarily received in "trust" in Nzega; but here was a custom whereby the father of the bride, or his main heir, could share the bridewealth. (3) The remaining twelve cattle admittedly in defendant's possession may be retained as her share of the bridewealth and as compensation for her services. Plaintiff's appeal allowed.

346. United Bus Service Limited Co. v. The New India Assurance Company, Ltd. Civ. Case. 1-M-67, 19/7/68, Seaton J.

Plaintiff, a limited company operating a fleet of buses, filed an application for insurance with defendant in which it set forth the market value of the vehicle to be insured as Shs. 65,000/- This value was correct at the time the proposal form was submitted, but the value only included the chassis and cab, which were purchased for approximately Shs. 65,000/- under a hire-purchase agreement, and did not include a bus body which plaintiff fitted to the chassis at a cost of about shs. 25,000/- before the policy was issued. The vehicle was subsequently damaged in an accident and defendant initially commenced repair work; but when it discovered that the value of the vehicle was Shs. 90,000/- rather than Shs. 65,000/- as the proposal stated, it ordered the work stopped and disclaimed liability because of the alleged false statement. Plaintiff sued for the cost of the repairs and lost profits which it would have earned during the repair period. Defendant raised the defence misrepresentation; and its witnesses proved its standing policy of not insuring vehicles worth more than Shs. 75,000/-. It also argued that only the legal owner could sue, and that the policy required arbitration of disputed claims within 12 months after liability was disclaimed. Under the hire-purchase agreement, plaintiff was obliged to maintain and repair the vehicle and also to

procure a policy of comprehensive liability insurance, with the owner designated as sole agent to receive any proceeds and to negotiate claims. The policy issued by defendant was endorsed to set forth the interest of the owner under the hire-purchase agreement and to provide that all monies were to be paid to the owner as long as it was the owner.

Held: (1) Where the risk of loss is on the hirer, as here, it is entitled to recover under the policy even though all monies received would be held by the hirer as trustee for the owner. (2) The dispute here "arose out of the policy and is thus subject to arbitration; plaintiff's argument, that the denial of liability goes to the entire policy and thus repudiates the entire policy (including the arbitration clause), is not well taken. However, having been advised in correspondence from plaintiff's attorney that a lawsuit was contemplated, and not having invoked the arbitration clause, defendant is estopped to raise this as a defence. (3)Even though the value as stated on the proposal was true as of the date of the proposal, defendant relied upon the truth of the statements in issuing the policy and they were untrue by the date the policy was issued. In view of its intention to build on a bus body to the chassis and cab, plaintiff had a duty to disclose to the defendant the true value of the vehicle as of the date the policy was issued. In failing to do so the plaintiff "misled the defendants into consenting to issuing the policy which they would otherwise have declined to do …." The contract of insurance was thus void able at the option of the insurer under section 19 (1), of the Law of Contract Ordinance. (4) Having so held against plaintiff, the Court entered findings on the remaining issues as follows. While plaintiff had proved the actual cost of repairing the damage, it would not be entitled to lost profits even under the contract, since

(i) the policy excluded, by its terms, "consequential loss;" (ii) plaintiff had not adequately established its special damages; and (iii) plaintiff failed to mitigate losses, but continued the repairs after defendant disclaimed.

347. Henrico s/o Welengaile v. Felician s/o Kiraama, (PC) Civ. App. 111-M-68, 15/8/68, Mustafa J.

Both plaintiff and defendant are members of the same Haya clan and each owned a clan shamba. In 1950, defendant mortgaged his shamba to a stranger. Plaintiff redeemed the shamba and remained in possession. In 1967 defendant refunded the mortgage money to plaintiff and claimed possession of the shamba. Plaintiff filed action for Shs. 4200/-, being compensation for the improvements which he effected on the shamba. The Primary Court, after visiting the site, ordered the defendant to pay Shs. 1010/60 as compensation. The District Court, however, reversed that decision, and relying on Cory & Hartnoll, Customary Law of the Haya Tribe, para 567, held that no compensation was payable. Paragraph 567 reads: "Right of Original Owner. At any time the original owner or has direct male descendants have the right to claim the return of the relative who redeemed it on payment of the redemption price. Any hardship to the present occupier incurred by his dispossession is not considered." This is followed by a "Note" which states, "For this reason relatives who have only a vague right to interfere will not do so."

Held: Plaintiff was in occupation for 15 years and that would indicate that he could not be certain if the defendant was going to redeem the shamba or not. In any event, plaintiff could not be expected to keep the shamba unattended and uncultivated for all this period or to let it go to ruin. "I think that both common sense and equity would require that (plaintiff) should be entitled to compensation." Primary Court judgment restored.

348. Kimonge Mwalimu v. Kavuli Ngoma, (PC) Civ. App. 25-D-68, 25/5/68, Hamlyn J.

Some years ago, a certain path was used by villagers generally to take cattle to pasture. Within the past few years, respondent extended his cultivation into the track, narrowing it until it now suffices only for pedestrians. Appellant sought to re-open the track, which "saves cattle owners from driving their beasts several miles in order to get to the grazing grounds."

Held: As it appears that there is no lack of ground in the area for cultivation of crops elsewhere, the track should be re-opened; the whom of a single person cannot outweigh "the established rights of the community as a whole." "I consider that local authority might assist in demarcating the boundaries of the track so that all may be aware of the extent of their rights of passage.

349. Bi Mukagilaya Bitasimbile v. Raphael s/o Rubili, (PC) Civ. App. 73-M-68, Mustafa J.

Plaintiff sued for return of purchase price paid on a clan shamba wrongly sold to her by defendant's aunt, and for compensation for a house and other permanent improvements

She effect thereon. It was not disputed that plaintiff had paid defendant's aunt for the said shamba. It was further established that defendant's mother had taken proceedings in 1954 to declare the sale void. In those proceedings the District Commissioner's Court had held the sale invalid but allowed defendant's aunt to remain in the shamba until her death; thereafter, the shamba was to become the property of defendant's mother. Plaintiff remained on the shamba until the death of defendant's aunt. Defendant, as successor to her mother's rights, recovered possession from the plaintiff who started these proceedings.

Held: (1) It had already been decided in the earlier action that plaintiff was entitled to be refunded her purchase money; but she is not entitled to be compensated for improvements in the form of houses and permanent crops because she was aware, at the time of improving the shamba, of the dispute over her title.

(2) Plaintiff should remain in possession of the shamba until the purchase price she had paid is refunded to her. (3) If plaintiff dies before receiving the purchase money, the shamba should then become the property of the defendant, and no heir of the plaintiff would be entitled to claim the sum, "for the right of the plaintiff to remain on the shamba pending the receipt of the money would be personal to her."

350. Hamisi Mlezi v. Umoja Printers, Civ. App. 8-D-68, 31/7/68, Duff J.

Plaintiff sued defendant on a dishonored cheque issued by him and was granted judgment. The cheque had been given by defendant to plaintiff and signed by him but with a rubber stamp marked "Bashir & Company" affixed to the cheque. In 1955, Bashir & Company was registered under the Business Names (Registration) Ordinance, Cap. 213, and the defendant was the person authorized to operate its bank account. Defendant alleged that he had signed the cheque on behalf of a principal or in a representative character, and so was not personally liable, by virtue of s. 26(1) of the Bills of Exchange Ordinance, Cap. 215.

Held: The defendant is personally liable on the cheque. "Examination of the cheque reveals that it was not said in terms that he was signing on behalf of a company, and the fact that the same 'Bashir & Company' was rubber-stamped on the cheque without further ado did not automatically exclude his liability …… A court is entitled to look at the surrounding circumstances under which the bill was signed, and this the lower court did. The court accepted, as it was entitled to do, the evidence adduced which established that the appellant was personally liable."

351. Jeremiah Kaijage v. Sahid Byarushengo, Civ. Application 9-M-68, Mustafa J.

At the hearing date of a suit filed by applicant, neither he nor the advocate named as representing him appeared, and the suit was dismissed under Civil Procedure Code Order 9 Rule 8. Plaintiff applied to the High Court for leave to

appeal out of time, on the grounds that he had never instructed the advocate to appear for him, and was never himself told of the hearing date.

Held: The dismissing the suit under Order 9 Rule 8 is not appeal able. Applicant's only remedy is to apply for restoration of his suit under Order 9 Rule 9. Application dismissed; no order as to costs, because of applicant's probable ignorance of the provisions of the Civil Procedure Code.

352. Martin Mwanga v. Essak Esmail & Sons, Civ. App. 7-D-68, 24/7/68, Biron J. Plaintiff sued defendant for goods sold and delivered, and was granted an ex parte order in the absence of defendant. Prior to judgment, defendant had written to plaintiff, agreeing that he owed him "some money" and promising to pay it. A copy was sent to the Resident Magistrate with the not attached; "I am prepared to pay the said sum in production of all the Invoices signed by me." Defendant argued on appeal (i) than his letter constitute a written statement of defence in that it did not accept the full claim of the plaintiff, but required proof of the alleged debt by way of production of invoices, and (ii) that the claim was never proved in court.

Held: Appeal allowed. "Although the appellant defendant's letter does not really constitute a formal written statement of defence, it certainly is a very strong indication that he was not admitting the claim, therefore, if the magistrate was not prepared to accept this letter as a written statement of defence, it was his duty to so inform the appellant and direct him to file a proper written statement of defence. In any event, he had certainly no right or justification to make an ex parte order in the absence of the defendant, and even without the claim having been proved, which violates all the principles natural justice. "

353. Dr. M. Daya, Administrator of H.H. The Aga Khan Hospital, Dar es Salaam v. T. Sanga. Civ. Rev. 3-D-67, 29/7/68, Georges C. J

Plaintiff sued defendant in District Court for service rendered. Defendant, being duly summoned, did not appear. Judgment was given ex parte for plaintiff on 20 November 1966, execution proceedings were filed, and defendant was subsequently arrested and brought to court on 20 April 1967, when he first became aware of the judgment against him. On 4 May 1967, defendant was informed by the court of his right to apply for a stay of execution and for a setting aside of the judgment. On 23 May, 1967, such an application was filed.

Held: Defendant's application was too late. Under Article 164, Indian Limitations Act, the defendant had a period of thirty days from the date he first knew of the judgment to make application to set it aside. The period does not begin to run from the time when defendant first learned of his right to make such application. If that were so, the period could be indefinitely postponed. Application dismissed.

354. Sabayaga Farmers' Cooperative Ltd v. Anyony Mwita, Civ. App. 172-M-67, 6/6/68, Seaton J.

Plaintiff sued defendant in Resident Magistrate's Court for Shs. 715/-, for maize which defendant was alleged to have wrongfully taken. Defendant, who was not represented by an advocate and whose officer in charge of the case had never appeared in court, filed a written statement of defence which read as follows: "1; That on behalf of the Society, I strongly deny any indebtedness to the Plaintiff in the sum of Shs. 715/-. 2. That I put the plaintiff to strict proof of his claim." The Resident Magistrate ordered the written statement of defence struck out under Order 6, rule 16 of the Civil Procedure Code, because it was a general denial and therefore insufficient under Order 8, rules 3, 4 and 5. Plaintiff was then permitted to give his evidence ex parte, and judgment was awarded for plaintiff. Defendant then appealed, and his memorandum of appeal included the following: "5. That the defendant (appellant) denies having removed unlawfully 13 bags of maize from the plaintiff's premises at Ngoremi. Also the defendant (appellant)

denies his indebtedness to the plaintiff in respect of 13 bags of maize or Shs. 715/-." The District Registrar gave him notice of hearing of the appeal in which he was advised that the could appear himself or by agent, or might submit a written statement of his arguments. Defendant did not appear at the appeal, and plaintiff moved that his appeal be dismissed.

Held: (1) The notice of appeal was given under Rule13 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1963, G. N. 312/64, which permits an appellant to submit his appeal in writing without appearing. The rule is not applicable to this appeal, which is from a Resident Magistrate's Court, but as defendant has relied on the notice in ignorance of its invalidity, the appeal should be decided on its merits. (2) There is authority that a court has discretion under Order 8, rule 10 of the Indian Civil Procedure Code of 1908 (which is similar to Order 8 rule 14 of the present code) to ignore a defective written statement of defence and to give judgment for plaintiff after hearing his evidence ex parte [Citing Haji Ibrahim Haji Adam v. Ismail Dilmirkhan (1938) 1 T.L.R. (R) 585]. The court also has inherent powers to strike portions of pleadings in addition to its powers under Order 6, rule 6 of the Code. [Citing Bank of India, Ltd. v. Manibhai M. Patel, Ltd., (1965) E.A. 638]. However, these powers should be exercised very cautiously, and a pleading should generally not be struck where the defect can be cured by amendment. [Citing Mulla, Indian Code of Civil Procedure of 1908, 10th edn., p. 543] (3) In the present case the written statement of defence was curable as is shown by paragraph 5 of the memorandum of appeal, which would have satisfied the requirements of Order 8, rules 3, 4, or 5 of the Code. Defendant's officer was a man of limited education and with no legal experience, and in these circumstances, the trial court erred in striking the written statement of defence. Ex parte judgment set aside, and case remanded to trial court for amendment of the written statement and trial of the case on its merits.

355. Joseph Kimera v. Idd Hemedi, Civ. App. 1-M-68, 31/7/68, Seaton J.
Plaintiff sued defendant upon a contract of guarantee and was awarded judgment. His principal evidence consisted of a document, Exhibit A, alleged to have been written and signed by defendant acknowledging the guarantee, and also a copy of a letter, Exhibit B, written by plaintiff to defendant demanding payment on the contract. Defendant appealed on the following grounds, inter alea; (i) the magistrate should have referred Exhibit A to handwriting experts or the police to determine if it was really written by defendant, rather than rely on his own judgment; (ii) the magistrate erred in admitting in evidence Exhibit B without proof that it was delivered to the defendant and without proof of service of notice to produce the original; (iii) plaintiff failed to serve a copy of Exhibit A on the defendant together with the plaint and summons as required by Order VII, Rule 14 of the Civil Procedure Code; (iv) the magistrate failed to frame the issues at the outset of the trial as required by Order XIV, Rule 1 of the Civil Procedure Code.

Held: (1) "Most magistrates would perhaps prefer to have the evidence of specialists or experts on a question of handwriting, but I do not think the method employed by the learned magistrate was unreasonable or failed to satisfy s. 69. of the Evidence Act.' (2) Notice to produce is a technical device with which laymen would not ordinarily be acquitted, and was not required of plaintiff. However, plaintiff should have been required to prove delivery of the original of Exhibit B to the defendant. (3) The trial court should have recorded the reasons why plaintiff failed to attach copy of Exhibit A to the plaint, and why nevertheless it was admitted as evidence. (4) The failure to frame the issues at the outset was not in itself fatal. However, the combination of the various procedural irregularities amounts to a mis-trial and a failure of justice. Case remanded for re-trial.

356. Farrab Inc. S. A. v. The Ottoman Bank, Civ. Case 23-A-66, 23/3/68, Platt J.
Plaintiff company, incorporated and with its principal place of business in Tangier, but with a registered office in Tanzania, was in liquidation. It sued certain of its mortgagees for an accounting and to recover certain of its properties. The defendant banks sought an order under Order 25, rule 1 of the Civil Procedure

Code and under section 344 of the Companies Ordinance compelling plaintiff argued that, because it had the office in Tanzania, it was not a person residing outside Tanzania – the only class of persons subject to the security for costs provisions of Order 25, rule 1. Auditors were unable to vouch for the accuracy of the valuations of the fixed assets on plaintiff's books, and other valuations did not convince the Court of plaintiff's solvency.

Held: (1) The residence and domicile of a trading company are determined by the situs of its principal place of business – "Where the administrative business of the company is conducted, and this may not be the place where is manufacture or other operations are carried on." As

Plaintiff is in liquidation, with all its assets in receivership, it has no place of business in Tanzania and its principal place of business must be elsewhere.(2) Under Order 25, rule 1, security for costs might not be required if the plaintiff had sufficient immovable property in Tanzania, apart from the property in suit, to cover the costs likely to be incurred by defendants; but plaintiff's property was not sufficient here. (3) Plaintiff cannot avoid the requirements of Order 25, rule 1, by arguing that in a mortgage suit, costs would not be awarded against the mortgagor but would be added to the mortgage debt. In some cases, a mortgage may be permitted to apply for cost, and in such cases security for costs is proper. Such an order is within the court's discretion here, where the mortgagor plaintiff is a company in liquidation. [Citing City of Moscow Gas Co. v. International Financial Society, 7 L.R. Chancery App. (1871/72)] (4) With respect to section 344 of the Companies Ordinance, the Court indicated that companies in liquidation should normally be required to give security for costs, but did not rely on this presumption; reliance for the order was rather placed on the finding of fact that plaintiff's solvency was doubtful. Plaintiff ordered to furnish £1000 security for costs for each of the two defendants making the application.

357. Mohamed Stambuli v. Mwanaharusi Selemani, Probate and Administration Cause 11-M-65, 1/7/68, Seaton J.

This was an application for the revocation of letters of Administration of a deceased's estate, under the Probate and Administration Ordinance, Cap. 445, section 49. Proceedings begun in the Primary Court to settle the estate ended in an equivocal way. The present respondent, acting on legal advice that those proceedings were outside the jurisdiction of the Primary Court, brought a petition in the High Court for a grant of Letters of Administration and this was granted. Meanwhile, present applicants, anxious to protect their interests, had brought an action in the District Court, which asked the District Administration and this was granted. Meanwhile, present applicants, anxious to protect their interests, had brought an action in the District Court, which asked the District Administrative Officer to take possession of the estate. Applicants now seek revocation on the grounds that the original petition was false, in that (1) respondent is only half-sister of deceased; (2) deceased was wife of applicant Stambuli up to her death; (3) applicant Saudi is a whole blood son of deceased's brother Husein.

Held: (1) Primary Courts have no pecuniary limits to their jurisdiction in administration of deceased's' estates, where the applicable law is customary or Islamic law and the estate is not governed by the Marriage, Divorce and Succession (non-Christian Asia tics) Ordinance (G.N. 320 of 1964). (2) Applicant failed to prove that respondent was not whole blood sister of deceased, and the onus is on him to prove it. (3) Deceased was married to applicant Stambuli; the onus is therefore on respondent to prove a divorce. [Citing Ali Omar Mote v. Ali Siraj (1959) E. A. 883]. Although deceased "married" two other persons after leaving Stambuli, there was no firm evidence of any valid form of divorce. (4) Evidence was brought to show that applicant Saudi was illegitimate since his mother was already pregnant with him when she married Hussein, the deceased's brother. Although Islamic law presumes a child born within 6 months of marriage is illegitimate unless acknowledged by the father, the Evidence Act 1967,

s.121 states that birth during marriage is conclusive proof of legitimacy. Even if the Evidence Act does not supersede Islamic law on this point, Husein acknowledged Saudi as his son. (5) As both applicants have interests in the estate, the proceedings to obtain the Letters of Administration were defective. However, it seems that no useful purpose would be served by revoking the existing grant; but it should be qualified by attaching thereto a declaration of the beneficial interests of the present applicants as found by this Court. So. Ordered; costs to be borne by the estate.

358. John Lwehabura v. Edward Lwehanura, (PC) Civ. App. 74-M-68, Seaton J.
At issue is the validity of a will which purports to disinherit the eldest son of the testator. It was alleged that the testator disinherited the son, plaintiff, because the latter beat the former and had not apologized according to Haya customary law. The testator then disinherited the plaintiff in his will, which he signed and which was attested by two witnesses. It was not established whether the testator's wife or any of the testator's kin witnessed the will as required by law.

Held: (1) The alleged will was invalid and insufficiently proved. [Citing ss. 3-5 of the Law of Wills, G. N. 436/63, which provide that written wills must be attested by proper witnesses who must include testator's wife or wives if at home]. (2) Under section 19, two witnesses are required, on of them being a kinsmen and the other unrelated to the testator, if the testator is literate. (3) Property should devolve according to the Law of Inheritance, G. N. 436 of 1963. Appeal allowed.

359. Bi Temalilwa d/0 Bijumi v. Bernardino Baitilwake, (PC) Civ. App. 80-M-68, 19/7/68, Mustafa J.
First defendant had, by a will, bequeathed a clan shamba to second defendant, The shamba belonged to one Biyongo, after the death of his father. Biyongo left a daughter, Bi Kibihile, who as a female could not inherit the clan shamba. The chief of the area attempted to dispossess Be Kibihile's aunt of the shamba but

his attempt was successfully resisted by plaintiff. Upon Be Kibihile's death, the first defendant made a written will, which was disputed by plaintiff, bequeathing the shamba to second defendant. Defendants alleged that the matter was res judicata; in two previous actions brought by the plaintiff, plaintiff had failed to obtain an injunction preventing first defendant from building a house on the shamba, and failed to obtain a declaration that he was first defendant's guardian. In the first of these cases, the Primary Court Magistrate had specifically left open the question of plaintiff's right of inheritance. Plaintiff was a closer blood-and clan-relative of the first defendant than was the second defendant. It also appeared that on one occasion plaintiff had redeemed a portion of the shamba which had been sold by the first defendant to a third party. Both the Primary Court and District Court of Bukoba found for plaintiff in this action, which was brought to invalidate first defendant's will and the bequeath to second defendant.

Held: (1) The evidence establishes that the right of plaintiff to inherit the clan shamba was "much greater" than that of second defendant, and that the "clan members were in favour of (plaintiff) being the heir of (first defendant)." (2) The right of a testator to bequeath property to whom she likes is restricted in respect of clan shambas. In Section 38 and 39 in Third Schedule (Law of Wills) of the Local (Declaration) Order, G. N. 436/63, it is provided that a will which disinherits a person "Without just cause" may be set aside, such a matter "being decided by a family council ….." Since the clan members favoured plaintiff in the hearing below, the courts' finding that the will was invalid should not be upset. (3) The matter was not res judicata, since the question of inheritance of the clan shamba was not at issue in the previous actions brought by plaintiff. Appeal dismissed.

360. R. v. Modest s/o Bishungwe, Crim. Rev. 26-M-68, 19/7/68, Seaton J.

Complainant is a school-girl between the ages of 10 and 12 years. The two accused, her brother and the man who sought to marry complainant were convicted of abduction. (P.C. s. 133) Second accused had paid bridewealth to the father of complainant, for an elder sister of complainant. Meanwhile, however, the elder sister had married someone else; after consultation with village elders, it was decided that second accused should marry complainant, whereupon a marriage ceremony was performed. She lived with second accused for a short time, though the marriage was never consummated. Complainant objected to the marriage. Her brother rather than her father, who was "somewhat mentally defective," arranged the compromise of having second accused marry his sister, which accounts for his presence as an accused party. Section 133 makes it an offence to abduct for the purpose of marrying, a "woman of any age."

Held: (1) The only question was whether a girl is generally taken to be "something between a child and a woman (Citing The Queen v. Prince (1875) L.R. 2 C. C. R. 154). The Legislature distinguished between a woman and a girl under the age of 16 years. "It is an established rule in the interpretation of statutes that, when construing the terms of any particular provision, every clause should be construed with reference to the context and the other claused of the Act, so as, …. To make a consistent enactment of the whole statute or series of statutes relating to the subject matter." (Citing Canada Sugar Refining Co. v. R., (1898) A.C. 735 and particularly per Lord Davey at page 741). This can only be done be limiting the term "woman" to human females aged 16 or over. (2)When the Legislature intended to create an offence where the victim was a human female n any of the stages of development or categories of age groups, it used the phrase "female person." (P.C. s. 158, incest by females). (3) The rationale for distinguishing between females of 16 or more and those of lesser years is that on the question of consent to marriage those in the older group are deemed legally capable of consenting to marriage, whereas those under 16 are not legally competent to do so. As complainant was not a "woman of any age" the conviction were quashed.

361. R. v. Katabazi s/o Kahurananga, Crim. Rev. 49-M-68, 1/8/68, Seaton J.

The first accused possessed a General Game Licence which he loaned to the second accused. The second accused then used the Licence in order to obtain two elephants. The second accused pleaded guilty to making a false declaration and hunting elephants without a General Game Licence. [Fauna Conservation Ordinance, Cap. 302, ss. 13 (1) 53(1), 12(1)]. The first accused was convicted of transferring a game licence. [Fauna Conservation Ordinance, Cap. 302, ss. 13(4), 53(1)(b) 53 (2)].

Held: (1) "Section 12 of Cap. 302 does not create the offence of making a false declaration for a licence but it may be that section 12 read with s. 13 could be construed together as creating the offence of hunting an elephant without first obtaining a general game licence. Hence I am not prepared to challenge [the second accused 's] conviction …. " (2) Section 13(4) makes the transfer of a licence void but nothing in section 13 or section 53 makes such transfer a crime. Conviction of first accused quashed.

362. Sidori Francis v. R., Crim. App. 317-D-68, 17/7/68, Biron J.

Accused was convicted of conveying property (a radio) reasonably suspected of having been stolen or unlawfully obtained. After testifying in his own behalf, he refused to answer questions put to him during cross-examination. Thereupon, the trial court also convicted accused of contempt of court. (P.C. s. 114(1)(b)). He only appealed the main conviction, which appeal was dismissed, but the High Court, sua sponte, considered the conviction for contempt of court. Accused said that he had a licence for the radio, but that he had lost it. The trial court had asked him where it was, and ordered him to produce it, which accused failed to do.

Held: (1) Section 114(1)(b) makes it an offence, inter alea, for a sworn witness (as accused was) to refuse to answer a question or produce a document. Since the court believed that accused was not properly in possession of

the radio, he hardly would be able to produce a licence for it, so the failure to do so cannot constitute contempt of court. Conviction quashed. (2) The Court made note of the fact that accused could have, had he so chosen, refused to give any evidence at all.

363. Makubi s/o Nana v. R., Crim. App. 335-D-68, -/7/68, Hamlyn J.
Accused was convicted of corruption [Prevention of Corruption Ordinance, s. 3(2)] A Village Executive Officer has come to his house to count his cattle for tax purposes. Accused said that some of the cattle in his kraal belonged to a neighbor. When the officer insisted on counting them all, accused offered him a twenty-shilling not, as he admitted in his testimony, "as an inducement not to include the other cattle which were of another man." The trial court took this explanation as a plea of guilty.

Held: A necessary element of the offence is that the act of offering an inducement be done "corruptly". But for an act to be done corruptly, it must be done with an evil mind or an evil intention. [Citing Mandia v. R., (1966) E. A. 315; R. v. Akbarali K. Jetha, 14 E.A.C.A. 122; and Bradford Election Petition. (No.2), (1869) 19 L.T. 723] The accused here clearly had no evil mind. "The dictionary meaning of 'corrupt' in this sense is to induce to act dishonestly or unfaithfully, and in no sense can appellant be said to have acted thus." So the accused 's statement was not equivalent to a plea of guilty, since it contained no admission of having acted corruptly. Appeal allowed; conviction quashed.

364. Mzee s/o Selemani v. R., Crim. App. 244-D-68, 21/6/68, Georges C. J.
Accused, a Divisional Executive Officer, was convicted of wrongful confinement [P.C. s. 253] and abuse of office [P.C. s. 96]. Complainant went to accused 's house to seek a permit to hold an ngoma. When accused replied that no such permits were available, complainant apologized for bothering him. At this point

accused rebuked complainant for interrupting a “bwana mkubwa” and ordered a clerk to arrest complainant. No warrant for the arrest was issued. Complainant was charged with an offence contrary to section 124 of the Penal Code and was released on bail after being detained for short period. This charge against complainant was later dropped. Accused argued that because he was an ex officio justice of the peace, he was immune from prosecution as a judicial officer under section 16 of the Penal Code and section 60 of he Magistrates’ Courts Act.

Held: (1) The immunity of judicial officers extends only to those actions taken by the officer in the performance of a judicial function. [Citing Saudi Bakari Kionywaki v. R., Crim. App. 714-D-67, High Court Digest, Vo, I, case No. 443]. (2) Although the issuance of a warrant of an arrest has been held to be a judicial function [Citing Saudi Bakari Kionywaki v. R., supra], the arrest of a person without warrant for an offence allegedly committed within the officer’s view does not constitute a judicial function. In the first case, the officer is to make an impartial evaluation of the grounds justifying the warrant; in the second case he is exercising a function similar to that of countless police officers. Therefore, there was no immunity and the conviction for wrongful confinement was proper. (3) Penal Code section 124 provides for the disobedience of a lawful order, and since no order has been made by accused which could be disobeyed, the arrest of complainant was unlawful. (4) Penal Code section 96 provides that any officer “who …. Does or directs to be done, in abuse of the authority of his office, any arbitrary acts prejudicial to the rights of another, is guilty of misdemeanor.” Accused knew that the arrest was wrongful, and the arrest was arbitrary and prejudicial to complainant. Sentence on first count reduced from nine months to three months; appeal otherwise dismissed.

365. Ahmed Ibrahim v. R., (PC) Crim. App. 330-M-68, 29/6/68, Seaton J.

Accused was convicted of stealing, largely on the basis of a confession which he later recanted, claiming that he had been beaten and coerced into confessing. It

came out at the trial that accused had a previous theft conviction. This fact was referred to by both assessors as justifying their view that accused was guilty. Several witnesses testified that accused 's hands were bound and that they saw him being beaten.

Held: (1) The Primary Court should have instructed the assessors that the confession could be admitted into evidence only if they were satisfied that accused made it voluntarily. [Citing Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations, 1964, rule 13). (2) The trial court erred in admitting evidence of accused 's bad character (i.e., the previous conviction.) Because of these errors the conviction was quashed and sentence set aside.

366. Salehe s/o Kassim v. R., Crim. App. 226, 227,228-D-68, 29/7/68, Hamlyn J.
The three accused were convicted of burglary and stealing. The magistrate held that "though accused No. 1 claimed that the clothes .. were his own in absence of proper identification on his side and his failure to quote at least cost of each as the complainant did, I find that they are not his… On the other side accused No. 2 and 3 claimed to have got the clothes from accused No. 1. Though this might be so, I am reluctant to accept this testimony which is uncorroborated as the law requires."

Held: The magistrate misdirected himself on two counts. (1) No corroboration is required b the law for testimony by co-accused which is part of the defence evidence. (2) The law does not require accused to positively prove their version of the matter; they need only "raise some doubt in the mind of the court as to whether the prosecution has proved its case to the full. Appeal allowed.

367. R. v. John Yakubona, Crim. Sass. 102-M-68, 12/7/68, Mustafa J.
The first accused, an assistant divisional executive officer, ordered second accused, a messenger, to lock up over fifty alleged tax defaulters in two small cells which had almost no ventilation. First accused gave evidence, denied by the second accused, that he had ordered that no more that eleven people be locked in one cell and twelve in the other. There was other evidence that prisoners

shouted intermittently all afternoon and throughout the night, while second accused was on guard. It also appeared that first accused returned at midnight, but went away without doing anything. Thirteen of the prisoners in one cell suffocated, and accused were charged with manslaughter.

Held: (1) The evidence of each accused against the other is accomplice evidence. However, making allowances for that, it does seem that first accused ordered second accused to lock up the prisoners in two cells, knowing full well that the cells could not safety hold so many people.(2) Both of the accused had a duty of care to the prisoners, and both showed such a high degree of recklessness in regard to human life as to.

Amount to an unlawful act; therefore, they are guilty of manslaughter. As both are equally responsible, and as a "severe and deterrent" sentence is called for, each is sentenced to ten years' imprisonment.

368. R. v. Tulali s/o Kisongo, Crim. Sass. 55-A-67, 9/5/68, Platt J.

Accused was charged with endangering the safety of persons traveling on the railway, by placing stones on the line [P.C. s. 224]. Both assessors and the judge accepted the evidence of the driver and a passenger that accused had been sitting on the railway line with two other persons and that they had placed stones on the line.

Held: (1) The prosecution must prove beyond reasonable doubt that accused intended to endanger the safety of a person or persons traveling by railway. The Penal Code contains no offence equivalent to section 34 of the English Offences Against the Person Act 1861 (endangering by unlawful act or omission the safety of any railway passenger). The assessors must consider whether the accused, a youth with not formal education who alleges that he did not know the likelihood of danger resulting from his acts, formed the specific intent required by the section. (2) The stone was of a size to be inherently dangerous, and the only

conclusion must be that the accused intended the natural consequences of his acts, which would be to endanger the safety of travelers. In agreement with the assessors, accused is found guilty.(3) Taking into account the Probation Officer's report, referring to accused 's youth and backwardness due to illness which has left him deaf, a sentence of 18 months' probation is ordered.

369. R. v. Rashidi s/o Mohamed, Crim. Rev. 25/7/68, Georges C. J.
Accused was convicted of having committed an unnatural offence. [P.C. s. 154(1)].There was ample evidence that a brutal rape per anum had been committed upon complainant, an elderly woman, but he only evidence connecting accused with the offence was the testimony of the complainant herself.

Held; (1) There is a general rule that corroborative evidence is required to support the testimony of the complainant concerning a sexual offence. (2) If a magistrate notes the absence of corroboration, warns himself of the danger of convicting in the absence of corroboration, but nevertheless finds that the evidence is so convincing that he feels it is safe to convict, it is possible to support the conviction. However, no such course was followed by the magistrate in the present case. Conviction quashed.

370. Mchelengwajingi s/o Masala v. R., Crim. App. 279-M-68, 19/6/68, Seaton J.
The four accused were convicted of rape. [P.C. s. 130]. There was evidence that the accused and the complainant had been drinking together and that all of them were drunk. At about midnight, one of the accused carried complainant away. Complainant testified that the first and second

Accused then had intercourse with her by force. She stated that the third and fourth accused later had intercourse with her but that she was too tired and drunk by that time to resist. Another prosecution witness saw the third accused having intercourse with complainant, and a torn piece of her clothing was later found

near the scene. The first and third accused admitted having had intercourse with complainant but stated that she had consented. The second and fourth accused denied having had intercourse with her.

Held: (1) There was no corroboration for complainant's testimony that the second and fourth accused had had intercourse with her. (2) There may be authority supporting a conviction for rape when the complainant is too drunk to resist. [Citing R. v. Complain (1845) 1 Cox C.C. 220]. However, in the present case, there is no corroboration of complainant's testimony that the intercourse with the first and third accused was without her consent. Neither the torn clothing nor the fact that she was drunk would necessarily negative the fact of her consent. (3) The trial magistrate also failed to consider the possibility that because of their drunkenness the accused had no intention to commit rape and mistakenly believed that complainant had consented. Convictions quashed.

371. Thomas @ Mkiria Ikwabe v. R., Crim. App. 497-M-68, 25/7/68, Seaton J.
Accused was convicted of being in unlawful possession of the local liquor called "moshi" and was sentenced to pay a fine of Shs. 500/- or six months' imprisonment. Accused is a first offender who has to support his brother's wife, who is ill, and who also has three children who are in school. He says that he is a poor man.

Held: Fines imposed for liquor offences "should bear a reasonably relation to the accused 's power to pay taking all his circumstances into account." [Citing Mohamed Juma v. Rex, 1 T.L.R. 257]. The fine imposed is excessive for a first offender and should be reduced to a fine of Shs. 200/- or two months' imprisonment.

372. R. v. Yasini s/o Ramadhani, Crim. Rev. 22-D-68, 10/7/68, Biron J.
Accused was convicted in each of two separate cases of housebreaking and stealing. Both cases were heard by the same magistrate on the same day, and judgment and sentence in the cases were also given on the same day. In one

case accused was sentenced to imprisonment of 16 months and in the other case to imprisonment of 14 months.

Held: (1) In the absence of any direction to the contrary, the sentence in the second case would run consecutively to that in the first case for a total of 30 months. (2) As the Minimum Sentences Act applies to the offence of housebreaking, and as special circumstances cannot be considered in the facts of this case, the minimum permissible sentences in each case was two years imprisonment. (3) The Court stated, obiter, "(I) t is not understood why the offences were dealt with in two separate files." Sentence enhanced, due to accused 's long record of previous convictions, to three years imprisonment in each of the two cases, the sentences in the two cases to run concurrently.

373. Geofray s/o Buyombe v. R., Crim. App. 355-M-68, 30/7/68, Mustafa J.

Accused was convicted of stealing by servant [P.C. ss. 265, 271]. He was a Divisional Secretary of T.A.P.A., and collected revenues on its behalf. He admitted appropriating part of it for himself, but alleged that this was partly because he had not been paid his salary by T.A.P.A for 8 months.

Held: Appeal rejected. Even "if an employee has not been paid his salary he has no right to use money which he has received for his employer without authorization."

374. Issa s/o Ntoka v. R., Crim. App. 217-D-68, Georges C. J.

Accused having sold eight kilos of cashew nuts valued at Shs. 5/75, to the weighing clerk (P.W.1) of the Nanyanga Co-operative, altered the chit issued to him to read 988 kilos, valued Shs. 650/75, and presented for payment to P.W. 2, who paid that sum. Accused admitted that he was paid in excess, but stated that he was illiterate.

Held: Illiterate though he might be, it is clear that accused could not have thought that eight kilos of cashew nuts were worth Shs. 650/-, and that he should

have enquired. (2) Conviction on the count of stealing quashed, but a conviction for obtaining by false pretences substituted. “(T)he most intelligible distinction between larceny by trick and obtaining by false pretences is that in the former the person parting with the property intends to part with possession only, not with the property, while in the latter, he intends to part with both.” The victim here clearly intended to part with both possession and property of the money he handed to accused.

375. Magati s/o Mchoya v. R., Crim. App. 340-M-68, 31/7/68, Seaton J.
Accused was convicted of robbery with violence. The village headman and others discovered his wife illegally brewing moshi. When they arrested her, the accused seized a bicycle and briefcase belonging to the headman and pulled out a knife, saying that if the headman could take away, accused took the articles into his house. The headman later recovered them.

Held: Conviction quashed. “As to he detaining of the bicycle and the briefcase, the appellant’s motives were to exert pressure to have his wife freed by detaining them temporarily.” He did not intend to deprive the headman permanently of them, so there could be neither theft nor robbery.

376. Meliki s/o Mayala v. R., (PC) Crim. App. 246-M-68, 19/7/68, Seaton J.
Accused, by a written contract, agreed to build a home for the complainant, who was to supply the building materials. The complainant became unsatisfied with the progress made and terminated the accused ’s contract. Complainant demand return of four bags of cement, which accused has sold to a third party before the complainant ended the contract.

Held: The essential element of section 273, and all other cases of theft in the Penal Code, is fraudulent taking or conversion. Here, there was no evidence that the contract required the accused to use the very bags supplied to him for

building the house. The act of the complainant in terminating the contract deprived the accused of the opportunity of replacing the bags; his fraudulent intent was not proved. Conviction quashed.

377. Waziri s/o Abdallah v. R., Crim. App. 273-D-68, 12/7/68, Georges C. J.
Accused, the secretary of a cooperative society, was convicted of three counts of stealing by servant [P.C. 265 ss. 271] and was sentenced to two years imprisonment and 24 strokes under the Minimum Sentences Act. There was evidence that accused knowingly submitted vouchers to the treasurer of the society for traveling expenses and "posho" which were in excess of the amount due to him and as a result received excess payment of three occasions of Shs. 21/-, Shs. 27/- and Shs. 48/-.

Held: The crime was obtaining money by false pretences rather than of stealing. Conviction for obtaining money by false pretences substituted, and sentence reduced to imprisonment of one year as the Minimum Sentences Act was not applicable to the substitute conviction.

378. Andogwisye s/o Mwambungu, Crim. App. 294-M-68, Seaton J.
Accused, an Executive Officer in a region Police office was convicted of six counts of stealing by public servant [P.C. s. 270]. The main question on appeal arose in connection with five counts concerning premium monies received by accused in respect of insurance policies held by police constables. The Regional Commander testified that he had been instructed by the Inspector-General of Police to act as agent, receiving premiums from policy holders for transmission to the insurance company. This duty was delegated to accused. The evidence accepted by the court showed that accused had failed to had failed to hand over some Shs. 2000/- in premium payments, as a result of which many police policies lapsed.

Held: The premiums were the property of the insurance company, not the Government, and accused received them as an agent of the company. The "failure to deal specifically with the question of employment and to make and finding

of fact thereon was a serious misdirection." [Citing Rajabu s/o Mbaruku v. R., (1962) E.A. 669]. Convictions under section 265 of the Penal Code substituted (simple theft) and sentences of twelve months imposed. Order for compensation to Government altered to require compensation to insurance company.

379. National and Grindlays Bank, Ltd. v.Mohamedali Shariff, Bankruptcy Cause 6-D-67, -/8/68, Hamlyn J.

Petitioner creditor brought an action to have the debtor adjudge bankrupt. The petition was accepted by the court and a receiving order made. Section 20 (1) of the Bankruptcy Ordinance, Cap. 25, provides that after the creditors Ordinance, Cap. 25, provides that after the creditors have met, if they do not agree to a composition or other scheme as provided in the Ordinance, the debtor

Shall be adjuged bankrupt. The proper procedures under section 20(1) were complied with, whereupon the creditor now seeks an adjudication of bankruptcy. The debtor at this point alleges that because of certain "irregularities" in the creditor's claim, the question of whether there was an ct of bankruptcy at all should be reopened. The creditor argued that once the petition of bankruptcy was accepted by the court, which under section 7 of the Ordinance is empowered to dismiss such petition if it is not satisfied with the proof of the petitioning creditor or of the act of bankruptcy, the issue of whether there has been an act of bankruptcy is closed.

Ruled: Section 104(2) of the Ordinance provides: "The courts may at any time adjourn any proceedings before it upon such terms, if any, as it may think to impose." The Court noted that "in the present case, the debtor has set out in his affidavit a number of allegations, one of which raises the question of the correctness of the creditor's claim, and states that the figure given therein is incorrect … The allegation of the debtor … is a serious one, nor has any counter-affidavit been filed putting the matter into issue. It would .. be a strong thing for this Court

to rule in the face such allegation of the debtor, that without any inquiry into the truth or otherwise of the affidavit, adjudication should be made forthwith. It may be that the debtor's contention has no real basis in either fact or law, but it is clearly impossible at this stage for this Court to say. There is nothing sacrosanct about the decree annexed to the Bankruptcy Notice as would warrant this Court to disregard the contentions contained in the debtor's affidavit …" (Citing Boaler v. Power (1910) 2 K.B.229, where "even after adjudication the court inquired into the validity of the petitioning creditor's judgment.") The Court found that the debtor's affidavit contained "good reason" or granting an adjournment of the proceedings to enable him to produce his objections to an adjudication of bankruptcy. It was so ordered.

380. Onorato Della Santa t/o New Phoenix Restaurant v. Michael George Scohdoulis, Civ. Case 12-D-68, 21/8/68

Plaintiff brought this action for the sale of his restaurant under his own name, adding the words "trading as New Phoenix Restaurant." Defendant raised the preliminary point that this name is not registered under the Business Names (Registration) Ordinance, Cap. 213, and that plaintiff had filed no statement of particulars under that name. Section 15(1) of that Ordinance provides that where there has been such a default, the defaulter's rights under any contract "made or entered into ….in relation to the business in respect of the carrying on of which particulars were required at any time while he is in default shall not be enforceable by action or other legal proceeding whether in the business name or otherwise." The restaurant is registered as "New Phoenix Restaurant, Bar and Cafereria," but described in the contract in question as "New Phoenix Restaurant."

Held: (1) Section 15(1) is not applicable here. Plaintiff is registered and not in default, and the transaction Plaintiff is registered and not in default, and the transaction is clearly concerned with the firm whose registered name closely

Resembles the name appearing in the title to the suit. (2) The reference to the firm name in the title to the suit is merely a misdescription, which can be amended at any time, with leave by the Court, under Order I, Rule 10 of the Civil Procedure Code. [Citing Chitaley & Rao, Vol. I 2nd ed., p. 1127] Leave to amend granted.

381. Joseph Constantive v. Losilale Ndaskoi, Civ. Case 18-A-67, 28/6/68, Platt J. Plaintiff agreed to build a house for defendant and, in return, defendant was to give plaintiff a piece of land. Both are Waarusha. Plaintiff entered the land and carried out a number of improvements. He failed to build the house for the defendant. Defendant forcibly ejected plaintiff from the land. Plaintiff, in an action brought initially in the High Court, claimed compensation for unexhausted improvements, including permanent trees and some houses and produce, under Arusha law. In earlier proceedings, defendant had claimed title to the land on the basis of Arusha Law.

Held: (1) The dispute is governed by Arusha law, because (i) plaintiff based his claim upon it and not upon the Law of Contract Ordinance; (ii) both parties had accepted that the agreement was governed by customary law; and (iii) defendant's claim for title of the land had been governed by customary law, and it would now be illogical to decide the question of unexhausted improvements on a different basis. (2) Since the agreement was governed by customary law, the Law of Contract Ordinance was excluded by section 1 (3) of that Ordinance, as amended in the Magistrates Courts Act 1963, Sixth Schedule. (3) By section 57(1) of the Magistrates Courts Act, no proceedings relating to immovable property under customary law could be instituted in any court other than a Primary Court without the leave of the High Court. "Immovable property" in that section must be defined to include permanent trees and houses, but to exclude crops and "food plants." Since most of this claim related to permanent trees and houses, it was necessary to obtain leave from the High Court. (4)Since it is undesirable to devide the claim, the entire proceedings are referred to the Primary Court.

382. Peter John Burt v. Christine Hassnoot Burt, Matr. Cause 3-D-68, 11/6/68, Biron J.

This was an application for leave to present a petition for divorce, before the expiry of three years since the date of the marriage. The grounds for the application were unusual hardship and unusual depravity" --- i.e., that applicant's wife was living with another man by whom she had had a child, forcing applicant to "live the life of a bachelor." Applicant came to Tanzania from Britain in 1966 on an entry permit due to expire in November, 1968. His job with a local company was to terminate on 30 September, 1968, and he stated that "he has no relative or friend in this country……

Held: (1) Applicant has not acquired a domicile of choice in this country, "nor apparently is he in a position to do so." The Court therefore has no jurisdiction to entertain this matrimonial suit. (2)The Court stated, obiter, that the applicant's allegation of unusual depravity and hardship was "not particularly compelling."

383.El Haji Salum Mbogorowe v. Asumini d/o Ngobesi, (PC) Civ. App. 82-M-68, 11/6/68, Seaton J.

Plaintiff was married to the son of defendant for twelve years. She bore eight children during their marriage. She left her husband in 1967 and was prevented from marrying another man by the defendant. She sued him for this in Primary Court. She there claimed that her children were not her husband's he being impotent, and that the true father had been his brother. When she left him, she had given defendant one cow, of the previously paid dowry of one cow and Shs. 200/-, and had taken her one-year-old son with her. The Primary Court dissolved the marriage, ordering that the dower should be returned in full. Finding that the child was in fact the child of plaintiff on condition that they live at her home. She then made repeated attempts to take the child to the home of her lover, and the court

ordered the child placed in the custody of defendant, to force plaintiff to live with her son there, the son to be given to her husband if she refused. The District Court held that the child had been born out of wedlock, and that there had been a khula divorce, so that defendant and his son had no claim to her or to the child. Defendant now argues, inter alia, that the khula divorce was not effective because the dowry was not fully returned.

Held: (1) Under Muslim law, a khula divorce is obtainable "at the initiative of the wife." The two parties, or their agents, speak or write appropriate words, the wife offering and the husband accepting compensation out of her property for the release of his marital rights. The "dissolution of the marriage is not contingent on the payment of the consideration." (2) Defendant "had throughout been acting as (his son's) agent and …..the divorce which was accomplished through the intervention of the court" was a proper khula divorce. [Citing Suddan v. Faiz Baksh, 1 Lahore 402; Bazul ul Raheem v. Luteefut con nissa, 8 M.L.A. 396; Fitzgerald, Mohamedan Law (1931) 78, 79; Tybji,Principles of Mohamedan Law (2nd ed. 1919 s. 181; Wilson, Anglo-Mohamedan Law(1930) s. 70]. The remaining dowry may be recovered from plaintiff or her father as a civil debt. (3) According to the cited authorities, "a child born after six lunar months from the date of the marriage is conclusively legitimate." The husband's alleged impotence "might be grounds for a judicial divorce, but could not rebut the presumption that the children born during ….. wedlock …… were his." (4) The Primary Court's order, as it relates to paternity and custody, is restored. It comports with Muslim Law principles, under which the mother should have custody of a male child under seven if that is consistent with the "paramount consideration", of the child's welfare.

384. Azverali Karimjee & Others v. City Council of Dar es Salaam, Civ. App. 4-D-68, 12/5/68, Georges C. J.

Defendant tenants in the Splendid Hotel building had left the country, leaving an outstanding building bill for sewage services with the Dar es Salaam City Council. Being sued by the Council for the charges, defendants argued that they had

not been notified of the outstanding charges until their tenants had left the country, making it impossible for defendant to recover from them. Section 68 of the

Municipalities Ordinance, Cap. 105, makes such charges recoverable by the Council from the owner of premises, in accordance with section 46; this section makes all monies due "recoverable from the owner and occupier jointly and severally … Provided that the owner shall … be entitled to recover from the occupier .." It also provides for proceedings by the Council "jointly and severally against the owner and occupier" where six weeks have elapsed since "written notice (has) been given by the Council to the owner or occupier of his indebtedness ….."

Held: (1) The proviso to section 46 merely prescribes that the owner should have notice of his indebtedness before he is sued, in a situation in which he is not normally held responsible for payment. (2) The Council's normally held responsible for payment. (2) The Council's right to recover from the owner is not dependent upon the owner's ability to recoup from the occupier. Defendant's appeal dismissed.

385. Ottoman Bank v. Hanna Ghaui, Civ. Case 63-D-60, 14/8/68, Georges C. J.
Defendant judgment-debter died after a preliminary decree for the sale of mortgaged properties had been given by Court of Appeal. Administratix was appointed two years later. Further details of accounts referring to the mortgaged property were filed. 3 years after the preliminary decree, an application was made to have the adminitrix' name put on the record. Defendant's counsel objected on the ground that the limitation period had run, and that the application was not maintainable under s. 95 of the Civil Procedure Code. It was not disputed that the limitation period under order XX11 Rule 4 was 3 months.

Held: (1) Order XX11 Rule 4 only applies where a right to sue survives death. Once a preliminary decree had been given, that crystallizes the rights of

the parties and it cannot be said that a right to sue survives. What survives is a right to the enforcement of the decree. An application could not therefore be brought under Rule 4. (2) Rule 9 sub-rule 2, giving power to set aside an abatement of a suit, did not apply here as there had been no abatement under Rule 4, since it had already been decided that Rule 4 did not apply. (3) The court therefore invoked the inherent power conferred by s. 95 of the Civil Procedure Code to make an order where no alternative remedy was available.

386. Kotak Ltd. v. Vallabdas Kooverji, Civ. App. 15-D-68, 12/7/68, Georges C. J.
An order was made by consent granting respondent landlords possession of premises occupied by appellant company, conditioned upon payment of compensation. Before the order was carried out, the Rent Restriction Act was amended, bringing the land under rent control legislation for the first time. Under that legislation, an order for possession could only be obtained if a number of specific grounds were established. Section 19(5), as amended, gave power to the court to suspend or stay the execution of any unexcuted order under certain conditions. Appellant company claimed for rescission of the order for possession; this claim was for rescission of the order for possession; this claim was dismissed by the Resident Magistrate on the ground that

Section 19(5) was not retrospective. The case was unsuccessfully appealed. The company then filed an identical claim before a second Resident Magistrate which was dismissed.

Held: (1) The second claim was res judicata. Even if the doctrine only applied where there had been a ruling on the merits, a court's decision that the law provides no remedy is equivalent to deciding the merits of the case. (2) Section 19(5) is retrospective in the sense that it gives the court power to review orders made before the amendment; but successive applications can only be made where the fact situation has changed, and that does not appear here.

387. Simon s/o Mkoma, Mark s/o Masisila, Francis s/o Mwambe, Crim. App. 314, 327, 336-D-68; 9/8/68; Georges, J.

One of the accused was convicted (inter alia) of transferring a firearm and ammunition for the use of another person, without permit, contrary to s. 16(1) of the arms and ammunition act, Cap. 223. He had loaned his gun for hunting purposes to a person who did not posses a licence to use or carry a firearm.

Held: Accused was improperly charged and convicted. S. 16(1) merely enables an authorized officer to issue a permit authorizing the transferring without such a permit. S. 15, indeed, does forbid the transfer of arms or ammunition without a permit. However the word “transfer” in this context indicates “ a transfer analogous to a disposition in which property passes in the arms or ammunition, and not merely possession” (citing Joakim Michel v. Republic (1963) E.A. 235), and so does not cover a mere loan as in this case. It would seem that the person to whom the gun was transferred would be guilty of holding without a licence under s. 13(1), so that the accused could be convicted of aiding and abetting the commission of this offence. However this is not he offence contemplated in the charge, which must therefore be quashed.

388. Sarder Mohamed v. R., Crim. App. 44-A-68, 19/6/68, Platt, J.

Accused was convicted of unlawful possession of government trophies, contrary to sections 49 and 53 of the Fauna Conservation Ordinance, Cap. 302. It was not disputed that accused was found in possession of four ostrich egg shells and that he had no certificate of ownership. The issue for determination was whether these egg shells were government trophies.

Held: (1) The ostrich egg shells were trophies within the definitions of “trophy” and “animal” in section 2 of Cap.302, read together. (2) Section 47(1) and 47(2) explain Government Trophies”. Particularly, Section 47(1)(b) requires that the animal should be a “game animal” and, under section 2 of the Ordinance, “game” and “game animal” mean “any animal specified in the First, Second and Third Schedule of the Ordinance including the eggs and young thereof”. From

Third Schedule, an ostrich is a game animal; and therefore, from the definition, eggs of an ostrich are “game animals”. (3) Under section 49(2), the onus of proving lawful possession lies upon accused. Appeal dismissed.

391. Kibwana Salehe v. R., Crim. App. 255-D-68, 16/8/68, Georges C. J.

Accused were convicted of stealing by agent. [P.C. ss. 273(b), 265]. There was evidence that they were employees of a transporter and had stolen a consignment of cotton. One of the prosecution witnesses had given a statement to the police in which he said he had given the first accused a letter of authority to receive the consignment. In his evidence-in-chief at the trial, he denied delivering such a letter. The prosecution then obtained permission to cross-examine him, and he acknowledged delivering the letter. The trial court relied on his testimony in arriving at one of its findings

Held: (1) “Whenever a witness is proved to have made a statement on oath inconsistent with a statement previously made by him, the credibility of that witness is completely destroyed, unless he can give an acceptable explanation for the inconsistency.” The witness gave no such explanation, and neither his testimony or previous statement should have been relied upon. (2) The other evidence was sufficient to support the conviction. Appeal dismissed.

392. R. v. Balutunika s/o Mhozi, Crim. App. 153-M-68, 15/5/68, Seaton,J.

Accused was charged and convicted of causing grievous bodily harm. The word “unlawfully” was omitted from the charge. Accused ’s reply to the charge was, “Yes, it is true I cut the complainant by panga…..” This was entered as a plea guilty. Accused said that he had been angry with the complainant for having ridiculed his wife and daughter as they were mourning the death of a daughter.

Held: (1) Accused ’s plea of guilty was not unequivocal, under section 225 of the Penal Code. (2) The word “unlawfully” must be included in the charge. (3) Accused ’s statements, that he was angry over complainant’s treatment of his

wife and daughter, might have gone some way to show that accused did not believe that he was acting unlawfully, or that he did not intend to do so. Conviction quashed; re-trial not ordered, in view of the fact that accused has already spent some time in prison.

393. R. v. Otto s/o Miller, Crim. Rev. 50-D-68, 17/7/68, Biron J.

Accused was charged with driving a motor vehicle on the public road without due care and attention, thereby causing his vehicle to run off the road. The magistrate found that there was no case to answer and acquitted him. The magistrate then heard more witnesses, purporting to act under section 175 of the Criminal Procedure Code, which allows the court to order the complainant to pay the accused a reasonable sum for trouble and expenses to which accused has been put by reason of a frivolous and vexatious charge. It was the magistrate's view that the accused had been forced off the road by a prosecution witness, a rival bus company's driver. The magistrate thereupon ordered the witness' employer to pay compensation to the accused for his loss of profits and cost of spares.

Held: (1)Section 175 allows an order only against the complainant – here, the police – and not against a witness, or his employer. (2) The order is to be for compensation for trouble and expense arising from the charge, and not from those acts – here, the accident – which result in a charge being brought. The magistrate had no jurisdiction to make the order made here; it is ultra vires, and is therefore set aside.

394. Saudi s/o Sefu v. R., Crim. App. 185-M-68, 27/6/68, Seaton J.

Accused was charged on four counts under the Traffic Ordinance, two of which were (i) causing death by reckless or dangerous driving [s. 44 (A)(1) of Act 41 of 1964 of the Laws] and (ii) using a motor vehicle on the road with defective tyres [ss. 30(1)(i) and 69 of Cap. 168]. Accused was driving a Land-Rover to Nzega

carrying twelve cases of empty Fanta bottles and about fifteen passengers. On the way a rear left hand tyre burst and this was replaced by another which apparently quite worn. The journey was resumed and the passengers requested the accused to drive slowly because of their overcrowded condition; also, the turnboy warned accused that the replaced tyre had a protruding piece of metal. The accused however neither reduced his speed nor mended the replaced tyre. On the way, the replaced tyre also burst on a slope of a hill, and the vehicle overturned. Three passengers were killed and the rest were injured. A question arose whether the charge was defective, since it joined in one count the charge of causing the death of three separate persons and the charge of causing the injuries of the rest.

Held: (1) The joinder of the three deaths and injuries to the other persons was not prejudicial to accused in the circumstances of the case. Accused was full aware of the substance of the case he had to meet and the defective charge did not occasion failure of justice and was curable under section 346 of the Cr. P. C. (2) The duty of care owed by motor-drivers to users of the highway is not to drive recklessly, not to drive at a dangerous speed and not to drive a vehicle in a dangerous condition. This duty of care extends both to passengers and other members of the public independently using the road. Appeal dismissed.

395. The Manager, Burhani Saw Mills, Ltd. v. R. Crim. App. 292-D-68, 28/6/68, Georges C. J.

The accused Company was charged with six offences under the Traffic Ordinance; permitting a motor vehicle to be driven whilst steering was defective [ss. 43 and 70]; and without the appropriate licence [ss. 6 and 70]; permitting an unlicensed person to use the vehicle [ss. 14(2) and 70]; failing to affix identification marks on the vehicle [ss. 3(1)(k) and 69 of the Rule]; contravening rules relating to driver's accommodation in a commercial vehicle by failing to provide a barrier; and contravening the conditions of the use of the motor vehicle by having defective springs. A motor vehicle inspector on examining the vehicle found all these defects. The manager of the company testified that he had "refused" to let the

driver take the vehicle and that the driver had used it for his own purposes contrary to the instructions.

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Held: (1) Once the word “permit” is used, mens rea is required. [Citing Alli s/o Mzee v. R. [1960] E.A. 404]. This does not require an active grant of consent but may involve an inattention to duty. (2) There was evidence that the driver disobeyed his instructions from the manager and, in the circumstances, the company did not permit the act.(3) Where the offence is using a vehicle in a defective state, as apart from permitting its use, no mens rea need be proved, provided always that the servant is driving on his master’s business. [Citing James & Son Ltd. v. Smee [1954] All E. R. 273 at p. 277.] This was not proven to be the case here. Appeal allowed.

396. R. v. Athumani Hatibu, Crim. Rev. 96-D-68, 26/8/68, Hamlyn J.

Accused was convicted of theft by public servant and sentenced to two years imprisonment and twenty four strokes of corporal punishment under the Minimum Sentences Act. The Court, relying on a statement of accused, gave his age as 43 years. After the trial was completed, the Prison Medical Officer gave the opinion that accused was 47 years of age but subsequently wrote the court stating that he deferred to the finding of the trial court.

Held: (1) The Prison Medical Officer must give his independent opinion as to the age of accused. “if the medical officer finds that the convicted man is not fit for corporal punishment, either by reason of some physical defect or by reason of age it is his duty to say so, and it is immaterial that others may have reached an earlier and different conclusion. He is in the position of an expert on which both the court and the prison authorities must finally rely.” (2) Doubt as to the accused ’s age should be resolved in favour of the accused. Corporal punishment set aside.

397. Wilfred Asasiana v. R., Crim. App. 64-A-68, 3/7/68, Platt J.
Accused was convicted of stealing by servant from a school, and sentenced to two years and twenty-four strokes under the Minimum Sentences Act. Accused had stolen a cheque for Shs. 182/50 from a fellow employee of the school. However, payment on the cheque was stopped, and although accused received goods and money to a total of Shs. 182/50 from a shopkeeper to whom he negotiated the cheque, the question arose whether accused he negotiated the cheque, the question arose whether accused had in fact stolen anything more than the value of the cheque from his employer.

Held: At the time the cheque was stolen, it was intended to have the value was recognised by the shopkeeper to whom it was negotiated. "The value of the stolen property was equivalent to money for the sum drawn on the cheque." [Citing Mensour Ahmed v. R., (1957) E.A. 386]. Conviction and sentence confirmed.

398. Mussa s/o Kandege v. R., (PC) Crim. App. 150-D-68, 18/7/68, Hamlyn J.
Accused was convicted of cattle-stealing in Primary Court. There, and in the District Court on appeal, he argued that he attempted to recover a bull and four cows in an effort to recover dowry paid in respect of a marriage which had

Come to an end. Both courts evidently paid slight attention to the argument.

Held: To convict for theft, a court must be satisfied that the taking was not done under a "claim of right" [citing P.C. s. 258(1)]. "It matters not ….. whether such claim can in fact be substantiated in law; the question …. Is whether the accused person, at the time of the commission of the act complained of, considered that he had any right to act so. Even if in law he had no such right, but considered that the taking was justifiable, then a conviction cannot be had." Conviction quashed.

399. Jayantilal Narbheram Gandesha v. Killingi Coffe Estate Ltd. & Panyiotis Preketss, Civ. Rev. 1-A-68, 9/9/68, Platt J.

The suit proper involves a dispute over a contract between the parties for the sale of a farm. Plaintiff's advocate, who had acted for both parties during the negotiation of the contract, was called by defendant as a witness. Plaintiff objected that to allow this would amount to an abuse of the process of the court. The court permitted the summons to issue, and in addition ruled that, in view of his role as a witness, plaintiff's advocate should relinquish his retainer. [Citing Safi Seed Ltd. v. ECTA (Kenya) Ltd., Civ. Rev. 1-A-67, Seaton J., (unreported)]. This partition for revision is concerned only with these ruling (Indeed, the case has progressed no further).

Held: (1) This petition for revision was brought under section 79(1) of the Civil Procedure Code, 1966. The High Court observed that it could have been brought under the Magistrates' Courts Act, Cap. 537, ss. 38, 39, as provided by sec. 79(2) of the Civil Procedure Code, which gives the High Court wider revisional powers than 79(1). As plaintiff petition did not refer to the latter provisions, however, the Court limited itself to sec. 79(1). (2) Sec. 79(1) provides for revisional jurisdiction over decided cases. Whether an interlocutory decree may come within the meaning of "case" is a thorny question on which the authorities diverge.[Citing Hassan Karim & Co. Ltd. v. Africa Import and Export Central Corp. Ltd., (1960) E. A. 396; Muhinga Mukono v. Rushwa Native Farmers Co-operative Society Ltd. (1959) E.A. 595]. The present situation cannot qualify as a decided case under any reasonable definition. "It was an interlocutory matter, unconcerned with the final decision or that of any of the issues before the Court and was concerned entirely with a step in the procedure." (3) Even if this view were wrong, the ruling of the learned magistrate could be upset on revision (as opposed to appeal) only if the magistrate did not have the jurisdiction to make the order in question, or if he exercised his jurisdiction illegally or with material irregularity. As neither of these are present here, plaintiff has no claim on the merits to relief by way of revision. (Citing Mulla's Commentary to sec. 115 of the Indian Code of Civil Procedure which is in the same terms as sec. 79(1) of the Tanzania

code). (4) “It is well established … that it is irregular, save in exceptional cases for an advocate both to appear as counsel and to give evidence as a witness.” An advocate is an officer of the court, and if the court deems it unwise for him to act in such a dual capacity, he should comply. [Citing Halsbury’s Laws of England, vol. 3, para. 102; Safi’s case, supra] (5) “It was also argued that if the

Application was allowed it would lead to a convenient method of putting counsel out of the case. As I understand it advocates in this country are apparently accustomed to dealing with matters such as these for both sides. That may be, but if a dispute arises which leads to a conflict of interest, and one party wishes to call the advocate as a witness, it seems that the proper course would be for him to act as a witness rather than as counsel for the other side. If this is maintained, then while the present advocate may have to step down in this case, on other occasions other advocates may similarly have to step down, with the result that what is fair to one will be fair to all. Petition dismissed.

400. Ignatius Balamuzi v. Jeremiah Peter, (PC) Civ. App. 38-M-68, 8/8/68, Seaton J.

An order was made in the Karabagaine primary court attaching a shamba, said to belong to Thadeo, in satisfaction of a judgment debt. Thadeo’s son claimed the shamba belonged to him and sought an order releasing the property. The primary court found that the son had established his claim and cancelled the attachment order. The district court of Bukoba reversed the decision of the primary court on the ground that Thadeo and his son had conspired to transfer the property from Thadeo to a third party was present at either transaction.

Held: (1) Under s. 16 of the Magistrates Courts Act Cap. 537 there is no restriction on the right to appeal against orders of the primary court, including orders attaching property, and therefore the district court had jurisdiction. (2) Under

s. 70 of Magistrates Courts (Civil Procedure in Primary Courts) Rules 1964 in order for the primary court to make an order releasing the property from the attachment it must be satisfied that the property does not belong to the judgment-debtor. (3) The decision of the district court on the question whether the property belonged to the judgment-debtor was more consistent with the evidence than that of the primary court Since s. 32(2) of the Magistrates' Courts Act provides that decisions should not be reversed on appeal unless a failure of justice would occur, the court would uphold the district court.

401. Mohamedali Virji Walji v. Shinyanga African Trading Company, Limited (hc) Civ. Case 18-D-68, Biron, J.

Plaintiff sued a limited company of which he was formally the managing director for unpaid salary, repayment of advances, and the price of goods sold by him to the Company. The defendant company had been formed by plaintiff and another group to distribute beer, plaintiff having already been engaged in the beer distribution business in a different region. After disputes arose between plaintiff and other group, all the directors agreed to authorize a firm of accountants to audit the books and records of the company to ascertain the amounts due to plaintiff and his controlled companies by defendant. The accounting firm found that Shs.23, 695. 25 was owed to plaintiff and plaintiff sought to recover this amount. Defendant defended and counterclaimed on the grounds (1) it had authorized

An account to be stated by the accounting firm at a time when it did not know of facts constituting fraud by plaintiff and therefore the account stated was not binding; (2) plaintiff could not recover any loans made to the company after incorporation; (3) plaintiff could not recover any sums advanced prior to the incorporation

of defendant; and (4) plaintiff had defrauded defendant by causing defendant to purchase beer from plaintiff's controlled companies.

Held: (1) At the time plaintiff caused beer to be purchased by defendant from companies in which plaintiff was interested, defendant was unable to purchase beer directly from its supplier brewery because of shortages. The price paid by defendant was reasonable, and in fact was the price fixed by the brewery for resale's by plaintiff's companies. At the time of the purchase defendant's other directors were aware that the purchases were being made and approved of them. The court noted that the Defendant's Memorandum of Association authorized defendant to deal with interested directors as long as such interest was disclosed to the Board. Therefore it held that no fraud was committed. (2) As to the loans made after incorporation, the Court held that the defendant's Memorandum and Articles authorized borrowing, and the original agreement between plaintiff and other group required plaintiff to make loans to defendant when it was formed. (3) With respect to the money advanced before incorporation (which was used to purchase a vehicle) the Court did not pass on the question whether the use of the vehicle constituted a new agreement to pay by the plaintiff, but held that, since defendant had entered into a new agreement to have the accounting firm resolve the disputes between plaintiff and defendant, defendant became liable for the resulting balance found to be due, even though in computing the balance, the accounting firm could take into account a debt which might not otherwise be separately enforceable. (4) Consideration for the agreement to submit the dispute to the accounting firm was supplied by the mutual and reciprocal promises by each party to forego their claims and accept the account to be stated, citing the Contract Ordinance (Cap. 433) Section 2(1). (5) Since no fraud was proved against plaintiff the court did not have to reach the question whether there was a unilateral mistake of fact sufficient to avoid the contractual obligation to submit the dispute to the accounting firm. (6) Judgment was awarded to plaintiff with interest at 9% per annum the court noting some dissatisfaction with interest at this high rate in an action for a liquidated amount, but stating that it was the general prac-

tice to award interest at this rate and that it was not excessive in light of prevailing economic conditions.

402. Khetram v. The New India Assurance Co. Ltd. Civ. Case 23-A-67, 16/9/68, Platt, J.

An insurance contract contined a clause requiring all disputes under the policy to be submitted to arbitration and making an arbitration award a condition precedent to a right of action against the insurer. In an action on the policy by the insured who had not first obtained an arbitration award, the insurer pleaded the arbitration provision and asked for dismissal. In argument, but not in its pleadings, insured claimed: (1) that the condition precedent of an arbitration award had been waived; and (2) that the insurer should have applied for a stay of proceedings and not pleaded that no right of action had arisen.

Held: Obtaining an arbitration award can properly be made a precedent to right of action. Scott v. Avery (1843-60) All E.R. Rep. 1. Waiver of a condition precedent must be pleaded and it was not in this case. Shah v. South British Ins. Co., (1962) E.A. 131. Section 6 of the Arbitration Ordinance (cap. 15) permits the defendant to apply for a stay of proceedings and a referral to arbitration but it does not require such action. The defendant retains his right to request dismissal for failure to comply with the condition precedent that an arbitration award be obtained. Suit dismissed.

403. Lalji Naran v. United Construction Co. Ltd. Civ. App. 28-D-67; 6/9/68; Saudi J.

Appellant (original plaintiff) sued his former employer for; (1) Shs. 2,560/- for work done on Sundays and public holidays, and Shs. 936/- for overtime work; (2) Shs. 1,200/- salary for one month in which appellant had been in the Hospital; (3) return of Shs. 1,000/- deposit made by appellant to respondent for a security

bond from Immigration office during term of employment; and (4) Shs. 750/- in lieu of local leave. District Court ruled for the respondent on all issues holding; (1) the employment contract made no reference to additional services, and the Employment Ordinance was inapplicable because appellant's salary was too high; (2) the employment contract was silent on the issue of payment during illness not connected with employment. No district court holding on claims (3) and (4) is reported.

Held: (1) Although the Employment Ordinance is inapplicable, appellant is entitled to remedies under the general law of contract, and Sec. 70 of the Contract Ordinance (Cap. 433) clearly entitles appellant to payment for overtime if the employment contract is silent. However, appellant has burden of proof that overtime work was actually performed and he failed to sustain the burden. (2) Where the contract of employment is silent on payment during period of illness not connected with employment, the common law provides that the employee is entitled to wages during the period of incapacity providing that his employment contract has not been terminated. (3) Respondent's defence that appellant had done nothing to release respondent from its bond with Immigration office is not supported by facts, the evidence indicating that respondent had been released from its bond. Appellant therefore is entitled to return of deposit (4) Respondent's defence was that at one point during the period of employment he had terminated appellant's employment and then rehired him a week later, so that appellant had never worked for an entire one year period and therefore was not entitled to leave. Held that by rehiring appellant at an increase in salary, respondent had waived right to dismiss appellant (which originally existed), so that the employment should therefore be considered continuous and appellant is entitled to leave. Appeal allowed. Lalji Marn v. United Construction Co. Ltd. Civ. App. 28-D-67; 6/9/68; Saudi J.

404. Ezekiel s/o Luka v. Kijana s/o Mlinda (PC) Civ. App. 115-M-68, 26/7/68, Seaton J.

Respondent sued that village headman for damages for refusing to allow him to sell pombe. He claimed that he had suffered a loss of Shs. 600/-, including the profit he might have made on the sale.

Held: (1) Under s. 14 of Magistrate's Courts Act, Cap. 537, respondent had to establish not only that he had suffered loss through the appellant's act, but also that it was the kind of loss for which customary law provides a remedy. There is no evidence of such a remedy under customary law. See s. 32(3) of Magistrates Courts Act and s. 9 of Judicature and Application Ordinance 1961. (2) There does not seem to be any recorded opinion or statement regarding the headman's liability under customary law. There was ample evidence that prior to selling the pombe, respondent had twice been refused the right to sell at the place in question. Therefore the headman's acts when he saw respondent selling the pombe must be considered to have been within the scope of his duties to see that laws and orders regarding pombe are carried out.

405. Adam Kharid v. Amina Rajabu, (Pc) Civ. App. 95-D-67, 28/8/68; Saidi J.
The parties had lived together as husband and wife for eight years, although no bride price had been paid. The father was now claiming custody of the children born as a result of this union. It was admitted that among the Haya people there existed a form of marriage called "Kulehya" which was preceded by elopement. (Hans Cory and Hartnoll).

Held: Non-payment of brideprice would not necessarily invalidate the marriage, nor would the absence of a marriage certificate (para. 86, Declaration of Marriage). The parties were married according to Haya customary law. Alternatively, there was a case of reputed marriage and so the children were legitimate. (Kiangi Sekanyonge v. Mnyika Msingi (Local Court Digest No. 202) and Langeni Yonaza v. Haika d/o Asakari (Local Courts Digest No. 202) and Langeni Yonaza v. Haika d/o Asakari (Local Courts Digest No. 204). Although appellant was the

lawful father of the children, their welfare demand that they remain with the mother.

406. Omari s/o Kanyonge v. Oure Oruchi (PC) Civ. App. 128-M-68, 23/7/68, Seaton J.

Respondent sued appellant in the primary court for Shs. 600/- compensation for adultery. Appellant claimed in defence that he was married to the woman, and produced evidence that he had paid the bride-wealth, with the result that respondent's claim failed. On appeal to the district court, the claim succeeded, mainly on the evidence of the woman involved who testified that she was married to respondent, and never to appellant and that her father forced her to stay with appellant because he had promised to pay more cattle.

Held: (1) Since the parties are Luo and resident within the jurisdiction of the North Mara District Council, the Luo law of persons were to be construed strictly, there could be no customary marriage without a marriage certificate. However a footnote to the chapter states that it is not intended to abolish any custom of contracting marriage. There is sufficient evidence that appellant was married to the woman by Luo Custom. Therefore no question of compensation arises. Appeal allowed.

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407. Ruzebe Sweya v. Jacobo Kitale (PC) Civ. App. 116-M-68, 19/8/68.

The plaintiff claimed that the respondent's cattle had grazed on his shamba, damaging cassava. Witnesses testified that they saw the cattle on the shamba and that they were driven off by the defendant's children.

Held: (1) The primary court has jurisdiction in this type of tortuous liability since it comes within the phrase 'customary law' under s. 14 Magistrates Courts Act Cap. 537. [Citing Alli Kindoli v. Tuzihirwe Pendaamani No 220 Vo. IX Digest of Appeals from Local Courts (1962) p. 7. a case of compensation for damage to crops, and Civil case. No. 27 of 1968 in the Nyamwigura Court (P.C Civil Appeal

No. 148 of 1968 unreported) in which Mustafa J. upheld an award of compensation for destruction of crops and plants under customary law of North Mara District]. (2) The Magistrate misdirected himself in saying that the burden was on the defendant to prove there were no cassavas. Under Rule 12) of Jurisdiction of Courts (Rules of Evidence in Primary Courts) Regulations 1964 the burden is on the person who claims unless the claim is admitted by the other party. (3) Decisions of the primary and district courts upheld. Defendant entitled to damages.

408. Nyamhanga Wansaga v. Mkami Bange, (PC) Civ. App. 120-M-68, 20/7/68, Mustafa J.

Mkami claimed that he married the sister of Nyamhanga, and had paid 41 head of cattle as bride-wealth. Mkami was later convicted of cattle theft, and Nyamhanga paid 5 head of cattle as compensation. When Mkami came out of prison he said he could not pay 5 head of cattle. As a result Nyamhanga took away his sister (wife of Mkami). Mkami claimed that the marriage was dissolved and that he was entitled to recover the whole of the bridewealth.

Held: Nyamhanga had intended to dissolve the marriage by taking away his sister. Only 37 head of cattle were paid as bride-wealth and 13 head of cattle were paid as bride-wealth and 13 head of cattle were paid as compensation, leaving a balance of 24. Since the parties were married for six to seven years, Nyamhanga should only return 14 head of cattle.

409. Nyagobro Ginonge v. Chagha Gasaya, (PC) Civ. App. 151-D-67; 19/9/68, Hamlyn J.

Appellant claimed the disputed plot of land as owner thereof. It was established that about ten years before the re-allocation she had left the disputed land and had gone to live in another area at a considerable distance there from, though she had left standing on the land a hut “of no great value”. There was no evidence that during the period of absence the land was worked or developed by her. The Village Committee allotted the land to respondent as result of which appellant instituted these proceedings alleging that the land was hers and that res-

pondent was a trespasser upon it. The Primary Court, Nyamawaga, gave judgment in her favour; this judgment was reversed by the District Court, North Mara.

Held: Appellant's claim dismissed (1) It would be neither good law nor in accordance with public policy to allow a plot holder to depart from the land for such a number of years with the result that the land may lie fallow or revert to bush. (2) Once it becomes established (as in the instant case) that there has been no real animus revertendi, even though a hut remains thereon, the land merges in the common public seeking property to develop.

410. Laurean Baitu v. Stanslaus Tibenda, (PC) Civ. App. 168-M-68, 19/9.68, Mustafa J.

Plaintiff brought an action to redeem clan shamba sold by his full brother for Shs. 350/- to defendant. It was established that defendant is a clan member, and that the sale was made in the presence of three witnesses and that when plaintiff was asked to be present at the time of the sale, he refused.

Held: Affirming the judgments of the courts below, "[Plaintiff] has no right to redeem the clan shamba when it was sold to another clan member. I refer to case No. 84 in the Digest of Appeals From Local Courts, being Appeal No. 18 of 1955 from the Bukoba area where the court disallowed the attempted redemption of a sale of clan lands within the clan; i.e. both the vendor and the purchaser belonging to the same clan. In fact, the district magistrate referred to this appeal in his judgment when dismissing [Plaintiff's]first appeal."

411. Pancras Elias v. Gretian Pancras and another (PC) Civ. App. 99-M-68, 13/8/68, Seaton J.

The shamba in question is divided into two parts, "A" and "B". 'A' was bought by Pancras from a third pary. Part 'B' was inherited by Gretian, the son of Pancras, from his grand father. Pancras gave Part A to Gretian since 'B' was not enough

for his needs. Later, Gretian sold both parts. Pancras claimed that they were clan shambas and that he had the right to redeem them.

Held: (following Garasiani Kabena Murefu and another v. Bushaija Luhirwa Vol. 4 Digest of Appeals from Local Courts p.3) (1) The court should demand strict proof of all the conditions under which a relative could redeem clan land since otherwise it would stultify the initiative and enterprise of purchasers of clan land. (2) Land bought from a third party is not clan land therefore there was no right to redeem Part A. (3) Proceedings to nullify a sale had to be started within 3 months from the time the relative first heard of the sale. There was no evidence as to whether the time limit had been exceeded or not in relation to part B and the case on that question was remitted to the primary court. (4) If the primary court finds that the time limit was exceeded, Pancras is entitled to receive from Gretian value of banana and coffee trees on Part B.

412. Evarister Martin v. Tefumwa Tibishubwamu & Another (PC) Civ. App. 171-M-68, 30/8 Mustafa J.

The appellant claims to redeem a clan shamba sold by the respondent to a third party for 350/-. The sale was witnessed by the appellant's father and other clan members. The district court, upholding the decision of the primary court, held that the period of limitation was stated in Cory

& Hartnoll's book to be 3 months from the time the appellant became aware of the sale. The appellant had not brought the action within that period and the action failed.

Held: (1) The period of limitation was now laid down by the Customary Law (Limitation of Proceedings) Rules, 1963, Government Notice 311/1964 made under Magistrates Courts Act 1967. And under that provision, by Item 6 of the schedule, proceeding to recover land must be brought within 12 years. Cited;- Evarista Makono v. Mashomelo Muhuba Mwanza P. C. Civil Appeal

37/1965 and Constantine Kaiza v. Bi Mukalegililwa Kampanju Mwanza P.C. Civil Appeal 85/1968 (2) The appellant is therefore allowed to redeem the shamba. (3) He must pay the third party the 350/- purchase price and the value of any improvements made by the third party since the date of purchase. (4) The case is remitted to the primary court to assess the value of those improvements (5) A period of 6 months is allowed within which the appellant may redeem since this will enable the primary court to assess the improvements. (6) If the appellant does not redeem within the 6 months, the sale will become irrevocable.

413. Noorally Hasham Rawjee v. Julius Kerenge, Civ. App. 2-M-68, Seaton J. Defendant leased certain premises from plaintiff at a rent of Shs. 600/- per month. A few months after the lease was entered into, the parties orally agreed that the defendant should made and pay for certain repairs, for which he would be recompensed by deducting hald the rent every month until he had recovered the cost of the repairs. It is clear that defendant fell into arrears in the payment of rent, though the amount was hotly disputed in two different law suits, which have been consolidated for the purposes of this appeal. A dispute developed as to payment for the repairs. Defendant then stopped paying rent, whereupon the plaintiff ordered him to quit the premises, and cut off the utilities when defendant failed to do so. Both parties concede that defendant became a statutory tenant by virtue of the Rent Restriction Act, Cap. 479, before plaintiff served him with notice to quit the premises.

Held: (1)"It is clear … that the court, before making an order for possession, even when there are arrears of rent due, must take into consideration the question of whether it is reasonable to make an order." Cap. 479, sec. 19(2). Citing Bhimjani v. R. M. Patel (1957) E.A.L. R. 149]. The failure of the court below to consider this issue "must be considered to have been a misdirection." (2) The Court then itself considered the reasonableness of eviction, noting that while the rent payments clearly were in arrears, "the purpose of the Rent Restriction Act is to provide a degree of security for tenants." It was ordered that if the defendant paid the rent in arrears within 21 days, and if he filed in the District Court an un-

dertaking to pay future rent as due, he could maintain possession. Also, plaintiff "shall be at liberty to apply to the District Court for an order for possession in the event of any breach by the appellant of his undertaking to pay the future rent of the premises …."

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414. Fatehali Ali Peera v. Onorato Della Santa. Misc. Civ. App. 10-D-68, 29/8/68, Georges C. J.

On 1st April, 1966, the lessor and lessee signed a three year lease covering the suit premises, at a monthly rental of Shs. 5,500/- per month. At the time of signing the premises, being business premises, were not controlled; the passing of the Rent Restriction (Amendment) (No. 2) Act, 1966 brought business premises under rent control as of 1st January, 1967. The date prescribed for ascertaining the standard rent of existing premises was 1st January, 1965. At that time the premises here involved were leased to another tenant for Shs. 5,450/- per month. The lessee initiated this action before the Rent Tribunal of Dar es Salaam, alleging that the before the Rent Tribunal of Dar es Salaam, alleging that the rent he was paying was " extortionate" and requesting that it be "scaled down to conform with that of adjacent properties so as to reflect a just return on the purchase price thereof." The Tribunal found that the rent on the suit premises was far higher than that for comparable buildings (though it did not inform the parties on what basis it came to that conclusion, which fact constituted a special circumstance entitling the Tribunal to disregard the rental price on 1st January, 1965 in setting the standard rent for these premises. It then set the standard rent at Shs. 2,500/- per month, effective as of the date the lease was entered into. The lessor challenged the authority of the Rent Tribunal to set the standard rent in the manner which it did.

Held: (1) The standard rent for building constructed before the Act went into effect shall be that rent at which they were let as of 1st January, 1965. Section 4(2)(a) provides an exception to this rule "in the case of any premise in re-

gard to which a Tribunal is satisfied that in the special circumstances of the case it would be fair and reasonable to alter … the standard rent …(to) such figure as the Tribunal shall in all the circumstances of the case consider reasonable." The crucial question in this case is whether a rent higher than others in an area constitutes a special circumstance, so as to allow the Tribunal to ignore it in setting the standard rent. In two places in the Act the yardstick of rents for comparable buildings is used – where a building can only be used part of the year, and where a building in existence was not rented on the effective date. It will be noted that in both of these situations the yardstick of the rental price as of 1st January, 1965 could not fairly be used in one case, and not used at all in the other. Had the Legislature intended to use the rental price of comparable buildings as a basis for setting the standard rent it surely would have said so. Otherwise the Tribunal would have to consider and set the standard rent for every covered building; if the Legislature had wanted such a gargantuan task to be under Instead, the standard rent is defined as "….. the rent at which the premises were let at the prescribed date." [Sec. 4(1)(a)]. (2) "(T)he purposes underlying the Rent Restriction Act and its amendments is the stabilizing of rents at the level existing on a certain prescribed date … (T)herefore … the alleged disparity in the rent between the suit premises and neighboring premises cannot be held to be a special circumstance within the meaning of section 4(2)." Accordingly, the appeal was allowed with costs, and the standard rent set at Shs. 5,450/- per month, Shs. 50/- per month below the contract price, and the rental which was in effect on 1st January, 1965. (3) The Tribunal may not base its decision on information gained through its regular work

Or expertise, unless it is put before the parties for rebuttal or modification should they desire (and be able) to do so. "It is against natural justice to decided a case on a point noted by the Board as a result of its own efforts and not specifically communicated to the parties so as to allow them an opportunity, if they wish, for

contradicting it. [Citing Sharif Marfudh v. Joseph Austin Merulo, Misc. Civ. App. No. 3 of 1967; R. v. Paddington and St. Marylebone Rent Tribunal, Ex Parte Bell London and Provincial Properties Ltd., (1949) 1 All E. R.720]. (4)"It is noticed that the Board made its finding retroactive to the 1st April, 1966. This cannot be right. The Board does have power to fix a standard rent retroactively, but the fact of the matter is that the premises were not controlled on the 1st April, 1966. It was not possible to make the rent retroactive beyond the date on which the Rent Restriction Act came into force, which was the 1st January, 1967.

415. Mussa s/o Abdallah v. R., Crim. Rev. -/D/68, 30/7/68. Biron J.
Accused was convicted of being in possession of an unlicensed firearm [see cap. 223 s. 13(1) and (2) and was fined Shs. 450/- or seven months imprisonment in default. In sentencing the accused, the trial magistrate was of the opinion that the penalty laid down under section 31(2) of Cap. 223 did over ride section 29(IV) of the Penal Code.

Held: Section 31(2) of cap. 223 and Section 29(Iv) of the Penal Code are "not mutually exclusive but complementary". Thus "where a fine is awarded and a term of imprisonment is imposed in default of the payment of the fine, such term cannot exceed six months as laid down in section 29(IV) of the Penal Code." Sentence of imprisonment reduced to six months.

416. In re R. v. Georges Tumpes, misc. Civ. Cause 2-A-68, 17/9/68, Platt J.
Accused was charged in District Court at Monduli with theft by public servant. Bail was granted after two persons had agreed to act as sureties. In addition, accused was ordered not to leave Monduli settlement and to report to the police later. Later, a dispute arose as to whether accused had reported to the police. The District Magistrate, after referring to a report made to him in chambers by the auditors investigating the case, cancelled the bail and remanded accused in custody. Accused than applied to the High Court for bail to be reinstated and for a change of venue for the trial.

Held: (1) The Court has stated that the purpose of bail is to place the accused in the recognisance of sureties who are responsible for ensuring his appearance in court and who may reseize him if they have reason to believe he is about to flee. “If that be the purpose of bail, then there can be little ground for attaching special conditions, such as that the accused must report at certain times to the Police Station.” (2) “(T)he proper test in considering a change of venue, is not whether the Magistrate … is actually prejudiced against the accused, but whether there exists in the mind of the accused a reasonable apprehension that he will not have a fair and

Unprejudiced trial … In deciding what is a reasonable apprehension .. regard must be had not to abstract standards of reasonableness but to the standard of honesty and the impartiality of the accused himself and his degree of education and intelligence.” [Citing Bhag Singh v. R., 1 T. L. R. (R) 133]. In view of the interview of the magistrate with the auditors and accused ’s education and character, his fear of prejudice is reasonable. Bail reinstated and venue transferred to the Arusha Resident Magistrates Courts.

417. Morrison s/o Shem v. R., Crim. App. 436-D-68, 27/9/68, Biron J.

Accused was convicted of stealing for which he was sentenced to imprisonment and 24 strokes. The magistrate directed himself that accused had not succeeded in establishing his alibi, and accepted the evidence of two witnesses which contradicted the proffered alibi. On the same day, in a different case, accused was convicted of another offence for which he also was sentenced to imprisonment and 24 strokes, making a total of 48 strokes between the two convictions.

Held: (1) The magistrate’s direction in respect of the alibi was wrong in law. “(W)here an accused sets up an alibi in defence, it is not on him to establish it, but it is sufficient if it succeeds in raising a reasonable doubt as to whether it was the accused who committed the offence with which he is charged.” Because

the misdirection by the magistrate in no way prejudiced the accused, and the conviction was fully supported by the evidence, the appeal on the merits was dismissed. (2) “However, an award of 48 strokes corporal punishment on the same day cannot but be regarded as excessive, part curly as both offences could have been tried together, in which case the court would not have awarded more than the statutory 24 strokes….” (3)”It is by no means irrelevant to not that there is a Bill before Parliament entitled the Written Laws (Miscellaneous Amendments) Act, 1968, amending the Minimum Sentences Act, 1963 (to preclude double impositions of strokes in situations such as the present one) …. Although I may be accused of anticipating legislation, at least applying the spirit, if not he letter, of the law as it now stands, and, as remarked, as the two cases could have been taken together, when only one award of corporal punishment could have been made, I consider that the award of corporal punishment in the instant case should be set aside.” It was so ordered.

418. Rashidi s/o Omari v. R., Crim. App. 377-D-68; -/8/68; Hamlyn, J.
Accused was convicted of burglary and stealing and of escape from lawful custody. At his trial, his wife testified for the prosecution. There was nothing in the record to show that the accused was asked whether he agreed to this.

Held: In the absence of any statement by the accused on the record, it must be assumed that he was not informed of his rights under s. 155(2) of the Criminal Procedure Code. Thus her testimony was improperly admitted. It was, however, of little import in the case. Conviction affirmed.

419. R. v. Maneno s/o Salum, Crim. Rev. 109-D-68, 16/9/68, Biron J.
Accused was charged with the defilement of a girl of five years of age. The girl was found to be not capable of understanding the nature of an oath and gave her evidence not on oath. A psychiatric report was submitted concerning accused

and on the basis of this report the magistrate found accused to be “guilty but insane.” He was therefore acquitted and apparently discharged.

Held: (1) Section 127(2) of the Evidence given not on oath is insufficient to support a conviction. (2) Section 168(1) of the Criminal Procedure Code provides that in cases such as the present on, the court shall make a special finding that the accused did the act or made the omission charged but is not guilty by reason of insanity. The verdict of “guilty but insane” is unknown in law. (3) After finding accused not guilty by reason of insanity, the court should have submitted a record of the proceedings to the Minister and ordered accused kept in custody as a criminal lunatic pursuant to section 168(1) of the Criminal Procedure Code. Proceedings declared a nullity and accused ordered to be charged and tried de novo.

420. R. v. Matenyanu s/o Nzagula, Crim. Rev/ 112-D-68, 20/9/68, Saidi J.
Accused was charged with unlawful wounding. The trial magistrate found that accused was of unsound mind after hearing the evidence of the district medical officer. He therefore postponed the proceedings, order accused remanded to prison and referred the matter to the Minister of Justice.

Held: (1) The magistrate did not apply the proper procedure as specified by section 164 of the Criminal Procedure Code. Under that procedure, the magistrate must first determine whether a case has been made out against accused. If a case has been made out an order should be made that accused be detained in a mental hospital for observation. If the report of the medical hospital for that accused is incapable of making his defence, the case can be postponed and accused detained (usually in the mental hospital) and the matter referred to the Minister in charge of legal affairs. (2) The High Court may make the appropriate orders in the present case. Case postponed and appropriate orders made.

421. C. R. Chipanda v. R., Crim. App. 63-D-68; 6/4/68; Duff, J.
Appellant was convicted of failure to pay the statutory minimum wage contrary to Section 12(1) of the Regulation of Wages and Terms of Employment Ord. Cap.

300; failure to maintain a written record of an oral contract contrary to section 35 of the Employment Ord., cap. 388; and failure to insure an employee contrary to section 25(1) and (4) of the Workmen's Compensation Ord., cap. 263.

Held: In view of appellant's testimony that the alleged employee had come to his house seeking assistance in finding employment and that appellant had agreed to house him and provide pocket money until he could get a job, with the alleged employee is turn helping in the house, there was insufficient

Evidence to establish the existence of a contract of service. Appeal allowed.

422. Mahende Isanchu v. R., Crim. App. 269-M-68; 23/9/68; Seaton, J.

Accused was convicted of unlawful possession of "moshi" contrary to s. 36(1)(2) of the Local Liquor Ordinance, Cap. 77. None of the prosecution witnesses were expert in identifying moshi nor did they describe in detail the appearance of the liquid allegedly found in accused 's home. However the accused stated: "The moshi is not mine and was found in a house which has no owner which is not mine. I saw the moshi. I admit that it is moshi."

Held: Conviction quashed. The accused "was not apparently more qualified than any one else to testify what was the nature of the liquid …… His "admission" cannot, therefore, be taken to supply the defect or gap in the prosecution case.

423. Halid s/o Twalibu v. R., Crim. App. 351-D-68, 23/8/68, Saidi J.

Accused was convicted of one count of throwing or introducing prohibited articles into a prison and of a second count of possession of bhang. The first count was laid under section 119(1) of the Prisons Ordinance, Cap. 58 which had been repealed and had been replaced by section 85(1) of the Prisons Act, 1967. The second count was added by amendment during the trial. After the amendment

accused requested that the first prosecution witness be recalled for cross-examination, but this request was refused.

Held: (1) The trial court had the power under section 209(1) of the Criminal Procedure Code to amend the charge by substituting the section of the new Act for that of the repealed Ordinance, and the High Court has power under section 319(1), 329(1) and 346 to do what the trial court ought to have done. Such an amendment can be made provided that no failure of justice would result and provided that the offence under the old and the new statutes is in every essential the same. [Citing R. v. Indo Parsad Jamictram Dave, Crim. Rev. 40 of 1963; Abdulrasul G. Sabur v. R., (1958) E.A. 126]. (2) In the present case, the ingredients of the offence in section 119(1) of the Prisons Ordinance and section 85(1) of the Prisons Act, 1967, are essentially the same, and no injustice would result from the substitution of the latter. (3) After the amendment adding the second count accused should have been given the opportunity to cross-examine prosecution witnesses who had previously testified and it cannot be said positively in this case that accused was not prejudiced by the failure to do so. Conviction on first count amended to specify the new statute; conviction on second count quashed.

424. Selemani Athumani v. R., Cr. App. 373-D-68, 23/8/68, Saidi J.

Accused was convicted of two counts of burglary and two counts of stealing. Evidence showed that accused broke into a certain house and stole articles of two complainants who apparently occupied two different rooms in that house.

Originally the accused was charged with one count of burglary and one count of burglary and one count of stealing to which he pleaded not guilty. On a later date, the charge was amended by adding on count of burglary and one count of stealing but the accused was not asked to plead to these new charges. There was, however, ample evidence to warrant conviction on all four counts.

Held: Conviction on the third and fourth counts a nullity since the accused was not asked to plead from the beginning. [Applying Akberali Walimohamed v. Regina, 2 T.L.R. (R) --.]

425. John Joseph v. R., (PC) Crim. App. 13-A-68, 16/9/68, Platt J.
Accused was charged with stealing. When the trial commenced the prosecutor entered two additional counts; accused did not plead to these new charges. Accused had answered the original count, and his conviction thereon was affirmed.

Held: (1) The Primary Court Magistrate acted properly in admitting the additional charges at the commencement of the trial. [Primary Court Criminal Procedure Code (Third Schedule to the Magistrates' Courts Act), para. 21. This paragraph permits but does not require a magistrate to allow the entering of additional charges]. (2) As the appellant was not arraigned on (i.e., required to plead to) the two new counts, the trial in respect of them was "null and void.[Primary Court Criminal Procedure Code, para 27].

426. Paulo Kemigani v. R., (PC) Crim. App. 233-M-68, 23/8/68, Seaton J.
Accused were convicted in Primary Court of malicious damage to property. The charge was not explained to the accused and they were given no opportunity to plead to it. Also the charge initially did not specify the date on which the offence took place.

Held: (1) Sections 27 and 28 of the Primary Courts Criminal Procedure Code [Magistrates' Courts Act, Cap. 537, Third Sch.] provides that the court shall read and if necessary explain the charge to the accused and shall either itself state the facts on which the charge is founded or require the complainant to do so. (2) In the particular facts of this case, the date of the offence was very important and the late amendment specifying the date prejudiced the accused. (3) Because of the failure to take a plea, the trial was a nullity, and the error is not curable. [Citing Walli Mohamed Damji v. Reg. (1956) w. T.L.R. (R) 137]. Convictions quashed.

427. Asumani s/o Mataka v. R., Crim. App. 422-D-68, -/9/68, Saudi J.

Accused was convicted of assault causing bodily harm and malicious damage to property. When asked to plead to the charge he stated, “It is true”. However, he was given no opportunity to state whether he agreed or disagreed with the facts as outlined by the prosecutor. After the plea on each count he was found guilty on

That count by the magistrate. Thereafter, it was alleged that accused had a previous conviction, but he was given no opportunity to admit or deny the conviction.

Held: (1) An accused must be given the opportunity to agree or disagree with the facts alleged in the charge. A plea of guilty should not be entered until he has agreed to the facts or the prosecution has modified the alleged acts so as to conform with accused ’s version. The prosecution may wish to modify the facts where the accused dis-agrees only with non-material details. [Citing Reg. v. Waziri s/o Musa, 2 T.L.R.(R) 30, 31; R. v. Azizi Mrimbi, Crim. Rev. 34 of 1964, High Court Bulletin No. 14, Case No. 204]. (2) Accused must be given the opportunity to admit or deny previous convictions, and evidence of the conviction must be adduced unless the conviction is admitted. Conviction must be adduced unless the conviction is admitted. Conviction quashed.

428. William Stephano and Bilauli Zalula v. R., Crim. App. 448, 449-M-68, 28/8/68, Mustafa, J.

The two accused were jointly charged with 2 counts (1) of burglary contrary to s. 294(1) of the Penal Code and (2) of assault with intent to steal contrary to s. 288 of the Penal Code. They were convicted instead of (1) malicious damage of property contrary to s. 326 of the Penal Code and (2) assault causing actual bodily harm contrary to s. 241 of the Penal Code. The court purported to do this under s. 181 of the Criminal Procedure Code which allows an accused to be con-

victed of an offence with which he is not charged, if it is included in the offence charged.

Held: (1) The conviction for assault charged, bodily harm must be quashed, since it cannot be substituted for a conviction for assault with intent to steal under s. 181 of the Criminal Procedure Code. The former offence attracts a sentence of 5 years imprisonment, whereas the latter only attracts 3 years imprisonment, (2) The substituted conviction for malicious damage to property was, however proper.

429. Hassan s/o Mohamed v. R., Crim. Rev. 106-D-68, 7/9/68, Duff, J.
Accused was convicted on his own plea of two traffic offences. When asked if he wished to say anything in mitigation, accused appeared to retract his original pleas. The court considered that, having already convicted the accused, it had no power to set aside the convictions. Record forwarded for revision.

Held: "It is quite clear that a plea of guilty may be withdrawn with the leave of the court before sentence and this is entirely a matter for the discretion of the court….[O]nce the accused appeared to be disputing the facts given by the prosecution even when making a plea in mitigation, a plea of not guilty should have been entered and the charge or charges tried." Convictions set aside and accused to be re-tried.

430. Alli s/o Ramadhani v. R. Crim. App. 352-D-68; Georges, C. J.
Accused was convicted of retaining stolen property contrary to s. 311(1) of the Penal Code. He had at first been charged with being in possession of property suspected to have been stolen, contrary to s. 312 of the

Penal Code, but this charge was altered. Accused had been found in possession of a number of bicycle parts, some of which were usable. The serial numbers on a few of them appeared to have been erased. There was no evidence that the

property was concealed. The accused 's explanation was that he was a bicycle repairer and that various customers would leave parts with him after repairs had been effected. There was no evidence that accused was not a bicycle repairer.

Held: Conviction quashed. (1) Accused clearly could not have been convicted under s. 312, as originally charged. The pre-requisites for a conviction under this section are; (a) that the accused was detained in exercise of the powers under s. 24 of the Criminal Procedure Code; (b) that he was detained while in the course of a journey, whether or not in a street, in private land or in a building; (c) that he had in his possession, when detained, a particular thing; (d)that the thing might reasonably be suspected to have been stolen or unlawfully obtained, from its nature or from the circumstances; (e) that the accused refused to give an account to the court of how he came by the thing, or gave an account which was so improbable as to be unreasonable or which was rebutted by the prosecution (Kiondo Hamisi v. R., (1963) E.A. 209). But there was no evidence that either pre-requisites (a) or (b) were satisfied here. Therefore accused could not have been convicted under s. 312. (2) Accused was wrongly convicted under s. 311(1). "Whereas under section 312 all that needs to be done is to lead evidence to show that there was a reasonable suspicion that the property was stolen, under section 311(1) there must be satisfactory evidence that the property was in fact stolen or unlawfully obtained and that the appellant knew or had reason to believe that this was the case. This does not necessarily mean that the owner of the property should be identified , or that there should be direct evidence of theft." The circumstances under which an accused received or possessed the goods may prove that they were stolen and that the accused knew this. (Idi s/o Waziri v. R., (1961) E. A. 146). However here, the evidence was not sufficient to establish the theft of the goods.

431. Hamadi Sadiki v. R., Crim. App. 395-D-68, 19/8/68, Biron J.

Accused was convicted of causing death by dangerous driving [Traffic Ordinance (Amendment) Act, No. 41 of 1964, sec. 44A(1)(a)] for which he, inter alia, was disqualified from holding a driving licence for 12 months. He now appeals against

this disqualification on the ground that he is a driver by profession and that he will lose his job if he loses his licence, causing hardship to his family and dependents whom he will be unable to support.

Held: The 12 months disqualification is mandatory for the offence involved here, unless the court finds "special reasons". It has been held in "a long unbroken line of authority" that special reasons means only those special to the offence, and not those special to the offender. "(H)owever much hardship an order of disqualification may cause, that cannot be taken into consideration." Appeal dismissed.

432. John Wayaga Nyamahende v. R. Crim. App. 550-M-68, 16/9/68, Mustafa J.

Appellant, who was a conductor of a bus, was convicted on his own pleas of guilty of failing to comply with conditions attached to a road service licence. It was alleged that appellant failed to comply with the conditions of the time-table by arriving late and having left late contrary to sections 23(3) and 26(1) of the Traffic Ordinance Cap. 373 of the Laws. It was not established that appellant was the holder of the licence or the owner of the bus.

Held; Appellant was the wrong person charged since Section 26(1) of Cap. 373 only applies to the holder of licence and it was not proved that he was the holder of the licence. Appeal allowed. The Court approved the obiter in Hamed Abdallah v. Republic [1964] E.A. 270 at page 272 to the effect that only a licence holder can be charged under section 26(1) of Cap. 373 and not a driver nor a conductor of a vehicle though he may be responsible for the offence committed.

433. Malika s/o Kabendera v. R., Crim. App. 303-D-68, 30/8/68, Georges, C. J.

Accused was convicted of driving, on a road, a motor vehicle which had a number of defects. The complainant had testified that he was on the "Kilombero Estate road" when he saw the vehicle. "going along Msorwa Estate", carrying a load

of cane. There was no other evidence as to the nature of the road on which the vehicle was traveling.

Held: Conviction quashed: (1) The prosecution has not led enough evidence to show that the vehicle was being driven along a “road” within the meaning of the Traffic Ordinance. “If it was an estate road, then it may well not have been a road within that definition.” (2) There is some uncertainty as to the meaning of the word “road” as used in the Traffic Ordinance. It was originally defined in the Traffic Ordinance, Cap. 168, s. 2. However the Traffic Ordinance (Amendment) Act, 1964, supplied a new and more restricted definition of “road”, without repealing the old definition. The uncertainty is as to which definition applies.

434. Stephen Kagatula v. R., Crim. App. 553-M-68, 15/8/68, Seaton J.
Accused was convicted of using language and common assault and received concurrent sentence of 4 and 3 months respectively. He had become abusive while at a beer-shop, insulting the Village Executive Officer, T.A.N.U. and the President When some by-standers remonstrated with him, he pushed one of them down and later followed him and seized him by the shirt.

Held: The sentence were excessive. “It appears from the evidence that the appellant was drunk. This would not excuse his crime. But one does not regard the words of a man in his cups as seriously as those of one who is cold sober. The appellant is a first offender and has nine dependants. His occupation prior to this offence was that of a primary court clerk. It is possible he may now lose that position which itself would be a heavy penalty.” Sentences reduced to 2 months on each count to run concurrently, of which accused had already served 1.5 months.

435. R. v. Joseph s/o Michael, Crim. Rev. (-)-D-68, 23/8/68, Duff, J.
Accused was convicted of stealing by servant contrary to ss. 271 and 265 of the Penal Code. He stole a cow belonging to the National Development Corporation.

He was sentenced to 3 years' imprisonment and 24 strokes, the court considering that the National Development Corporation was a body to which the Minimum Sentences Act, Cap. 526, applies.

Held: The sentence imposed was illegal. The National Development Corporation must be regarded as an ordinary employer and not one to which Part (1) of the Schedule to the Minimum Sentences Act applied [i.e. Stealing by a person in the public service]. Sentence set aside and 9 months imprisonment substituted.

436. Rasimni s/o Yasini v. R., Crim. App. 357-D-68, 23/8/68, Said, J.
Accused was convicted of shop breaking and stealing and was sentenced to 3 years imprisonment with 24 strokes. At the trial, the prosecution alleged that the accused had been previously convicted of a number of offences. The accused denied this, but the court took it into account in assessing sentence without requiring the prosecution to prove the allegation.

Held: The court erred in considering these alleged previous convictions in passing sentence, since the accused had denied them and the prosecution had not proved them. The sentence itself, however, is not severe in the circumstances of the case. Appeal dismissed.

437. Jumanne Dummwala v. R., Crim. App. 399-D-68, 6/9/68, Duff J. Accused was convicted of several counts of theft by public servant, an offence covered by the Minimum Sentences Act, whereupon he received the minimum sentence of two years imprisonment and 24 strokes. He stole from his employer, the National Development Credit Agency. The appeal was dismissed on the merits, leaving only the question of whether the offence was covered by the Act.

Held: The Agency is a parastatal body independent of the Tanzania Government, and thus the Minimum Sentences Act is inapplicable. A conviction of theft by servant [P. C. ss. 265, 271] was substituted, and sentence reduced to nine months imprisonment.

438. Edward Mponzi v. R., Crim. App. 78-A-68, 3/8/68, Platt J.

Accused was convicted on twenty-four counts of forgery and one count of theft by public servant [P.C. ss. 337, 270, 265]. As a counter clerk in charge of overseas telegrams for the East African Posts and Telecommunications Administration in Arusha, he allegedly failed to properly charged or properly account for a number of telegrams. In some cases, he had altered duplicate receipts, so that they showed a lesser charge than that shown in the original; in others, he had made false entries in summary sheets to indicate that he had received less money than he had actually received. During the trial, the Postmaster identified the accused 's handwriting on various documents, although there was no

Direct showing that he knew the accused 's handwriting, but it was not clearly indicated in his judgment what corroboration, if any, he had relied upon to support his comparisons of the available samples.

Held: (1) Under the East African Posts and Telecommunications Act of 1951, section 104(4), officers of the Administration are deemed, for purposes of the Penal Codes of the "territories", to be employed in the public service thereof. The charge of theft by public servant was therefore proper. (2) "(M)erely to tell a lie in writing is not forgery. The writing must tell a lie about itself, (must purport) to be something which it is not." The alteration of duplicate receipts was forgery, for "these duplicates purported to show that a different transaction had taken place than really had in fact." However, the making of false entries in the summary sheets, purporting to show that accused had received less money than he had actually received, was not forgery as defined in section 333 of the Penal Code, but fraudulent false accounting contrary to section 317. (3) Under section 49 of the Evidence Act, 1967, the magistrate would have been entitled to accept the opinion of the Postmaster as to the handwriting, had the Postmaster testified that he had seen the accused write, or that he had received documents purportedly written by accused in answer to documents written by himself, or that in the ordi-

nary course of business documents purportedly written by accused had been "habitually" submitted to him. None of these conditions was fulfilled. (4) In forming his own opinion, the magistrate is obliged to rely upon some corroboration elsewhere in the evidence; it is not clear that this was done here. However, the convictions could be upheld on counts where the offence was established by testimony of customers, as to transactions where the accused 's handwriting was not in issue.

439. Doto s/o Luhende v. R., (PC) Crim. App. 625-M-68; 5/9/68; Mustafa, J.
Accused was convicted of cattle theft contrary to ss. 265, 268 of the Penal code. Complainant had left a bull in a market place while searching for another animal which had fled. On returning, he found the bull missing. He later discovered it among some people who told him that accused (who was absent) had claimed ownership of the bull. When accused appeared, he claimed, in the presence of complainant, that the bull was his. Complainant called in the police.

Held: The conviction is quashed. The evidence merely indicates that accused falsely claimed ownership of the bull. There is no evidence that he "took" the bull, as required by the definition of theft in s. 258(1) of the Penal Code. The word "takes" connotes asportation. But accused is not alleged to have moved or caused to be moved the bull from one place to another.

440. Aloys Ignas v. Simeo s/o Mulokozi, Civ. App. 5-D-68, 5/11/68, Saidi J.
Defendants had tried to enter a room near one occupied by their father, plaintiff's tenant. Plaintiff asked them to leave, and they threw him down and beat him. Plaintiff was only slightly injured. Defendants were convicted of

Assault, the Primary Court magistrate fining them and, noting that they were liable for damages as well, directing plaintiff to begin civil proceedings. Plaintiff did so, losing in Primary Court on the grounds that it was necessary to prove serious

injury or material loss. The District Court reversed, awarding damages of Shs. 100/- on his claim for Shs. 600/-.

Held: (1)An assault victim may claim at least nominal damages for distress, and need not prove material loss or serious personal injury. Citing Clerk & Lindsell on Torts, 12th ed., par. 619. (2) The Primary Court should have awarded compensation of Shs. 100/- which seems a reasonable sum on the facts, in the criminal proceedings, under Primary Courts Criminal Procedure Code, Paragraph 5; had it done so, the case would not have taken two years to be settled, as ultimately happened.

441. Edmond Van Tongeren v. Tanganyika Tegry Plastics Limited (H.C.) Civ. Case 44-D-68, 7/10/68, Hamlyn, J.

Plaintiff sued defendant, a limited company for additional remuneration which was agreed upon in a letter written on defendant's ordinary business stationery and signed by its managing director. Defendant claimed inter alia that the managing director had exceeded his authority.

Held: The Article of the company authorized the board of directors to appoint a managing direct who would be entitled to exercise the powers of the board. Therefore the managing director was the actual agent of the company, acting within the scope of his authority. The Court also indicated that the managing director was the ostensible agent of the company, having held himself out as authorized to act for it. Since plaintiff had relied on the agreement, and had performed extra work on the promise of the additional compensation, the Court indicated that if necessary it would have held the defendant estopped from denying the authority of the managing director, but such holding was not necessary in light of the finding of actual authority.

442. In the Matter of Air Safaris (Tim Air) Ltd., Misc. Civ. Cause 4-A-65, 3/10/68, Platt, J.

Petitioner was a principal shareholder of a company which was being wound-up and had asserted a claim for monies she was alleged to have advanced to the

company as loans. The liquidator had rejected her claim, on the ground that s. 158(1) (g), Companies Act required that the claim e deferred to unsecured creditors. That section provides that a sum due to any member "in his character of member" is deferred to the claims of other creditors.

Held: The Court first stated the fundamental proposition that a director or member may loan money to company, so long as the company has power to borrow, which the company, so long as the company has power to borrow, which the company in question did. Furthermore the reference in s. 158(1) (g) didn't apply since petitioner did not advance monies in her capacity as a member but rather as a creditor; the statute was only designed to defer payments receivable by a member as such, like dividends and profits.

The liquidator challenged petitioner's contentions that the advances were made as loans since there was no evidence of the indebtedness and the company did not reflect the advances in a loan account but rather in a capital account.

The Court noted that the company's account were in disorder, but that the share capital of the company had never been increased. Nor had more shares ever been issued to the petitioner. Even if the advances were intended to be added to "circulating capital" they were not equivalent to capital paid in to the company. The Court pointed out that the petitioner could not claim dividends on the advances, which did not lose their identity as loans. The court rejected the liquidator's argument that it was unfair to other creditors to allow the petitioner to claim repayment of her advances, particularly since the accounts of the company were not properly drawn up. The Court noted that the creditors could have found out from the Registry that no accounts were filed, and it was not clear what the effect would have been if they knew that petitioner was lending money to the company on an unsecured basis. The court found no basis to charge petitioner with fraudu-

lent trading or misfeasance; nor did it find that petitioner would make any gain at all, let alone an improper gain. Therefore, her claim was admitted to proof.

443. Patel v. Internation Motor Mart Ltd. 13-A-67; 19/9/68; Platt, J.

Plaintiff hired defendant on a probationary bases for a period of 6 months as an accountant at a salary of Shs. 1,500/- paid monthly. The contract was not subject to the Employment Ordinance. Three days after beginning work, defendant terminated his employment without notice. As a result, plaintiff was unavoidably without the services of an accountant for the period 1.5 months. Plaintiff sued for damages for defendant's breach and the trial court awarded plaintiff Shs. 1,500/-, the equivalent of 1 month's salary. Defendant appeals.

Held: (1) The trial court rightly rejected the defence that plaintiff breached the contract first, by requiring defendant to perform the duties of a cashier and to handle insurance matters. The duties of an accountant in a small firm with only one accountant are necessarily flexible, and defendant knew this since he interviewed for the job. (2) Even though the employment was for a probationary period, in the absence of a stipulation to the contrary, neither party had a right to terminate the contrary, neither party had a right to terminate the contract neither party had a right to terminate the contract without reasonable notice, which in this case was 1 month.(3) Although plaintiff was unable to prove any special loss resulting from the breach, plaintiff is entitled to substantial damages because of the considerable inconvenience to which he was put by the breach. In deciding whether to award nominal or substantial damages in cases where no specific loss can be proved, each case must be examined on its own merits. (Nitin Coffee Estates Ltd. v. Noran Mistry, Tanz. H. Court Digest, Vol. 1, Case No. 117, distinguished on this basis). In this case, however, Shs. 1,500/- is too much; damages will be assessed at Shs. 750/- Judgment modified and appeal dismissed.

444. Tanzania Exhibitors Ltd. v. Karimbhai Hassanali Adamji Jiriwalla, Civ. Case 22-D-68, 31/8/68, Duff J.

Plaintiff sought the transfer of title to building he purchased from defendant. About 75% of the purchase price was to be paid directly to defendant, and 25% to a third party. A

Clause in the contract specifically provided that after the 75% had been paid to defendant, he would transfer the title to the plaintiff. The 75% had been paid but defendant refused to transfer title because not all of the 25% had been paid to the third party, and certain tax payments were in arrears. Because of this, defendant argued that plaintiff's prayer for specific performance of the contract should be rejected. Defendant also filed a counterclaim relating to another contract between the parties.

Held: (1) To obtain an order for specific performance the moving party must show that he has performed his obligations under the contract. Whether plaintiff has done so here turns on what the parties intended when they signed the contract. Since clause 2 (h) specifies that title shall pass not on payment of the whole contract price, but upon the payment of 75% of the price to defendant, the failure to pay the other 25% as yet cannot amount to a breach. Specific performance granted. (2)Defendant's counterclaim could be excluded by the Court if it deemed such a course to be expedient. As the counterclaim raised several substantive issues, and was concerned with a different contract covering a different piece of property, it was excluded, without prejudice to any further action defendant might want to take.

445. Hassan s/o Sefu v. Muru s/o Mohamed. (PC) Civ. App. 43-A-68, 30/8/68, Platt J.

In May, 1967 defendant contracted to purchase plaintiff's house for Shs. 8,00/-. Shs. 3,000/- was paid at that time and it was agreed that the balance would be paid in July, 1967. The house was kept in plaintiff's name, and it was agreed that defendant would take possession immediately but would surrender possession if

the balance was not paid. Defendant failed to pay and plaintiff filed this action in Primary Court for recession of the contract and the return of the house upon repayment of the Shs. 3,000/- which had been paid. Plaintiff is an Asian and defendant is an African but is not the member of any tribe.

Held: (1) The provisions of s. 14, Magistrates' Courts Act, control the provisions of s. 57 of that Act. Thus, an action must be filed in Primary Court under s. 57 only if it has been determined that the Primary Court has jurisdiction under s. 14 to hear the case. [Citing Mohamedi Ngownyani v. Tumwa Dodo, (PC) Civ. App. 34-67]. (2)Customary law can govern contracts for the sale of a house even though the transaction does not involve special forms of tribal organization such as clan ownership of land. [Citing Andrea Rafael v. Antonia Masakuya, (PC) Civ. App. 57-66]. Paragraph 3 of the Fourth Schedule of the Magistrates' Courts Act suggests a wide definition of the scope of customary law in reference to contracts. (3) The Primary Court had jurisdiction to try this matter if the parties were subject to customary law. (4) s. 9(1) (a), Judication and Application of Laws Ordinance, Cap. 453, provides that customary law shall apply to civil matters "between a member of one community and a member of another community if the rules of customary law of both communities make similar provision for the matter." The Primary Courts lack jurisdiction where there is no such common ground of legal procedure and jurisprudence. [Citing dicta in

Report made in 1953 was held relevant but the court found that any inference of partnership was adequately rebutted by (1) the fact that the alleged partnership had never been registered under s. 4, Business Names (Registration) Ordinance, Cap. 213, which would have been required if there had been a partnership, but not if there had been joint ownership only, and (2)plaintiff had never explained the interest of the bankrupt's daughter, who owned a share of the farm. The Court concluded that the sharing of profits did not necessarily made the parties partners, relying on s..191 (2)(a) and (b), Contracts Ordinance, Cap. 433, which

provide, in substance that joint ownership is not necessarily a partnership even if there is a sharing of profits or gross returns. The Court held that s. 191(2)(c) of the Ordinance, which provides that, in certain circumstances, sharing of profits of a business is prima facie evidence of a partnership in that business, was not relevant, since plaintiff had not demonstrated there was any "business" rather than merely the affairs of co-owners.

448.Leo Mkasu v. Salim Mohamed El Shukery, Civ. Case 71-D-67, 10/10/68, Biron J.

Plaintiff filed this suit claiming damages for injuries sustained when he was allegedly pushed off a bus. When the case was first set down for hearing on 21 February, 1968 defendants appeared with their witnesses but plaintiff failed to appear and gave no explanation to the court or his advocate for his failure. The case was adjourned. Plaintiff again failed without explanation to appear when the case again came up for hearing on 10 October. Plaintiff's advocate moved for another adjournment, and this motion was opposed by defendants' advocate who referred to the expense of bringing the defendants and the witnesses from distant areas of Tanzania.

Held; Courts are extremely reluctant to dismiss a case on account of the failure of a party to appear. Adjournments are freely granted on the theory that expenses can be cured by costs. However, in the facts of the present case, it appears that plaintiff is impecunious and could not pay such costs, and conditions should be placed on the granting of an adjournment. Adjournment granted on condition that the case not be heard until security is posted for defendants' costs n attending the two adjourned hearings, Costs of appearing at the adjourned hearings awarded to defendants in any event.

449. Valentine Makwaba v. Maxmillian Mgingurwa (pc) Civ. App. 27-D-68, 5/10/68, Hamlyn J.

The testator died without issue. Appellant claimed the property because he alleged that the testator gave him the land for the service he rendered to the testa-

tor when there was litigation between the testator and a woman who claimed the shamba. Respondent is brother of the testator and apparently his natural heir. At the original trial a number of documents purporting to be wills of the testator were produced, some alleged to have been signed or thumb-printed by the testator and a number of other signatories to the documents. The trial magistrate found as a fact that the documents were missing the required witnesses' signatures.

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Held: (1) "For a court to interfere with the natural 'run' of inheritance would require very explicit and incontrovertible evidence, for the claims of consanguinity cannot lightly or easily be disregarded." (2) Clause 34 of Government Notice 436 of 1963 requires that the testator must declare specifically in writing his intentions and reasons for disinheriting his heir-at-law. Appeal dismissed.

450. Zamberi Muga v. Wanzira Muga (P.C) Civ. App. 18-D-68, 7/10/68, Biron J.
Respondent, full sister of deceased who had died childless leaving no full brother nor wife, claimed 18 head of cattle in possession of appellant who was deceased's half brother. In the lower courts there was dispute as to the quantum of the estate but it was found that the estate was comprised of 18 head of cattle. Appellant admitted at the trial court that a half-brother is not entitled to inherit but the heir was his father, to whom deceased was like a son.

Held: Both under Zanaki Customary Law and General Laws of Inheritance, section 44 of Government Notice 436 of 1963, where a person dies leaving neither children, full brothers, nor a wife, his full sister is entitled to inherit. Appeal dismissed.

451. Thimotheo Jimanyika v. Hassani Jimanyika, (PC) Civ. App. 200-D-67, Biron J.
This case concerned (1) a dispute between plaintiff and defendant over the succession to a coffee plantation left by their paternal uncle who die childless at a

ripe age of 70 years; and (2) the effect of a sale of the entire plantation by the defendant to the co-defendant for Shs. 4,500/-. Both plaintiff and defendant claimed to have inherited the land through oral wills made by the deceased. The Primary Court disbelieved the evidence of the witnesses called by both parties and decided that the first defendant had inherited the land because he had been left in possession there of at the date of the deceased's death and the plaintiff had failed to establish that the property was bequeathed to him. The District Court Magistrate ordered that the land should be divided between the plaintiff and defendant, but two-thirds was to be given to the plaintiff because he had used his money to enfranchise the property from nyarubanja tenure and had redeemed it when it was pledged by the deceased.

Held: (1) Both plaintiff and defendant were entitled to inherit the land equally on the deceased's death intestate. (2) As the defendant had sold the land to the second defendant and received Shs. 4,500/- in respect of such sale, the former was to hand over to the plaintiff Shs. 2,250/- who was then to be allowed to redeem half of the shamba with the money so received if he wished. (3) Should the plaintiff wish to avail himself of the opportunity to redeem half or the land, the division should be made by the clan elders together with the magistrate of the Primary Court.

452. Bi. Mary w/o Bilauri v. Calist s/o Bilauri (PC) Civ. App. 30-D-68, 15/10/68, Hamlyn J.

At issue is the validity of a will which is purported to have been executed by the testator. The testator before his death was apparently sick and in great paid and sought the

Services of a scribe who wrote a will for the testator who signed it and a number of witnesses as well. It was established that the witnesses signed the will sometime after the death of the testator and not at the same time the will was executed.

Held: The Laws of inheritance (Government notice No. 436 of 1963) provides in clause 3. “A will should be attested by proper witnesses who must be present at the same time.” The court stated; “I presume that this slightly ambiguous wording sets out the normal requirement that both testator and witnesses shall be present and shall sign this requirement was not followed, the will is invalid. Appeal dismissed.

453. Abdulaziz Velji Ratansi v. Sheri Singh, Civ. Case 14-A-67, 27/9/68, Platt J. Plaintiff’s car, which he hired out, was virtually destroyed due to the negligence of the two defendants. The plaintiff’s car had recently been in another accident, damaging the car to the extent of Shs. 1,600/-, which the person hiring the car had paid. Plaintiff made a claim for damages under two heads; Shs. 14,000/- being the pre-accident value of the car, and Shs. 11,095/- being Shs. 35/- per day times 25 working days per month, for a little over one year, the profit plaintiff lost due to the destruction of his vehicle.

Held: (1) The damages for destruction of the vehicle were Shs. 10,900/-, plus interest. The Shs. 14,000/- valuation not disputed, but from that figure was subtracted 1,600/- since the car was in a damaged state at the time of the accident in question, and Shs. 1,500/-, the salvage value of the car. (2) A claim for loss of profits was in principle justifiable, in addition to the loss of the car. [Citing Jones v. London Authority, Lloyds Rep. 489; Pick fords Ltd. V. Perma Products Ltd. (1947) 80 Li. L. R. 513]. In shipping cases, recovery of profits is permitted for the voyage she was undertaking at the time of the accident, plus that for other voyages she was under charter to perform. [Citing The Philadelphia (1917)]. The main dispute was not over the principle of recovery for lost profits being allowed, but for how long the period would run. Plaintiff argued that he had no duty to mitigate damages. (Citing Southern Highlands Tobacco Ltd. v. Mc Queen (1960) E.

A. 490, 494, a case involving an employment contract.) Defendant replied that plaintiff was entitled to recover damages only over such period of time until he could reasonably have obtained another vehicle. [Citing The Liesbosch (1963) A.C. 489]. The measure of damages and the duty to minimize damages are two separate things. The aim is to put plaintiff, as far as possible, in as good a position as he was before the collision, the principle sometimes being referred to as restitutio in integrum. To do this it must be contemplated that plaintiff would replace the destroyed taxi. "Therefore, the measure of his damage is the value of his vehicle and the loss of profits from the date of the accident to the date when a further similar vehicle could reasonably be acquired to replace the damaged vehicle." Shs. 900/- was allowed for loss of profits, plus 7% interest, running from the date of the accident, on the value of the car (Shs. 10,900/-, but apparently not on the Shs. 900/- lost profits. (3) Plaintiff argued that he should be awarded costs since his

Claim succeeded on the main point he had to prove – defendant's negligence – and a although he received less than he claimed, the part he lost on only entitled brief argument before the court. In short, he won on the substantive claim, though he was awarded less than he had requested. Defendant argued that as plaintiff had recovered only Shs. 11,800/- out of a claim of Shs. 25,095/-, plaintiff should not be allowed costs. As plaintiff was required to bring this law suit only because the two defendants could not decide how to apportion liability among themselves, and plaintiff had succeeded on the substantive issue under both heads of damage claimed, plaintiff was awarded costs.

454. Sanga v. Sanga, Civ. Case 48-D-67, 31/10/67, Biron J.

Plaintiff brought a claim for damages arising out of the crash of defendant's motor car, in which plaintiff was traveling on the road from Iringa to Njombe. Plaintiff was about 28 years old, educated to standard ten and though at the time unem-

ployed, had last been employed at Shs. 1,800/- per month. He testified that he was going abroad to take a university degree, but there was evidence to indicate that he was proceeding to Njombe to open a branch of his brother's business. Liability for the driver's negligence was admitted and the only issues before the court concerned damages. Plaintiff sought to recover special damages for the loss of cash and personal effects which were apparently stolen as he lay unconscious immediately after the accident. He also sought general damages for pain and suffering, loss of amenities and loss of earning capacity.

Held: (1) Plaintiff is entitled to recover the value of the cash and personal effect stolen from him. The court said "In my judgment, bearing in mind the state of the roads in Tanzania, the volume of traffic on them, and the lonely tracts of country through which they run, damage this instant case, is not too remote to be claimed in negligence." (2) As to the assessment of general damages, the court said "It is, to my mind, next to, if not altogether, impossible to establish to the degree of certainty I would wish, the actual injuries and damage the plaintiff has sustained, or is likely to sustain should his condition deteriorate …. All I can hope to achieve is to arrive at a reasonable approximation as to the quantum of damages the plaintiff is entitled to." The court then assessed the mass of medical testimony and concluded that as a result mainly of a brain injury plaintiff had suffered fifty per cent permanent incapacity in relation to future earnings, plus considerable pain and suffering and loss of amenities. The court found it "well nigh impossible to determine with any degree of certainty any precise figure to which the plaintiff's loss of earning capacity can be related." The court then stated "I do not propose to make assessments or estimates of damage under specific heads, but to attempt to assess in a single figure the comprehensive quantum of compensation. (Citing Waldon v. The War Office (1956) 1 All E.R. 108). "(T)here is no case to the point in this part of the World, which could be of any guidance to the court in assessing the quantum of damages. In fact ….. no two cases are alike. Learned counsel have each, however, cited English cases …. As being analogous … (A)nalogous cases re certainly

Of assistance to a Court in trying to arrive at what may be considered a reasonable assessment in compensation … Although some guidance may be obtained from analogous cases, no real standard can be derived from such cases, let alone a yardstick by which to measure damages….. However, cases are of assistance in that they give some indication as to what is considered reasonable to award as compensation, which, as constantly reiterated, does not mean translating into shillings and pence, or cents, the injuries, that is the physical damage, loss, and pair and suffering etc. sustained by the plaintiff, but a determination as to what is reasonable compensation for such injuries." On the basis of plaintiff's injuries, the most serious being traumatic epilepsy, impairment of vision and the use of right arm, the likely loss of future earnings and amenities, the court awarded plaintiff Shs. 100,000/-.

455. Ndaruvyariye s/o Burankusiye v. Yusufu Barakabitse, (PC) Civ. App. 46-D-68, 24/10/68. Duff J.

Plaintiff was beaten by the three defendants. In an earlier criminal proceeding the court, pursuant to s.176 Crim. Proc. Code ordered each defendant (they were accused in the other case) to pay Shs. 22/35 to plaintiff. Unsatisfied with this award, plaintiff instituted the present civil action seeking further damages. The district court ordered each defendant to pay Shs. 350/- for a total of Shs. 1,050/-.

Held: The award of compensation under s. 176 is not a ban to a subsequent civil action. In such a subsequent action the court shall take into account the amount awarded in the earlier case. (s. 178(3), Crim. Proce. Code). As the Court did not find the sums awarded excessive in light of injuries inflicted on plaintiff, the appeal was dismissed.

456. Aloice Matanda v. Samanya Ngapanyi, (PC) Civ. App. 91-A-66, 7/9/68, Platt J.

Plaintiff sued defendant in Primary Court for damages resulting when defendant's cattle trespassed on plaintiff's cultivated land. In addition to damages for the destruction of his crops, plaintiff was awarded Shs. 190/- for keeping one of the cows for 190 days.

Held: (1) The Primary Court has referred to no customary law on the matter and it seems that general law is applicable. (2) Under s. 8, Animals (Pounds) Ordinance, Cap. 154, a land owner or occupier may seize a poundable animal, such as a cow, which has trespassed on cultivated land, but the animal must be delivered to the pound within four days or be returned to its owner. Thus, plaintiff not only cannot recover for keeping the animal but laid himself open to criminal liability under s. 15. (3) The Primary Court did not have jurisdiction to hear the claim for the cost of keeping the cow since customary laws was not applied. The Court stated, obiter, that even if customary law on this matter had existed, it may have been superseded by the Ordinance. [Citing ss. 9(3), 4 Judicature and Application of Laws Ordinance, Cap. 453].

457. Hassani s/o Mohamed v. R., Crim. App. 600-D-68, 30/10/68, Biron J.
Accused have a firearm to another person to deliver it for repairs. He pleaded guilty to a charge of unlawfully transferring a firearm c/ss. 15 and 31, Arms and Ammunition Ordinance,

Cap. 223. Before sentence, accused stated in mitigation; "The firearm was defective. It was to be sent for repair." s. 15 makes it an offence for a person to "sell or transfer or buy or accept any arms and ammunition either by way of gift or for any consideration except in accordance with a permit signed by an authorized officer."

Held: (1) For the transfer of a firearm to constitute an offence c/o 15, such transfer must be ejusdem generic – that is, of a similar type, kind or nature – with a sale, purchase, or gift. (2) "(Accused 's) answer to the charge, taken in con-

junction with his plea in mitigation …. To the effect that he had handed over his firearm … with the object of having it sent for repair, cannot be regarded as an unequivocal plea of guilty to the charge …. " Conviction quashed.

458. Halimoja Kavira v. R., Crim. App. 460-D-68, 4/10/68, Biron J.
Accused was convicted of possessing a Government trophy without an ownership certificate and of failing to report his possession of that trophy to the Game Division, c/ss 41(2), 49(1) and 48 Fauna Conservation Ordinance, Cap. 502. The item was a wildebeest tail, which accused had brought to a wedding feast for his son, such tails being used by female celebrants during dances which were part of the traditional ceremonies. Accused claimed that he had inherited the tail from his father 1940, and there was no evidence to the contrary. The Ordinance was enacted in 1964.

Held: (1) A wildebeest tail is not a Government trophy as that term is defined in s. 47 of the Ordinance, (2) "Like any other penal statute, the Ordinance has no retrospective effect, therefore, even if the wild beast tail had been a Government trophy, there was no obligation on the appellant to report when it came into his possession."

459. Ntibabara s/o Mwaloha v. R., Crim. App. 504-M-68, 16/9/68, Mustafa J.
Accused, being charged with common assault, failed to appear on the date fixed. A bench warrant was issued for his arrest; when two policement met him and attempted to arrest him, he felled one of them with a spear. The record showed no finding as to his age, which he gave as 60 years and which the charge sheet alleges to be 45 years. For failing to appear, accused was convicted of contempt of court c/s 114(1)(b), Penal Code; for resisting arrest, he was convicted under s. 243(a), Penal Code, and sentenced to 3 years' imprisonment. He was also convicted on the common assault charge, and sentenced to 6 month's imprisonment. Accused was a first offender.

Held: (1) s. 114(1)(b), applied to persons "having been called upon to give evidence in a judicial proceeding ….. " i.e., to witnesses, and does not apply to a failure to appear by the accused himself. Conviction for contempt quashed. (2) A sentence of 3 years' imprisonment for an "elderly" first offender, for the offence charged here, was "manifestly excessive." Sentence reduced to 15 months. (3) For the same reason, the assault sentence was reduced to 3 months, to run concurrently.

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Accused was charged with contempt of court c/s 114, Penal Code, for showing disrespect to the court by laughing during the course of a trial in which he was involved. Accused said that a fly had entered his nose, which was the cause of the ensuing noise that he made. He was sentenced to 8 months imprisonment.

Held: (1) "It is to be presumed that an offence under s. 114(1) (a) of the Penal Code requires mens rea. The offender must intend to show disrespect to the officer administering justice or to the proceeding, in which he is engaged." The record did not contain such a showing. (2) The proper procedures for a court to follow in summarily dealing with contempt of court was set out by the Court of Appeal in Joseph Odhengo s/o Ogongo v. R. [(1954) 21 E.A.C.A. 302, a case involving the equivalent section of the Kenya Penal Code.]. These were not followed here. (3) The maximum sentence of imprisonment permitted under s. 114 (2)is one month. (A fine can also be imposed). Thus the court erred in passing a sentence of eight months imprisonment . (4) "(A) good principle to bear in mind when dealing with contempt of court cases is that trivial incidents ought not to be magnified into offences." Conviction quashed.

461. R. v. Mzee Lewanga Cr. Rev. 42-A-68, 21/8/68, Platt J.

Accused was charged and convicted giving false information to a police officer c/s 122(1), penal code. Accused failed to take part in a self-help scheme and the local elders took his goat in default and killed it. The accused reported to the police that his goat had been stolen. There had been a public meeting in which it was agreed that forfeits should be exacted for not taking part in the scheme. The accused did not disagree with that in principle, but claimed that although a goat might be taken, it should not have been killed, but kept until he paid 10/- as forfeit. It was found as fact that the meeting agreed that a goat should be forfeit without redemption and the proceeds applied to a community project.

Held: (1) Although there is no penalty in law for not taking part in a self-help scheme, if a community generally agrees that a forfeit should be paid for not taking part, then the forfeit exacted is not theft. (2) Accused should not therefore have brought the charge and his conviction is upheld.

462. R. v. Japhet Fungameza, Crim. Sass. 163 BUKOBA-67, 3/10/68, Bramble J.

Accused and three other Field Force Unit members were on duty at Murongo Ferry, each armed with a rifle. On the night in question they all talked around the camp-fire before returning to their tent. The accused testified that on of them, Elias, had brought the pombe, “Moshi”, to drink. A series of quarrels broke out between accused and Elias. In the first of these, accused called Elias a “Muha”, and Elias replied that accused “had a cut finger,” after which there was some mutual pushing, broken

Up by brother constable. The quarreling continued in the tent with Elias allegedly saying to accused “the vagina of your mother”. Later, Elias tried to snatch from accused a hurricane lamp in whose light accused was writing a letter. Accused was ordered to take the lamp outside the tent, which he did. After a while the accused was heard to challenge anyone inside the tent, who was brave, to come out. When one of the constables left the tent, accused began shooting. Two of

the constables, including Elias, escaped, but the third was killed. Accused was charged with murder.

Held: Accused is guilty of murder. The pushing and the swear-words used during the quarrel and the snatching of the lamp were not sufficient provocation to "bring it within the definition so as to reduce the charge of murder to man-slaughter". If any provocation existed "It was not such as to warrant the accused using a lethal weapon like a gun nor was it such as to arouse the passion of an ordinary man. The accused himself being a policeman would be expected to act with more discretion than any citizen can be expected.

463. Oscar Jonas Mwambola v. R., Crim. App. 320-A-68, 21/10/68, Seaton J.
The accused was convicted of communicating to an unauthorised person the contents of an official secret document c/s 5(1)(a) and 15, Official Secrets Ordinance Cap. 45, and was sentenced to 18 months imprisonment. On 2nd September, 1967, the security officer for Nzega district arrested and detained the Hon.Kasela-Bantu, then M.P. from Nzega. That evening the security officer wrote a letter to His Excellency the President, explaining why the Hon. M.P. had been detained. This letter was marked "SECRET" and sent to H.E. the President. Accused then Area Commissioner for Nzega, received a copy of the letter, On 6th September, 1967, Kasela-Bantu was released from detention by H.E. the President. On 7th September, accused, who by this time had been dismissed as Area Commissioner, read out the contents of the secret letter in the presence of Kasela-Bantu and two others, to prove that he had not been the person responsible for the detention. The transmission of the information in the letter is the letter is the solve violation charged.

Held: (1) s. 5(1) refers, inter alia, to "any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this ordinance or which has been entrusted in confidence to him by any person holding office under the Republic or which he had obtained or to which he had access owing to his position as a person who holds or has held a contract made

on behalf of the Republic, or as a person who is or has been employed under a person who holds or has held such office or contract ….." (underlining added). The accused has submitted that the word "document" must be construed as being qualified by the words "which relates to or is used in a prohibited place or anything in any such place", and that since it has not been proved that document in question fulfills this qualification, the conviction cannot be supported. However there is no reason to put such a narrow interpretation on the word "document". It would appear that the words "which

Relates to or is used in a prohibited place or anything in such place" are restricted to the word "information" which immediately precedes the word "information" which immediately precedes the words quoted and that the word "document" is qualified b the words" or which has been made or obtained" and following. (Citing Rex v. Simington (1921) 1 K. B. 451, similarly interpreting the analogous section of the English Official Secrets Act.) The maximum term of imprisonment for minor offence under the Act is two years; accused her received 18 months. "The court …..was influenced in giving the sentence it did by the need to protect the security of Tanzania, 'a revolutionary progressive country having enemies not so far away to the South of its borders and others no doubt within the country.' The learned magistrate concluded that he would be failing in his duty if he did not underline the necessity for everyone to be security conscious especially those who are in a position to know official secrets. Although the High Court considered the sentence severe, it was not "so excessive as to warrant interference severe, it was not "so excessive as to warrant interference" by it. Conviction and sentence confirmed.

464. N. R. Ladak & Sons v. Republic Crim. App. 637-M-68, 15/10/68, Seaton, J.
A partnership appealed from a conviction upon a charge of failing to pay a particular employee the required minimum wage under the Employment Ordinance.

The defendant pleaded autrefois acquit on the ground that he had been acquitted in an earlier case involving the same charge. The magistrate held that the earlier case was against one of the partners only, and that the partner was a different person in law than the partnership. He also found that in the earlier case the named partner had not appeared, but his did. On appeal the State Attorney conceded that the defendant intended to be charged in each of the cases was the employer of the particular employee involved.

Held; The first case was s nullity since it was erroneous to dispense with the presence of the accused. Under s. 99, Criminal Procedure Code, such presence may be dispensed with only if the accused submits a written plea of guilty or appears by an advocate. Therefore the plea of autrefois acquit under s. 139, Criminal Procedure Code, failed. But the Court also held that it was error to charge, convict, or sentence a unincorporated body in its firm name rather than in the name of the individuals, citing Nterekeiyna Bus Service v. R. (1966) E.A.C.A. 333. The conviction was therefore quashed.

465. Simon s/o Gadeu v. R., (PC) Crim. App. 164, 165-D-68, 19/8/68, Hamlyn J.
Accused were convicted in Primary Court of assault causing bodily harm and robber c/ss 241 and 286, Penal Code. The District Court, hearing the case on confirmation, altered the convictions to robbery with violence and increased the sentences which the trial court had imposed without regard to the Minimum Sentences Act to severer sentences in accordance with the act. The High Court agreed that the original charges had been drawn incorrectly.

Held: Nowhere in the statutes are the courts empowered to convict persons of offences more serious than those charged-

Robbery with violence, being punishable with life imprisonment, is more serious than simple robbery, albeit that the robbery charge is combined with on of as-

sault. Convictions of robbery substituted; accused sentenced to two years and twenty – four strokes.

466. Simon Joseph s/o Magangira v. R., Crim. App. 498-M-68, 1/11/68, Seaton J.

Accused pleaded guilty to corrupt solicitation of money c/s 3(1), Prevention of corruption Ordinance, Cap. 400. Thereupon a statement of facts setting out the particulars of the charge was read, and the accused admitted to the facts as outlined.

Held: The Court found that the statement of facts read out to the accused was "either meaningless or indicates a set of circumstances that do not support the is not a statutory requirement but it is the "invariable practice" that such a statement is read to the accused. If accused denies the truth of the statement of facts, or makes an ambiguous reply, a plea of not guilty should be entered and the case should proceed to trial. [Citing Rex v. Mwasambanga s/o Lyakumba, 1 T.L.R. 82] Because of the confusion in the statement of facts here, accused could not with comprehension have pleaded guilty to them. The trial court should consequently have entered a plea of not guilty and proceeded to hear the case. Conviction quashed.

467. R. v. Dani s/o Timoth, Crim. Rev. 56-M-68, 1/10/68, Mustafa J.

Accused was charged with assault causing actual bodily harm. After his plea was taken and before the trial commenced, the trial magistrate ordered accused to be medically examined and on the basis of the medical report found him to be of unsound mind and ordered him detained as a criminal Lunatic.

Held: S. 164(1), Criminal Procedure Code, as amended by Act. 1966 No, 35, provides that if the court has reason to believe that the accused is of unsound mind, it shall call upon the prosecution to adduce evidence in support of the charge before enquiring into the issue of whether the accused unsoundness of mind shall proceed only if the court finds that a case has been made out against

accused. Trial magistrate's order set aside and case returned to the trial court for the taking of the prosecution's evidence.

468. Aloys Kamuzora v. R., Crim. App. 527-M-68; 18/10/68, Seaton J.
Accused was convicted of driving a motor vehicle without an insurance policy c/ss 4(1) and 4(1), Motor Vehicles Ordinance, Cap. 169, and was fined Shs. 60/- and disqualified from holding a driving licence for 12 months. The accused argued, before sentence, that special reasons existed for not imposing a disqualification, in that the vehicle had been purchased on hire purchase and was in joint ownership with B.C.D. The insurance was kept with B.C.D. and so accused did not know that it had expired at the time of the offence. The court held, however, that the accused had a duty to check when his insurance ceased to operate although the policy was kept by a joint owner, and so his neglect to check could not constitute special reasons.

Held: A "special reason" for not ordering a disqualification is one which is special to the facts which constitute of offences, and not one which is special to the offender as distinguished from the offence. Moreover the reason must be "special", (1946) 2 All E.R. 552). In this case, it has been pointed out that more than held of all motor vehicles in use in this country are purchased under some sort of hire purchase arrangement and insurance policies are not kept by the person in charge of the vehicle. In view of this, the accused cannot succeed in his claim that special reasons exist, since his failure to have an insurance policy "was due to mere forgetfulness or carelessness" on his part in not checking the expiry date.

469. Hamisi Juma v. R., Crim. App. 512-M-68, 27/7/68, Seaton J.
Accused, 19, was seen by a police inspector at a settlement and asked about his residence. Failing to show one, he was charged and convicted on his own plea –

to a charge of “loitering “ and failing to show “means of subsistence” or “give a good account of himself” - of being a rogue and vagabond c/s 1777(3), Penal Code.

Held: (1)”Loitering” would be an offence under s. 176 (1), Penal Code, if accused were shown to have been a common prostitute. (2)Under s. 177(3), the accused must be “a suspected person” or “reputed thief”; and he must fail to give an account for himself “in such circumstances that the suspicion that he was sustaining himself dishonestly would attach to him”. On the strength of Tanzania authorities discussing the charged offence, “I would take the view that mere homelessness does not constitute roguishness”. [Citing R. v. Mtambara bin Selemani (1935) 1 T.L.R. 29; Omari Ramadhani and Abdallah Earagi v. R. (1955)2 T.L.R. 118]. Conviction quashed.

470. R. v. Fitina s/o Nchumba, Crim. Case 23-M-68, 14/10/68, Seaton J.
Accused was convicted of stealing from the person c/o 269 (1), Penal Code. The trial court found him to be over 16 years of age and sentenced him to 8 strokes.

Inspection Note; “It is appreciated that the learned magistrate’s motive was to spare the accused the more severe and degrading punishment of imprisonment. Nevertheless, insofar as corporal punishment is concerned, a person of the age of 16 years or over is an adult, upon whom the award of corporal punishment is prohibited save for one of the offences mentioned in the schedule to the Corporal Punishment Ordinance, Cap. 17”.

471. R. v. Msingwa s/o Mnyelele. Dist Ct. Crim. Case 216-Geita – 68, 14/10.68, Inspection Note by Seaton J.
Accused was convicted of assault causing actual bodily harm c/s 241, Penal Code, and was sentenced to 6 months imprisonment and 10 strokes.

Noted: “The accused must have already received the 10 strokes … nevertheless, it is pertinent to point out that corporal punishment should only be awarded for such offences when there exist aggravating circumstances such as the use of exceptional violence or the fact that the victim is a woman or a child.”

472. Govindram Isherdas v. R., Crim. App. 688-M-68, 17/10/68, Bramble J.

Accused was convicted of hunting a lion in a prohibited area without the written permission of the Minister of Agriculture and Co-operatives c/s 24(3) and 53, Fauna Conservation Ordinance, and was sentenced to 12 months imprisonment.

Held: "In directing his mind to sentence the trial magistrate noted that the appellant was first offender; that he showed no repentance and that it was the duty of the court to deter the commission of such offences, which were frequent in the district, and detrimental to the country. The circumstances of the offence do not suggest a deliberate attempt to break the law since there were police officers present – unless they were parties to the offence and I do not believe this. It was borne of impatience, sudden temptation and a consequence of recklessness as to the act, after a long period of travel. These circumstances ought to have been considered in determining punishment and I consider this sentence manifestly severe." Appeal allowed in part and sentence varied to a fine of Shs. 3,000/- or 6 months imprisonment in default.

473. Juma Masumbuko v. R., Crim. App. 11-D-68, 2/10/68, Hamlyn J.

Accused, an employee of the East African Community, stole money from the community and was convicted of stealing by a person in the public service c/ss 270 and 265, Penal Code. The trial court held, however, that accused was not employed in the public service within the meaning of the Minimum Sentences Act, and so was sentenced to only 18 months imprisonment.

Held: An employee of the East African Community is clearly a person employed in the public service within the meaning of the Minimum Sentences Act. Sentences enhanced to 2 years imprisonment with 24 strokes.

474. Shah Ali v. R. Crim. App. 461-D-68, 4/10/68, Biron J.

Accused was convicted of receiving stolen property c/s 311, Penal code, on the basis of a statement made to a police witness, and considerable other evidence. He was sentenced to 2 years and 24 strokes under the Minimum Sentences Act.

Held: (1) The evidence of the police witness as to accused 's statements to him was inadmissible because it amounted to a confession within the meaning of s. 27, Evidence Act, 1967. (2) "Even disregarding the inadmissible evidence in toto, the conviction for receiving is fully supported and justified by the evidence. The admission of the inadmissible evidence has not occasioned any miscarriage of justice …." Conviction affirmed. (3) There was no evidence to indicate that accused knew or had reason to believe that the property was stolen in the course of a burglary. However receiving property stolen in the commission of a scheduled offence under the Minimum Sentences Act in itself constitutes a scheduled offence, notwithstanding that the receiver neither knew nor had reason to believe that the goods were taken in the commission of a scheduled offence. (4) The lack of such knowledge does, however, constitute a special circumstance

Within the meaning of s. 5(2), Minimum Sentences Act and when combined with the fact that accused was a first offender and the amount involved did not exceed Shs. 100/-, allowed the Court to reduce sentence.

475. R. v. Kahema s/o Mkwe, (PC) Crim. Rev. 2-A-68, 23/9/68, Platt J.

Accused were convicted in Primary Court of simple theft c/s 265, Penal Code and sentenced to 1 year and 12 strokes. On appeal the District Court, without making any record of having heard accused, not noting only that the "memorandum of appeal" had been "read incorporated", substituted a conviction for robbery c/s 186, Penal Code, and imposed a sentence of 2 months and 12 strokes, purportedly under the Minimum Sentences Act, accused, having by that time received their corporal punishment, were soon released. The Supervisory Magi-

strate noting the errors in both proceedings below, sent the records of the cases to the High Court for revision, under s. 26(2)(a), Magistrates Courts Act.

Held: (1) The Primary Court's order for corporal punishment was ultra vires, since simple theft is not among the offences scheduled in the Minimum Sentences Act. (2) The District Court erred in substituting a conviction "for a more serious offence" without giving the accused an opportunity of being heard on appeal in person. (3) The Primary Court conviction for simple theft is upheld. To compensate the accused for the illegal corporal punishment, and as they have suffered some imprisonment and have now been at large for some time, the sentences are reduced "to such term of imprisonment which would accord with the periods of imprisonment they have served together with normal remission." The Court stated, obiter; had the robbery conviction been proper, the Magistrate would have been bound to apply the Minimum Sentences Act, ordering two years' imprisonment and twenty-four strokes..

476. Paulo s/o Vincent Crim. App. 454-D-68. 25/11/68, Duff J.

Accused was convicted of housebreaking and theft C/ss 294(1) and 265, Penal Code, and was sentenced to 2 years imprisonment and 24 strokes under the Minimum Sentences Act. He had pawned his radio to complainant for Shs. 80/- and later, lacking the money necessary to redeem the radio, broke into complainant's residence and stole it.

Held: Accused is 17 years old and a first offender. The value of the radio does not exceed Shs. 100/-. He originally pawned his radio to obtain money to help in the education of a younger brother. "He has expressed his contributing to this court for his offences and … all these facts constitute special circumstances and entitles a court to exercise its discretion under the provisions of section 5 (2) of he Minimum Sentences Act, Cap. 526. Prior to his arrest, the accused … was learning to be a typist. He has been in custody over three months already and with a view to helping him continue his studies and to occupy a useful position in society, the sentences imposed are reduced to such term as well result in his immediate release. This is a case which calls out for sympathy…. "

477. R. v. Petro Masani Amsi, Crim. Revs. 44, 49-A-68, 13/9/68, Platt J.

Accused, both 18 years of age, were convicted in separate cases of defilement of girls under 12 years of age c/s 136 (1), Penal Code, and sentenced to 3 years' imprisonment and 12 strokes corporal punishment. In the case of the first penetration; the second accused 's victim suffered greater injuries, but the Court noted that she contracted no disease.

Held: Although these offences were serious, "it is not generally desirable to impose a long term of imprisonment" where corporal punishment has been imposed and where the accused is a youthful first offender, because of "the undesirable side effects" of imprisonment on such persons. First accused sentenced to 18 months and 12 strokes; second accused sentenced to 2 years and 12 strokes.

478. R. v. Lwalanda Banene, Dist. Ct. Crim. Case. 225-Geita-68; 14/10/68, Inspection Note by Seaton, J.

Accused was convicted of attempted suicide c/s 217, penal Code and sentenced to 5 strokes. He was boy of 11 years of age, whose attempt at suicide was caused by his father stopping him from going to school and ordering him to work in the shamba.

Noted: "The offence of attempted suicide … is a difficult one to deter by punishment. Hence, courts usually deal with it by placing the offender on probation or in some other manner which while indicating society's disapproval, nevertheless, holds out the hope of reform and re-kindling of the desire to live ….. although 5 strokes of the case is not a very severe punishment, in circumstances such as these, a sentence might have been spared and the offender let off with an admonition."

479. R. v. Musa s/o Thomas, Crim. Rev. 117-D-68, 9/10/68, Duff J.

Accused was convicted of attempted suicide c/s 217, Penal Code and sentenced to 6 months imprisonment.

Held: "It has been repeatedly stated in these courts that, normally, sentences of imprisonment should not be imposed in cases where attempted suicide is involved. No reasons were disclosed as to what prompted the accused to act as he did, but it is clear that in cases of this nature an accused person is usually deserving of sympathy and not punishment." Sentences reduced to such term as will result in the immediate release of accused.

480. Hassani Mirambo v. R., Crim. App. 476-D-68, 4/10/68, Bion J.
Accused was convicted of attempting to steal from a motor vehicle, on evidence which established that he pushed a sorewdriver through the ventilation window of a parked motor car. As a result, the car was slightly scratched, but the accused did not gain entry. Since nothing was actually taken, the magistrate conceded that the offence was "of a minor nature" He said, however, that the accused 's previous record of four convictions "shows that he would have stolen from the car had he not been apprehended in time," and he therefore sentenced the accused to 12 months in prison.

Held: (1) The attempted theft conviction is clearly based on the accused 's intention to steal as revealed, not by his acts in the incident being considered, but by his previous record. Since prior convictions may be considered in sentencing, but not in determining guilt of the offence charged, the conviction cannot be sustained. (2) The facts as proven might support a charge of causing malicious damage. However, a conviction for that offence cannot be substituted under s. 319, Criminal Procedure Code; that section gives an appellate tribunal a wide discretion as to varying a conviction (but) it does not … give an unlimited and unbounded discretion to vary a conviction found to any other which the court may consider is supported by the evidence. The power to vary a conviction is go-

verned by, and corresponds with, the power the convicting court had, that is, in convicting for an offence other than that with which the accused before it is charged. The powers of returning a conviction for an offence other than that charged are expressly laid down in sections 181 to 188 of the Criminal Procedure Code, which certainly fo not embrace a power to substitute a conviction for causing malicious damage for one of attempting to steal, the offences not even being cognate."

481. Omari s/o Juma Mkindo v. R., Crim. App. 289-D-68, 14/9/68, Duff J.
Accused was convicted on several counts of fraudulent false accounting c/s 317 (c), Penal Code. In each count, however, the words "with intent to defraud" were omitted from the particulars.

Held: A charge of false accounting which does not specifically aver an intent to defraud "discloses no offence at law, and is not merely an irregular or defective charge which can be put right by the application of section 346 of the Criminal Procedure Code." (Citing Terrah Mukindia v. R. (1966) E.A. 425, 429; Matu Gichumu v. R. (1951) E.A. 311) Convictions quashed.

482. Martin s/o Kamau v. R., Crim. App. 525-D-68, 6/11/68, Biron J.
Accused was convicted of conveying property reasonably suspected to have been stolen from his employer, c/s 312, Penal Code. The magistrate rejected his claim of right based on a written authorisation by his superintendent. The magistrate believed the superintendent's testimony that the authorisation did not cover the items found in accused 's possession, and did not cover the items found in accused 's possession, and did not cover the day on which accused was arrested. The High Court, finding that the authorisation was ambiguous enough that the accused might have read it otherwise, and might therefore have been conveying the property under bona fide claim of right, reversed the conviction on that grounds.

Held: The Court stated, obiter; The magistrate expressly found that accused had stolen the items from his employers. "It is well settle law … that where

the evidence establishes that a person has in fact stolen the property ….. he cannot be reasonably suspected of having been stolen." Also, although such a conviction may be returned upon a charge for theft, a theft conviction cannot be returned on a charge under s. 312, Penal Code.

483. Gaspare s/o Jovin v. R., Crim. App. 583-M-68, 30/10/68, Bramble J.

On 27th September, 1967 accused and several others were at a house where a watch was later discovered to be missing. On 7th March, 1968, the watch was found in accused 's possession, and he was convicted of stealing c/s 265, Penal Code.

Held: (1) Accused 's presence at the house where the watch was lost does not "point irresistibly to his stealing it at the particular time." (2) Four months is too long a period to be considered "recent" in order to raise the presumption that the accused was the thief or the knowing receiver. "There is no general rule as to what time is close enough ….It is generally accepted that a period of two months …. Will be too long to raise the presumption in the case of articles that pass readily from hand to hand." Conviction quashed.

484. Joseph Selemani v. R., Crim. App. 413-D-68, 5/10/68; Hamlyn J.

Accused, the headmaster of a Primary School, received school fees from parents and kept the money for himself. Although he was employed by the Town Council which operated the school, he was not authorized to receive the fees, this being done at the Council's office by its Treasurer. The prosecution initially charged the accused with stealing by public servant c/s 270, Penal Code, on the theory that he came to possess the money "by virtue of his employment," at an early stage, however, they withdrew this charge and substituted one of stealing by servant c/s 271, Pena Code i.e., of stealing funds held "on account of his employer." None-theless, the magistrate convicted him under s. 270.

Held: (1) A conviction for stealing by public servant cannot be had upon a charge of stealing by servant. (2) As the magistrate noted, the evidence shows that at the time the accused received the money, it was “still the property of those who handed it to him – the money had not become the property of the Council – so the accused cannot be said to have stolen the property of the Council.” Conviction for simple theft substituted, under s. 181, Criminal Procedure Code. The court stated, obiter; “I would have thought that the circumstances shown by the evidence in the case would have made a charge under section 273 (b) the more appropriate – the offence known to English law as ‘fraudulent conversion’, on the grounds that the appellant had held himself out to be a person with authority to receive the fees.”

485. National Bank of Commerce v. Yusuf Hussein Allidina, Civ. Case 48-D-68, 4/10/68, Georges C. J.

The plaintiff, as a holder in due course, sued on a promissory not made by the defendant. The note was endorsed to the plaintiff and was dishonored when presented for payment. The plaintiff admitted that at the time of the endorsement the place of payment was blank. I had been filled in later without the consent of the defendant.

Held: (1) The case did not fall within the material alterations specified in s. 64(2), Bills of Exchange Act, Cap. 215. It was not an “alteration of the place of payment” but an addition. (2) The second part of s. 64(2). Referring

To additions of places of payment, applies only to bills accepted generally. S. 90(3)(b) makes provisions as to acceptance inapplicable to promissory notes. (3) The list of material alterations in s. 64(2) is not exhaustive. (4) Although at common law, the alteration of a bill of exchange by adding the place of payment was a material alteration (Macintosh v. Hayden (1826) Ry & Mood. 362) there was a distinction made between bills and promissory notes, whose use in commerce

and freedom of circulation was more restricted. The nature of the contract entered into by the maker is not changed, since if the addition had not been made, presentation would not have been needed to render the maker liable. (5) (obiter) Addition of a place of payment to a promissory not as between endorsees, was material alteration. Under s. 88(2) of the Act, presentation for payment is necessary to render an endorsee liable. (6) (obiter) s. 45 provides that where in a bill there is no place of payment specified, but the address of the drawee or an acceptor is given on the bill, the bill is properly presented there. That section also applies to promissory notes.

486. R. F. Mboya v. Mewa Singh Mangat, Civ. App. 18-A-67, 26/10/68, Platt J. Defendants in 1964 entered into an agreement to purchase a motor vehicle from plaintiff. As the agreement predated the Tanzania Hire Purchase Act, 1966, which act would cover this transaction were it to occur today, the relevant law was found in the Contract Ordinance, Cap. 433, the Sale of Goods Ordinance, Cap. 214, and the common law. The vehicle was delivered in late 1964. Despite the fact that the vehicle failed an inspection, defendants kept possession of the vehicle until August, 1965, at which time plaintiff repossessed it because defendants had not kept up their payments. Plaintiff in this action sought arrears for 9 unpaid monthly installments. Defendants refused to pay because they had expected a roadworthy vehicle. The contract contained a clause specifically waiving all warranties, both express and implied.

Held: (1) A disclaimer of warranties, no matter how widely expressed is "only available to a party where he is carrying out his contract in its essential respects…..They do not avail him when he is guilty of a breach which goes to the root of the contract." (Quoting Karsales (Harrow) Ltd. v. Wallis (1956)2 All E.R. 866, at 868.) This case also involved the delivery of a faulty vehicle. It was held there that defendant did not have to accept the wrecked vehicle which plaintiff tendered, notwithstanding that warranties of roadworthiness of the vehicle specifically disclaimed. This was because a car that is an undrivable wreck is so fundamentally different from a sound vehicle, that its delivery does not satisfy the

terms of the contract any more than delivery of 100 1bs. Of oranges would have sufficed. Thus it was in breach.) (2) Assuming arguendo that the failure to deliver a workable vehicle constituted a breach going to the root of the contract, for the defendants to rely on that breach as a justification for their own nonperformance, they should have refused delivery of the vehicle or returned the vehicle to the plaintiff upon learning of the breach. Having retained the vehicle, the defendants have converted what might have been a breach of a condition to a breach of a warranty, and their only remedy is by way of damages caused by the unsatisfactory state of the vehicle.

(Citing National Cash Register Ltd. v. Stanley (1921) 3 K.B. 292) Judgment was entered for plaintiff for Shs. 5760/-. (3) If the facts do not appear quite clearly that is a reflection on the record. The judge observed: “I cannot help reflecting that a great deal more went on behind the scenes that appeared on the face of the record.”

487. Mohamed Yusufu v. Tunda Kassim, (PC) Civ. App. 182-D-67, -/2/68, Georges C. J.

The respondent claimed that the deceased had given a house to her before her death. She produced a transfer of a right of occupancy thumb printed by the deceased in the presence of the Area Commissioner. In fact, no right of occupancy had been granted to the deceased at the time of the ‘transfer’. She said the deceased had been offered a right of occupancy, but did not take it up. The offer was accepted by the respondent as the done of the land and the land was then registered under the Land Registration Ordinance. This was done after he suit was filed in the primary court, but before that court gave judgment. The appellant, widower of the deceased, disputed the gift.

Held: (1) The document executed by the deceased was ineffective to pass title to the respondent. (2) The Magistrates’ Courts Act Cap. 537 s. 14(1) inter

alia provides that: “No primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Regulation Ordinance”. Once the land is registered, the primary court has no jurisdiction, and advise her to pursue her remedy in the District Court or the High Court, depending on the value of the property involved, - in this case the District Court. (3) (obiter) The appropriate law to be applied in the District Court will be Islamic Law if that appears to be the law by which the parties consider themselves to be governed. The question of fact to be decided then, would be (a) whether the gift inter vivos (if that is what it was) had been perfected by delivery or, (b) if it was a donation mortise cause (death bed gift), whether the donor had the legal capacity to make it in the absence of the consent of his heirs. (4) Appeal allowed.

488. Didas s/o Paul v. Christina d/o Leiya, (PC) Civ. App. 122-A-66, 7/9/68, Platt J.

The appellant was sued in the Primary court by the respondent for expenses connected with the pregnancy and birth of a child. There was evidence, as found by the Primary court, that the respondent was living as the appellant’s mistress. Nonetheless the Primary Court held that there was not sufficient evidence of affiliation and dismissed the case.

Held: As far as the law is concerned the provisions of paragraphs 183 to 189 in Chapter 4 of the Law of Persons, Govt. Notice 279 of 1963, are pertinent. “The combined effect of those paragraphs is that where a woman names a man as being the father of her child, he may not dany paternity unless he proves that he had no intercourse with the woman. This rule still holds good even if the woman had more than one lover. But if the man can produce evidence that he never had sexual intercourse with the woman,

then the burden falls on the woman of proving her assertion by adducing detailed evidence. Once the man has been found to be responsible for the pregnancy, he

is liable to pay for the expenses connected with the pregnancy, and childbirth." On this case, since it appears that the respondent was appellant's mistress, he could not deny having sexual intercourse with her. He has been named by the respondent as father and so is held responsible for the pregnancy. Claim for expenses allowed.

489. Pius M. Mkonyo v. Julias Brashi, (PC) Civ. App. 34-M-68, 9/10/68, Mustafa J.

Pius Mkonyo was allocated land by the village development committee. During his temporary absence, Julias Brashi approached the district executive officer and persuaded him to coerce the village development committee into allocating a part of Pius' land to him. After this was done, Julias built a house on the land. Pius claimed damages from Julias.

Held: (1)As far as the court was aware, the allocation of land was the sole privilege and responsibility of the village development committee. (2) It was quite wrong for the district executive officer to interfere in the allocation of land by the village development committee. (3) Nevertheless, once the land had been allocated to Julias, he had a right to it. (4) Although it was not clear whether Pius' claim was in respect of Julias' action in building the house or for the value of the plot allocated to him, neither claim could be upheld for the above reasons.

490. Masera Mwita v. Matiko Muhabe, (PC) Civ. App. 166-M-68, 14/10/68, Seaton J.

The respondent ran off with the appellant's daughter without paying brideprice. The appellant later seized 7 head of cattle in the possession of the respondent, who now claims their return.

Held: The father of a bride is not entitled to seize cattle when the brideprice has not been paid, if there has been no agreement as to the amount of the brideprice. The cattle may in any case, be the property of other owners.

491. Nziku d/o Nalimu v. Mayila Kamanda, (PC). Civ. App. 21-D-68, 5/10/68, Biron , J.

The appellant's wife petitioned for divorce on the grounds of desertion. There were some quarrels, but every time the wife left the husband, he persuaded her to come back. Later on it appeared that the wife left the matrimonial home and went to live with be parents, alleging that the husband did not provide her with sufficient food. The husband's case was that the wife had deserted him for two years, that he had made attempts to persuade her to return but she always gave excuses. Once she returned but again left him. The Primary Court held that the onus was on the husband to persuade his wife to return, and this the respondent failed to do. Divorce granted to the wife. On appeal to the District Court, the judgment was reversed.

Held: It is not disputed that the wife physically left the matrimonial home. The desertion on which she based her petition could only be constructive desertion. It may be true that the marriage has broken down, but that

In itself is not sufficient. The issue as to who divorces whom is determined by the fact as to whom was at fault. It has been fully established that the husband had made genuine efforts to persuade his wife to return. Therefore "it has by no means been established that it was the husband who was in desertion not the wife". Appeal dismissed.

492. Paulo Nzuri v. Pius Koroso, (PC). Civ. App. 145-M-68, 17/10/68, Seaton J.

The appellant sued for 15 head of cattle which he claimed to be the balance of dowry payable by the respondent on his marriage with the appellant's sister, which had taken place about 1920.

Held: The claim was time-barred under the Customary Law (Limitation of Proceedings) Rules, G. N. No. 311 of 1963, as the wedding had taken place about 1920, almost half a century ago. Judgment of the District court upheld;

493. Mutesiga Mpohi v. Felician Rashabo Barthazal, (PC) Civ. App. 143-M-68, 10/10/68, Seaton J.

The appellant claimed damages for reeds which he claimed had been cut and taken from his land by the respondent. He succeeded in the Primary Court but the District Court, while upholding the order for payment of compensation, stated that the land belonged to the respondent although the t appellant had an interest in the reeds for his life.

Held: (1) The District Magistrate had said that reeds were invaluable in Buhaya for such purposes as building huts and as firewood, and could be inherited by a different person from he who inherited the land. Whether or not this was correct as to the ownership of reeds in Buhaya, there was no evidence of separate ownership here. The evidence was that the land and reeds belonged to the appellant. (2) Appeal allowed.

494. Duncan Mberelie v. Gibson Mawalla, Civ. App. 1-A-68, 26/10/68, Platt J.

This was essentially a family dispute, growing out of a partnership agreement. The parties are disputing who has failed to perform certain duties under the agreement, whereupon plaintiff brought this suit claiming certain moneys. His action was dismissed, because he failed to present documentary proof of his claim, in that he did not tender in to court receipts for payments he allegedly made. It is claimed by plaintiff on appeal that even if he failed for lack of receipts, he should have been allowed recovery because defendant had at the trial admitted full liability – and admissions against pecuniary interest are admissible under 20(3) (a), Evidence Act, Act no. 6 of 1967. Plaintiff's claim was rejected by the trial court solely because of his failure to present the requisite documentary evidence; the alleged admission by defendant was not considered relevant by the magistrate.

Held: (1) Plaintiff sought to bring fresh evidence – the receipts – before the High Court. Permission to present such further evidence was denied. [Citing Civil Procedure Rules, Order 39, rule 27; R. Tarmohamedi v. Lakhani (1958) E. A. 567, at 584]. "This is not a case of fraud or surprise, and from the nature of the

application it is plain that the documentary evidence could have been adduced at the trial.

The plaintiff was represented by counsel …. and therefore I cannot think why fresh evidence should be admitted." (2) The failure by the trial magistrate to consider defendant's admissions constituted error. Feeling unable to decide the case on the bases of the record, the High Court remanded the case for a new trial. At the same time it observed that "it is not a light matter to order a fresh trial owing to undesirable features in that course of action." [Citing Harharrshen Rhemarey v. Lachbai Murlidhar (1960) E.A.1]. New trial ordered.

495. New India Insurance Co. Ltd. v. Ali Saleh Foto. Civ. App. 29-D-67, 19/10/68, Duff, J.

The respondent's motor cycle was involved in an accident. At the time, it was being driven by the holder of a provisional licence who had been given permission to drive the motor-cycle. There was a passenger on the pillion seat. The respondent claimed damages from the appellant insurance company repudiated liability claiming that the vehicle was not being driven by an "authorized person" within the meaning of clause in the insurance policy. "Authorized person" included a person driving with the insured's permission, but only if he was permitted to do so by law.

Held: (1) s. 20 (d), Traffic Ordinance, Cap. 168, the holder of a provisional licence was not permitted to drive a motor cycle carrying a passenger. The driver was therefore not an "authorized person" within the clause, and the policy was avoided as against the insured. (2) (obiter) a restriction on the user of a motor cycle in an insurance policy would not entitle the insurer to avoid the policy as against a third party such as the passenger. (Cited: New Insurance Co. Of India v. Cross (1966) E.A.91, House of Manji v. Liverpool Marine Insurance Co. (1964) E.A. at 693).

496. Mohamedi s/o Salum v. Salehe Mtakata, (PC) Civ. App. 128-D-68, 30/9/68, Georges, C. J.

The respondent, the husband, divorced his wife by pronouncing on talak. The wife went back to her parents, the appellants. Before the period of eda had expired, the respondent called at the appellants house with two witnesses, intending to exercise his right of recall. Neither the appellant nor the wife was home. He then left telling the witnesses that he had gone to recall his wife. Respondent relied on a certain section of the 'Nikahi' "It is not essential for recall for the wife to know of it or consent to it nor for her walli to do so.

Held: This only means that the wife need not know or consent, nor need the walli consent. But some form of communication is necessary, not to the wife, but certainly to her walli. Since there was to communication the recall was not effective.

497. Amiri Ludongo v. Hija Gamba, (PC) Civ. App. 86-D-68, 19/11/68, Hamlyn J.

The appellant and respondent occupied contiguous shambas on a mountain slope. The lower boundaries of their shambas were marked by the bank of the Ruvu River. At a recent date,

The river shifted its channel so that it flowed further down the slope, forming a strip of newly uncovered land contiguous to the existing shambas of the two parties. Both parties claimed that whole strip belonged to them.

Held: (upholding District Court) (1) The new land did not accrue to either party. (2) The parties, or anybody else were at liberty to apply to the appropriate authorities to obtain the new land and their application would presumably be considered as a normal administrative decision. (Note; It does not appear from the facts whether the land in question was held for a right of occupancy or under the customary law of the Morogoro area).

498. Kidele s/o Juma v. Thomas s/o Shenkunde, (PC) Civ. App. 103-D-68, 10/10/68, Duff J.

Appellant, the niece of respondent, had been in possession of a piece of land for over 30 years. It had been given to her by her grandfather. Respondent claimed it was given only for cultivation, and that he had inherited it, when his father, the appellant's grandfather, died. He claimed he now needed it for his son.

Held: (1) (reversing both lower courts) The burden of establishing that the gift was not absolute lay on the respondent since it was he who was claiming the land. (2) The delay of 30 years in bringing the claim could not be excused merely on the ground that the respondent needed it for his son. (3) Although the assessors doubted the ability of a woman to inherit under Sambaa Law, that issue was not raised by the respondent. Appeal allowed.

499. Bi Verdiana Kyabuje & Others v. Gregory Kyabuje, (PC) Civ. App. 29-D-68, 12/10/68, Hamlyn J.

The will of deceased having been held void, the Primary Court divided the estate, according to Haya Law, amongst the surviving heirs. The appellants, female relatives of the deceased, claimed they were entitled to ownership of a share of the clan land in the possession of the deceased at his death.

Held: (1) Although the court sympathized with the appellant's argument that a distinction between males and equal standing with men, the court had no power to over rule customary law or reject it as inappropriate to modern conditions. Customary law could only be changed by the community itself adopting new customs. (2) The Law applicable was summarized in Government Notice No. 436 of 1963. Paragraph 20 of that notice provided that woman could only receive a usufruct of clan land, unless there were no males of the clan alive. (3) It was not in dispute that the appellant's brother was alive, and therefore they were only entitled to usufruct of the clan land.

500. Petro Kinani v. Bi. Dariagnes, (PC) Civ. App. 19-D-67, -/-/68, Duff J.

After the deceased died, the appellant was installed as caretaker of the land in the possession of the deceased at his death. The appellant was later expelled from the property by the respondent and her sisters. He claimed to be entitled to a share of the estate.

Held: The appellant was not entitled to any share of the land, his sole function being to look after it and manage it.

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501. Transgem Trust v. Tanzania Zoisite Corp. Ltd. (HC) Civ. Case 33-A-68, 9/9/68, Platt J.

Plaintiffs sued for a declaration that the defendant's termination of their contract was null and avoid and for an order of specific performance directing defendants to perform the contract. Under the contract, the defendants agreed to sell all of a certain mineral (zoisite) coming into their possession by virtue of certain mining conditions to the plaintiffs and that the plaintiffs would loan the defendants specified sums for purposed of mining operations. Disputes arose between the parties, the plaintiffs claiming that the defendants were sending minerals of an inferior quality and that somehow better quality minerals were being delivered to plaintiffs' competitors and the defendants claiming that the plaintiffs' competitors and the defendants claiming that the plaintiffs were not paying for the shipments made with sufficient promptness. In August, 1968, the parties met and an oral agreement was made that the plaintiffs would pay for shipments already delivered and that the defendants would make up for deficient quality of earlier shipments by including higher quality minerals in subsequent shipments. The defendants were late in making the next shipments and the plaintiffs did not pay for the earlier shipments by the date that the defendants expected. The defendants then terminated the contract citing plaintiffs' failure to make the payments and also an alleged failure to advance certain sums promised under the contract. The case came up for hearing on plaintiffs' application for a temporary injunction

pending final decision in the case restraining the defendant form disposing of any minerals in their possession other than to the plaintiffs.

Held: (1) The plaintiffs have not signed the plaint, but have given an undertaking to sign the complaint later. Signing of the plaint is a matter of procedure and this defect does not affect the merits of the case or the jurisdiction of the court. (2) In dicta, the court noted that under Order 37 of the Civil Procedure Code it is not possible to file for a temporary injunction before the suit is filed, and that it might be desirable to amend the Order to allow for that possibility. In this case, however, the suit had been filed. (3) Plaintiffs' action is based in part on the theory that the contract contained an arbitration clause which the defendant did not respect in terminating the contract unilaterally, and that the court should therefore enter an order of specific performance requiring defendants to submit their complaints to arbitration. However, the contract did not make an arbitration award as a condition precedent to a cause of action, and it is well settled that an arbitration clause of this type will not be enforced by specific performance. [Doleman & Sons v. Ossett Corp., (1912) 3 K.B. 257, 296]. (4) It is clear that the plaintiffs will suffer irreparable loss if the defendants sell minerals to other buyers as they plan, because plaintiffs have invested considerable resources in building up a market for this minerals, which is a new type of jewel. (5) The plaintiffs must also show that there is a fair chance that they will succeed ultimately on the merits of the lawsuit. Although the fact are complicated, and not all the evidence is before the court, there appears to be reasonable possibility that the plaintiffs will be found not to be in breach at all, or if they are in breach that the breach was not so serious as to entitled defendants to terminate the contract under

s. 31(2), English Sale of Goods Act, which is made applicable by an express term of the contract. (6) The balance of conveniences must also be considered, and become very important in a case which the outcome of the suit on the merits is in doubt. It does not appear the injunction will cause the defendants undue in-

convenience providing it is conditioned on the plaintiffs paying the defendants the amount owing for shipments already made and upon placing a deposit in court sufficient to cover the defendants' possible damages if they succeed on the merits. Temporary injunction issued.

502. M. C. Pardhan v. Ali Mohamed Osman Civ. Ref. 1-D-68, 22/12/68, Hamlyn, J.

A successful respondent had submitted a claim for an Instruction fee of Shs. 7,500/- of which has been allowed by the Deputy Registrar as taxing officer. The appellant/applicant maintained that such sum was excessive and that the taxing officer should not have allowed more than Shs. 200/- per diem. The applicant also claimed that since more than one-sixth of total bill of costs had been disallowed, respondent should not be entitled to the costs of taxation.

Held: (1) The Court noted that judges "will not interfere with the quantum allowed as an instruction fee upon taxation unless it is manifestly so high or so low that it calls for interference by reason of some misdirection having occurred or some wrong principle having been adopted." The Court stated that an instruction fee includes both solicitor's and barrister's work and includes both attendances for taking instruction as well as all other work necessary for preparing the case for trial. In the present case, the taxing officer did not set forth any reasons for the reduction, and did not use any "mathematical manipulation." The Court held that there was no "magic formula" and that "every case must be adjudged on its own merits and on its particular circumstances." The use of mathematical per diem figure is of assistance, stated the court, but other matters should be considered by the taxing officer, including the prolixity of the preparation of a case and any peculiar complications in its presentation to court. The subject matter involved may also have a bearing in some, but not all, cases. Since the taxing officer did not set out in his ruling any statement of a wrong principle, the Court declined to interfere with the discretion of the taxing officer. (2) The Court also held that, under Rule 41 of Part 111 of the Advocates Remuneration and Taxation of Costs Rules, the taxing officer had discretion, in applying the "one-sixth

rule" to ignore the instruction fee he must so indicate. But the court held that the Rule does not require the taxing officer to record that he has so exercised his discretion and the reasons for doing so, and if there is nothing to show that the discretion was improperly exercised or the Rule not followed, the taxing officer was entitled to ignore the "one-sixth rule". Application dismissed.

503. Kantibhai C. Patel v. Gulamhusein Brothers, Civ. App. 12-D-68, -/8/68, Hamlyn J.

By the consent of the parties involved, the Rent Tribunal made an order which the appellant sought to set in the District Court as a nullity and incompetent because it was,

He alleged, incapable of execution. The District Court refused to vary or discharge the order.

Held: The questioning of the validity of a decree by an executing court is against public policy. But if some good cause is shown, which must be a change of circumstances which could not have been envisaged by the parties at the time the original order was made, a consent order can be varied by a court a called upon to execute it. As the appellant raised no arguments to show change of the terms of the original order work a hardship upon him, the refusal of the District Court to vary the order was justified. Appeal dismissed with costs.

504. Tulsidas Khimji v. Yusufali Gulamhussein Essaji & Another, Civ. App. 24-D-68, 3/12/68, Georges C. J.

The landlords claimed vacant possession of premises which later became controlled as a result of an amendment to the Rent Restriction Act. On 7 June 1967 judgment for the landlords was recorded by consent. The tenant was ordered to deliver vacant possession by 31 March 1968. The tenant failed to pay the rent as stipulated in the order until on month after the possession was due, On 1st April

1968 the tenant lodged an application to set aside the consent order on the grounds that the landlords did not need the premises as they had other business premises in the town. The land lords claimed that their existing premises were inadequate and that the tenant had been consistently in arrears in payment of his rent.

The Resident Magistrate ruled that the application was made solely on humanitarian grounds – the hardship which would be suffered by the tenant because he would not obtain alternative accommodation. He pointed out that the tenant should not go back on his undertaking in the consent order.

Held: (1) An order made by consent should rarely be received or varied where both parties are represented by counsel at the hearing. (2) If a tenant agrees to give vacant possession having himself no idea where he intends to move, but merely hoping to find somewhere, he can hardly be heard to plead absence of alternative accommodation as a ground for recission. (Citing Khantibhai Patel v. Gulamhussein Bros., Civ. App. 12-D-68, High Court Digest, n. 503, December, 1968, where Hamlyn J. observed that there must be "a change of circumstances which could not have been envisaged at the time of the making of the original order".) (3)(Obiter) If a magistrate directed himself that an order, since it was made by consent, could not be varied, he would be wrong. The fact that a consent order is, by definition, voluntarily agreed to by the parties, does not of itself prevent it from being varied. (4) (Obiter) Magistrates should not record consent orders for possession under the ground set out in the Act has been made out, and if so, that it is reasonable to make the order. Evidence of this need not be taken. A tenant may admit the existence of the ground, and the fact, which show that the order was reasonable. (5) The magistrate exercised his discretion properly. Appeal dismissed.

505. Dimishky v. Sergio Mauritizi Misc. Civ. App. 12-D-68, 1/11/68, Biron J.

This was an appeal in connection with an application by a landlord to the Rent Tribunal for registration of a lease of residential furnished premises to a tenant apparently in accordance with s. 11(a), Rent Restriction Act, 1962, as amended by the Rent Restriction (Amendment) Act, 1962, so as to recover possession at the expiry of the lease as provided by s. 19(j)(i) of the Act. The ground of the appeal was that the tribunal did not deal with the question of the registration of the lease but proceeded to determine the standard rent. Appellant (original applicant) contended that such determination was not in accordance with the law.

Held: (1) The Tribunal had no jurisdiction to register the lease. Such jurisdiction is reserved to the court. (2) The tribunal had the power to determine or assess from time to time the standard rent of any premises. In exercising this power, however the tribunal should have heard evidence as to the amount of the rent on the prescribed date. (3) The tribunal must act according to law and must determine the standard rent as provided in the Act. Appeal allowed. Determination of standard rent by the tribunal set aside and the proceedings remitted to the tribunal with a direction to hear the parties and determine standard rent according to law.

506. Mwantanga binti Selemani v. Douglas Jay Meeleck, Misc. Civ. App. 8-D-68, Duff J.

This is an appeal by a landlord against the decision of the Rent Tribunal by which rents in respect of rooms in a dwelling house situate in Dar es Salaam were fixed on the application of the tenants. Appellant contended that no standard rents were fixed and that, before the tribunal could alter the amount of the standard rent, a finding had to be made as to what constituted the standard rent.

Held: (1) Where the evidence for ascertaining the standard rent is insufficient, a figure ought to be determined based on the standard rent of similar premises in the neighborhood. (2) The discretionary power to alter the amount of the standard rent must be exercised judicially. This discretion cannot be exercised until the amount of the standard rent has been ascertained in accordance with the provisions of s. $(1), Rent Restriction Act. (Citing Hammond v. Wales, 19

E.A.C.A. 209 and Blandina v. Patel, (1963) E.A. 485). Appeal allowed. No order made as to repairs.

507. Wanyang'ura s/o Matuja v. R., Crim. App. 760-M-68, 29/10/68, Seaton J.
Accused was convicted on his own plea of cattle theft, and sentenced to 3 years imprisonment and 24 strokes under the Minimum Sentences Act. The court also made an order for compensation in the following terms: "Two heads of cattle recovered to be returned to the complainant and the accused must compensate the complainant six heads of cattle after release from prison."

Held: "It is to be observed that the order for compensation is bad for vagueness. Individual cattle may so vary in size and condition that the value of six head of cattle may be Shs. 600/- or Shs. 1,200/. The object of section 6(1) of the Minimum Sentences Act is to ensure that the convicted person receives no material benefit from his crime. Therefore, the trial court is required to assess the value of the property the convicted person had obtained as a result of the commission of the offence and to order the convict to pay to the owner of the property compensation equal to its value. It follows that the trial court should have assessed the value of the 8 head of cattle stolen." Order for compensation set aside, and order substituted to pay complainant Shs. 600/-.

508. R. v. Mussa s/o Gungachuma Panga Masasi, Crim. Sass. 159-D-68, 21/10/68, Georges C. J.
Accused was charged with murder and he pleaded guilty to manslaughter, which plea was accepted. Returning from a pombe party one night, the accused met on the path his elder brother, with whom he was on bad terms. The brother apparently abused him, using the word "nyoka", and attacked him with an axe. The accused snatched the axe away from him, and following him, beat him with a billhook. The brother died from the blows.

Held: Accused was convicted on his own plea and sentenced to 6 years imprisonment. The court stated before sentencing; “I do not think in this case you were defending yourself at all. If a man throws an axe at you and runs away, then you can let him go, because he is running away, and he no longer has an axe, so he is incapable of any longer launching an attack on you. And I find it difficult to see how one can hope to hit another human being with a billhook and not run the risk of seriously injuring him or killing him. It is a deadly instrument … The only reason why I can accept a plea of guilty to manslaughter in this case is the fact that in throwing an axe at you and lying in wait for you, he was acting in a provocative manner, especially in circumstances where you must have had a considerable amount of drink.”

509. Kinou s/o Msengi, Crim. App. 565-D-68, 30/10/68, Biron J.

Accused was convicted of causing grievous harm c/s 225, Penal Code, and was sentenced to 2 years. The complainant was a self-proclaimed witch who had been requested to create a sick child in the accused ’s family. She warned the family that if they took to child to hospital, the child would die. The child was nevertheless taken to hospital where it died. When the accused and others returned with the body of the child, the woman remarked that now they should appreciate that “she was a qualified witch”, apparently implying that she had caused the child’s death. Accused and 2 others then assaulted her, hitting her with their firsts and a stick, and kicking her. Accused alone was charged and convicted. Appeal from sentence.

Held: Appeal allowed and sentence reduced so as to result in the immediate discharge of the accused. 1) “Although the complainant’s remarks obviously enraged the child’s relations, and certainly constituted provocation, such provocation is not only no defence in law but really does not excuse the assault on her. The provocation however is a mitigating factor.” (2) It was “unfortunate that the appellant alone was charged with this defence in the commission

Of which he was the sole participant .. It is much less than fair that the appellant alone should be punished so severely whilst the others who participated in the offence get off seot-free.

510. Francis Chilemba, v. R., Crim. App. 503-D-68, 30/10/68, Biron J.

Accused was convicted on 4 counts of stealing by public servant c/ss 270 and 265, Penal Code, and sentenced under the Minimum Sentences Act to 2 years imprisonment on each count, to run concurrently, and 24 strokes. Three months previously, he had been convicted on a similar charge, but as the sum was less than Shs. 100/- and he was a first offender, he received a sentence of 9 months. The sentence imposed in the instant case was to commence on the expiry of the sentence imposed in the previous case. Accused appealed from sentence, submitting that the sentence imposed in the instant case should be made to run concurrently with the previous sentence.

Held: Appeal allowed. The sentences imposed in this case are ordered to run concurrently with the sentence imposed in the previous case, as from the date the previous sentence itself was imposed. (1) It was to the accused 's credit that he pleaded guilty to the charges. "It is generally, if not universally, recognized that an accused pleading guilty to an offence with which he is charged, qualifies him for the exercise of mercy from the court. The reason is, I think, obvious, in that one of the main objects of punishment is the reformation of the offender. Contrition is the first step towards reformation, and a confession of a crime, as opposed to brazening it out, is and indication of contrition. Therefore, in such a case, a court can and does impose a milder sentence than it would otherwise have done. " (2) "By section 295 of the Criminal Procedure Code (Amendment) Act, 1963(by the addition of the words "or in the Penal code" at the end thereof):- "….Every sentence shall be deemed to commence from and to included, the whole of the day of the date on which it was pronounced, except where otherwise provided in this Code or in the Penal Code." It is evident from the respective provisions of the Penal Code [s36] and the Criminal Procedure

Code, before that in the latter was amended by the addition of the words "in the Penal Code," the power of a court to order a sentence of imprisonment to run concurrently with a previous one imposed was limited to ordering it to run concurrently with only the unexpired portion of such previous sentence, as there is no provision in the Criminal Procedure Code which permits a court to order a sentence to run earlier than the day on which it is pronounced. On my construction [of s. 295, Criminal Procedure Code as amended, and s. 36, Penal Code] read together…… a court is empowered to order a sentence to run concurrently with a previous sentence as from the date the previous sentence itself commenced to run."

511. R. v. Mwanaiba d/o Ramadhani, Crim. Sass. 139-D-68, 24/10/68, Georges C. J.

Accused was charged with murder and pleaded guilty to manslaughter, which plea was accepted by the prosecution. The deceased woman came to the accused 's house and after a brief conversation hit her on the arm with a stick she was carrying. Accused seized the stick and hit deceased

Once or twice with it on the buttocks, apparently causing deceased to fall. Deceased later became unconscious and died in hospital of a ruptured spleen.

Held: Accused was convicted of manslaughter on her own plea. The court, in passing sentence, stated; "this is not a particularly bad case …. [N]o sharp cutting instrument was used, and it can be said that it was unfortunate that the spleen was ruptured, causing death in the circumstance. I will take into account that she did plead guilty, indicating a certain amount of contrition, that she has no previous conviction, that she has spent 5 months in custody, and sentence her to three months imprisonment.

512. Mohamed s/o Saidi v. R. (PC) Crim. App.184-D-68, 19/11/68, Hamlyn, J.

Accused was convicted (inter alia) of burglary c/s 294 (1), Penal Code, and was sentenced to 2 years and 24 strokes under the Minimum Sentences Act. The amount of property stolen was Shs. 109/50 but the amount recovered from the accused was only shs. 39/50. Accused appealed from sentence arguing that since he was a first offender and found with stolen property valuing less than Shs. 100/-, he should be given the opportunity to show "special circumstances" under s. 5(2), Minimum Sentences Act.

Held: Appeal dismissed. "In the present case, the appellant has admitted stealing goods in the course of the burglary to a value of over one hundred shillings …. And it is quite immaterial as to what value the recovered property amounted to …. It would clearly defeat the object of the Act if an offender could conceal the major part of the proceeds of his theft, where the offence is a scheduled one, and escape from the rig ours of the sentence imposed by the Act ….."

513. Joha d/o Juma v. R., Crim. App. 699-M-68, 2/11/68, Seaton J.

Accused was convicted on her own plea of unlawful wounding c/s 228 (1), Penal Code, and was sentenced o 30 months imprisonment, the maximum sentence being 3 years. Accused had slashed her husband thrice during a quarrel, after, she alleged, he had stripped her naked, assaulted her with his fists and threatened to kill her.

Held: The sentence is manifestly excessive. The actions of the complainant, though not justifying the assault, nevertheless "constitute provocation sufficient to cause any reasonable "constitute provocation sufficient to cause any reasonable woman to react violently." Sentence reduced to 9 months.